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UNITED STATES COMPILED STATUTES

ANNOTATED

1916

EMBRACING THE STATUTES OF THE UNITED STATES OF A GENERAL AND PERMANENT NATURE IN FORCE AT THE CLOSE OF THE FIRST SESSION OF THE 64TH CONGRESS

AND

DECISIONS CONSTRUING AND APPLYING SAME TO APRIL 1, 1916

INCORPORATING UNDER THE HEADINGS OF THE REVISED STATUTES THE SUBSEQUENT LAWS, TOGETHER WITH EXPLANATORY AND HISTORICAL NOTES

TEXT OF THE STATUTES COMPILED BY

JOHN A. MALLORY

ASSISTED BY EDITORIAL STAFF

ANNOTATIONS BY MEMBERS OF THE PUBLISHERS' EDITORIAL STAFF

IN 12 VOLUMES

VOLUME 3

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1916

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UNITED STATES COMPILED STATUTES ANNOTATED

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VOLUME 3

TITLE XIII

THE JUDICIARY

(CONTINUED)

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Many sections of this Title of the Revised Statutes, and subsequent acts and parts of acts relating to the subjects thereof were incorporated in the Judicial Code, ante, Title XII C, and were repealed or superseded thereby. Such repeals, etc., are indicated specifically under the several chapters of this Title.

Other sections of this Title, and acts and parts of acts subsequent to the Revised Statutes relating to subjects which were included in this Title of the Revised Statutes, but not within the scope of the Judicial Code, the provisions of which remain in force, are set forth post, under the several chapters of this Title.

CHAPTER SEVENTEEN

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§ 1464. (R. S. § 858, as amended, Act June 29, 1906, c. 3608.) Competency of witnesses in civil cases to be determined by laws of State.

The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held.

Act July 2, 1864, c. 210, § 3, 13 Stat. 351. Act March 3, 1865, c. 113, 13 Stat. 533. Act July 16, 1862, c. 189, § 1, 12 Stat. 588. Act June 29, 1906, c. 3608, 34 Stat. 618.

This section, as enacted in the Revised Statutes, was as follows: "In the

courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: Provided, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

It was amended to read as set forth here by Act June 29, 1906, c. 3608, cited above.

All persons within the jurisdiction of the United States are entitled to the same right to give evidence as are white citizens, by R. S. § 1977, post, § 3925.

Officers and other persons entitled to or claiming compensation under the provisions of the customs-revenue laws are not thereby disqualified from becoming witnesses in any action, suit, or proceeding for the recovery, mitigation, or remission thereof, by Act June 22, 1874, c. 391, § 8, post, § 5802.

A similar provision relating to proceedings for recovery of fines and forfeitures was made by R. S. § 5295, post, § 10137.

A provision that a person convicted of perjury under the laws of the United States should be incapable of giving testimony in any court of the United States, was contained in R. S. § 5392, but was not incorporated with the other provisions of the section in Crim. Code, § 125, post, § 10295, and the entire section was repealed by Crim. Code, § 341, post, § 10515.

Notes of Decisions

Applicability of general conformity act, see section 1537, post, and notes thereunder.

Construction and operation of this section and of former law.—Where the laws of a state and an act of congress conflict as to the competency of witnesses, held, that the United States court must be governed by the act, even in a case removed from a state court. King v. Worthington (1881) 104 U. S. 44, 26 L. Ed. 652.

Wife held not competent witness against husband, charged with assisting in her transportation in violation of Act June 25, 1910, § 2. Johnson v. U. S. (1915) 221 Fed. 250, 137 C. C. A. 106.

This section relates only to the competency of the witnesses, and not to admissibility of evidence. Downs v. Wall (1910) 176 Fed. 657, 100 C. C. A. 209.

In New York, defendant in a federal court in a civil case in a trial at common law may be required to appear and be examined as a witness for plaintiff. Fowler v. Hecker (C. C. 1860) Fed. Cas. No. 5,001.

Parties who are competent witnesses in the state courts are also competent in the federal courts, under Act July, 1862. Scammon v. Hobson (D. C. 1872) Fed. Cas. No. 12,434.

Where by the state law a wife is not a competent witness in favor of her husband, she cannot testify in his favor in a suit brought in the federal courts. Lucas v. Brooks (1873) 18 Wall. 436, 453, 21 L. Ed. 779.

The competency of witnesses, the mode of examination, and the production and admissibility of evidence, are for the federal courts to determine in compliance with sections 1468, 1472, post. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554, 555.

R. S. § 858, was applicable only where there is no rule prescribed by act of congress. The statute of New York, which permits a party to a suit to be examined by his adversary as a witness at any time previous to the trial in an action at law, is in conflict with the provision of the Revised Statutes which enacts that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. Ex parte Fisk (1885) 5 Sup. Ct. 724, 113 U. S. 713, 28 L. Ed. 1117.

The legislation embodied in R. S. § 858, covered the whole subject of the examination of the parties to a suit. Pennsylvania R. Co. v. Allegheny Valley R. Co. (C. C. 1885) 25 Fed. 115. It applied to the competency of witnesses and not to the mode of obtaining proof for the trial. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554, 555; Page v. Burnstine (1880) 102 U. S. 664, 665, 26 L. Ed. 268. There was no ground for the suggestion that it could be construed as relating to the competency of witnesses rather than to the principles of evidence. Connecticut Mut. Life Ins. Co. v. Union Trust Co. (1884) 5 Sup. Ct. 119, 122, 112 U. S. 250, 28 L. Ed. 708.

For further construction of the superseded provisions, see Monongahela Nat. Bank v. Jacobus (1883) 3 Sup. Ct. 219, 109 U. S. 275, 27 L. Ed. 935; Maryland v. Baldwin (1884) 5 Sup. Ct. 278, 112 U. S. 490, 28 L. Ed. 822; Goodwin v. Fox (1889) 9 Sup. Ct. 367, 129 U. S. 601, 32 L. Ed. 805; Hobbs v. McLean (1886) 6 Sup. Ct. 870, 117 U. S. 567, 29 L. Ed. 940; Witters v. Sowles (C. C. 1886) 28 Fed. 218; In re Kessler (D. C. 1915) 225 Fed. 394; Smith v. Township of Au Gres, Michi-

gan (1906) 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876.

The expression "courts of the United States," in the former act of congress providing that in the courts of the United States no witness shall be excluded, etc., because a party or interested, does not include the courts of a territory. Good v. Martin (1877) 95 U. S. 90, 24 L. Ed. 341.

"Civil action."—The phrase "civil action" includes suits in equity as well as actions at law. Rison v. Cribbs (C. C. 1870) Fed. Cas. No. 11,860. It includes all cases of a civil, as contradistinguished from those of a criminal, nature. A seizure of property for violation of the internal revenue law, and the controversy arising upon a claim interposed thereto by a third party, are within the act. U. S. v. Ten Thousand Cigars (C. C. 1867) Fed. Cas. No. 16,451. A proceeding by writ of habeas corpus is not a criminal proceeding, but is a "civil action," and the prisoner may testify in his own behalf. In re Reynolds (D. C. 1867) Fed. Cas. No. 11,721.

This section does not apply to criminal cases tried in the federal courts. U. S. v. Hughes (D. C. 1892) 175 Fed. 238; Logan v. U. S. (1892) 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, reversing (C. C. 1891) 45 Fed. 872; U. S. v. Hall (D. C. 1892) 53 Fed. 352.

Since this section applies only to civil cases, competency to testify in criminal cases is determined by the common law of the state, unless otherwise provided. Maxey v. U. S. (1913) 207 Fed. 327, 125 C. C. A. 77.

"Laws of state."—Competency of witnesses in civil proceedings in federal courts is determined by the state law. In re Hoffman (D. C. 1912) 199 Fed. 448; In re Bean (D. C. 1875) Fed. Cas. No. 1,166; Wise v. Williams (C. C. 1908) 162 Fed. 161. State statutes governing the admission of evidence apply in actions in the federal court. In re Thompson (D. C. 1912) 197 Fed. 681.

A witness convicted of making false national bank reports under oath to the Comptroller of the Currency, being a competent witness in the courts of New York, is also a competent witness in the courts of the United States sitting in New York. Wise v. Williams (C. C. 1908) 162 Fed. 161.

State laws in force prior to Dec. 1, 1873, are rules of decision in federal courts as to the competency of witnesses. Rev. St. § 858. In re Bean (D. C. 1875) Fed. Cas. No. 1,166.

—— Particular state laws.—Code Iowa, § 3643, prohibiting physicians and others from testifying as to confidential communications made to them in a professional capacity, is binding upon a federal court sitting within that state. Mutual Ben. Life Ins. Co. v. Robison (1893) 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325, affirming decree (C. C. 1893) 54 Fed. 580.

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A state law compelling parties to testify is enforceable in the federal court. Berry v. Fletcher (C. C. 1870) Fed. Cas. No. 1,356.

Code Civ. Proc. N. Y. §§ 835, 836, in effect prohibiting the disclosure of instructions given by a testator to an attorney employed to draw the will, are binding on federal courts sitting in New York. Butler v. Fayerweather (1899) 91 Fed. 458, 33 C. C. A. 625.

2 Hill's Code Wash. § 1646, provides that, where a party sues or defends as a personal representative of a deceased person, then a party in interest or a party to the record shall not be admitted to testify in his own behalf as to any statement made to him by such deceased person. The evidence in an action against a railroad company to recover for the death of plaintiff's husband, who was killed by a landslide, showed that he was a section man on defendant's railroad, and that, with another section man, he was engaged in removing earth which had been deposited on the track, blocking the passage of a train, by a landslide from the bluff overhanging the track; that while so engaged, in answer to interrogatories of the conductor of the delayed train, he stated that there was danger of another landslide occurring at any time, that he had worked there before, and that they could expect another at any time. Held, that the conductor may testify to such statements, as he is not a party to the record or interested in the case. Slavens v. Northern Pac. Ry. Co. (1899) 97 Fed. 255, 38 C. C. A. 151.

Under Gen. St. Kan. 1909, § 5915 (Code Civ. Proc. § 321) and this section, a wife is a competent witness for her husband in an action by him for alienation of her affections, brought in a federal court in Kansas. Harris v. Brown (1911) 187 Fed. 6, 109 C. C. A. 60.

1 Rev. St. Mo. 1879, §§ 1791, 1793, 1794, providing that members of the grand jury may be compelled to disclose the names of witnesses who have appeared before it, and the evidence heard in the grand jury room, only (1) to show whether the testimony of a witness on trial is consistent with or different from that given before the grand jury; and (2) on trial for perjury committed before that body—establish much more than a rule of evidence. They declare the public policy of the state, and so are binding on the

federal courts sitting in the state. Fotheringham v. Adams Exp. Co. (C. C. 1888) 34 Fed. 646.

In determining the meaning of the words "personal transaction" and "communication" in Code W. Va. 1906, c. 130, § 23 (sec. 3945), prohibiting a witness to testify to personal transactions or communications with a person since deceased, the federal courts will be governed by the decisions of the Supreme Court of Appeals of the state. McBride v. Kirkpatrick (D. C. 1913) 207 Fed. 893.

Cited without definite application, American Lithographic Co. v. Werckmeister (1911) 31 Sup. Ct. 676, 678, 221 U. S. 603, 55 L. Ed. 873 (affirming judgment [1908] 165 Fed. 426, 91 C. C. A. 376); Powers v. U. S. (1912) 32 Sup. Ct. 281, 223 U. S. 303, 56 L. Ed. 448; Cassatt v. Mitchell Coal & Coke Co. (1907) 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; Beaumont v. Beaumont (1907) 152 Fed. 55, 81 C. C. A. 251; Kennedy v. Custer (1909) 174 Fed. 972, 98 C. C. A. 584; Summers v. U. S. (1913) 202 Fed. 457, 120 C. C. A. 563; U. S. v. Sims (C. C. 1907) 161 Fed. 1008; U. S. v. Price (C. C. 1908) 163 Fed. 904; In re Felts (D. C. 1909) 205 Fed. 983.

§ 1465. (Act March 16, 1878, c. 37.) Competency as witnesses of defendants in criminal cases.

In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (20 Stat. 30.)

This was an act entitled "An act to make persons charged with crimes and offenses competent witnesses in the United States and territorial courts."

Notes of Decisions

Right of defendant to testify and weight of his testimony.—The purpose of this act was to make defendants competent witnesses, but reserving to them the right to refrain from testifying without prejudice, and when any defendant chooses to testify he may do so, and it does not matter whether his testimony is for or against himself or for or against a codefendant. Wolfson v. U. S. (1900) 101 Fed. 430, 436, 41 C. C. A. 422, writ of certiorari denied (1901) 21 Sup. Ct. 919, 180 U. S. 637, 45 L. Ed. 710.

One of two defendants jointly indicted and tried may, at his own request, be examined as a witness by the government. Wolfson v. U. S. (1900) 101 Fed. 430, 41 C. C. A. 422 (writ of certiorari denied [1901] 21 Sup. Ct. 919, 180 U. S. 637, 47 L. Ed. 710); Id. (1900) 102 Fed. 134, 41 C. C. A. 422, writ of certiorari denied (1901) 21 Sup. Ct. 919, 180 U. S. 637, 47 L. Ed. 710.

Codefendants who had pleaded guilty were competent to testify for the government against their codefendants in the indictment. Ryan v. U. S. (C. C. A. 1914) 216 Fed. 13.

The defendant in a prosecution for sending obscene matter through the mails is a competent witness, and his testimony is to be received on the same basis, and under the same rules, as that of any other witness. U. S. v. Bebout (D. C. 1886) 28 Fed. 522.

The laws of the United States permit a person charged with crime or misdemeanor to be a witness in his own behalf, and such weight is to be given to his testimony as, under all the circumstances, it is fairly entitled to. U. S. v. Houghton (D. C. 1882) 14 Fed. 544.

Comment on failure to testify.—The fact that the accused declines to testify on his own behalf cannot be commented on by the public prosecutor in his remarks to the jury. U. S. v. Snyder (C. C. 1882) 14 Fed. 554; Wilson v. U. S. (1893) 13 Sup. Ct. 765, 766, 149 U. S. 60, 37 L. Ed. 650; Stout v. U. S. (C. C. A. 1915) 227 Fed. 799; U. S. v. Ogden (D. C. 1900) 105 Fed. 371.

It is prejudicial error for the court or counsel to call to the attention of the jury, in a criminal case, in any manner, the right of the defendant, under the statute, to testify in his own behalf; and such an error can only be cured, if at all, by a clear and emphatic statement by the court that the jury are not permitted to attach any importance to the failure of the defendant to testify. Such comment is not rendered harmless by the fact that the defendant does afterwards testify, since it virtually compels him to do so to avoid unfavorable inferences by the jury. McKnight v. U. S. (1902) 115 Fed. 972, 54 C. C. A. 358. See U. S. v. Breese (D. C. 1904) 131 Fed. 915, 927, reversed (1906) 143 Fed. 250, 74 C. C. A. 388. Nor can it be commented on by the court. Stout v. U. S. (C. C. A. 1915) 227 Fed. 799; U. S. v. Ogden (D. C. 1900) 105 Fed. 371. But, where accused has waived the privilege accorded him by testifying in his own behalf, his failure to testify concerning certain matters may be commented on by coun-

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A state law compelling parties to testify is enforceable in the federal court. Berry v. Fletcher (C. C. 1870) Fed. Cas. No. 1,356.

Code Civ. Proc. N. Y. §§ 835, 836, in effect prohibiting the disclosure of instructions given by a testator to an attorney employed to draw the will, are binding on federal courts sitting in New York. Butler v. Fayerweather (1899) 91 Fed. 458, 33 C. C. A. 625.

2 Hill's Code Wash. § 1646, provides that, where a party sues or defends as a personal representative of a deceased person, then a party in interest or a party to the record shall not be admitted to testify in his own behalf as to any statement made to him by such deceased person. The evidence in an action against a railroad company to recover for the death of plaintiff's husband, who was killed by a landslide, showed that he was a section man on defendant's railroad, and that, with another section man, he was engaged in removing earth which had been deposited on the track, blocking the passage of a train, by a landslide from the bluff overhanging the track; that while so engaged, in answer to interrogatories of the conductor of the delayed train, he stated that there was danger of another landslide occurring at any time, that he had worked there before, and that they could expect another at any time. Held, that the conductor may testify to such statements, as he is not a party to the record or interested in the case. Slavens v. Northern Pac. Ry. Co. (1899) 97 Fed. 255, 38 C. C. A. 151.

Under Gen. St. Kan. 1909, § 5915 (Code Civ. Proc. § 321) and this section, a wife is a competent witness for her husband in an action by him for alienation of her affections, brought in a federal court in Kansas. Harris v. Brown (1911) 187 Fed. 6, 109 C. C. A. 60.

1 Rev. St. Mo. 1879, §§ 1791, 1793, 1794, providing that members of the grand jury may be compelled to disclose the names of witnesses who have appeared before it, and the evidence heard in the grand jury room, only (1) to show whether the testimony of a witness on trial is consistent with or different from that given before the grand jury; and (2) on trial for perjury committed before that body—establish much more than a rule of evidence. They declare the public policy of the state, and so are binding on the

federal courts sitting in the state. Fotheringham v. Adams Exp. Co. (C. C. 1888) 34 Fed. 646.

In determining the meaning of the words "personal transaction" and "communication" in Code W. Va. 1906, c. 130, § 23 (sec. 3945), prohibiting a witness to testify to personal transactions or communications with a person since deceased, the federal courts will be governed by the decisions of the Supreme Court of Appeals of the state. McBride v. Kirkpatrick (D. C. 1913) 207 Fed. 893.

Cited without definite application, American Lithographic Co. v. Werckmeister (1911) 31 Sup. Ct. 676, 678, 221 U. S. 603, 55 L. Ed. 873 (affirming judgment [1908] 165 Fed. 426, 91 C. C. A. 376); Powers v. U. S. (1912) 32 Sup. Ct. 281, 223 U. S. 303, 56 L. Ed. 448; Cassatt v. Mitchell Coal & Coke Co. (1907) 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; Beaumont v. Beaumont (1907) 152 Fed. 55, 81 C. C. A. 251; Kennedy v. Custer (1909) 174 Fed. 972, 98 C. C. A. 584; Summers v. U. S. (1913) 202 Fed. 457, 120 C. C. A. 563; U. S. v. Sims (C. C. 1907) 161 Fed. 1008; U. S. v. Price (C. C. 1908) 163 Fed. 904; In re Felts (D. C. 1909) 205 Fed. 983.

§ 1465. (Act March 16, 1878, c. 37.) Competency as witnesses of defendants in criminal cases.

In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him. (20 Stat. 30.)

This was an act entitled "An act to make persons charged with crimes and offenses competent witnesses in the United States and territorial courts."

Notes of Decisions

Right of defendant to testify and weight of his testimony.—The purpose of this act was to make defendants competent witnesses, but reserving to them the right to refrain from testifying without prejudice, and when any defendant chooses to testify he may do so, and it does not matter whether his testimony is for or against himself or for or against a codefendant. Wolfson v. U. S. (1900) 101 Fed. 430, 436, 41 C. C. A. 422, writ of certiorari denied (1901) 21 Sup. Ct. 919, 180 U. S. 637, 45 L. Ed. 710.

One of two defendants jointly indicted and tried may, at his own request, be examined as a witness by the government. Wolfson v. U. S. (1900) 101 Fed. 430, 41 C. C. A. 422 (writ of certiorari denied [1901] 21 Sup. Ct. 919, 180 U. S. 637, 47 L. Ed. 710); Id. (1900) 102 Fed. 134, 41 C. C. A. 422, writ of certiorari denied (1901) 21 Sup. Ct. 919, 180 U. S. 637, 47 L. Ed. 710.

Codefendants who had pleaded guilty were competent to testify for the government against their codefendants in the indictment. Ryan v. U. S. (C. C. A. 1914) 216 Fed. 13.

The defendant in a prosecution for sending obscene matter through the mails is a competent witness, and his testimony is to be received on the same basis, and under the same rules, as that of any other witness. U. S. v. Bebout (D. C. 1886) 28 Fed. 522.

The laws of the United States permit a person charged with crime or misdemeanor to be a witness in his own behalf, and such weight is to be given to his testimony as, under all the circumstances, it is fairly entitled to. U. S. v. Houghton (D. C. 1882) 14 Fed. 544.

Comment on failure to testify.—The fact that the accused declines to testify on his own behalf cannot be commented on by the public prosecutor in his remarks to the jury. U. S. v. Snyder (C. C. 1882) 14 Fed. 554; Wilson v. U. S. (1893) 13 Sup. Ct. 765, 766, 149 U. S. 60, 37 L. Ed. 650; Stout v. U. S. (C. C. A. 1915) 227 Fed. 799; U. S. v. Ogden (D. C. 1900) 105 Fed. 371.

It is prejudicial error for the court or counsel to call to the attention of the jury, in a criminal case, in any manner, the right of the defendant, under the statute, to testify in his own behalf; and such an error can only be cured, if at all, by a clear and emphatic statement by the court that the jury are not permitted to attach any importance to the failure of the defendant to testify. Such comment is not rendered harmless by the fact that the defendant does afterwards testify, since it virtually compels him to do so to avoid unfavorable inferences by the jury. McKnight v. U. S. (1902) 115 Fed. 972, 54 C. C. A. 358. See U. S. v. Breese (D. C. 1904) 131 Fed. 915, 927, reversed (1906) 143 Fed. 250, 74 C. C. A. 388. Nor can it be commented on by the court. Stout v. U. S. (C. C. A. 1915) 227 Fed. 799; U. S. v. Ogden (D. C. 1900) 105 Fed. 371. But, where accused has waived the privilege accorded him by testifying in his own behalf, his failure to testify concerning certain matters may be commented on by coun-

sel. Diggs v. U. S. (C. C. A. 1915) 220 Fed. 545. And may be considered by the jury. Diggs v. U. S. (C. C. A. 1915) 220 Fed. 545.

A verdict cannot be impeached by showing that jurors, while in the jury room alone, discussed defendant's failure to testify. Stout v. U. S. (C. C. A. 1915) 227 Fed. 799.

The exception to the court's action or want of action on objection to reference by counsel for the prosecution to the failure of accused to take the stand is the proper method of objection, and such an exception when properly presented can be considered on writ of error. Wilson v. U. S. (1893) 13 Sup. Ct. 765, 766, 767, 149 U. S. 60, 37 L. Ed. 650.

The language of the district attorney, in a case in which defendant did not testify, in summing up the case to the jury, "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go on the stand, and hold up my hand before high heaven, and testify to my innocence of the crime." Id.

The court, when its attention was called to this language by defendant's counsel, said: "I suppose the counsel should not comment upon the defendant not taking the stand." Held, that the court did not sufficiently condemn the district attorney's language. Id.

A remark by counsel for the prosecution, in argument to the jury, "Why didn't the defendant put a sworn witness on the stand?" is not necessarily to be considered as a comment on the failure of the defendant to take the stand, where it appeared from the testimony that there were many witnesses of the act charged in the indictment; and it is not such a plain error as to require a reversal on appeal, in the absence of an assignment of error thereon, especially where the jury were promptly admonished by the court that they should not be influenced thereby. Jackson v. U. S. (1900) 102 Fed. 473, 42 C. C. A. 452.

Counsel for the government in a prosecution for conspiracy in his argument to the jury analyzed and criticized the testimony of one of the defendants, and then stated that neither of the other defendants had taken the stand. At this point he was interrupted by an objection, and the court immediately held that he had no right to comment on such fact; and both the court and the district attorney expressed themselves to the effect that such comment was improper, and the district attorney disclaimed any intention of making it. The court also, at request of defendant's attorneys, fully stated the law in that regard in the charge to the jury. Held, that the mere reference to such fact, at once disclaimed by counsel, and in view of the further statements of the court, did not constitute such prejudicial error as would warrant a reversal, especially as the fact that one defendant had testified had presumably called the attention of the jury to the omission of the others to take the stand. Wright v. U. S. (1901) 108 Fed. 805, 48 C. C. A. 37, writ of certiorari denied (1901) 21 Sup. Ct. 924, 181 U. S. 620, 45 L. Ed. 1031.

That the district attorney may not refer in argument to failure of accused to testify did not prevent argument that the government had made out a prima facie case, which had not been contradicted. Carlisle v. U. S. (1912) 194 Fed. 827, 114 C. C. A. 531.

Accused, being tried on two indictments and having testified only as to a fact involved in one, did not waive his right to object to argument of counsel as to his failure to testify fully. Myrick v. U. S. (1915) 219 Fed. 1, 134 C. C. A. 619.

Remarks by the district attorney held not an invasion of accused's privilege against self-incrimination. Bettman v. U. S. (1915) 224 Fed. 819, 140 C. C. A. 265.

Remarks by the District Attorney in his argument to the jury in commenting on the evidence held not improper. Rose v. U. S. (C. C. A. 1915) 227 Fed. 357.

Instructing that the fact that defendant did not testify is not to be considered against him is not a prejudicial comment on the fact of his not testifying. Hanish v. U. S. (C. C. A. 1915) 227 Fed. 584.

Where the prosecuting attorney has alluded to the failure of defendant to testify in his own behalf, the irregularity is cured by an instruction to the jury to disregard the remarks. U. S. v. Snyder (C. C. 1882) 14 Fed. 554.

Witness compelled to testify.—A particeps criminis, where the statute of limitations has run in his favor, may be compelled to testify against the defendant. U. S. v. Smith (C. C. 1809) Fed. Cas. No. 16,332.

An indictment should be quashed when it appears that defendant was compelled by subpœna to attend before the grand jury, and give material testimony, without knowing that his own conduct was under investigation. U. S. v. Edgerton (D. C. 1897) 80 Fed. 374.

Presumption.—Where, in a prosecution for using the mails with intent to defraud, defendant became a witness in his own behalf, as authorized by this section, an instruction that, defendant having gone on the stand, if he had not fully explained or had not explained matters material to the issues which were naturally within his knowledge, the jury might consider such failure as a circumstance tending to show that the facts, if explained, would bear out the contention of the government, and his failure to explain them, or give a truthful explanation, was against him, was erroneous as misleading, and as placing an undue burden of proof on de-

fendant. Balliet v. U. S. (1904) 129 Fed. 689, 64 C. C. A. 201.

Waiver of privilege.—Where accused testifies in his own behalf, his waiver of his privilege is complete. Diggs v. U. S. (C. C. A. 1915) 220 Fed. 545.

Cross-examination and impeachment.—Where a defendant in a criminal case becomes a witness for himself, his credibility may be impeached. U. S. v. Brown (D. C. 1889) 40 Fed. 457. He waives his constitutional privilege by taking the witness stand, occupies the attitude of any other witness, and may be cross-examined like an ordinary witness and to the same extent. Balliet v. U. S. (1904) 129 Fed. 689, 64 C. C. A. 201.

Immunity.—Where defendants were called before a federal grand jury, investigating an alleged fraud against the United States, and before any proceeding had been instituted against them, or indictment found, testified without objection, an indictment subsequently found by the grand jury was not subject to a motion to quash because defendants were not warned of their privilege to refuse to testify, conferred by Declaration of Rights Pa. § 9, and Const. Amend. 5. U. S. v. Wetmore (D. C. 1914) 218 Fed. 227.

Cited without definite application, Maxey v. U. S. (1913) 207 Fed. 327, 330, 125 C. C. A. 77.

§ 1466. (Act March 3, 1887, c. 397, § 1.) Competency as witness of husband or wife of defendant in prosecution for bigamy, etc.

In any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law. (24 Stat. 635.)

This section was the first section of the Edmunds-Tucker Act, cited above, amendatory of the Edmunds Act, Act March 22, 1882, c. 47, 22 Stat. 30, which amended R. S. § 5352, relating to bigamy, polygamy, etc., the provisions of which, with such amendments, were incorporated in the Criminal Code, and were repealed by section 341 of said Code, post, § 10515.

Section 2 of this act, authorizing attachment for witnesses, without previous subpœna, in prosecutions for bigamy, polygamy, etc., is set forth post, § 1493.

The provisions of sections 3–5, 9, 10 of this act were incorporated in the Criminal Code, and those sections were repealed by section 341 of said Code, post, § 10515.

Sections 6–8 and the remaining sections of this act, relating to the Territory of Utah, were superseded by the admission of that Territory to the Union as a State, by Act July 16, 1894, c. 138, 28 Stat. 107.

Notes of Decisions

Second wife as witness.—Before the enactment of the act of 1887, it was held under the laws of Utah that, as long as the fact of the first marriage was contested, the second wife could not be admitted to prove it, but that, when the first marriage was duly established, she might be admitted to prove the second marriage, but not the first. Miles v. U. S. (1880) 103 U. S. 304, 315, 26 L. Ed. 481.

§ 1467. (R. S. § 859.) Testimony of witnesses before Congress not admissible against them in criminal prosecutions.

No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

Act Jan. 24, 1862, c. 11, 12 Stat. 333. Act Jan. 24, 1857, c. 19, § 2, 11 Stat. 156.

The right of witnesses to refuse to testify upon the ground that their testimony, if given, may tend to disgrace them or otherwise render them infamous, does not extend to testimony required by Congress, or any committee of either house thereof; and the refusal of a witness to testify is required to be cer-

tified to the district attorney for the District of Columbia, who shall bring the matter before the grand jury for action by R. S. §§ 103, 104, ante, §§ 158, 159.

Witnesses are not excused from attendance on and testifying before the Interstate Commerce Commission on the ground that the testimony required of them may tend to criminate them or subject them to a penalty or forfeiture, by Act Feb. 11, 1893, c. 83, § 1, post, § 8577. Said section also contained a further provision similar to the one in this section, and a provision relating to the punishment of witnesses refusing to attend, etc.

(R. S. § 860. Repealed.)

This section, as enacted in the Revised Statutes, was as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

It was repealed by Act May 7, 1910, c. 216, 36 Stat. 352.

Notes of Decisions

Effect of repeal of R. S. § 860.—The repeal of R. S. § 860, after the incriminating testimony was given, does not deprive the witness of the immunity afforded by that section against the use in evidence of such testimony in any criminal proceeding. Cameron v. U. S. (1914) 34 Sup. Ct. 244, 231 U. S. 710, 58 L. Ed. 448.

§ 1468. (R. S. § 861.) Mode of proof in common-law actions.

The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.

Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88. Act Feb. 20, 1812, c. 25, § 3, 2 Stat. 682. Act Jan. 24, 1827, c. 4, §§ 1, 2, 4 Stat. 197, 199.

Provisions for requiring parties to produce books or writings in actions at law were made by R. S. § 724, post, § 1469.

Notes of Decisions

Taking of testimony.—Under this section witnesses may be examined and cross-examined ore tenus in equity suits as well as suits at law. This power was not taken away by any subsequent act, or by rule 67, promulgated March 2, 1842. Sickles v. Gloucester Co. (C. C. 1856) Fed. Cas. No. 12,840.

In common-law actions in the United States courts, the witnesses must appear in open court, unless the case falls within one of the statutory exceptions. Colgate v. Compagnie Française du Telegraphe de Paris à N. Y. (C. C. 1885) 23 Fed. 82, 83; Compania Azucarera Cubana v. Ingraham, Maxwell & Beals (C. C. 1910) 180 Fed. 516.

Federal courts need not exclude evidence which, although not within the terms of this section or of the following provisions relating to depositions, is still admissible under the principles of evidence recognized by the common law. Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28.

Section 1537, post, does not affect this section. Shellabarger v. Oliver (C. C. 1894) 64 Fed. 306, 307.

Code Civ. Proc. Cal. § 437 (St. 1907, p. 836), provides that in an action on an insurance contract wherein defendant claims exemption from liability, because, though the proximate cause of the loss was a peril insured against, the loss was remotely caused by, or would not have occurred, but for a peril excepted in the contract, defendant must specify in his answer the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss, or itself caused the peril insured against, and if he claims that the peril excepted caused the peril insured against upon what premises, or at what place the peril excepted caused the peril insured against. Held, that such section is not inapplicable to the United States courts in an action at law as compelling a disclosure of evidence in advance of trial, while this section provides that the mode of proof in the trial of actions at common law shall be by oral testimony, and examination of witnesses in open court, except as thereinafter provided. Board of Education of City and County of San Francisco v. Alliance Assur. Co. (C. C. 1908) 159 Fed. 994.

Depositions may be taken to be used on the hearing of rule, notwithstanding the provision requiring proof in the trial of actions at common law to be by oral testimony, and examination of witnesses in open court. Importers' & Traders' Nat. Bank v. Lyons (C. C. 1905) 134 Fed. 510.

—— **Controlling effect of federal statutes.**—The mode of proof in common-law actions is by oral examination in open court, except as otherwise provided by federal statutes, and in deter-

mining whether the right to take testimony by depositions in common-law causes exists, reference must be had to federal statutes, and when the right to take the testimony of witnesses by deposition exists, the parties may follow at their election the state law or federal law prescribing the mere mode of procuring depositions. McLennan v. Kansas City, St. Joseph & C. B. R. Co. (C. C. 1884) 22 Fed. 198, 199.

The prescribed mode of making proof through the testimony of witnesses must be by oral testimony in open court, with the exception that the testimony of witness may be taken in the cause at the time pending in the United States court, and, though the state statute and practice provide that a deposition may be taken no matter where the witness lives at the time and regardless of his intention or condition, the federal statute on the subject governs in the federal courts. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554, 555.

Interrogatories addressed to the opposite party in the manner and form prescribed by the Massachusetts statute (Pub. St. c. 167) are not admissible in actions at law in the federal courts, since this section and R. S. §§ 863–870, post, §§ 1472–1474, 1477–1481, control, and R. S. § 914, post, § 1537, does not apply. National Cash Register Co. v. Leland (1899) 94 Fed. 502, 37 C. C. A. 372.

Inspection of property.—The methods of trial of an issue at law under this section are not changed by section 1537, post, and to obtain an inspection of property alleged to be in the possession of an adverse party there must be a motion under section 1469, post, or a bill of discovery. Cheatham Electric Switching Device Co. v. Transit Development Co. (C. C. 1911) 190 Fed. 202.

Discovery and interrogatories.—This section does not refer to discovery, whether by bill or interrogatory. Bryant v. Leyland (C. C. 1881) 6 Fed. 125.

Plaintiff cannot, in an action at law, file, with his complaint, interrogatories to be answered by defendant. Ex parte Fisk (1885) 113 U. S. 713, 5 S. Ct. 724, 28 L. Ed. 1117; Pierce v. Union Pac. Ry. Co. (C. C. 1891) 47 Fed. 709; Tabor v. Indianapolis Journal Newspaper Co. (C. C. 1895) 66 Fed. 423.

Defendant cannot be compelled to file answers to interrogatories attached to the petition, as allowed under the Iowa statute. Pierce v. Union Pac. Ry. Co. (C. C. 1891) 47 Fed. 709, following Ex parte Fisk (1885) 5 Sup. Ct. 724, 113 U. S. 713, 28 L. Ed. 1117. Evidence may not be obtained before trial in an action at law by an application for a bill of particulars as to particular matters which are in fact mere interrogatories. Green v. Delaware, L. & W. R. Co. (D. C. 1914) 211 Fed. 774.

Interrogatories addressed to the opposite party in the manner and form prescribed by the Massachusetts statute (Pub. St. c. 167) are not admissible in actions at law in the federal courts. National Cash Register Co. v. Leland (1899) 94 Fed. 502, 37 C. C. A. 372. But see Bryant v. Leyland (C. C. 1881) 6 Fed. 125, holding that under this section interrogatories authorized by a state statute may be filed in a federal court, in an action at law, in lieu of a bill of discovery.

The law of New York authorizing examination before trial does not apply to actions in federal courts in that state. Barnes v. Trees (D. C. 1912) 194 Fed. 230.

An order made by the New York state court as authorized by the statute of that state, requiring a party to a suit to be examined by his adversary previous to the trial, could not, on the removal of the cause to the federal court, be enforced. Ex parte Fisk (1885) 5 Sup. Ct. 724, 728, 113 U. S. 713, 28 L. Ed. 1117.

Defendant, in an action at law for infringement of a patent, was not entitled to an examination of the plaintiff before answer. Fischer v. Automobile Supply Mfg. Co. (D. C. 1912) 199 Fed. 191. But a federal court in New York may, in conformity to Code Civ. Proc. N. Y. § 803, require the defendant in an action by a servant for a personal injury alleged to have been caused by a defective appliance to produce such appliance for plaintiff's inspection, which is in the nature of a discovery. Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed 88.

P. L. N. J. 1903, p. 537, § 140, providing that either party to a suit at law may submit interrogatories to the other concerning matters material to the issue, and that written answers shall be made thereto within 30 days, which answers shall only be evidence in the cause if offered by the party proposing the interrogatories, is inapplicable to federal courts sitting in New Jersey. Smith v. International Mercantile Co. (C. C. 1907) 154 Fed. 786.

Code Civ. Proc. Cal. § 437 (St. 1907, p. 836), provides that in an action on an insurance contract wherein defendant claims exemption from liability, because, though the proximate cause of the loss was a peril insured against, the loss was remotely caused by, or would not have occurred, but for a peril excepted in the contract, defendant must specify in his answer the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss, or itself caused the peril insured against, and if he claims that the peril excepted caus-

ed the peril insured against upon what premises, or at what place the peril excepted caused the peril insured against. Held, that such section is not inapplicable to the United States courts in an action at law as compelling a disclosure of evidence in advance of trial. Board of Education of City and County of San Francisco v. Alliance Assur. Co. (C. C. 1908) 159 Fed. 994.

See, also, notes under §§ 1536, 1537, post.

Physical examination of party.—This section and sections 1469, 1472, post, do not authorize the courts of the United States in an action for injuries to order before the trial a physical examination of the injured person. Union Pac. R. Co. v. Botsford (1891) 11 Sup. Ct. 1000, 1003, 141 U. S. 250, 35 L. Ed. 734.

Act N. J. May 12, 1896 (P. L. p. 344), does not conflict with this section, since information obtained by the surgeon who examined plaintiff can be used only by defendants' producing and examining the witness in open court or by deposition, if he comes within the exception mentioned in section 1472 et seq., post. Camden & S. R. Co. v. Stetson (1900) 20 Sup. Ct. 617, 619, 177 U. S. 172, 44 L. Ed. 721.

Testimony of witness since deceased.—This section does not bear upon the right to prove the testimony of a deceased witness. Nome Beach Lighterage & Transp. Co. v. Standard Marine Ins. Co. (C. C. 1907) 156 Fed. 484, 485, affirmed (1909) 167 Fed. 119, 92 C. C. A. 571.

It is competent for a party, on the second trial of an action in a federal court, under the general rule, to prove the testimony given on the former trial by a witness who has since died, there being no federal statute on the subject. Nome Beach Lighterage & Transportation Co. v. Standard Marine Ins. Co., Limited, of Liverpool, Eng. (C. C. 1907) 156 Fed. 484, judgment affirmed Standard Marine Ins. Co., Limited, of London, Eng., v. Nome Beach Lighterage & Transp. Co. (1909) 167 Fed. 119, 92 C. C. A. 571.

Rev. St. Ohio, § 5242a, which authorizes the admission in evidence of the testimony given by a witness on a former trial of the same case when the witness is dead or beyond the jurisdiction of the court, is in conformity with the rule recognized at common law, which permits the use of such evidence generally where it is impossible to obtain a viva voce examination of the witness, and is not in conflict with this section, and may properly be applied in an action at law in a federal court sitting within the state, where the witness is without the district, and more than 100 miles distant from the place of trial. Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28.

Statements of counsel as evidence.—In a proceeding in a federal court involving a question of international law, a suggestion filed by the district attorney, acting by authority of the executive department, is appropriate for the purpose of disclosing to the court facts not appearing in the record, but the legal effect of such facts is for determination exclusively by the court. Motherwell v. U. S. (1901) 107 Fed. 437, 48 C. C. A. 97, affirming judgment U. S. v. Motherwell (D. C. 1900) 103 Fed. 198 and reversed Tucker v. Alexandroff (1902) 22 Sup. Ct. 195, 183 U. S. 424, 46 L. Ed. 264.

Hearsay.—The testimony which was given at a former trial by a witness who was presumptively within the jurisdiction of the court is hearsay and inadmissible under this section. Salt Lake City v. Smith (1900) 104 Fed. 457, 43 C. C. A. 637.

Rules of court.—Rule 73 of the supreme court of the District of Columbia, authorizing judgment for plaintiff for want of a sufficient affidavit of defense in actions ex contractu in which plaintiff has filed a supporting affidavit, does not violate the rule of this section regarding the mode of proof of trial. Fidelity & Deposit Co. v. U. S. (1902) 23 Sup. Ct. 120, 122, 187 U. S. 315, 47 L. Ed. 194.

Congress has not conferred power upon the district and circuit courts of the United States to make rules touching the mode of taking testimony. Randall v. Venable (C. C. 1883) 17 Fed. 162.

Cited without definite application, Blease v. Garlington (1875) 92 U. S. 1, 4, 23 L. Ed. 521; Diamond Coal & Coke Co. v. Allen (1905) 137 Fed. 705, 71 C. C. A. 107; Swift & Co. v. Jones (1906) 145 Fed. 489, 76 C. C. A. 253; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; Standard Marine Ins. Co. v. Nome Beach L. & T. Co. (1909) 167 Fed. 119, 92 C. C. A. 571; Fogg v. Fisk (C. C. 1884) 19 Fed. 235, 236; U. S. v. Sanborn (C. C. 1886) 28 Fed. 299, 302; Burrow v. Kansas City, Ft. S. & M. R. Co. (C. C. 1893) 54 Fed. 278, 283; Hunter v. Russell (C. C. 1894) 59 Fed. 964, 965; Lowrey v. Kusworm (C. C. 1895) 66 Fed. 539, 540; National Cash Register Co. v. Leland (C. C. 1896) 77 Fed. 242; Blood v. Morrin (C. C. 1905) 140 Fed. 918; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88.

§ 1469. (R. S. § 724.) Power to order production of books and writings in actions at law.

In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.

Act Sept. 24, 1789, c. 20, § 15, 1 Stat. 82.

Provisions for compelling production of books and receipts in proceedings, other than criminal, under revenue laws, were made by Act June 22, 1874, c. 391, § 5, post, § 5799, but were held unconstitutional in the case of Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524.

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I. "IN THE TRIAL"

1. Right to require production before trial.—A federal court cannot compel a party in an action at law to produce books or papers before the trial, under this section, or under a state practice; the only remedy of the party desiring such production being by a bill of discovery in equity. Carpenter v. Winn (1911) 31 Sup. Ct. 683, 684, 221 U. S. 533, 55 L. Ed. 842 (reversing judgment [1908] 165 Fed. 636, 91 C. C. A. 301); Cassatt v. Mitchell Coal & Coke Co. (1907) 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; Same v. Pennsylvania Coal & Coke Co. (1907) 150 Fed. 48, 81 C. C. A. 97 (judgment reversed Pennsylvania Coal & Coke Co. v. Cassatt [1907] 28 S. Ct. 110, 207 U. S. 187, 52 L. Ed. 163); Cassatt v. Webster Coal & Coke Co. (1907) 150 Fed. 48, 81 C. C. A. 97 (judgment reversed Webster Coal & Coke Co. v. Cassatt [1907] 28 S. Ct. 108, 207 U. S. 181, 52 L. Ed. 160); Hylton v. Brown (C. C. 1806) Fed. Cas. No. 6,981; Guyot v. Hilton (C. C. 1887) 32 Fed. 743; Paine v. Warren (C. C. 1888) 33 Fed. 357; Kaiser v. Chicago, St. P., M. & O. Ry. Co. (D. C. 1912) 192 Fed. 1013; Schatz v. Winton Motor Carriage Co. (D. C.) 197 Fed. 777; Cheatham Electric Switching Device v. American Automatic Switch Co. (D. C. 1912) 198 Fed. 496. CONTRA, U. S. v. National Lead Co. (C. C. 1896) 75 Fed. 94; Schatz v. Winton Motor Carriage Co. (D. C. 1912) 197 Fed. 777.

This section confers authority on the federal courts in civil actions at law to require under pain of judgment of nonsuit or by default production of books and writings, containing evidence pertinent to the issue, not only at the trial, but after the joining of issue and before trial, for inspection in order to prepare for trial. Central Bank v. Tayloe (C. C. 1823) Fed. Cas. No. 2,548; Lucker v. Phœnix Assur. Co. of London (C. C. 1895) 67 Fed. 18; Victor G. Bloede Co. of Baltimore City v. Joseph Bancroft & Sons Co. (C. C. 1899) 98 Fed. 175; Gray v. Schneider (C. C. 1902) 119 Fed. 474; Shaefer v. International Power Co. (C. C. 1907) 157 Fed. 896; U. S. v. Youngs (D. C. 1879) Fed. Cas. No. 16,783. With permission to make copies. Exchange Nat. Bank v. Washita Cattle Co.

(C. C. 1894) 61 Fed. 190. And power should be exercised in advance only when the situation is clearly such that in no other way can the ends of justice be properly subserved. American Banana Co. v. United Fruit Co. (C. C. 1907) 153 Fed. 943. Confers power to require a party to produce books before as well as at the trial where it would be required on a bill of discovery, but not otherwise. Rosenberger v. Shubert (C. C. 1910) 182 Fed. 411. But see Victor G. Bloede Co. of Baltimore City v. Joseph Bancroft & Sons Co. (C. C. 1899) 98 Fed. 175, holding that, even on the assumption that the scope of this section is confined to production only at the trial, it is doubtful whether by virtue of section 1537, post, in conjunction with section 13 of chapter 107 of the Revised Code of Delaware, as amended by the act of April 19, 1895 (20 Del. Laws, p. 187), the court would not be authorized to order production for inspection before trial.

II. "ACTIONS AT LAW"

2. Application of statute.—This section relates to suits at law only, and is inapplicable to proceedings in admiralty. Havermeyers & Elder Sugar Refining Co. v. Compania Transatlantica Espanola (D. C. 1890) 43 Fed. 90, 91. To suits in equity. Bischoffsheim v. Brown (C. C. 1886) 29 Fed. 341, 342; Ryder v. Bateman (C. C. 1898) 93 Fed. 31; West Pub. Co. v. Edward Thompson Co. (C. C. 1907) 151 Fed. 138; Oro Water, Light & Power Co. v. City of Oroville (C. C. 1908) 162 Fed. 975. Or to proceedings in rem. U. S. v. Twenty-Eight Packages of Pins (D. C. 1832, 1833) Fed. Cas. No. 16,-561.

An action to recover treble damages under Sherman Anti-Trust Act, § 7, post, § 8829, is penal in character, but such fact does not preclude the court from requiring the defendant, when a corporation, to produce books or writings under this section. American Banana Co. v. United Fruit Co. (C. C. 1907) 153 Fed. 943.

III. "ON MOTION"

3. Motion to require production.—A notice to produce records and papers or a subpœna duces tecum does not sufficiently protect the rights of the party, but he may proceed by motion under this section. Kirkpatrick v. Pope Mfg. Co. (C. C. 1894) 61 Fed. 46.

The methods of trial of an issue at law under section 1468, ante, are not changed by section 1537, post, and to obtain an inspection of property alleged to be in the possession of an adverse party there must be a motion under this section or a bill of discovery. Cheatham Electric Switching Device Co. v. Transit Development Co. (C. C. 1911) 190 Fed. 202.

The party requiring the production of books or writings should move for a rule requiring their production, describing the books or papers with sufficient certainty, and should state, to the best of his knowledge, information, and belief, that the books or papers called for will tend to prove the issue in his favor. The motion should further state the facts which the books will prove pertinent to the issue. The truth of the allegations stated in the motion should be verified by the affidavit of the mover or his agent, and the materiality of the testimony sought to be certified to by counsel of the mover. Lowenstein v. Carey (D. C. 1882) 12 Fed. 811.

It is not enough for defendant to give notice and then move for a judgment of nonsuit. There must be a motion for an order to produce the documents. Thompson v. Selden (1857) 20 How. 194, 197, 15 L. Ed. 1001.

Generality in the designation of books or writings is not objectionable if the subject-matter to which they relate is specifically mentioned in the motion and notice. Victor G. Bloede Co. of Baltimore City v. Joseph Bancroft & Sons Co. (C. C. 1899) 98 Fed. 175.

A motion for leave to inspect a mine held to be in the nature of a motion under this statute. Henszey v. Langdon-Henszey Coal Min. Co. (C. C. 1897) 80 Fed. 178, 179.

IV. "DUE NOTICE"

4. Necessity and sufficiency.—A motion to produce a paper necessary to enable defendants to plead may be granted without a preliminary notice to produce. Bronson v. Kensey (C. C. 1843) Fed. Cas. No. 1,927.

A notice of the time and place of making the application and a plain designation of the documents sought for are sufficient. Jacques v. Collins (C. C. 1846) Fed. Cas. No. 7,167. As is a notice to produce an account book, given on the preceding evening, when the counting house of the party is very near the courthouse. Shreve v. Dulany (C. C. 1808) Fed. Cas. No. 12,817.

Notice to the opposite party to produce at the trial all letters in his possession relating to moneys received by him under the award of the commissioners under the Florida treaty is sufficiently specific, as they are described by their subject-matter. Vasse v. Mifflin (C. C. 1825) Fed. Cas. No. 16,895.

Notice to produce deeds, given to attorney of party living at a distance, and a reply of references to pages of records, held sufficient. Geyger's Lessee v. Geyger (C. C. 1795) Fed. Cas. No. 5,375.

5. Time for compliance.—Where notice of a rule to produce deeds and papers is served on an attorney whose client resides at a distance, the trial will be postponed until further opportunity has been afforded him to communicate with his client. Geyger's Lessee v. Geyger (C. C. 1795) Fed. Cas. No. 5,375.

Notice must be given the party required to produce the books or writings, or his attorney, sufficient time for the party to appear and show cause why the rule should not be made, and if issue is made on the motion the court may grant or refuse the rule, according to the proof. Lowenstein v. Carey (D. C. 1882) 12 Fed. 811.

V. PRODUCTION OF BOOKS OR WRITINGS

(A) "Books or writings"

6. Whether inanimate objects included.—This section provides only for requiring the production of books or writings in the possession of a party, and does not authorize a federal court in an action at law in general to order the production or inspection of inanimate objects. Mutual Life Ins. Co. of New York v. Griesa (C. C. 1907) 156 Fed. 398, order reversed Griesa v. Mutual Life Ins. Co. of New York (1909) 169 Fed. 509, 94 C. C. A. 635, writ of certiorari denied Mutual Life Ins. Co. of New York v. Griesa (1909) 30 S. Ct. 400, 215 U. S. 600, 54 L. Ed. 344. But in Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88, it was held that the federal court may pursuant to a state statute require the defendant master to produce an alleged defective appliance for inspection.

7. Use as evidence.—A paper produced by one party on notice from the other does not become evidence unless, from its legal character, it is entitled to admission as such. Hylton v. Brown (C. C. 1806) Fed. Cas. No. 6,982.

Papers are not made evidence by a notice calling on the opposite party for them, and he may waive reading them. Blight v. Ashley (C. C. 1808) Fed. Cas. No. 1,541.

Plaintiff may read his books in evidence where, being called for by defendant, they are inspected by him, or retained without objection. Coote v. Bank of the United States (C. C. 1826) Fed. Cas. No. 3,203; Corps v. Robinson (C. C. 1809) Id. 3,252.

A party has no right to inspect papers which he has given the other notice to produce at the trial, unless he consent that they shall be used in evidence. Jordan v. Wilkins (C. C. 1811) Fed. Cas. No. 7,526.

That defendant has called upon plaintiff to produce an account does not give plaintiff a right to read it in evidence, after defendant has refused to introduce it. Smith v. Coleman (C. C. 1821) Fed. Cas. No. 13,029.

A paper produced on notice by the adverse party who is not a party thereto and does not claim a beneficial interest under it must be proved by him who offers it in like manner as if he had himself produced it. Rhoades v. Selin (C. C. 1827) Fed. Cas. No. 11,740.

Where a party calling for books in possession of the opposite party inspects them, he makes them evidence for the other party. Waller v. Stewart (C. C. 1835) Fed. Cas. No. 17,109; Wilkes v. Elliot (C. C. 1839) Id. 17,660.

When a party inspects a document which he has compelled his adversary to produce by subpœna duces tecum, and afterwards fails to offer it, his adversary may put it in evidence. Edison Electric Light Co. v. United States Electric Lighting Co. (C. C. 1891) 45 Fed. 55.

8. —— Subject to objection.—Books and papers required by an order of court to be produced by a party on the trial of a cause remain subject to objections to their relevancy as evidence which must be passed upon at the trial. International Coal Min. Co. v. Pennsylvania R. Co. (C. C. 1907) 152 Fed. 557.

(B) Right to require production

9. Existence of right.—This section confers authority on a federal court in an action at law on a proper showing to require a party to produce books or papers for the inspection of the adverse party before trial, where they contain facts essential to be known by the party desiring the inspection, in order to prepare for trial, and which apparently cannot be shown in any other way. Cameron Lumber Co. v. Droney (C. C. 1904) 132 Fed. 304.

The court will, on motion, require a plaintiff to produce a book alleged by defendant to be material to the issues, in order that the questions raised thereon may be fully presented. Dun v. International Mercantile Agency (C. C. 1904) 133 Fed. 1004.

A motion to require defendant to produce records and papers is addressed to the discretion of the court governed by the practice in such cases in chancery, and the authority should be exercised only where the relief might have been had by bill of discovery. Kirkpatrick v. Pope Mfg. Co. (C. C. 1894) 61 Fed. 46, 47. However, to obtain a discovery under this section, it is only requisite that the cause should be at issue, and that the court should be satisfied that the evidence will be pertinent to such issue, and that the discovery would be decreed in equity. Jacques v. Collins (C. C. 1846) Fed. Cas. No. 7,167.

If a party is entitled to documentary evidence, and a witness refuses to furnish it, his remedy is by application to the federal court of the district in which the evidence was taken for process to compel its production. Northern Pac. Ry. Co. v. Keyes (C. C. 1898) 91 Fed. 47. When a party to a suit asks another party to produce in evidence a certain table that would entail great expense in the preparation, he must first tender the expense required. Id.

A corporation may be compelled to produce its books and papers in evidence, which may be necessary and vital to the rights of litigants, and con-

siderations of inconvenience must give way to the paramount rights of parties to the litigation. Wertheim v. Continental Railway & Trust Co. (C. C. 1883) 15 Fed. 716.

A petition by a stockholder and bondholder of an insolvent company to inspect a mine either in person or by agent, with a view to having the receiver in charge thereof removed, is in the nature of a motion made for the production, by parties, of books or writings in their possession, or motion for inspection of writings or examination of parties before trial, and being made by a party in interest, and entitled to the knowledge sought, will be granted by a federal court. Henszey v. Langdon-Henszey Coal Min. Co. (C. C. 1897) 80 Fed. 178. An inspection made pursuant to such a petition gives the party inspecting only the ordinary powers, and his report is subject to the same rules of evidence as the testimony of any other witness. Id.

A corporation cannot refuse to produce its books in an action against it to recover damages for a violation of Interstate Commerce Act on the ground the evidence therein may incriminate it. International Coal Min. Co. v. Pennsylvania R. Co. (C. C. 1907) 152 Fed. 557.

The court will not grant a motion to compel the opening of the records of a corporation not a party, which records it is alleged would disclose something of importance to the litigation. Henry v. Travelers' Ins. Co. (C. C. 1888) 35 Fed. 15.

Under this section a federal court, in an action against certain brokers to recover damages for improperly closing certain cotton contracts belonging to plaintiff, has jurisdiction to require defendants to exhibit their books before trial, and permit plaintiff to investigate, copy, and make abstracts from the same, and to give judgment to plaintiff by default for defendant's refusal to comply with such order. Carpenter v. Winn (1908) 165 Fed. 636, 91 C. C. A. 301, judgment reversed (1911) 31 Sup. Ct. 683, 221 U. S. 533, 55 L. Ed. 842.

In an action against a corporation to recover royalties, defendant answered that it had sold its business and assets to another corporation of the same name, and that the returns made by the latter as to the number of patented articles manufactured were erroneous. Plaintiff replied that the two corporations were practically identical, and that the returns were signed by defendant's officers, and were correct. To substantiate these allegations, plaintiff moved that defendant be required, under this section, to produce its records, and accounts of sales. By the contract for royalties these accounts were to be open to plaintiff's inspection. Held, that the case was a proper one for the application of this remedy, and that a subpœna duces tecum would not be adequate. Kirkpatrick v. Pope Manuf'g Co. (C. C. 1894) 61 Fed. 46.

An action to recover treble damages under Sherman Anti-Trust Act, § 7, post, § 8829, is penal in character, but such fact does not preclude the court from requiring the defendant, when a corporation, to produce books or writings under this section. American Banana Co. v. United Fruit Co. (C. C. 1907) 153 Fed. 943.

Where plaintiffs sued on a document alleged to have been signed by defendants' decedent, which defendants claimed was a forgery, and defendants alleged that plaintiffs had in their possession letters purporting to have been signed by deceased, written in the same handwriting as the document sued on, in which reference was made thereto, defendants were entitled to an order requiring plaintiffs to produce such letters for defendants' inspection and to permit photographic copies to be made thereof under proper restrictions. Newcomb v. Burbank (C. C. 1907) 159 Fed. 568.

Where a complaint failed to charge the falsity of certain statements in a circular, on which it was averred plaintiff relied in making a subscription to the stock of a company organized by defendants, complainant was not entitled to an order compelling defendants to produce certain accounts, nautical charters, and other books before trial, in order to enable plaintiff to prove the falsity of such statements at the trial. Ridgely v. Richard (C. C. 1904) 130 Fed. 387.

A motion by defendant, in an action for wrongfully and maliciously suing out an attachment, to require plaintiff to produce its books so as to show its insolvency, inability to meet accrued obligations, and failure to make profits was improperly granted, neither plaintiff's insolvency nor inability to meet accrued obligations being a defense. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (1903) 121 Fed. 233, 57 C. C. A. 469.

The court will not compel plaintiff to produce a charter party of which defendant has a counterpart. Sampson v. Johnson (C. C. 1814) Fed. Cas. No. 12,281.

A bank will not be required on motion to produce books and papers, when it does not appear that a subpœna duces tecum, directed to the proper officers of the bank, would not suffice. Merchants' Nat. Bank v. State Nat. Bank (C. C. 1868) Fed. Cas. No. 9,448.

The fact that a bill of discovery has been filed and answered, where the papers were not produced, is no bar. Issigi v. Brown (C. C. 1853) Fed. Cas. No. 6,993.

10. Limits of power.—The power of a federal court to require the production of documentary evidence is not limited to an order made on motion, as

provided by this section, but it has power to issue a subpœna duces tecum and to enforce obedience thereto by proceedings for contempt. American Lithographic Co. v. Werckmeister (1908) 165 Fed. 426, 91 C. C. A. 376, judgment affirmed (1911) 31 S. Ct. 676, 221 U. S. 603, 55 L. Ed. 873.

As to the production of books and papers, the statute seems to assign the limits to the courts powers, and the Practice Act was not intended to interfere therewith. Bryant v. Leyland (C. C. 1881) 6 Fed. 125, 127.

11. Preliminary showing.—To authorize a federal court to require a party to produce private books and papers for the inspection of his adversary before trial in an action at law, under this section, it must be shown, not only that they contain evidence pertinent to the issues, but that they are in the possession or under control of the party against whom the motion is made, and that the moving party cannot secure the evidence from any other source. Rosenberger v. Shubert (C. C. 1910) 182 Fed. 411.

Where the inconvenience and expense attending the production of books and papers are very great, and where the sworn copy of the entries from the books is given, or proposed to be given, a very strong case of the necessity for their production should be made, to compel their production or be subjected to the penalty. Lowenstein v. Carey (D. C. 1882) 12 Fed. 811.

The ex parte affidavit of a party interested is competent evidence on a motion for an order to produce books and papers. U. S. v. Twenty-Eight Packages of Pins (D. C. 1832, 1833) Fed. Cas. No. 16,561.

12. "Parties."—Where an action was brought against a railroad company alone for alleged violation of the interstate commerce act, the corporation's officers and agents were not "parties" within this section. Cassatt v. Mitchell Coal & Coke Co. (1907) 150 Fed. 32, 81 C. C. A. 80, 10 L. R. A. (N. S.) 99; Same v. Pennsylvania Coal & Coke Co. (1907) 150 Fed. 48, 81 C. C. A. 97 (judgment reversed Pennsylvania Coal & Coke Co. v. Cassatt [1907] 28 S. Ct. 110, 207 U. S. 187, 52 L. Ed. 163); Cassatt v. Webster Coal & Coke Co. (1907) 150 Fed. 48, 81 C. C. A. 97, judgment reversed Webster Coal & Coke Co. v. Cassatt (1907) 28 S. Ct. 108, 207 U. S. 181, 52 L. Ed. 160.

Since this section only permits courts of law to require parties to an action to produce evidence, it does not afford a remedy at law which bars equitable relief against one not a party to the action. Manning v. Berdan (C. C. 1905) 135 Fed. 159.

13. "Possession or power."—A notice at the trial to produce a letter will not be enforced unless it is in the possession of the party or his counsel. Chapin v. Siger (C. C. 1848) Fed. Cas. No. 2,600.

Respondent, who may be in possession or control of books referred to generally in the answer, may be ordered to produce them. Russell v. McLellan (C. C. 1847) Fed. Cas. No. 12,-158. Such order will not be denied on presentation of an affidavit denying possession. Id.

Proof of the existence of a paper, its pertinency to the issue, and its possession, is necessary before an order will be issued requiring its production. Potter v. Beal (1892) 50 Fed. 860, 2 C. C. A. 60; Iasigi v. Brown (C. C. 1853) Fed. Cas. No. 6,993; Buell v. Connecticut Mut. Life Ins. Co. (C. C. 1875) Fed. Cas. No. 2,103.

A suggestion that the opposite party is in possession of the paper which the other has given him notice to produce will put the burden upon the former of producing it, or showing by affidavit that he is unable to do so. Hylton v. Brown (C. C. 1806) Fed. Cas. No. 6,981.

Evidence may be received to disprove possession of or power to produce papers. Bas v. Steele (C. C. 1818) Fed. Cas. No. 1,088.

14. "Evidence pertinent to the issue."—The documents called for must be pertinent to the issue. Crocker-Wheeler Co. v. Bullock (C. C. 1904) 134 Fed. 241.

Where a complaint alleged that certain nautical charters and contracts had been sold by defendants to a corporation which was not a party to the action, complainant, in the absence of anything tending to indicate that such charters, etc., had not been transferred to the corporation, was not entitled to an order directing defendants to produce the same, together with the stockbook, minute book, and all papers and bank and check books of the corporation, for plaintiff's inspection before trial, under this section. Ridgely v. Richard (C. C. 1904) 130 Fed. 387. Where such complaint failed to charge the falsity of certain statements in a circular, on which it was averred plaintiff relied in making a subscription to the stock of a company organized by defendants, complainant was not entitled to an order compelling defendants to produce certain accounts, nautical charters, and other books before trial, in order to enable plaintiff to prove the falsity of such statements at the trial. Id.

Plaintiff in an action at law is not entitled to an order for the production by the defendant before trial of private books of account for the plaintiff's inspection on an affidavit merely stating that affiant "believes" such books will tend to prove the issues in the mover's favor, without stating any grounds for such belief. Caspary v. Carter (C. C. 1897) 84 Fed. 416.

A party whose books have been call-

ed for and inspected by his adversary may show by a witness that they contain no entries relating to the matter in controversy. Coote v. Bank of United States (C. C. 1827) Fed. Cas. No. 3,204.

15. **"Ordinary rules of proceeding in chancery."**—Under this section the courts of the United States, in actions at law, can require the production of books and papers in the hands of the adverse party only where the relief might have been had by a bill of discovery, and as a substitute therefor. Finch v. Rikeman (C. C. 1851) Fed. Cas. No. 4,788.

VI. ORDER REQUIRING PRODUCTION

16. **Nature and extent.**—It is apparent on the face of this section that to a certain extent the discretion of the court is appealed to, in asking for an order to produce books and writings, at least to the extent that the court upon such an application must decide that prima facie the books and writings mentioned are in the power of the party against whom the order is sought to be made, that the evidence they contain is not clearly irrelevant to the issue, and that the circumstances are such as that the party might be compelled to produce the same by the ordinary rules of proceedings in chancery. The court may exercise its power therefore in any form adapted to promote its efficiency and effect the purpose of the act. The order to show cause at trial afterwards modified by a subsequent order making the order to produce absolute in its term is an order within the terms and meaning of this section. Pennsylvania R. Co. v. International Coal Mining Co. (1907) 156 Fed. 765, 769, 84 C. C. A. 421.

17. **Service.**—The order for production of papers at the trial must be served a reasonable time before they are required. Macomber v. Clarke (C. C. 1828) Fed. Cas. No. 8,918.

18. **Review.**—An order made by a Circuit Court under this section, requiring a party to an action at law to produce books or writings at the trial, is an interlocutory and not a final order, and is not reviewable on a writ of error prior to final judgment in the cause. Pennsylvania R. Co. v. International Coal Min. Co. (1907) 156 Fed. 765, 84 C. C. A. 421.

19. **Conditioned order.**—The law secures to a litigating party the right to inspect, examine, and take copies of the books of other parties, with a view of securing information, and offering their contents in evidence, but the court will order it to be done in such a way as to prejudice as little as possible the owners of the books. Gregory v. Chicago, M. & St. P. R. R. (C. C. 1882) 10 Fed. 529, 530.

An order for the inspection by a party litigant, before trial at law, of books which contain entries with which he has no concern, and which he ought not to see, will be conditioned to require the deposit of the books in the clerk's office, and to provide for the attendance of a representative of the opposite party, the relevancy of contested entries to be determined in the first instance by the clerk, with summary application for review thereof to the judge at chambers. Gray v. Schneider (C. C. 1902) 119 Fed. 474.

VII. JUDGMENT OF NONSUIT OR BY DEFAULT

20. **Penalty for noncompliance with order.**—From the time of this enactment no contention has been raised questioning the power given to render a judgment by default under the circumstances provided for, and the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by legislative authority. Hammond Packing Co. v. Arkansas (1909) 29 Sup. Ct. 370, 380, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

The penalty of a nonsuit or default is inflicted for failure to produce a paper as ordered by the court. Iasigi v. Brown (C. C. 1853) Fed. Cas. No. 6,993; Merchants' Nat. Bank v. State Nat. Bank (C. C. 1868) Fed. Cas. No. 9,448. But such penalty is not available except where there was an order of court to produce. Bas v. Steele (C. C. 1818) Fed. Cas. No. 1,088; Bank of United States v. Kurtz (C. C. 1822) Fed. Cas. No. 920; Maye v. Carbery Id. 9,339. Nor does the power to inflict such penalty include power to compel production by attachment. Victor G. Bloede Co. of Baltimore City v. Joseph Bancroft & Sons Co. (C. C. 1901) 110 Fed. 76.

This section goes no further than to apply to actions at law the remedy which in equity is afforded by a bill of discovery; and, before a defendant can be held in default for a failure to produce such evidence as provided by the statute, the court must have determined that the evidence so sought is pertinent to the issues and ought to be produced, and have made an order for its production, which has been disobeyed. Owyhee Land & Irrigation Co. v. Tautphaus (1901) 109 Fed. 547, 48 C. C. A. 535.

The court, in view of its discretionary power under this section, summarily to give judgment of nonsuit or by default, will not favorably act on an application for the production of books and papers, ambiguous on its face or not conforming to such section. Victor G. Bloede Co. of Baltimore City v.

Joseph Bancroft & Sons Co. (C. C. 1901) 110 Fed. 76.

VIII. OTHER REMEDIES AND EFFECT OF STATUTE THEREON

21. Remedy by discovery.—The alleged inability of the government to state just when or by whom the wrongful cutting of timber on public domain had been performed or when or by whom the logs were manufactured into lumber and sold, and when the proceeds were divided, showed no necessity for discovery in equity which would render the remedy more adequate than in an action at law. U. S. v. Bitter Root Development Co. (1906) 26 Sup. Ct. 318, 326, 200 U. S. 451, 50 L. Ed. 550.

Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be had in a court of law and where, so far as necessary, discovery under this section may be obtained as well as in equity. Equitable Life Assur. Soc. v. Brown (1909) 29 Sup. Ct. 404, 412, 213 U. S. 25, 53 L. Ed. 682.

A bill based on a contract by which defendant agreed to use a patented device of plaintiff on cars to be built by defendant, and to render statements to plaintiff showing the number of cars so equipped, and pay a royalty thereon, which alleges that defendant has failed and refused to render the statements or pay the royalty, and prays for a discovery and accounting, is not one for an accounting between persons occupying fiduciary relations, and for that reason within the jurisdiction of equity, but is in effect one to enforce a legal demand, in aid of which a discovery is sought, and as such is not within the jurisdiction of a federal court of equity, because a bill of discovery is rendered unnecessary by this section. Safford v. Ensign Mfg. Co. (1903) 120 Fed. 480, 56 C. C. A. 630.

A federal court of equity is without jurisdiction of a suit for a discovery and for final relief which consists of the enforcement of a purely legal demand; the only ground of equity jurisdiction being the discovery by requiring the production of papers and records, which, under this section, can be obtained in an action at law. U. S. v. Bitter Root Development Co. (1904) 133 Fed. 274, 66 C. C. A. 652, decree affirmed (1906) 26 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

This section and section 1464, ante, have removed the necessity of resorting to bills of discovery in ordinary cases, though the equitable remedy by bill of discovery may not have been abolished. Brown v. M'Donald (1905) 133 Fed. 897, 67 C. C. A. 59, 68 L. R. A. 462.

This section does not make obsolete the old time right of discovery, and it is still allowable in a proper case, in an action contemplated as well as an action pending. Mutual Life Ins. Co. v. Griesa (C. C. 1907) 156 Fed. 398, 401, reversed (1909) 169 Fed. 509, 94 C. C. A. 635, certiorari denied (1909) 30 Sup. Ct. 400, 215 U. S. 600, 54 L. Ed. 344. It is designed merely to give courts of law of the United States the power to require the production of documents to obviate the necessity of parties going into equity with a bill of discovery for that purpose in aid of an action at law, and in no way affects the practice of federal courts of equity, which is governed by the general equity rules prescribed by the supreme court, and where they do not apply by the practice of the high court of chancery of England at the time those rules were promulgated in 1842. Ryder v. Bateman (C. C. 1898) 93 Fed. 31.

Courts of equity should not refuse to entertain a bill of discovery, though by the enlargement of the jurisdiction and remedies exercised by courts of law similar relief could be obtained by the complainant in his action at law, and notwithstanding this section a bill in equity may be maintained in the United States circuit court against a corporation to compel a discovery in aid of an action at law brought against it to recover damages for the infringement of a patent. Colgate v. Compagnie Française du Telegraphe de Paris à N. Y. (C. C. 1885) 23 Fed. 82, 83.

Discovery by production of documents or otherwise, having for its object the promotion of justice through the disclosure of material facts, will, subject to certain well-recognized exceptions, be awarded in aid of an action at law, unless it clearly appears that a discovery could not avail the case of the party applying for it. Victor G. Bloede Co. of Baltimore City v. Joseph Bancroft & Sons Co. (C. C. 1899) 98 Fed. 175. But it will not be awarded to gratify mere curiosity or to enable one party to make undue inquisition into the affairs of another; nor will the court extend discovery beyond the legitimate requirements of the case to be aided thereby. Id.

The power of a federal court of equity to entertain a cross-bill for discovery in a suit in equity has not been abridged by any act of congress or rule of the supreme court, and is not superseded by statutory methods provided for obtaining facts in actions at law. Indianapolis Gas Co. v. City of Indianapolis (C. C. 1898) 90 Fed. 196.

A bill seeking discovery and accounting held bad on demurrer where there is no right to an accounting, especially where plaintiff has an adequate remedy at law, in view of this section. Grieb v. Equitable Life Assur. Society of United States (1912) 194 Fed. 1021, 114 C. C. A. 658, affirming decree (C.

C. 1911) 189 Fed. 498. A bill for discovery and accounting on a life policy held to show that complainant has an adequate remedy at law by establishing a fact, which may be done under this section. Id.

Suit having failed as one to remove cloud held not maintainable as bill for discovery and accounting, plaintiff having an adequate remedy at law under this section. Childs v. Missouri, K. & T. Ry. Co. (1915) 221 Fed. 219, 136 C. C. A. 629.

Under the federal practice act, allowing interrogatories authorized by a state statute to be filed in the federal court in an action at law in lieu of a bill of discovery, such remedy is cumulative merely, and not adopted as a substitute for a bill of discovery. Bryant v. Leyland (C. C. 1881) 6 Fed. 125.

Complainant insured defendants, who were building contractors, against liability for injuries to their employés, or to others through the negligence of their employés, the stipulated premiums being based upon a percentage of the amount paid by defendants in wages during the term of the policies. An estimate of such amount was made at the beginning, and premiums paid thereon, the contract providing that defendants should make a statement at the end of the policy period of the actual amount in accordance with which the premium should be readjusted by a rebate or additional payment. Held, that a bill alleging that defendants refused to make such statement, fraudulently claiming that their pay rolls were no larger than estimated, did not state a cause of action for relief in a federal court of equity for a discovery and accounting, the remedy at law being adequate, in view of this section. London Guarantee & Accident Co. v. Doyle (C. C. 1904) 130 Fed. 719.

A federal court of equity will not entertain a bill of discovery, the sole purpose of which is to ascertain the names of alleged owners of stock of a corporation against whom complainant desires to bring actions for the collection of an assessment, where the bill shows that defendants, one of whom is responsible, are also liable for such assessment, since complainant not only has an adequate remedy at law for the collection of the assessment, but may call defendants as witnesses in such action and require them to produce books and papers. Brown v. McDonald (C. C. 1904) 130 Fed. 964, decree reversed (1905) 133 Fed. 897, 67 C. C. A. 59, 68 L. R. A. 462.

This section expressly applies only to cases where the party might be compelled to produce the books or papers "by the ordinary rules of proceeding in chancery," which never allowed a bill of discovery to be maintained in aid of an action for a penalty or forfeiture. Newgold v. American Electrical Novelty & Mfg. Co. (D. C. 1901) 108 Fed. 341.

See notes under § 1536, post.

22. Specific performance.—A contract by which defendants agreed to collect a certain royalty for each set of carriage springs manufactured and sold by them under complainant's patent, and to render quarterly accounts of sales, and to permit complainant's agents to examine their books, a certain portion of the royalty to be paid to complainant, will not be specifically enforced for a failure on the part of defendants to render accounts or to permit an examination of their books, as there is an adequate remedy at law, and, under this section, a production of the books can be enforced. J. B. Brewster & Co. v. Tuthill Spring Co. (C. C. 1888) 34 Fed. 769.

23. Bill for accounting and creditors' bill.—The statute does not devest the federal court of jurisdiction of a creditors' bill. Frazer v. Colorado Dressing & Smelting Co. (C. C. 1880) 5 Fed. 163.

This section clothes the courts of law with full power to compel the production of books and papers in evidence under all circumstances where they might be compelled to produce the same in chancery cases, and this power, with the unquestioned right of a complainant to examine all the agents and employés of the licensee as witnesses, seems to give all the facilities required for a complete remedy at law, and hence the licensor in a license under letters patent cannot maintain a bill in equity for an accounting of royalties accruing under the license. Crandall v. Plano Mfg. Co. (C. C. 1885) 24 Fed. 738, 739.

24. Subpœna duces tecum.—See note under § 1488, post.

25. Exclusion of state practice.—This section alone controls the practice as to discovery of books and papers in the federal courts, to the exclusion of the state practice. Gregory v. Chicago, M. & St. P. R. R. (C. C. 1882) 10 Fed. 529; Lucker v. Phœnix Assur. Co. of London (C. C. 1895) 67 Fed. 18, 19; U. S. v. National Lead Co. (C. C. 1896) 75 Fed. 94; Kaiser v. Chicago, St. P., M. & O. Ry. Co. (D. C. 1912) 192 Fed. 1013; Schatz v. Winton Motor Carriage Co. (D. C. 1912) 197 Fed. 777.

Compulsory production of the books of a corporate defendant under a subpœna duces tecum served upon an officer of the corporation in an action to recover the penalties prescribed by section 9517, post, for printing and selling copies of a copyrighted painting, did not, after the change of the rule as to the incompetency of parties as witnesses, made by section 1464, ante, violate any of the rights of the

corporation under this section, since this section cannot be regarded as providing an exclusive procedure. American Lithographic Co. v. Werckmeister (1911) 31 Sup. Ct. 676, 678, 221 U. S. 603, 55 L. Ed. 873, affirming judgment (1908) 165 Fed. 426, 91 C. C. A. 376. And see § 1537 and notes thereunder.

CITED WITHOUT DEFINITE APPLICATION

Boyd v. U. S. (1886) 6 Sup. Ct. 524, 532, 116 U. S. 616, 29 L. Ed. 746; Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 194 U. S. 303, 48 L. Ed. 989; Doyle v. London Guarantee & Accident Co. (1907) 27 Sup. Ct. 313, 316, 204 U. S. 599, 51 L. Ed. 641; Webster Coal & Coke Co. v. Cassatt (1907) 28 Sup. Ct. 108, 110, 207 U. S. 181, 52 L. Ed. 160; Babbott v. Tewksbury (C. C. 1891) 46 Fed. 86, 87; Dancel v. Goodyear Shoe Machinery Co. (C. C. 1904) 128 Fed. 753; In re Ward (D. C. 1908) 161 Fed. 755; Barnes v. Trees (D. C. 1912) 194 Fed. 230.

§ 1470. (R. S. § 862.) Mode of proof in equity and admiralty causes.

The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided.

Act Aug. 23, 1842, c. 188, § 6, 5 Stat. 518.

The mode of taking evidence in the consular courts was prescribed by R. S. § 4097, post, § 7642.

Provisions relating to the manner of and time for taking testimony in congressional contested election cases were made by R. S. § 107, and Act March 2, 1875, c. 119, § 2, ante, §§ 163, 164.

Notes of Decisions

As to equity and admiralty rules, see §§ 1536, 1543, post, and notes thereunder.

As to testimony taken by deposition, see § 1472 et seq., post.

Operation of statute.—This section is subject to section 1472, which applies to equity as well as common-law cases. Stegner v. Blake (C. C. 1888) 36 Fed. 183, 184.

Repeal of statute.—Judiciary Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88, authorizing federal courts to require a party to adduce his evidence orally in open court on final hearing, was repealed by this section. Hyams v. Federal Coal & Coke Co. (1907) 152 Fed. 970, 82 C. C. A. 324.

Taking testimony under equity rules.—See note under § 1536, post.

Circuit courts are not required by law to permit the examination of witnesses orally in open court upon the hearing of cases in equity, and if they do allow the introduction of such testimony, it must be taken down, or its substance stated in writing, and made a part of the record, or it will be disregarded on appeal, and if the testimony is objected to and ruled out, it must be sent with the record, and the case will not be sent back to have the rejected testimony taken, even though the supreme court on examination may be of the opinion that the objection to it ought not to have been sustained. Blease v. Garlington (1875) 92 U. S. 1, 6, 23 L. Ed. 521.

The power conferred upon the supreme court by this section is valid and constitutional, and under the amendment to the sixty-seventh equity rule, adopted pursuant to such power, the courts of the United States are authorized to appoint examiners to take testimony orally beyond the limits of the district in which a suit is pending, and the attendance of witnesses before such an examiner may be compelled by the courts in the district to which the examiner is sent. White v. Toledo, St. L. & K. C. R. Co. (1897) 79 Fed. 133, 24 C. C. A. 467.

Cited without definite application, Ex parte Phenix Ins. Co. (1886) 7 Sup. Ct. 25, 29, 118 U. S. 610, 30 L. Ed. 274; The Philadelphian (1894) 60 Fed. 423, 425, 427, 9 C. C. A. 54; Mears v. Lockhart (1899) 94 Fed. 274, 275, 36 C. C. A. 239; In re National Equipment Co. (1912) 195 Fed. 488, 115 C. C. A. 398 (certiorari denied [1912] 32 Sup. Ct. 835, 225 U. S. 701, 56 L. Ed. 1264); Randall v. Venable (C. C. 1883) 17 Fed. 162, 163; Ferguson v. Dent (C. C. 1891) 46 Fed. 88, 89; Coosaw Min. Co. v. Farmers' Min. Co. (C. C. 1895) 67 Fed. 31, 32; Dover v. Greenwood (C. C. 1910) 177 Fed. 946 (reversed [1911] 194 Fed. 91, 114 C. C. A. 169); In re Williams (D. C. 1903) 123 Fed. 321, 325.

§ 1471. (Act Feb. 26, 1913, c. 79.) Handwriting of person competent as basis for comparison to prove or disprove genuineness of handwriting.

In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person

may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. (37 Stat. 683.)

This was an act entitled "An act relating to proof of signatures and handwriting."

Notes of Decisions

Admissibility of expert testimony.— The testimony of expert witnesses, by comparison of handwriting, is clearly admissible. Green v. Terwilliger (C. C. 1892) 56 Fed. 384.

§ 1472. (R. S. § 863.) Depositions de bene esse.

The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88. Act March 1, 1817, c. 30, 3 Stat. 350. Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 168. Act July 29, 1854, c. 159, § 2, 10 Stat. 315. Act May 9, 1872, c. 146, 17 Stat. 89.

Depositions may also be taken in the mode prescribed by the laws of the state in which the courts are held, by Act March 9, 1892, c. 14, post, § 1476.

Notaries public were authorized to take depositions, acknowledgments, and affidavits in the same manner and with the same effect as commissioners of the United States circuit courts, by Act Aug. 15, 1876, c. 304, post, § 1475. The office of circuit court commissioner was abolished by Act May 28, 1896, c. 252, § 19, as amended by Act March 2, 1901, c. 814, ante, § 1337, and the provisions of all acts applicable to said circuit court commissioners were made applicable to United States commissioners created by the act.

The Supreme Court was authorized to prescribe the mode of taking and obtaining evidence, by R. S. § 917, post, § 1543.

Provisions relating to the taking of depositions for use in congressional election cases were made by R. S. §§ 117–122, ante, §§ 165–170.

Secretaries of legations and consular officers were authorized to administer to or take from any person an oath, affirmation, affidavit, or deposition, etc., by R. S. § 1750, post, § 3211.

The Commissioner of Patents was authorized to establish rules for taking affidavits and depositions required in cases pending in the Patent Office, by R. S. § 4905, post, § 9450. By the same section such affidavits and deposi-

tions may be taken before any officer authorized to take depositions to be used in the United States courts.

Prize commissioners were authorized to take depositions de bene esse in certain cases, by R. S. § 4622, post, § 8401.

Collectors, deputy collectors, and inspectors of internal revenue were authorized to administer oaths and to take evidence touching any part of the administration of the internal revenue laws, by R. S. § 3165, post, § 5885.

Provisions for taking depositions of witnesses in hearings before registers and receivers of land offices were made by Act Jan. 31, 1903, c. 344, §§ 4, 5, post, §§ 4502, 4503.

Provisions for depositions of witnesses in naturalization proceedings were made by the naturalization Act of June 29, 1906, c. 3592, § 10, post, § 4369.

Provisions for taking depositions for use in courts-martial are contained in the new articles of war, Act Aug. 29, 1916, c. 418, § 3, post, § 2308a.

Notes of Decisions

As to mode of proof in general, controlling effect of federal statutes, and physical examination, see § 1468, ante; admission and suppression of depositions, see § 1474, post; subpœna duces tecum, see § 1480, post; taking depositions in the mode prescribed by state laws, see § 1476, post.

1. Construction and operation of statute in general.
2. Mode of taking depositions.
3. Right to take depositions.
4. —— "Civil cause."
5. —— "Cause depending."
6. —— When witness lives at greater distance than 100 miles.
7. —— Foreign witnesses.
8. Before whom taken.
9. —— "Not of counsel nor interested."
10. Notice of taking.
11. —— Necessity.
12. —— Requisites and sufficiency.
13. —— "Reasonable notice."
14. —— Service.
15. Time of taking.
16. "Any person may be compelled to appear and depose."
17. —— Privilege of witness.
18. —— Subpœna duces tecum.
19. Number of deponents.
20. Costs and expenses.
21. Retaking and re-examination.

1. Construction and operation of statute in general.—This statute is remedial and is to be construed liberally. Nash v. Williams (1873) 20 Wall. 226, 235, 244, 22 L. Ed. 254.

Bankr. Act 1898, § 21b, in connection with this section, authorizes a court of bankruptcy to take the depositions of witnesses who reside more than 100 miles from the place of trial, whether within or without the state. In re Washington Steel & Bolt Co. (D. C. 1914) 210 Fed. 984. But see In re Dunn (C. C. 1874) Fed. Cas. No. 4,173, holding that this section does not apply to proceedings in bankruptcy.

Section 1470 is subject to this section, which applies to equity as well as common-law cases. Stegner v. Blake (C. C. 1888) 36 Fed. 183, 184.

Equity rule 47 printed in notes to § 1536, post, authorizing the granting of leave to take depositions, and fixing the time within which they may be taken, was not intended to vary or be a limitation upon this section. Iowa Washing Mach. Co. v. Montgomery Ward & Co. (D. C. 1915) 227 Fed. 1004.

This section and sections 1473, 1474, post, were not repealed by section 1537, post, requiring the federal practice to conform to that of the state courts. Sage v. Tauszky (C. C. 1877) Fed. Cas. No. 12,214.

This section and sections 1473, 1474, 1477–1481, post, relate exclusively to depositions de bene esse, in perpetuam memoriam, or under a dedimus potestatem. National Cash-Register Co. v. Leland (1899) 94 Fed. 502, 37 C. C. A. 372.

There is no statutory provision conferring power upon a clerk of a circuit court to issue subpœnas requiring witnesses to appear and give depositions before a notary, to be used in another federal court, except where such depositions are to be taken as provided in this section, and subpœnas so issued in other cases are without any lawful authority. Stevens v. Missouri, K. & T. Ry. Co. (C. C. 1900) 104 Fed. 934.

The competency of witnesses, the mode of examination, the production and admissibility of evidence are for the federal courts, under section 1468, ante, and this section. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554, 555.

2. Mode of taking depositions.—These sections prescribe the modes of taking proof in actions at law in the courts of the United States to the exclusion of all others. Diamond Coal & Coke Co. v. Allen (1905) 137 Fed. 705, 71 C. C. A. 107. And must be strictly complied with. Thorpe v. Simmons (C. C. 1819) Fed. Cas. No. 14,007.

The mode of taking depositions is by oral questions put at the time, if desired, and not necessarily by written interrogatories given to the officer before commencing the taking. Bischoffscheim v. Baltzer (C. C. 1882) 10 Fed. 1, 4. The mode of taking depositions de bene esse is the same as that provided for by the amendment to equity rule 67. Id.

The right to take testimony by depositions in common-law causes pending in the United States courts depends upon the statutes of the United States,

and not the statutes of the states in which such courts are held; but, when such right does exist under the United States statutes, the parties may follow, as to the mere mode of procuring the deposition, at their election, either the provisions of the state law or of the act of congress. McLennan v. Kansas City, St. J. & C. B. R. Co. (C. C. 1884) 22 Fed. 198.

See note to Russell v. Ashley (C. C. 1847) Fed. Cas. No. 12,150, as to mode of taking depositions.

3. Right to take depositions.—In actions at common law the depositions of witnesses cannot be taken before the trial to be used on the trial, but must be taken orally in open court, unless the witnesses reside more than 100 miles from the place of trial, or are bound on a voyage to sea, or are about to go out of the United States or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or when the witness is aged and infirm, and in these excepted cases the deposition may be taken and read at the trial. Importers' & Traders' Nat. Bank v. Lyons (C. C. 1905) 134 Fed. 510.

It is incumbent on the party for whom the deposition is taken to show that the disability of the witness to attend continues unless the witness lives beyond 100 miles from the place of trial. Patapsco Ins. Co. v. Southgate (1831) 5 Pet. 604, 616, 8 L. Ed. 243.

If witnesses are sick, or live beyond the 100-mile limit, they may be examined by commission; or if an oral examination is deemed more satisfactory, or notice has been given by either party that he desires the evidence to be taken orally, this and following sections provide a simple and efficient mode for taking their testimony. Arnold v. Chesebrough (C. C. 1888) 35 Fed. 16.

Depositions should not be taken merely de bene esse in case of old age, sickness, or going abroad. Allen v. Blunt (C. C. 1846) Fed. Cas. No. 217.

Where an action for treble damages for a violation of Sherman Act, § 7, was instituted, it would be presumed that it was honestly brought and intended to be tried; and hence it was no objection to the taking of the testimony of a witness de bene esse that the proceeding was a fishing excursion in the furtherance of another suit. Buckeye Powder Co. v. Hazard Powder Co. (D. C. 1913) 205 Fed. 827.

That the deponent in a prize case was a seaman on board a gunboat in a certain harbor liable to be ordered to some other place and not to be able to attend the court at the time of its sitting was not a sufficient reason for taking his deposition de bene esse under this section. The Samuel (1816) 1 Wheat. 9, 16, 4 L. Ed. 23.

4. —— "Civil cause."—This section applies to equity as well as common-law causes. Stegner v. Blake (C. C. 1888) 36 Fed. 183.

Proceedings brought under the Chinese exclusion act for the deportation of a Chinese person are civil, and not criminal, and a defendant claiming to be a native of the United States may avail himself of the right given by this section to take and use depositions de bene esse. In re Lam Jung Sing (D. C. 1907) 150 Fed. 608.

5. —— "Cause depending."—The provision of this act as to taking depositions de bene esse does not apply to cases pending in the supreme court, but only to those pending in the district and circuit courts. The Argo (1817) 2 Wheat. 287, 289, 4 L. Ed. 241.

A case after appeal to the supreme court is no longer "depending" in the circuit court, and hence is removed from the operation of this section. Richter v. Jerome (C. C. 1885) 25 Fed. 679, 681.

6 —— When witness lives at greater distance than 100 miles.—The person whose deposition is taken, under the act of congress, must reside more than a hundred miles from the place of holding the court. Wellford v. Miller (C. C. 1808) Fed. Cas. No. 17,380; Gustine v. Ringgold (C. C. 1831) Fed. Cas. No. 5,877; Russell v. Ashley (C. C. 1847) Fed. Cas. No. 12,150; Dreskill v. Parish (C. C. 1851) Fed. Cas. No. 4076; Curtis v. Central Ry. Co. (C. C. 1855) Fed. Cas. No. 3,501. Regardless of whether the deposition is taken within the district where the court is held. Patapsco Ins. Co. v. Southgate (1831) 5 Pet. 604, 616, 8 L. Ed. 243.

A party is not entitled to take the deposition of a witness in a federal court, under this section, where the witness actually lives at the place of trial and expects to remain there, although his legal domicile may be elsewhere. Frost v. Barber (C. C. 1909) 173 Fed. 848. Nor where the witness is casually absent from home, although found at a place more than 100 miles from the place of trial, unless he is aged and infirm. Ex parte Humphrey (C. C. 1851) Fed. Cas. No. 6,867.

A witness "lives" where he can be found, and is sojourning, residing, or abiding for his health or any other lawful purpose. Mutual Ben. Life Ins. Co. v. Robison (1893) 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325, affirming decree (C. C. 1893) 54 Fed. 580.

The right of a party to have testimony taken de bene esse where the witness lives more than 100 miles from the place of trial, etc., cannot be taken away by a federal District Court or any judge. In re National Equipment Co. (1912) 195 Fed. 488, 115 C. C. A. 398, writ of certiorari denied National Equipment Co. v. Holt (1912) 32

Sup. Ct. 835, 225 U. S. 701, 56 L. Ed. 1264.

Under this section depositions may be taken in certain cases, and notice thereof must be served on the adverse party or his attorney, provided either of them is within 100 miles of the place where such deposition is taken, and a certificate of the person before whom deposition was taken that neither the adverse party nor his attorney lived within 100 miles of such place, and that therefore no notice was made out, is sufficient. Dick v. Runnels (1847) 5 How. 7, 9, 12 L. Ed. 26.

A witness living more than 100 miles from the place of trial is not compelled to attend the court on a subpœna, but his deposition may be taken and his residence is proved prima facie by the certificate of the magistrate who takes it. Patapsco Ins. Co. v. Southgate (1831) 5 Pet. 604, 616, 8 L. Ed. 243.

Whether a witness lives at a greater distance than 100 miles from the place of holding a federal court, so as to authorize the taking of his deposition for use in a civil cause depending therein, is to be determined by taking the ordinary, usual, and shortest route of public travel, and not by the distance in a straight line. Jennings v. Menaugh (C. C. 1902) 118 Fed. 612.

As to the law in relation to the taking of depositions of witnesses residing over 100 miles from the place of holding the court, see Evans v. Hettick (C. C. 1818) Fed. Cas. No. 4,562.

7. —— **Foreign witnesses.**—Depositions de bene esse cannot be taken under this section in a foreign country. Bird v. Halsy (C. C. 1898) 87 Fed. 671. See note under § 1477, post. But may be taken within the United States only. Encyclopædia Britannica Co. v. Werner Co. (C. C. 1905) 138 Fed. 461; Compania Azucarera Cubana v. Ingraham, Maxwell & Beals (C. C 1910) 180 Fed. 516; The Alexandra (D. C. 1900) 104 Fed. 904.

8. **Before whom taken.**—A deposition may be taken before a notary public. Act July 29, 1854. Dinsmore v. Maroney (C. C. 1859) Fed. Cas. No. 3,920.

Where the notice states that the deposition will be taken before a certain notary public, "or some other officer authorized by law to take depositions," the deposition may properly be taken before some other notary than the one named. Gormley v. Bunyan (1891) 11 Sup. Ct. 453, 456, 138 U. S. 623, 34 L. Ed. 1086.

A judge of the probate court of a state which has a probate court for each county as a court of record with a seal is a judge of a county court within the statute. Fowler v. Merrill (1850) 11 How. 375, 393, 13 L. Ed. 736.

A "justice" of a county court is a "judge" of such court, and competent to take testimony. Smith v. Williams (D. C. 1847) Fed. Cas. No. 13,127.

The probate court of Mississippi being a court of record, and possessing a seal, the judge thereof is authorized to take depositions, under the statute. Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469.

The power and authority of the Circuit Court and of the notary are defined and limited by this section and sections 1474, 1480, post. Smith v. National Bank of D. O. Mills & Co. (C. C. 1910) 193 Fed. 255.

A deposition cannot be taken under the act of congress before a judge of a municipal court. Foreman v. Holmead (C. C. 1837) Fed. Cas. No. 4,935. Or a "county commissioner." Garey v. Union Bank (C. C. 1826) Fed. Cas. No. 5,241.

The jurisdiction conferred on the magistrate by the statute is special, and the facts calling for the exercise of it must appear on the face of the instrument, and cannot be left to parol proof; hence, where the magistrate, in his notice, only states that the witness is about to depart from the state, and in his certificate omits to state the reason for taking the deposition, it is not competent to supply the defect by parol proof. Harris v. Wall (1849) 7 How. 693, 704, 12 L. Ed. 875.

As to admissibility of deposition taken in another state before the superintendent of a city, see Lindsay v. Riggs (C. C. 1811) Fed. Cas. No. 8,366.

9. —— **"Not of counsel nor interested."**—A statement in the certificate of a notary taking a deposition that he is "not of counsel nor interested in any manner whatever in this cause" is a substantial compliance with the requirement of this section. American Exch. Nat. Bank v. First Nat. Bank (1897) 82 Fed. 961, 27 C. C. A. 274.

A magistrate who is a partner of the active counsel of a party to a patent-interference proceeding is incompetent to take depositions therein. Nichols v. Harris (C. C. 1854) Fed. Cas. No. 10,243.

10. **Notice of taking.**—Since this section authorizes the taking of depositions de bene esse without any application to or assistance from the court, the court has no jurisdiction to vacate or extend a notice; the party taking the deposition taking the risk of having it suppressed if the notice does not comply with the statute. Kline Bros. & Co. v. Liverpool & London & Globe Ins. Co. (C. C. 1911) 184 Fed. 969.

11. —— **Necessity.**—Ex parte depositions without notice ought not to be taken unless in circumstances absolutely necessary, or in cases of mere formal proof, or of some isolated fact. Walsh v. Rogers (1851) 13 How. 283, 286, 14 L. Ed. 147.

Where there is an attorney of record, it is improper to take depositions with-

out notice to him or to the party. The Argo (C. C. 1814) Fed. Cas. No. 517, affirmed (1817) 2 Wheat. 287, 4 L. Ed. 241.

Notice to counsel of taking is necessary when witness lives within 100 miles. Allen v. Blunt (C. C. 1846) Fed. Cas. No. 217. Defendants who were not served with process should be notified of the taking of depositions, if they lived within 100 miles of the place of caption. Brown v. Piatt (C. C. 1821) Fed. Cas. No. 2,026. But notice need not be given where neither the party nor his counsel is within 100 miles of the place of caption. Miller v. Young (C. C. 1812) Fed. Cas. No. 9,-596.

A magistrate need not certify that the opposite party had no attorney within 100 miles of the place of caption, in order to excuse a want of notice. Smith v. Coleman (C. C. 1821) Fed. Cas. No. 13,029.

Want of notice cannot be objected to where the proctor of the party knows of the deposition being taken. Nelson v. Woodruff (1861) 66 U. S. (1 Black) 156, 17 L. Ed. 97.

12. —— Requisites and sufficiency.—It is not necessary that the notice of taking under this act should state the reason for taking it. De Butts v. McCulloch (C. C. 1806) Fed. Cas. No. 3,-718. Where such notice correctly states the title of the case and the name of the court, but lays the venue in the state and county, instead of in the district, such technical irregularity does not vitiate the deposition. Gormley v. Bunyan (1891) 11 Sup. Ct. 453, 456, 38 U. S. 623, 34 L. Ed. 1086.

A notice, without date, that depositions will be taken on September 12 (no year being given), at the office of a person named, in the "city of Guilford, state of Maine," is not sufficient to let in a deposition taken September 12, 1867, in the "town of Guilford;" it not appearing that the "town" and "city" were the same place, and the opposite party not having attended. Knode v. Williamson (1873) 84 U. S. (17 Wall.) 586, 21 L. Ed. 670.

Where depositions are taken to be used as evidence in the federal courts in Tennessee, upon interrogatories filed with the clerk, where the witness resides over 100 miles from the place of trial, the notice served upon the opposite party need not state the time and place of taking the depositions or the cause for taking them, and the clerk may issue the commission without an order of court. U. S. v. Louisville & N. R. Co. (D. C. 1883) 18 Fed. 480.

Where the magistrate, in his notice to the opposite party to take a deposition, only said that the witness was about to "depart the state," and in his certificate omitted to state the reason for taking the deposition, it was held that it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States. Harris v. Wall (1849) 48 U. S. (7 How.) 693, 12 L. Ed. 875.

Form of notice of taking deposition, see Bussard v. Catalino (C. C. 1823) Fed. Cas. No. 2,228.

Under the law of Virginia respecting the taking of depositions, notice to the attorney at law of the opposite party is not sufficient. Wheaton v. Love (C. C. 1807) Fed. Cas. No. 17,484.

The deposition of a seafaring man may be taken on one day's notice to the adversary's attorney. Act Md. 1721, c. 14, § 14. Bowie v. Talbot (C. C. 1805) Fed. Cas. No. 1,732.

Notice of the time and place of taking a deposition given the attorney of the opposite party is not such notice as is required by the act of assembly of Virginia, but the attorney may agree to receive or to waive notice; and if notice is given that a deposition will be taken on the 8th of August and adjournments from day to day until finished, and the commissioners meet on the 8th and adjourn from day to day until the 12th and from the 12th to the 19th, a deposition taken on the last date is not taken agreeably to notice. Buddicum v. Kirk (1806) 3 Cranch, 293, 297, 2 L. Ed. 444.

13. —— "Reasonable notice."—What constitutes a reasonable notice, in point of time, of the taking of depositions, depends upon the circumstances of each particular case; the chief circumstances to be considered being distance, number of witnesses, and facility of communication to obtain proper representation at the taking. American Exch. Nat. Bank v. First Nat. Bank (1897) 82 Fed. 961, 27 C. C. A. 274.

One hour's notice of the taking of a deposition, where the adverse party lived in the same village or town, was reasonable. Leiper v. Bickley (C. C. 1801) Fed. Cas. No. 8,222. Where all parties reside in the place, a notice to take depositions on following day is not too short. Atkinson v. Glenn (C. C. 1831) Fed. Cas. No. 610.

Notice that plaintiff will proceed to take depositions of certain witnesses in three different cities on the same day is not reasonable notice. Uhle v. Burnham (C. C. 1890) 44 Fed. 729. Nor is notice served on counsel during court, or which would deprive him of attendance at the commencement of court. Bell v. Nimmon (C. C. 1849) Fed. Cas. No. 1,-259. Or notice given at noon to take a deposition between 4 and 6 o'clock of the same day. Renner v. Howland (C. C. 1823) Fed. Cas. No. 11,700. Or notice given at 8 o'clock of the taking of depositions between 9 and 2 of the same day. Jamieson v. Willis (C. C. 1809) Fed. Cas. No. 7,204. Or notice at Washington on December 31st, of taking of deposition in Baltimore on

January 2d. Barrell v. Simonton (C. C. 1829) Fed. Cas. No. 1,042.

14. —— **Service.**—As to certificate of service, see § 1474, post.

The notice of taking the deposition must be given by the magistrate before whom the deposition is to be taken. A notice given by the party is not sufficient. Young v. Davidson (C. C. 1838) Fed. Cas. No. 18,157.

Notice must be served on the adverse party or his attorney, provided either of them is within 100 miles of the place where such deposition is taken. Dick v. Runnels (1847) 46 U. S. (5 How.) 7, 12 L. Ed. 26.

Though a statute does not authorize notice to an attorney, still the attorney at law may consent to receive, or may waive, notice, and shall not be permitted afterwards to object to the want of it. Buddicum v. Kirk (1806) 7 U. S. (3 Cranch) 293, 2 L. Ed. 444.

Notice of taking, directed to the party, may be served on his attorney. Barrell v. Limington (C. C. 1830) Fed. Cas. No. 1,040.

Service of notice of taking the deposition by leaving a copy at the place of abode of the adverse party is insufficient. Merrill v. Dawson (C. C. 1848) Fed. Cas. No. 9,469; Carrington v. Stimson (C. C. 1853) Fed. Cas. No. 2,-450.

An affidavit of service of notice to take depositions, by leaving it with defendant's wife, need not state that she was informed of its purport. M'Call v. Towers (C. C. 1801) Fed. Cas. No. 8,-674.

Affidavit of service of notice of taking of deposition by leaving it at defendant's lodging held insufficient, where the place of lodging was not specified. Hill v. Norvell (C. C. 1845) Fed. Cas. No. 6,497.

15. **Time of taking.**—The federal statutes and practice do not authorize the examination of an opposing party before trial, although provided for by a state statute; but under this section, where he desires the testimony of the opposing party, the court may require the latter to appear at the trial, or postpone the trial when reached, to enable his deposition to be then taken. Frost v. Barber (C. C. 1909) 173 Fed. 847.

A witness in an equity case cannot be compelled to give his deposition before the cause is at issue. Flower v. MacGinniss (1901) 112 Fed. 377, 50 C. C. A. 291; Stevens v. Missouri, K. & T. Ry. Co. (C. C. 1900) 104 Fed. 934.

Depositions on the merits taken before issue, pending a plea in abatement, at which defendants did not appear, were premature, no emergency existing, and, on proper objection, should have been excluded. Wm. Caraway & Sons v. Kentucky Refining Co. (1908) 163 Fed. 189, 90 C. C. A. 59.

Where notice was given that a deposition would be taken on the 8th of August, and if not taken in one day that the commissioners would adjourn from day to day until it was finished, and the commissioners met on the 8th, and adjourned from day to day until the 12th, and then from the 12th to the 19th, when the deposition was taken, it was held that the deposition was not taken agreeably to notice. Buddicum v. Kirk (1806) 7 U. S. (3 Cranch) 293, 2 L. Ed. 444.

A notice specified that the taking of depositions, being begun on a certain day, would be "adjourned from day to day until completed." Held, that a deposition taken on the last day of several successive adjourned days, and in the absence of the adverse party, could not be excluded for want of notice, as the party was bound to take notice of the adjournments under the original notice. Knode v. Williamson (1873) 84 U. S. (17 Wall.) 586, 21 L. Ed. 670.

When notice is given that a deposition will be taken between certain hours, it is not necessary to wait until the last hour. House v. Cash (C. C. 1813) Fed. Cas. No. 6,736.

Depositions may be taken under the act of congress after the expiration of a rule to take them. Buckingham v. Burgess (C. C. 1844) Fed. Cas. No. 2,088.

Testimony which was regularly in order in rebuttal may be taken by deposition in that stage of the case. Stegner v. Blake (C. C. 1888) 36 Fed. 183.

16. **"Any person may be compelled to appear and depose."**—Whether the power of compelling a witness to appear and give his deposition is to be found with the authority taking the deposition or in the courts of the district in which it is taken is not shown by the statute, but the authorities incline to the latter view. In re Rindskopf (C. C. 1885) 24 Fed. 542, 543.

A party who has initiated proceedings to take a deposition de bene esse has no power, after a witness has been examined in chief and an adjournment taken, to withdraw the proceedings; and a party in interest may, by attachment, compel such witness to appear and submit to cross-examination. Id.

An attachment may issue against a witness for failure to attend before a commissioner for examination de bene esse, in obedience to a subpœna. Ex parte Humphrey (C. C. 1851) Fed. Cas. No. 6,867. But an attachment, for refusal of a witness to answer a question on an examination de bene esse before a commissioner, will not be granted, where the materiality of the evidence sought is not shown. In re Judson (C. C. 1853) Fed. Cas. No. 7,563; Ex parte Peck (C. C. 1853) Fed. Cas. No. 10,-885.

Before the witness can be punished for contempt, it must be shown that

the commissioner has jurisdiction. Ex parte Peck (C. C. 1853) Fed. Cas. No. 10,885. Before a subpœna can issue evidence must be given before the commissioner showing the case to be one in which a de bene esse examination can be had. Id.

A plaintiff in a federal court, who is a citizen of another state and resides more than 100 miles from the place of trial, may be compelled by the defendant to appear and testify by deposition de bene esse in advance of the trial, and such deposition may be taken at any place where he is found and served with subpœna. Blood v. Morrin (C. C. 1905) 140 Fed. 918.

A defendant in an action at law pending in a Circuit Court of the United States, who resides out of the district, and more than 100 miles from the place of trial, may be examined as a witness by the plaintiff, under this section. Hartman v. Feenaughty (C. C. 1905) 139 Fed. 887.

Defendant in an action on notes may examine plaintiff de bene esse, even before issue joined, where plaintiff resides out of the district and more than 100 miles from the place of trial. Lowrey v. Kusworm (C. C. 1895) 66 Fed. 539, distinguishing Ex parte Fisk (1885) 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117.

A person who does not reside within the district where a subpœna is issued and served may not be compelled, except under this section, to attend before an examiner as a witness in an equity cause in a federal court. Tomlinson v. Moore (C. C. 1910) 189 Fed. 845.

In the taking of testimony under this section, it is the duty of the court or judge within whose jurisdiction testimony is being taken in a suit pending in another district to compel the production of the evidence, even if the judge deems it incompetent, unless the witness or the evidence is privileged, or it cannot possibly be competent, and it would be an abuse of process to compel its production. Dowagiac Mfg. Co. v. Lochren (1906) 143 Fed. 211, 74 C. C. A. 341, 6 Ann. Cas. 573.

The same rules apply, in determining the propriety of compelling a witness to answer a question on an examination de bene esse before a commissioner, that govern in trials before the court. In re Judson (C. C. 1853) Fed. Cas. No. 7,563. Practice on motion for attachment for refusal to obey a subpœna for examination before a commissioner de bene esse, as a witness in a suit pending in another district. Id.

Where the testimony of a witness is taken by consent on oral interrogatories before an examiner of the court of the district of his residence, for use in an action pending in another court, the former court has power to decide as to the materiality of questions asked, and may compel the witness to answer. In re Allis (C. C. 1890) 44 Fed. 216.

A witness subpœnaed by a circuit court for one district to appear and testify before a master appointed to take testimony therein by the circuit court for another district, and refusing to be sworn, is punishable for contempt. In re Spofford (C. C. 1894) 62 Fed. 443. This practice was disapproved in Arnold v. Chesebrough (C. C. 1888) 35 Fed. 16.

On the taking of the deposition of a witness in an action at law, in another district, questions asked by plaintiff were objected to as being irrelevant or immaterial, or as calling for incompetent testimony, or as inquiring touching matters about which the witness was privileged not to answer, and, the witness having refused to answer, the matter was certified to the Circuit Court of the district where the testimony was being taken. Held that, as the power and duty of such court to pass on the objections was unsettled, it would require the witness to answer all questions in conformity to the equity practice, to enable the question to be taken before the appellate court in contempt proceedings should the witness still refuse to answer. Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. (C. C. 1905) 139 Fed. 843.

Where, in suits pending in a Circuit Court in Ohio, an order was made before issue joined authorizing defendants to take such evidence as could not be produced in open court in the form of depositions, under which defendants procured a subpœna for the appearance of a witness before a United States commissioner in the Southern district of New York, the Circuit Court in New York, on the refusal of the witness to testify, had no power, inherent or statutory, to compel the witness to testify or imprison him for contempt. In re Kingsley (C. C. 1911) 185 Fed. 1005.

A commissioner has no power, by habeas corpus, to bring before him a committed person, for the purpose of giving his deposition to be used in a pending cause. Ex parte Barnes (D. C. 1846) Fed. Cas. No. 1,010.

A witness examined under this section may be compelled to produce books and papers which would be competent for the party calling him upon the trial, but cannot be compelled to produce them to refresh his memory. U. S. v. Tilden (D. C. 1879) Fed. Cas. No. 16,522.

In an action at law, the court would not strike out defendant's answer because of his refusal to answer certain interrogatories propounded by plaintiff. Barnes v. Trees (D. C. 1912) 194 Fed. 230.

The privilege of a suitor from service of process extends to his attendance before a notary public for the taking of his deposition pursuant to agreement of the parties, when, under Comp. St. Neb. 1911, c. 61, § 7, and this section, a witness may be compelled by process

to appear before a notary and answer questions put to him. Roschynialski v. Hale (D. C. 1913) 201 Fed. 1017.

A witness, whose testimony is being taken de bene esse, is not entitled to refuse to answer questions because he or his counsel believe them to be immaterial and irrelevant. Buckeye Powder Co. v. Hazard Powder Co. (D. C. 1913) 205 Fed. 827.

17. —— Privilege of witness.—The general rule is that witnesses whose depositions are being taken under this section should be required to answer all questions which may possibly be material, subject to their right to be protected in their constitutional privileges. Perry v. Rubber Tire Wheel Co. (C. C. 1905) 138 Fed. 836.

On the taking of a deposition de bene esse in another federal district, the witness may assert his legal privilege to refuse to give testimony or to produce documents called for the same as though examined in open court, and in such case he has a right to be heard before the court in such district, and to have his claim of privilege determined by such court, before being compelled to answer or produce the documents. Crocker-Wheeler Co. v. Bullock (C. C. 1904) 134 Fed. 241. A witness has a legal privilege to refuse to give testimony sought, or to produce documents called for, where such testimony or documents will disclose trade secrets, and where the evidence is irrelevant or otherwise inadmissible in the case. Id. The fact that the defendant at the time of contracting owned all the stock of the corporation which he undertook to sell, could not enlarge the rights of the plaintiff as against the claim of privilege of the officer of such corporation, whom plaintiff had made a witness. Id. The issues in an action by a corporation against an individual to recover damages for breach of a contract by which the defendant agreed to sell to plaintiff the stock of another corporation of which he was president discussed, and held not such as to render the books of the latter corporation relevant or admissible in evidence, so as to entitle the plaintiff to compel the officer having them in charge to produce the same on the taking of his deposition in another federal district, in compliance with a subpœna duces tecum, against his claim of privilege, it being further shown that the two corporations were competitors in business, and that the disclosures would be detrimental to the corporation of which the witness was an officer. Id.

A party has no right, and a court no power, to compel the production of the private papers of a witness which are not relevant and material to the case. Any practice which sanctions such a proceeding is an infringement of a fundamental personal right guarantied by the federal Constitution, and which the courts have always recognized in the exercise of power given them to compel the production of papers. Dancel v. Goodyear Shoe Machinery Co. (C. C. 1904) 128 Fed. 753.

18. —— Subpœna duces tecum.—A subpœna duces tecum may properly be issued against a deponent. Davis v. Davis (C. C. 1898) 90 Fed. 791.

A federal court has power to issue a subpœna duces tecum to compel the production of books or papers by a witness being examined de bene esse within the district; but such subpœna is not a matter of right, and may not be issued as such by the clerk, but only on an order of the court, made upon preliminary proof that the documents called for are in the possession of the witness, and are, prima facie, competent and material evidence in the case, although the court will not finally determine their materiality or admissibility until the documents have been produced, and have been brought before it in proceedings to compel the witness to exhibit the same before the examiner. Dancel v. Goodyear Shoe Machinery Co. (C. C. 1904) 128 Fed. 753. A notary public, before whom depositions de bene esse are to be taken, has no power to issue a subpœna duces tecum to compel the production of books and papers by a witness. Id.

A clerk of a Circuit Court has authority, when so directed by an order of the court, to issue a subpœna duces tecum to require the production of documents on the taking of depositions de bene esse before him. Crocker-Wheeler Co. v. Bullock (C. C. 1904) 134 Fed. 241.

19. Number of deponents.—A party will not be limited in advance as to the number of witnesses whose testimony he may take by deposition, unless it appears from the nature of the issues that the number is unreasonable and unnecessary. Carrara Paint Agency Co. v. Carrara Paint Co. (C. C. 1905) 137 Fed. 319.

20. Costs and expenses.—One principal object of this section was to reduce the expenses of litigation. Burrow v. Kansas City, Ft. S. & M. R. Co. (C. C. 1893) 54 Fed. 278, 283.

This section provides a means by which a party may not lose the benefit of the testimony of a witness who cannot or will not attend court, but does not render voluntary attendance, reasonable compensation, or taxation of the fees of a witness unlawful. U. S. v. Sanborn (C. C. 1886) 28 Fed. 299, 303.

This section gives merely the option to take evidence in this way; and the failure to exercise this option will not destroy the right to recover mileage for witnesses who have traveled more than 100 miles. Hunter v. Russell (C. C. 1894) 59 Fed. 964, disapproving,

Smith v. Chicago & N. W. Ry. Co. (C. C. 1889) 38 Fed. 321.

Witnesses voluntarily attending a court more than 100 miles distant from their residences can only recover mileage for 100 miles. Eastman v. Sherry (C. C. 1889) 37 Fed. 844, 846.

The prevailing party in a suit in a federal court is not entitled to tax against his opponent as a part of his costs the fees of the marshal for serving subpœnas on witnesses residing without the district and more than 100 miles from the place of trial. U. S. v. Southern Pac. Co. (C. C. 1909) 172 Fed. 909.

While a party calling a witness may under this section take his deposition de bene esse, he ought not in justice in every case to be held to that course at the risk of paying the entire cost of the witnesses for personal attendance. Pinson v. Atchison, T. & S. F. R. Co. (C. C. 1893) 54 Fed. 464, 465.

This section, when construed in connection with section 1487, justifies the inference that it was the intention of Congress to limit the allowance of mileage to the distance of 100 miles where the witness lives in another district. The Vernon (D. C. 1888) 36 Fed. 113, 116.

21. Retaking and re-examination.—If deponent is not satisfied with his first deposition, he may give a second one without an order of court. Nash v. Williams (1873) 20 Wall. 226, 235, 244, 22 L. Ed. 254.

If a deposition be taken under the act of congress, in the absence of the party, he should take the deposition again, if not satisfied with the examination. Goodhue v. Bartlett (C. C. 1850) Fed. Cas. No. 5,538.

Where the deposition of a witness has been once taken and closed, he cannot be re-examined except by an order of court which can be made only upon good cause shown. Phettiplace v. Sayles (C. C. 1826) Fed. Cas. No. 11,-083.

Omission to certify as to the handwriting of a deposition not being the fault of the party in whose interest the depositions were taken, he should be allowed an opportunity to re-examine the witnesses whose depositions were suppressed. In re Thomas (D. C. 1888) 35 Fed. 822.

Where failure of defendant's counsel to appear at the taking of a deposition arose from a misunderstanding due to unwarranted reliance on statements in a letter of the witness' attorney, and it did not appear plaintiff would be prejudiced by return of the deposition for cross-examination, except to the extent of the expense, defendant's motion for return would be granted on condition of paying charges of the notary and stenographer and a fee of $50 to plaintiff for counsel on such examination. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. (C. C. 1909) 171 Fed. 579.

Where, on taking testimony de bene esse, the cross-examination of witnesses has been ended in ignorance of facts material to a further cross-examination, the court, upon proper affidavits, can make such order as may be just. The Normandie (D. C. 1889) 40 Fed. 590, decree affirmed La Normandie (1893) 58 Fed. 427, 7 C. C. A. 285.

Cited without definite application, Ex parte Fisk (1885) 5 Sup. Ct. 724, 113 U. S. 713, 28 L. Ed. 1117; Whitford v. Clark County (1886) 7 Sup. Ct. 306, 307, 119 U. S. 522, 30 L. Ed. 500; U. S. v. Julian (1896) 16 Sup. Ct. 801, 162 U. S. 324, 40 L. Ed. 984; Camden S. R. Co. v. Stetson (1900) 20 Sup. Ct. 617, 619, 177 U. S. 172, 44 L. Ed. 721; Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989; Walker v. Collins (1893) 59 Fed. 70, 71, 8 C. C. A. 1 (reversed [1897] 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76); Salt Lake City v. Smith (1900) 104 Fed. 457, 468, 43 C. C. A. 637; Van Hook v. Pendleton (C. C. 1848) Fed. Cas. No. 16,852; Jerman v. Stewart, Gwynne & Co. (C. C. 1882) 12 Fed. 271, 272; Smith v. Chicago & N. W. Ry. Co. (C. C. 1889) 38 Fed. 321, 322; In re Allis (C. C. 1890) 44 Fed. 216; Babbott v. Tewksbury (C. C. 1891) 46 Fed. 86, 87; Ferguson v. Dent (C. C. 1891) 46 Fed. 88, 89; Thum v. Andrews (C. C. 1892) 53 Fed. 84, 85 (reversed [1895] 67 Fed. 911, 15 C. C. A. 67); Coosaw Min. Co. v. Farmers' Min. Co. (C. C. 1895) 67 Fed. 31, 32; Zych v. American Car & Foundry Co. (C. C. 1904) 127 Fed. 723; Carrara Paint Agency Co. v. Carrara Paint Co. (C. C. 1905) 137 Fed. 319; In re Donnelly & Hughes (D. C. 1881) 5 Fed. 783, 786; Strong v. U. S. (D. C. 1888) 34 Fed. 17, 19; U. S. v. Hom Hing (D. C. 1892) 48 Fed. 635, 639; In re Williams (D. C. 1903) 123 Fed. 321, 325; U. S. v. National Surety Co. (D. C. 1909) 168 Fed. 314; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88.

§ 1473. (R. S. § 864, as amended, Act May 23, 1900, c. 541.) Mode of taking depositions de bene esse.

Every person deposing as provided in the preceding section shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's pres-

ence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent.

Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88. Act May 9, 1872, c. 146, 17 Stat. 89. Act May 23, 1900, c. 541, 31 Stat. 182.

This section was amended by Act May 23, 1900, c. 541, cited above, by substituting the word "officer" for the word "magistrate," wherever it occurred in the original section; by inserting the words "or typewriting" after the word "writing," wherever it occurred; and by inserting the clause "or by some person under his personal supervision" after the word "deposition."

Notes of Decisions

As to admission and suppression of depositions, also the certificate, see § 1474, post.

"Cautioned and sworn."—While, as to the mode of administering the oath, it is sufficient in that respect to follow the directions of the statute law of the state of the United States where the depositions were taken, this section must be strictly complied with in taking depositions de bene esse; and the witness must be sworn to testify the "whole truth" on the entire subject of the depositions, and not as to each interrogatory. Wilson Sewing Mach. Co. v. Jackson (C. C. 1877) Fed. Cas. No. 17,853.

A witness must be sworn to testify the whole truth. Rainer v. Haynes (C. C. 1854) Fed. Cas. No. 11,536. He may be sworn either before or after the deposition is reduced to writing. Tooker v. Thompson (C. C. 1842) Fed. Cas. No. 14,097.

A deposition which has been altered to correct an error must be resworn to before it can be filed. A deponent cannot confer upon another the power to alter a sworn paper. In re Walther (D. C. 1876) Fed. Cas. No. 17,126.

Objections to oath held to have been waived. Shutte v. Thompson (1872) 15 Wall. 151, 158, 21 L. Ed. 123.

Reduction of testimony to writing.—A deposition taken under this act must be reduced to writing by the magistrate or by the deponent. Edmondson v. Barrell (C. C. 1821) Fed. Cas. No. 4,284; Marstin v. McRea (C. C. 1854) Fed. Cas. No. 9,141; Rainer v. Haynes (C. C. 1854) Fed. Cas. No. 11,536. CONTRA, see Nicholls v. White (C. C. 1802) Fed. Cas. No. 10,235; Meade v. Keane (C. C. 1826) Fed. Cas. No. 9,373. Where it is reduced to writing by deponent, it must be in the presence of the magistrate. Vasse v. Smith (C. C. 1811) Fed. Cas. No. 16,896; Edmondson v. Barrell (C. C. 1821) Fed. Cas. No. 4,284; Rainer v. Haynes (C. C. 1854) Fed. Cas. No. 11,536. CONTRA, see Bussard v. Catalino (C. C. 1823) Fed. Cas. No. 2,228.

Where it did not appear that the deposition was reduced to writing in the presence of the magistrate, it could not be received. Bell v. Morrison (1828) 1 Pet. 351, 355, 7 L. Ed. 174.

A deposition taken under the act of congress which is written out by the party, and forwarded by him to the court, will be rejected. Shankwiker v. Reading (C. C. 1847) Fed. Cas. No. 12,704.

The irregularity of taking the testimony in a continuous narrative form, on a typewriter, will be waived by appearance and cross-examination by the adverse party, who is also an attorney of record in the case, without objecting to the form of the deposition or the use of the typewriter. In re Thomas (D. C. 1888) 35 Fed. 822.

"Subscribed by the deponent."—In a cause begun in a state court, and subsequently removed to a federal court, the deposition of a witness was taken previous to removal by a shorthand writer. Before the notes were written out for reading to the witness and for his signature, according to the requirements of the state statute, the cause was removed. Then the witness refused to sign his deposition. Held, that the federal court had no jurisdiction over the taking of the deposition, and could not compel the witness to sign it. Arnold v. Kearney (C. C. 1887) 29 Fed. 820.

Where, in accordance with Code Iowa 1873, § 3737, the commissioner certifies that the deposition was subscribed and sworn to by the deponent at the time and place mentioned, the signature of the witness need not be followed with a jurat. Giles v. Paxson (C. C. 1888) 36 Fed. 882.

Cited without definite application, Patapsco Ins. Co. v. Southgate (1831) 5 Pet. 604, 618, 8 L. Ed. 243; U. S. v. Julian (1896) 16 Sup. Ct. 801, 162 U. S. 324, 40 L. Ed. 984; Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989; Walker v. Collins (1893) 59 Fed. 70, 71, 8 C. C. A. 1 (reversed [1897] 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76); Salt Lake City v. Smith (1900) 104 Fed. 457, 469, 43 C. C. A. 637; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560 (dissenting opinion); Thum v. Andrews (C. C. 1892) 53 Fed. 84, 85 (reversed [1895] 67 Fed. 911, 15 C. C. A. 67); Blood v. Morrin (C. C. 1905) 140 Fed. 918.

tificate. Vasse v. Smith (C. C. 1811) Fed. Cas. No. 16,896; Ruggles v. Bucknor (C. C. 1824) Fed. Cas. No. 12,115; Jasper v. Porter (C. C. 1841) Fed. Cas. No. 7,229; Price v. Morris (C. C. 1849) Fed. Cas. No. 11,414; Dinsmore v. Maroney (C. C. 1859) Fed. Cas. No. 3,920.

Such certificate is good evidence of the facts therein stated, if it thereby appear that all the requisites of the statute have been complied with. Bell v. Morrison (1828) 26 U. S. (1 Pet.) 351, 7 L. Ed. 174. It is at least prima facie evidence of the facts it states. Fowler v. Merrill (1850) 11 How. 375, 13 L. Ed. 736, affirming Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469. It is competent evidence to prove compliance with the statute in taking and certifying the deposition. Winter v. Simonton (C. C. 1827) Fed. Cas. No. 17,894; Smith v. Williams (D. C. 1847) Fed. Cas. No. 13,127.

5. —— **Extrinsic evidence.**—Parol evidence is not admissible of a different cause of caption than that certified. Wheaton v. Love (C. C. 1807) Fed. Cas. No. 17,485.

Where the magistrate omits to state whether notice was given defendant, plaintiff may show that defendant lived more than 100 miles from the place of hearing, and had no agent or attorney within that distance. Travers v. Bell (C. C. 1818) Fed. Cas. No. 14,149.

The certificate of a magistrate to a deposition cannot be impeached by the testimony of experts in handwriting. Elliot v. Hayman (C. C. 1826) Fed. Cas. No. 4,388.

6. **Caption.**—Title of cause in which deposition is taken must be truly stated in the caption. Centre v. Keene (C. C. 1820) Fed. Cas. No. 2,553.

Where an issue is joined between plaintiff and garnishee, depositions must be entitled in the garnishee's name. Baker v. Mix (C. C. 1824) Fed. Cas. No. 774. But, where depositions are taken de bene esse, in a case in which there are several parties plaintiff and defendant, it is not necessary to state in the caption the names of all the parties to the suit. It is sufficient to give the style in the case thus "A. B. et al., Plaintiffs, v. C. D. et al., Defendants." Egbert v. Citizens' Ins. Co. of Missouri (C. C. 1881) 7 Fed. 47. See Peyton v. Veitch (C. C. 1816) Fed. Cas. No. 11,057, and Smith v. Coleman (C. C. 1821) Fed. Cas. No. 13,029, holding that the caption must name all parties in the suit.

A caption sufficiently shows the reason for taking depositions if it states where the depositions are taken, without giving the distance from the place of taking to the place of trial, if the distance is in fact, and is well known by all the parties to be, more than 100 miles. Egbert v. Citizens' Ins. Co. of Missouri (C. C. 1881) 7 Fed. 47.

Accidental omission of word from caption, or incorrect caption, is not necessarily fatal. Bussard v. Catalino (C. C. 1823) Fed. Cas. No. 2,228; Buckingham v. Burgess (C. C. 1844) Fed. Cas. No. 2,088.

A deposition is not defective which does not state in the caption in what county the cause is pending or that the name of one of the parties is misspelled. Van Ness v. Heineke (C. C. 1821) Fed. Cas. No. 16,866.

Where the place where the deposition is taken is stated in the caption, it is sufficient. Tooker v. Thompson (C. C. 1842) Fed. Cas. No. 14,097.

7. **Return of deposition to court.**—A state statute requiring every deposition intended to be read on the trial to be filed at least one day before the day of trial does not apply in the federal courts. Walker v. Collins (1893) 59 Fed. 70, 8 C. C. A. 1, judgment reversed (1897) 17 S. Ct. 738, 167 U. S. 57, 42 L. Ed. 76.

Though a deposition be taken under a stipulation waiving "all objections as to the form and manner of taking," it must still be returned to court in all respects as provided by law. Livingston v. Pratt (C. C. 1857) Fed. Cas. No. 8,417.

A party initiating proceedings to take a deposition has no right to the custody of the deposition or to its suppression, and the deposition must be personally delivered or transmitted under seal to the court before which the cause is pending. In re Rindskopf (C. C. 1885) 24 Fed. 542, 543.

8. **Sealing and directing.**—A deposition must be sealed. In re Thomas (D. C. 1888) 35 Fed. 337.

Where a deposition is taken by a person who is both commissioner and clerk of the court, it cannot be objected that the deposition was not sealed up. Nelson v. Woodruff (1861) 66 U. S. (1 Black) 156, 17 L. Ed. 97.

Where the name of the magistrate is written across the place where the envelope is sealed, it is sufficient evidence that the deposition was sealed up by him. Thorp v. Orr (C. C. 1822) Fed. Cas. No. 14,006. Directing the sealed deposition to "the judges" of the court is sufficient. Id.

9. **Opening of depositions.**—Act Sept. 24, 1789, § 30, is not changed by this section, in respect to the time when depositions de bene esse may be opened. U. S. v. Tilden (D. C. 1878) Fed. Cas. No. 16,520.

Depositions de bene esse may be opened before trial by order of the court on motion against the objection of the other party. Id.

Depositions taken under order of a special master cannot be opened by him, though they are in his hands as clerk of the court. In re Thomas (D. C. 1888) 35 Fed. 337.

Depositions opened out of court, and

without the consent in writing of the opposite party, cannot be read in evidence. The Roscius (D. C. 1873) Fed. Cas. No. 12,042; Beale v. Thompson (1814) 8 Cranch, 70, 71, 3 L. Ed. 491.

10. Admission in evidence.—As to depositions taken according to state practice, see § 1476, post.

When a deposition is taken de bene esse, it is not final, and it cannot be read on the trial, unless as expressly provided by this section. Texas & P. Ry. Co. v. Wilder (1899) 92 Fed. 953, 957, 35 C. C. A. 105.

The deposition of a witness who is a party to the suit is properly excluded where it was taken without the leave of the court. Hoyt v. Hammekin (1852) 14 How. 346, 350, 14 L. Ed. 449.

A deposition taken under the provisions of this and the two preceding sections may be read at any time after it is filed and opened, and a state statute requiring depositions to be filed at least one day before the day of trial in order to be read thereat has no application. Walker v. Collins (1893) 59 Fed. 70, 71, 8 C. C. A. 1, reversed on another point (1897) 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76.

Where a defendant has taken the plaintiff's deposition, he cannot prove part of the statements made by the plaintiff, as admissions, either by the evidence of the magistrate who took the deposition or by reading extracts from it. Dawson Town & Gas Co. v. Woodhull (1895) 67 Fed. 451, 14 C. C. A. 464.

Depositions not taken in accordance with the rules of the United States courts could not be used in such courts, though taken in accordance with the practice prevalent in the state courts. Evans v. Eaton (1822) 20 U. S. (7 Wheat.) 356, 5 L. Ed. 472.

Where a writing called for by a question is not in the power of the witness, the deposition cannot be excluded for failure to attach it to the deposition. Winans v. New York & E. R. Co. (1858) 62 U. S. (21 How.) 88, 16 L. Ed. 68.

Where depositions on behalf of plaintiff, on file, are destroyed by fire, and copies furnished by counsel for defendant are substituted on the files with his consent, it is not error to admit them in evidence, though the death of the witnesses was not shown, nor that they were incompetent to testify, nor that their depositions could not be retaken. Stebbins v. Duncan (1883) 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641.

A deposition taken without notice and not upon interrogatories, under a commission issued by consent, cannot be read in evidence. Dunlop v. Munroe (C. C. 1809) Fed. Cas. No. 4,167, affirmed (1812) 7 Cranch, 242, 3 L. Ed. 329.

Depositions sworn to before justice of peace, if taken under rule of court, may be read. Banert v. Day (C. C. 1814) Fed. Cas. No. 836.

The ex parte deposition of a deceased witness, not taken by consent, cannot be read in evidence. Zantzinger v. Weightman (C. C. 1824) Fed. Cas. No. 18,202.

An agreement to admit certain depositions held to extend to the final determination of the cause. Hinde v. Vattier (C. C. 1830) Fed. Cas. No. 6,512.

The objecting party should show affirmatively that there was mistake, misapprehension, or other good cause why depositions should not be received. Grunninger v. Philpot (C. C. 1869) Fed. Cas. No. 5,853.

11. —— Conditions precedent.—The authority to take depositions in the absence of the opposite party is in derogation of the rule of the common law, and must be construed strictly, and it is therefore necessary to establish that all the requisites of the law have been complied with before such testimony is admissible. Bell v. Morrison (1828) 1 Pet. 351, 355, 7 L. Ed. 174.

The deposition of a seafaring man cannot be read at the trial unless it appear that the witness has departed from the district. Bowie v. Talbot (C. C. 1805) Fed. Cas. No. 1,732.

The circuit court of the District of Columbia will not permit a deposition taken de bene esse to be read, if the witness resides within 100 miles, although out of the District. Park v. Willis (C. C. 1806) Fed. Cas. No. 10,-716.

The deposition of a witness, who resides 300 miles away, taken de bene esse, cannot be read, unless the witness was served with a subpœna, and it appears that, from some sufficient reason, he cannot attend. Brown v. Galloway (C. C. 1816) Fed. Cas. No. 2,006.

A deposition cannot be read unless due diligence be first used to obtain the attendance of the witness at the trial or his evidence under commission. Pettibone v. Derringer (C. C. 1818) Fed. Cas. No. 11,043; Bleecker v. Bond (C. C. 1819) Fed. Cas. No. 1,534.

That a witness who lives in another state, more than 100 miles from the place of trial, has been in the city during the sessions of the court, is no objection to reading his deposition, where his presence was not known to the party. Pettibone v. Derringer (C. C. 1818) Fed. Cas. No. 11,043.

The deposition is admissible where the adverse party appears, and cross-examines the witness, although notice of the taking was not given. Dinsmore v. Maroney (C. C. 1859) Fed. Cas. No. 3,920.

Depositions not taken within the time prescribed by equity rule 69 cannot be read in evidence, when timely objection is made. Western Electric

Co. v. Capital Telephone & Telegraph Co. (C. C. 1898) 86 Fed. 769.

12. —— Existence and continuance of grounds for taking.—It must be shown that witness whose deposition was taken de bene esse was served with subpœna, and is unable to attend. Penns v. Ingraham (C. C. 1811) Fed. Cas. No. 10,944; Banert v. Day (C. C. 1814) Fed. Cas. No. 836; The Thomas and Henry v. U. S. (C. C. 1818) Fed. Cas. No. 13,919; Read v. Bertrand (C. C. 1825) Fed. Cas. No. 11,603. It is incumbent on the party for whom a deposition de bene esse is taken to prove that the disability of the witness to attend continues, unless such witness lives more than 100 miles from the place of trial. Patapsco Ins. Co. v. Southgate (1831) 30 U. S. (5 Pet.) 604, 8 L. Ed. 243.

The admission of the deposition, taken de bene esse, of a witness who was shown to the court to be present in court, ready and able to testify if the case was called, before the reading of the deposition was begun, is error. Whitford v. Clark County (1886) 7 S. Ct. 306, 119 U. S. 522, 30 L. Ed. 500, reversing judgment (C. C. 1882) 13 Fed. 837. But after a deposition is taken, and before trial, if the witness moves within 100 miles, still the deposition may be read, unless the party objecting shall show that fact, and that it was known to the opposite party in time to have had the witness subpœnaed. Patapsco Ins. Co. v. Southgate (1831) 5 Pet. 603, 8 L. Ed. 243; Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469; Russell v. Ashley (C. C. 1847) Fed. Cas. No. 12,150.

Depositions cannot be read in admiralty any more than at common law without some sufficient showing why the witness was not produced at the hearing. Rutherford v. Geddes (1866) 71 U. S. (4 Wall.) 220, 18 L. Ed. 343.

This section does not prevent the use of the deposition of a witness in a federal court sitting in Texas, which was taken at the witness' place of residence in Minnesota, without proof that the witness was not within 100 miles of the court, since it would be presumed that he continued to reside where he was at the time the deposition was taken. Texas & P. Ry. Co. v. Reagan (1902) 118 Fed. 815, 55 C. C. A. 427.

A deposition taken in chief under a commission may be read, unless the other party can prove that the witness is within reach of the process of the court. Ridgeway v. Ghequier (C. C. 1801) Fed. Cas. No. 11,813.

What is a sufficient return to a subpœna to enable a party to read the deposition of the witness taken de bene esse, see Jones v. Greenolds (C. C. 1806) Fed. Cas. No. 7,464.

A certificate by the officer taking the deposition, of the residence of the witness, and that it is over 100 miles from the place of trial, is sufficient to authorize the reading of the deposition. Leatherberry v. Radcliffe (C. C. 1839) Fed. Cas. No. 8,163; Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469.

The deposition of a witness who is at the place where the court is held, if objected to, cannot be read if the witness be able to attend the court. Weed v. Kellogg (C. C. 1853) Fed. Cas. No. 17,345.

Deposition excluded in a trial at Philadelphia; it appearing that the witness generally lived in his boat, but, when on land, stayed in Jersey City,—less than 100 miles from the place of trial. Hope v. Eastern Transp. Line (C. C. 1875) Fed. Cas. No. 6,680.

13. —— Form of objection and time to object.—Where a deposition was taken after an adjournment not provided for by the notice, and subsequently examined by the attorney for the opposite party, who made no objection until it was offered in evidence, the witness having died, the objection was held to have been waived. Buddicum v. Kirk (1806) 7 U. S. (3 Cranch) 293, 2 L. Ed. 444.

A naked statement on the record that the reading of a deposition was objected to, without disclosing the ground of the objection, is ineffectual in a court of error. Camden v. Doremus (1845) 44 U. S. (3 How.) 515, 11 L. Ed. 705.

In admiralty, an objection to a deposition on the ground of the incompetency of the witness, from interest, must be made at the hearing, and comes too late if it be deferred until argument. Nelson v. Woodruff (1861) 66 U. S. (1 Black) 156, 17 L. Ed. 97.

An objection to the introduction of a copy instead of the original of a paper annexed to a deposition which was taken upon commission comes too late at the trial. It should have been raised upon the examination, or upon a motion to suppress the deposition. York Co. v. Central R. R. (1865) 70 U. S. (3 Wall.) 107, 18 L. Ed. 170.

Where a witness testifies in a foreign country from a private memorandum, an objection to this deposition that neither the memorandum nor a copy thereof is annexed to the deposition should be taken by motion to suppress or otherwise before the trial. If made first on the trial, it is too late. Blackburn v. Crawfords (1865) 70 U. S. (3 Wall.) 175, 18 L. Ed. 186.

Where a deposition, after a motion has been unsuccessfully made at one term to suppress it, as irregularly taken, is at another read on trial without objection or exception, it cannot be objected to here on the grounds that were made for its suppression, or for any cause. Brown v. Tarkington (1865) 70 U. S. (3 Wall.) 377, 18 L. Ed. 255.

Where both parties took further proofs on interrogatories and cross-interrogatories in which counsel of both parties joined, the objections to the depositions, based on want of order therefor, must be made in the court below to be available. The Georgia (1868) 7 Wall. 32, 38, 19 L. Ed. 122.

After denial of a motion before trial to suppress a deposition taken de bene esse, the deposition was read at the trial without objection. Held, that an objection could not afterwards be made to it in the supreme court. Ray v. Smith (1873) 84 U. S. (17 Wall.) 411, 21 L. Ed. 666.

Where an original deposition, regularly taken, sealed up, transmitted, opened, and filed in the case, was lost, and a copy, taken under the direction of the clerk of the court and sworn to as a true copy, was offered in evidence in its place, an objection to the copy, "on the ground that it was not the original," is too indefinite to let in argument that the witness was alive, and that the lost deposition could only be supplied by another one by the same witness, and that secondary evidence was inadmissible to prove the contents of the first deposition. Burton v. Driggs (1873) 87 U. S. (20 Wall.) 125, 22 L. Ed. 299.

Objections to defects and irregularities which might be obviated by retaking the deposition must be noticed when the deposition is being taken, or must be raised by a motion to suppress it, before trial. Doane v. Glenn (1874) 88 U. S. (21 Wall.) 33, 22 L. Ed. 476.

Though a motion was made before the trial to suppress a deposition because of irregularities in its taking, the objection will be waived if no objection is made or exception taken when it is offered at the trial. Northern Pac. R. Co. v. Urlin (1895) 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977.

An objection to the admissibility of depositions on the ground of irregularity in taking should be taken by motion to suppress made before the hearing, and where not so taken, although the depositions had been open and on file for a month, an objection to their being read on the hearing was properly overruled. Samuel Bros. & Co. v. Hostetter Co. (1902) 118 Fed. 257, 55 C. C. A. 111.

An objection to a deposition taken de bene esse, that it was not taken and returned according to law, held to apply to it as a deposition in chief. The Thomas and Henry v. U. S. (C. C. 1818) Fed. Cas. No. 13,919.

If, upon the return of depositions, the opposite party except "to the caption as well as to the substance of them," he may specify his objections at the hearing. Walker v. Parker (C. C. 1840) Fed. Cas. No. 17,082.

All formal objections to taking depositions must be indorsed on them before the trial. Brooks v. Jenkins (C. C. 1844) Fed. Cas. No. 1,953.

Objection to parts of depositions should be made before the final hearing, by motion to strike out. Hitchcock v. Shoninger Melodeon Co. (C. C. 1875) Fed. Cas. No. 6,537.

The mere interposition of the word "objection" in depositions, or the statement that one or the other party excepts, is not sufficient to raise the questions on the hearing by the court. Persons v. Beling (C. C. 1902) 116 Fed. 877, decree affirmed Wirgman v. Persons (1903) 126 Fed. 449, 62 C. C. A. 63, appeal dismissed (1905) 25 S. Ct. 795, 196 U. S. 636, 49 L. Ed. 629.

14. —— Objections rendering depositions inadmissible.—A deposition taken down stenographically, in questions and answers, and not reduced to writing in the presence of the witness, nor read over to or by him, is not properly taken, and is not admissible in evidence against the objections of either party. Moller v. U. S. (1893) 57 Fed. 490, 6 C. C. A. 459.

A statement of fact in writing, without date or venue, purporting to be signed by a witness, but giving neither his age nor residence, not shown to have been made under oath or after waiver of oath, or to have been taken on notice or in the presence of the parties or before any official authorized to administer oaths, and which is not accompanied by any certificate of a competent official from which compliance with any of the requisites for taking depositions can be inferred, is not a deposition, and cannot be read in evidence even under an agreement that neither party will take any objection "to the form of taking testimony * * * by the other de bene esse, when it appears that the agreement was not made with special reference to the paper in question. Lutcher v. U. S. (1896) 72 Fed. 968, 19 C. C. A. 259.

A deposition taken de bene esse under the judiciary act cannot be read in evidence where it is neither delivered to the court personally by the magistrate or by him sealed up and directed to the court. Jones v. Neale (C. C. 1796) Fed. Cas. No. 7,483.

Depositions which do not show, either in the caption or body of them, between what parties they were taken, cannot be received. Murray v. Marsh (C. C. 1803) Fed. Cas. No. 9,965.

A deposition, entitled in the district court, but not received by the clerk until after the trial there, and not sent up as a part of the record of that court, cannot be read on appeal. The

Buckeye State (C. C. 1857) Fed. Cas. No. 2,085.

A deposition left for several months in the hands of defendant's attorney, and not placed on file until the morning of the trial, cannot be read. Livingston v. Pratt (C. C. 1857) Fed. Cas. No. 8,417.

Depositions taken de bene esse, and without notice to the opposite party, in suits at common law, are not admissible in the trial of feigned issues out of equity. Cahoon v. Ring (C. C. 1861) Fed. Cas. No. 2,292.

On a trial in the district court, claimants put in no testimony; and, on libelant's testimony and the pleadings, a decree was rendered in favor of libelant. On appeal to the circuit court, claimants offered in evidence the depositions of witnesses taken in the circuit court, under libelant's objection to them that the witnesses were not examined in the district court, though present or procurable. Held, that those depositions as to which it was proved that the deponents had been present at the trial in the district court must be rejected, but not the others. The Stonington (C. C. 1885) 25 Fed. 621.

While the deposition of libelant was being taken, and before respondent had completed the cross-examination, the interpreter, whose services were necessary, refused to act further, and another could not be obtained before the witness left port. So much of the deposition as had been taken was signed by the witness and produced on trial. Held inadmissible. The Jacob Brandow (D. C. 1887) 33 Fed. 160.

The deposition of a witness since deceased, taken on notice to an accused, but without his consent or presence, is not admissible against him on his trial. U. S. v. French (D. C. 1902) 117 Fed. 976.

A deposition which was neither delivered into court in person, nor sealed and addressed to the clerk as required by statute, is not admissible as evidence. The Saranac (D. C. 1904) 132 Fed. 936.

15. —— Immaterial objections. — A deposition is not inadmissible because it does not appear that the commissioner was sworn; the commissioner being an officer of the courts whose acts are prima facie valid. Hoyt v. Hammekin (1852) 14 How. 346, 350, 14 L. Ed. 449.

Where a notice to take depositions at a place specified informed the adverse party that they would be taken on a day named, and that the taking would be adjourned from day to day until completed, and a part of the witnesses having been examined, at whose examination the adverse party with his counsel attended, the taking of the examination of the others was adjourned until the next day, when it was adjourned until the next succeeding day, and so on from day to day until a particular day, when the testimony was completed, in the absence of the adverse party and his counsel, the exclusion of the deposition for want of notice was erroneous. Knode v. Williamson (1873) 17 Wall. 586, 587, 21 L. Ed. 670.

The fact that a witness on his second examination reads over a copy of his testimony given on a previous examination, and subscribes the same as his deposition, does not render such deposition inadmissible. Samuel Bros. & Co. v. Hostetter Co. (1902) 118 Fed. 257, 55 C. C. A. 111.

The fact that a notary public, in his certificate to a deposition taken before him, through a clerical mistake misstated the name of the witness whose name was correctly given in the caption and also signed his own name thereto reciting that the signature was made by him instead of the witness under a stipulation attached which authorized him to sign the transcript of the shorthand notes which had been signed by the witness is not sufficient to render the deposition inadmissible where both parties were present and examined the witness and no prejudice resulted from the error. Columbus Ry. Co. v. Patterson (1906) 143 Fed. 245, 73 C. C. A. 603.

Objections to the introduction of an entire deposition are untenable if any part of it is admissible. Ritterbusch v. Atchison, T. & S. F. Ry. Co. (1912) 198 Fed. 46, 117 C. C. A. 154.

In a joint action against two the defendant served was the only one named in the caption of a deposition. Held, that it was admissible against the other, who was subsequently served. Pannill v. Eliason (C. C. 1828) Fed. Cas. No. 10,707.

A deposition will not be excluded because defendant's name is omitted from the caption, where it appears in the commission and proceedings. Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469; Waskern v. Diamond (C. C. 1855) Fed. Cas. No. 17,248.

A mistake in the name of a party, where he is designated as plaintiff or defendant, and the name is correctly stated in the title, is no ground for rejecting the deposition. Voce v. Lawrence (C. C. 1847) Fed. Cas. No. 16,979.

The deposition of a witness on direct examination by plaintiff will not be excluded on the ground that the witness died before he was cross-examined, where defendant procured the cross-examination to be postponed, and the witness died in the meantime. Celluloid Mfg. Co. v. Arlington Mfg. Co. (C. C. 1891) 47 Fed. 4.

Where, in ejectment to recover certain land sold pursuant to a special legislative act, defendants, in attempting to show that the plaintiffs had received a part of the consideration of the conveyance made by the donees of the

power, took plaintiffs' depositions, and by their own questions called for hearsay testimony as to the consideration for the sale of the land, drawing out the answers that it was a negro and horses, and then filed such depositions in court, an objection made by them to plaintiffs' offer to read same, on the ground of incompetency, ought not to be allowed. Arnold v. Garth (C. C. 1901) 106 Fed. 13, judgment modified Garth v. Arnold (1902) 115 Fed. 468, 53 C. C. A. 200.

Depositions taken under a commission issued to "A. C. Strong," a notary public of a certain county, are not inadmissible because they were taken and certified by "Alfred C. Strong," as a notary public of such county, who is shown to be the same person. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

16. —— Waiver of objections.—The cross-examination of a witness by the opposite party is considered as a waiver of exceptions to the regularity of his deposition. Mechanics' Bank v. Seton (1828) 1 Pet. 299, 307, 7 L. Ed. 152.

Where a deposition was taken by a person who was both commissioner and clerk of the court, and the proctor of the opposing party knew that the deposition had been taken, it cannot be excluded on the ground that it was not sealed up, that the preliminary proof of materiality was not made, or that notice of its being filed was not given. Nelson v. Woodruff (1861) 1 Black, 156, 169, 17 L. Ed. 97.

The required formalities may be waived, and a party waives every formal objection when he attends the examination of a witness, cross-examines without protest, and remains silent until the witness has died. Shutte v. Thompson (1872) 15 Wall. 151, 161, 21 L. Ed. 123.

An exception that the master refused to suppress certain depositions, and treated the testimony as competent, and relied on it in making his findings, is unavailing, where it does not appear by the record that any objection was made before the master to that testimony, or that any motion was made before him to suppress such depositions, or that any motion was made before the court to suppress them. Goodwin v. Fox (1889) 129 U. S. 601, 9 Sup. Ct. 367, 32 L. Ed. 805.

A deposition will not be suppressed on the ground that the witness was not cautioned and sworn as required by statute, where the objecting party was represented by counsel, and took part in the examination, as such irregularities were thereby waived. Northern Pac. R. Co. v. Urlin (1895) 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977.

An objection to the admissibility of a deposition in a federal court, on the ground that it is not shown that the witness is at the time of trial without the reach of a subpœna, is waived if no made at the time, and will not be considered when made for the first time in the appellate court. Columbus Ry. Co. v. Patterson (1906) 143 Fed. 245, 73 C. C. A. 603.

Depositions sworn to, but not signed, by the witness may be read where the objection has been waived. Ketland v. Bissett (C. C. 1804) Fed. Cas. No. 7,742.

A waiver of all objections to a deposition taken de bene esse does not impart any new character to it, and does not make it a deposition in chief. The Thomas and Henry v. U. S. (C. C. 1818) Fed. Cas. No. 13,919.

A deposition read without objection will not afterwards be rejected because other depositions, duly excepted to, were disallowed. Evans v. Hettick (C. C. 1818) Fed. Cas. No. 4,562.

Objections cannot be made to a deposition on a new trial where all objections were waived on the first trial. Edmondson v. Barrell (C. C. 1821) Fed. Cas. No. 4,284.

A party attending on the taking of depositions will be presumed to have waived objections to the competency of witnesses not raised at the time. But objections not known at the time may be raised on the reading of the deposition. U. S. v. One Case of Hair Pencils (C. C. 1825) Fed. Cas. No. 15,924.

An objection to a deposition that the certificate does not state the cause of the taking is waived when not made before trial or final hearing, there being no suggestion that cause did not in fact exist. Stegner v. Blake (C. C. 1888) 36 Fed. 183.

The deposition of a witness on direct examination by plaintiff will not be excluded on the ground that the witness died before he was cross-examined, where defendant procured the cross-examination to be postponed, and the witness died in the mean time. Celluloid Mfg. Co. v. Arlington Mfg. Co. (C. C. 1891) 47 Fed. 4.

Defendant, having consented that the removal of the cause to the federal court should not interrupt the taking of the depositions then in progress, was limited to its right to object to the testimony when introduced on the trial, on the ground that inasmuch as the witnesses were not under disability, or had not gone out of the United States, or a greater distance than 100 miles from the place of trial, their depositions were inadmissible. Zych v. American Car & Foundry Co. (C. C. 1904) 127 Fed. 723.

Where, in the taking of depositions for use in a federal court, both parties were present by counsel, and the testimony on both direct and cross examination was taken in shorthand and reduced to writing by the stenographer in the presence of the magistrate, witnesses, and counsel, a failure to object to such proceeding, either at the time of taking or when the depositions were offered in evidence, was a waiver of the right to have them excluded be-

cause the testimony was not reduced to writing by either the magistrate or the witness. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

17. —— Depositions taken before removal.—Depositions taken in a cause before its removal from a state court cannot be used on the trial in the federal court, where depositions taken in such court could not be read under the same circumstances, as where the witnesses are living within 100 miles of the place of trial and their oral testimony can be obtained. Texas & P. Ry. Co. v. Wilder (1899) 92 Fed. 953, 35 C. C. A. 105.

18. —— Admission on condition.—Where depositions or affidavits are taken with notice in conformity to a special order, but when the opposite side was not able to confer with counsel and attend, they will be admitted, with the condition that the opposite party have time to take them over again and cross-examine the witnesses. Aiken v. Bemis (C. C. 1847) Fed. Cas. No. 109.

19. —— Deposition taken in another suit or proceeding.—The deposition of a deceased witness, taken in a former action, is admissible in evidence in an action in which the same matter is in issue, between persons who were parties to the former action, although other persons not now before the court were also parties to the former action. Philadelphia, W. & B. R. Co. v. Howard (1851) 54 U. S. (13 How.) 307, 14 L. Ed. 157.

Depositions taken in one suit are not evidence in another for or against one not a party to the former suit nor privy to either party in the former suit. Rutherford v. Geddes (1866) 71 U. S. (4 Wall.) 220, 18 L. Ed. 343; Tappan v. Beardsley (1870) 77 U. S. (10 Wall.) 427, 19 L. Ed. 974.

The deposition of a deceased person taken in another cause may be read as hearsay. Joice v. Alexander (C. C. 1808) Fed. Cas. No. 7,435; Banert v. Day (C. C. 1814) Fed. Cas. No. 836; Boudereau v. Montgomery (C. C. 1821) Fed. Cas. No. 1,694.

In a suit by 100 plaintiffs, depositions taken in a suit by 5 of them are not admissible. Boudereau v. Montgomery (C. C. 1821) Fed. Cas. No. 1,694.

Depositions taken in another suit for freedom of a slave, by one of the same family, are inadmissible, as hearsay, in relation to the common ancestor. Humphries v. Tench (C. C. 1822) Fed. Cas. No. 6,873.

Depositions taken in another case will not be excluded where the objecting party was the real party in interest in that case, the subject-matter was the same, and he then had opportunity to cross-examine. McCormick v. Howard (C. C. 1853) Fed. Cas. No. 8,719.

The court may, upon application before trial, allow depositions taken in a suit between the same parties, for the same cause of action, in another court, to be filed as evidence. Grunninger v. Philpot (C. C. 1869) Fed. Cas. No. 5,853.

The deposition of a party in another cause is admissible to contradict his oral evidence, or as an admission. Lastrapes v. Blanc (C. C. 1878) Fed. Cas. No. 8,100.

A deposition of a party as to transactions with another party, taken while the latter is alive, may, though the latter dies without giving his deposition as he could have done, be used when the suit is revived in the name of his executors. McMullen v. Ritchie (C. C. 1894) 64 Fed. 253, decree modified Ritchie v. McMullen (1897) 79 Fed. 522, 25 C. C. A. 50.

Depositions taken to be used in an action in a state court, which has been discontinued, cannot be used in an action afterwards brought in a federal court between the same parties for the same cause of action, although the state practice allows depositions taken in a pending suit to be used in a renewed suit between the same parties for the same cause. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554.

In a suit for collision by the master of a vessel in behalf of the cargo owners, libelant cannot read in evidence a deposition taken in behalf of the owners of the vessel in a suit by them for the same collision. The John H. Starin (D. C. 1878) Fed. Cas. No. 7,351.

The deposition of a witness on an investigation before the board of inspectors, who is called for libelant in a suit for the collision, can only be used by respondent for the purpose of contradicting him. The Marietta Tilton v. The Harrisburg (D. C. 1879) Fed. Cas. No. 9,084.

20. —— Right of opposing party to introduce in evidence.—Depositions taken under a commission issued at the instance of the defendant may be read in evidence by the plaintiff, although the plaintiff had no notice of the time and place of taking the same. Yeaton v. Fry (1809) 9 U. S. (5 Cranch) 335, 3 L. Ed. 117.

Where the taker of a deposition refuses on its return to put it in evidence, the opposing party may introduce all or part of it, and the taker may put in any part of it not introduced by his opponent. H. Scherer & Co. v. Everest (1909) 168 Fed. 822, 94 C. C. A. 346.

There is no objection to the reading of a part only of the deposition if what is read does not consist of mere fragmentary excerpts and the opposite party has liberty to read what is omitted. Crotty v. Chicago Great Western Ry. Co. (1909) 169 Fed. 593, 95 C. C. A. 91.

Where a deposition has been properly taken, either party may introduce all or any relevant part of it which is not clearly fragmentary and misleading, and the opposing party may put in evi-

dence any other like part. Central Coal & Coke Co. v. Penny (1909) 173 Fed. 340, 97 C. C. A. 600.

Depositions taken and filed by one party may be read in evidence by the other. Park v. Willis (C. C. 1806) Fed. Cas. No. 10,716; Andrews v. Graves (C. C. 1870) Fed. Cas. No. 376.

A deposition taken by plaintiff cannot be read in evidence by defendant, where the testimony would not have been competent for defendant if the deposition had been taken on his part. Reid v. Hodgson (C. C. 1808) Fed. Cas. No. 11,667.

A deposition de bene esse, taken on interrogatories propounded by both parties, is not under the control of the one at whose instance it was taken; and if, at his request, the commissioner withholds the deposition, an order will issue requiring its return, the court having no discretion to refuse the order because the party was surprised by the testimony given. First Nat. Bank v. Forest (C. C. 1890) 44 Fed. 246.

21. —— **Right to contradict or impeach.**—A complainant in equity who takes the deposition of the adverse party without a previous order of court, specially reserving his rights, is not thereby estopped to deny the truth of his evidence. Rison v. Cribbs (C. C. 1870) Fed. Cas. No. 11,860.

22. **Withdrawal of deposition.**—A deposition, having been read without objection, cannot be afterwards rejected and withdrawn, because the court subsequently refused to allow a deposition to be read, on account of an exception which would also have excluded the deposition which had been read, had it been objected to. Evans v. Hettick (C. C. 1818) Fed. Cas. No. 4,562, affirmed (1822) 7 Wheat. 453, 5 L. Ed. 496.

A deposition, after having been read, may be waived and withdrawn by party offering it. Bank of Washington v. Walker (C. C. 1841) Fed. Cas. No. 956.

23. **Suppression of depositions.**—As to depositions taken according to state laws, see § 1476, post; "waiver of objections," see this note, ante.

At the trial of a cause a motion was made to exclude the whole testimony of a witness, taken under a commission, because the witness did not annex to his answer a certain writing called for in the question. Held, that the motion was properly overruled, and the testimony admitted, because, by the rules of practice in the court where the cause was tried, such an objection could not be made where the party, as in this case, had full time and opportunity to move for a suppression of the deposition or a re-examination of the witness. Winans v. New York & E. R. Co. (1858) 62 U. S. (21 How.) 88, 16 L. Ed. 68.

The suppression of depositions is not the remedy in equity and bankruptcy for refusal of a witness to answer or produce material evidence, but the remedy is an order of the proper court that the witness answer or produce the evidence. H. Scherer & Co. v. Everest (1909) 168 Fed. 822, 94 C. C. A. 346.

It is not an answer to a motion to suppress depositions that defendants have given a similar notice of intention to take depositions. Uhle v. Burnham (C. C. 1890) 44 Fed. 729.

A deposition will not be suppressed for refusal of the witness to answer cross-interrogatories, where no objection was made until too late to have the fault corrected. Rahtjen's American Composition Co. v. Holzapfel's Compositions Co. (C. C. 1899) 97 Fed. 949.

The depositions of witnesses for claimant will not be suppressed because taken before answer, where prejudice to libelant does not appear. The Pride of the Ocean (D. C. 1879) Fed. Cas. No. 11,419.

24. —— **Grounds.**—A deposition must be suppressed when it does not affirmatively appear that the witness resided more than 100 miles from the place where the cause was to be tried. Dunkle v. Worcester (C. C. 1869) Fed. Cas. No. 4,162. Where the examination of witnesses is made by counsel, and not by the examiner. Western Division of Western N. C. R. Co. v. Drew (C. C. 1879) Fed. Cas. No. 17,434. And where a witness, in obedience to instructions of counsel, refuses to answer. Thomson-Houston Electric Co. v. Jeffrey Mfg. Co. (C. C. 1897) 83 Fed. 614. But will not be suppressed upon the sole ground that it was taken during a term at which the case might be tried. Union Pac. Ry. Co. v. Reese (1893) 56 Fed. 288, 5 C. C. A. 510, writ of error dismissed (1896) 16 Sup. Ct. 1207, 163 U. S. 709, 41 L. Ed. 307. Nor because the witness heard the interrogatories in advance. Western Division of Western N. C. R. Co. v. Drew (C. C. 1879) Fed. Cas. No. 17,434.

Where the notary before whom a deposition is taken certifies that he is not attorney for either party, omission to certify that he is not interested in the event of suit is not sufficient cause to suppress the deposition, especially where it appears that, by consent, the testimony was taken in shorthand by a disinterested person. Stewart v. Townsend (C. C. 1890) 41 Fed. 121.

Where a witness whose deposition was taken was one of the complainants in the suit, and the only object for which a contract was designed was to show the interest of the witness, his refusal to produce such contract was no ground for striking his deposition. Bullock Electric Mfg. Co. v. Crocker-Wheeler Co. (C. C. 1902) 121 Fed. 200.

A deposition not sealed will be suppressed; otherwise if it bears the seal of an express company across which are

written the names of the commission. In re Thomas (C. C. 1888) 35 Fed. 337, 340.

Depositions taken by the plaintiff need not be suppressed because the preliminary notice described the case as pending in the district in which it was originally brought, instead of in the district to which the case had been transferred at the defendant's instance, after the notice and the accompanying interrogatories were prepared, but before they were served, where no cross-interrogatories were filed in either district, and after the expiration of the time allowed for them the clerk of the district in which the case was pending issued the commission, since counsel for the defendant could not have been misled or confused by the error in the notice. Grant Bros. Construction Co. v. U. S. (1914) 34 Sup. Ct. 452, 232 U. S. 647, 58 L. Ed. 776.

Depositions will not be suppressed for merely technical defects, in the absence of any showing of injury, when it appears that counsel for both parties were present, and participated in the examination of the witnesses. Kansas City, Ft. S. & M. R. Co. v. Stoner (1892) 51 Fed. 649, 2 C. C. A. 437.

After the appointment of H. as state agent and attorney to accept service for defendant had been revoked, and before another attorney to accept service had been appointed, plaintiff gave notice to defendant, by service on H., for the taking of H.'s deposition. Held that, since defendant could not revoke the authority of its attorney to accept service without appointing another on whom service could be made, the deposition of H. could not be suppressed for want of service on defendant. United States Life Ins. Co. v. Ross (1900) 102 Fed. 722, 42 C. C. A. 601, writ of certiorari denied (1900) 21 Sup. Ct. 916, 179 U. S. 683, 45 L. Ed. 385.

Where a bankrupt, a fugitive from justice, was examined by deposition after the repeal of R. S. § 860, granting immunity by Act May 7, 1910, his refusal to answer certain questions on cross-examination on the ground that his answers might incriminate him was not ground for suppressing the entire deposition or refusing to consider his testimony on the question of the grantee's good faith. Carey v. Donohue (1913) 209 Fed. 328, 126 C. C. A. 254.

Deposition will not be suppressed because taken at a different place from the one named in the notice, if taken in the presence of both parties or their representatives. Gartside Coal Co. v. Maxwell (C. C. 1884) 20 Fed. 187.

25. —— **Motion to suppress.**—A motion to suppress a deposition on account of defects in the manner of taking it, and in the form of the commission, comes too late after the party moving to suppress has consented to the issue of the commission, and has practically united with the adverse party in executing it by adding his own cross-interrogatories, and has raised no objection until after the trial has begun. Howard v. Stillwell & Bierce Mfg. Co., (1890) 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147.

A commission to take a deposition was issued April 18th, was executed May 17th, and the deposition published by the clerk under a general order of the court on May 29th. The court was then in session, and so continued until July 8th. Its next term began in November. Defendants moved to suppress the deposition on January 10th, the day set for the trial. Held, that the motion came too late. Bibb v. Allen (1893) 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

Where a motion to suppress a deposition as taken after publication had passed was not pressed on counsel's consenting to strike out certain interrogatories, held, that such a motion would not prevail at final hearing. Patten v. Darling (C. C. 1859) Fed. Cas. No. 10,812.

Motion to suppress depositions for irregularities is too late where not made until lapse of three years after filing. Bank of Danville v. Travers (C. C. 1868) Fed. Cas. No. 886.

A motion to suppress depositions brings up the regularity of an order directing them to be taken, as well as the competency of the witnesses examined, where the objection has not been waived. Eslava v. Mazange's Adm'r (C. C. 1871) Fed. Cas. No. 4,527.

A technical objection to evidence taken in a suit in equity must be made by motion to suppress. In re Holladay (C. C. 1886) 27 Fed. 830.

A motion to suppress depositions, not made until the hearing, one month after the depositions have been returned into court and opened, and the case set for hearing, is made too late. Smith v. The Serapis (D. C. 1891) 49 Fed. 393, decree affirmed The Serapis (1892) 51 Fed. 91, 2 C. C. A. 102.

An application to suppress a deposition because of refusal of witness to answer a question not made until the deposition was offered in evidence was properly denied. Young v. Corrigan (D. C. 1912) 208 Fed. 431.

Cited without definite application, Patapsco Ins. Co. v. Southgate (1831) 5 Pet. 604, 618, 8 L. Ed. 243; Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 194 U. S. 303, 48 L. Ed. 989; Salt Lake City v. Smith (1900) 104 Fed. 457, 469, 43 C. C. A. 637; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560 (dissenting opinion); Bischoffscheim v. Baltzer (C. C. 1882) 10 Fed. 1, 4; Hunter v. International

R. Imp. Co. (C. C. 1886) 28 Fed. 842; Smith v. Chicago & N. W. R. Co. (C. C. 1889) 38 Fed. 321, 322; Bird v. Halsy (C. C. 1898) 87 Fed. 671, 677; Blood v. Morrin (C. C. 1905) 140 Fed. 918. See note under § 1473.

§ 1475. (Act Aug. 15, 1876, c. 304.) Notaries public authorized to take depositions, etc., and acknowledgments and affidavits.

Notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do. (19 Stat. 206.)

This was an act entitled "An act to provide for the appointment of commissioners for taking affidavits, etc., for the courts of the United States."

See notes to R. S. § 863, ante, § 1472.

Notaries public were authorized to administer oaths and take acknowledgments in all cases in which they may be taken or made before any justice of the peace of any state or territory, or in the District of Columbia by R. S. § 1778, post, § 3259.

Notes of Decisions

As to depositions taken before notaries public, see §§ 1472–1474, ante.

Operation of statute.—In view of this section and section 1337, ante, an indictment for perjury in the taking of an oath was not defective on the ground that the officer administering it styled himself as "notary public and ex officio justice of the peace." U. S. v. Hardison (D. C. 1905) 135 Fed. 419.

§ 1476. (Act March 9, 1892, c. 14.) Depositions may be taken in mode prescribed by State laws.

In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held. (27 Stat. 7.)

This was an act entitled "An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States."

Notes of Decisions

Right to take depositions according to state law.—This section merely provided an additional method, and did not confer any additional rights, to take testimony. National Cash-Register Co. v. Leland (C. C. 1896) 77 Fed. 242; Magone v. Colorado Smelting & Mining Co. (C. C. 1905) 135 Fed. 846; Despeaux v. Pennsylvania R. Co. (C. C. 1897) 81 Fed. 897; Smith v. International Mercantile Co. (C. C. 1907) 154 Fed. 786; Zych v. American Car & Foundry Co. (C. C. 1904) 127 Fed. 723; Cheatham Electric Switching Device Co. v. Transit Development Co. (C. C. 1911) 190 Fed. 202; Smith v. International Mercantile Co. (C. C. 1907) 154 Fed. 786; Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554, 556. It authorizes federal courts to avail of all modes of taking testimony prescribed by the laws of the state in which they sit. International Tooth-Crown Co. v. Hanks Dental Ass'n (C. C. 1900) 101 Fed. 306. But it does not authorize the admission of testimony found in the stenographic notes of a former trial, though such testimony is admissible by the laws of the state in which the court is held. Mulcahey v. Lake Erie & W. R. Co. (C. C. 1895) 69 Fed. 172.

The laws of the state prescribing the manner of taking and returning depositions de bene esse may be followed in suits prosecuted in the federal courts, but the circumstances in which they may be used depends on the statutes of the United States whenever those statutes apply. Columbus R. Co. v. Patterson (1906) 143 Fed. 245, 73 C. C. A. 603.

The practice of the state courts cannot sanction the admission of depositions in the courts of the United States which are not taken according to the laws of the United States and the rules of their courts. Evans v. Eaton (1822) 20 U. S. (7 Wheat.) 356, 5 L. Ed. 472.

Rule 7, § 4, of the rules of the Circuit Court of the United States for the Eastern District of Pennsylvania, which provides that "on all motions or rules to show cause on the hearing of which facts are to be investigated, the testimony of witness shall be taken by deposition in writing, * * * and no witness shall be examined at the bar unless by special previous order of the court," prescribes a mode of practice which it was within the power of the court to adopt, and a witness may lawfully be subpœnaed to give testimony

by deposition to be used on such a hearing in an action at law. Despeaux v. Pennsylvania R. Co. (C. C. 1906) 147 Fed. 926.

Prior to this statute, as well as now, the right to take testimony by depositions in common-law causes pending in the United States courts depended upon the statutes of the United States, and not the statutes of the states in which such courts are held; but, when such right did exist under the United States statutes, the parties could follow, as to the mere mode of procuring the deposition, at their election, either the provisions of the state law or of the act of congress. McLennan v. Kansas City, St. J. & C. B. R. Co. (C. C. 1884) 22 Fed. 198; Hanks Dental Ass'n v. International Tooth-Crown Co. (1904) 24 Sup. Ct. 700, 194 U. S. 303, 48 L. Ed. 989; Flint v. Crawford County (C. C. 1879) Fed. Cas. No. 4,871. But depositions taken according to the mode prescribed by the statutes of a state for the taking of depositions were not admissible in evidence in a circuit court of the United States, when the state law governing the same conflicted with the provisions of the act of congress in relation thereto. Randall v. Venable (C. C. 1883) 17 Fed. 162.

Mode of taking depositions.—Under Code Civ. Proc. N. Y. tit. 3, c. 9, art. 2, relating to the taking of depositions outside of the state, and the practice of the state courts thereunder, which practice the federal courts are authorized to follow by this section, commissions for the oral examination of either named or unnamed witnesses will be issued only under exceptional circumstances. Wallace v. D. Appleton & Co. (C. C. 1908) 161 Fed. 884.

Where the laws of a state in which a court is held provide for the issuance of a commission by the clerk to take depositions of witnesses on interrogatories attached on notice to the adverse party, such practice may properly be followed in the federal court with respect to the taking of depositions of witnesses residing in other districts or states. Carrara Paint Agency Co. v. Carrara Paint Co. (C. C. 1905) 137 Fed. 319.

Where a party to a suit in the federal court applied to take a deposition on the ground that the witness resided more than 100 miles from the place of trial, he was not limited to the mode of taking the deposition orally before an authority named in the notice, but was entitled to take the deposition in the mode prescribed by the laws of the state in which the court was held. Blood v. Morrin (C. C. 1905) 140 Fed. 918.

Interrogatories propounded, as provided by 2 Ballinger's Ann. Codes & St. Wash. §§ 6008–6010, by the plaintiff, to be answered by the defendant, in an action at law in the circuit court of the United States, district of Washington, are proper, and should not be stricken from the files. Smith v. Northern Pac. Ry. Co. (C. C. 1901) 110 Fed. 341.

For practice as to taking of testimony by deposition where the state constitution provided that testimony in equity causes shall be taken in the same manner as at law, see Bronson v. La Crosse & M. R. Co. (D. C. 1861) Fed. Cas. No. 1,930.

Taking depositions of party before trial.—This section does not, in connection with Gen. St. Kan. par. 4442, providing that "either party may commence taking testimony by deposition at any time after service on defendant," authorize the taking of defendant's deposition before trial, in the absence of any of the grounds therefor prescribed by section 1472, ante, and section 1477, post. Shellabarger v. Oliver (C. C. 1894) 64 Fed. 306.

Under this section a plaintiff in an action in a federal court in the state of New York may avail himself of the provisions of Code Civ. Proc. N. Y. § 870 et seq., permitting him to take the deposition of the defendant before trial. International Tooth Crown Co. v. Carter (C. C. 1901) 112 Fed. 396.

The examination of a party before trial, authorized by Code Civ. Proc. N. Y. § 870, cannot be required by a federal Circuit Court sitting in that state, by virtue of this section. Hanks Dental Ass'n v. International Tooth-Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989.

Prior to this statute a plaintiff could, in an action at law in a federal court, obtain an order for the examination of the defendant, to enable the plaintiff to frame his complaint, where such an order was provided for by the state Code of Procedure. Anderson v. Mackay (C. C. 1891) 46 Fed. 105.

The examination of a party to a suit as a witness for the adverse party, pending in a state court under a provision of the Code of Procedure for that state, could be continued after the removal of such suit to the federal court, though such an examination would not be allowed under the practice of the federal court, had the action been originally brought there. Fogg v. Fisk (C. C. 1884) 19 Fed. 235.

Use in evidence.—Depositions taken to be used in an action in a state court which has been discontinued cannot be used in an action afterwards brought in a federal court between the same parties for the same cause of action, although the state practice allows depositions taken in a pending suit to be used in a renewed suit between the same parties for the same cause. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554.

Suppression.—Where the deposition of a witness residing within 100 miles of the place where court is held is

taken in a cause pending in the state court, in accord with the laws of the state, the deposition will not be suppressed, upon removal of the cause to the federal court, on the ground of the witness residing within 100 miles of the place of holding court, if the witness be dead when the motion is made. United States Life Ins. Co. v. Ross (1900) 102 Fed. 722, 42 C. C. A. 601, writ of certiorari denied (1900) 21 Sup. Ct. 916, 179 U. S. 683, 45 L. Ed. 385.

Dedimus potestatem.—Under this section, and under the Connecticut law, permitting the taking of depositions of nonresidents and providing for their oral examination, direct and cross, the Circuit Court for the District of Connecticut can grant a dedimus potestatem to take depositions in Cuba, where otherwise there will be a failure or delay of justice. Compania Azucarera Cubana v. Ingraham, Maxwell & Beals (C. C. 1910) 180 Fed. 516.

Cited without definite application, Hanks Dental Ass'n v. International Tooth-Crown Co. (1903) 122 Fed. 74, 58 C. C. A. 180; Swift & Co. v. Jones (1906) 145 Fed. 489, 76 C. C. A. 253; Fenno v. Primrose (C. C. 1903) 125 Fed. 635; Hartman v. Feenaughty (C. C. 1905) 139 Fed. 887.

§ 1477. (R. S. § 866.) Depositions under a dedimus potestatem and in perpetuam, etc.

In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five, shall not apply to any deposition to be taken under the authority of this section.

Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 88. Act May 9, 1872, c. 146, 17 Stat. 89.

R. S. §§ 863, 864, 865, mentioned in the last sentence of this section, are set forth ante, §§ 1472–1474.

Notes of Decisions

As to depositions taken according to state practice, see § 1476, ante; as to subpœna duces tecum, see § 1480, post; as to fees and mileage of witnesses, see Agius v. Perkins Co. (C. C. 1907) 151 Fed. 958; note under § 1452, ante.

I. Taking of depositions under dedimus potestatem

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I. TAKING OF DEPOSITIONS UNDER DEDIMUS POTESTATEM

1. In general.—This section applies to criminal as well as civil cases. U. S. v. Cameron (C. C. 1883) 15 Fed. 794.

The second clause is wholly separate from the first clause, and is a recognition and regulation of the general power of the federal courts as courts of chancery under Const. art. 3, § 2, to entertain bills to perpetuate testimony, where the complainant cannot himself bring the matter to which the desired testimony relates into present judicial investigation. Westinghouse Mach. Co. v. Electric Storage Battery Co. (1909) 170 Fed. 430, 95 C. C. A. 600, 25 L. R. A. (N. S.) 673, reversing decree (C. C. 1908) 165 Fed. 992.

The effect of section 1478, post, is not to exclude testimony taken under this section, but to permit the courts of the United States to admit in evidence testimony perpetuated according to state law. New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co. (C. C. 1881) 9 Fed. 578.

Depositions taken under a dedimus potestatem, "according to common usage, when it may be necessary to prevent a failure or delay of justice," are under no circumstances to be considered as taken de bene esse, whether the witnesses reside beyond the process of the court or within it; the provi-

sions of the act relative to depositions de bene esse being confined to those taken under the enacting part of the section. Sergeant v. Biddle (1819) 4 Wheat. 508, 4 L. Ed. 627.

Where a commission is issued by a federal court, it is not governed by the statutes of any state, but by this section. U. S. v. Pings (D. C. 1880) 4 Fed. 714.

The United States circuit court, sitting in a state where, by state laws, depositions of witnesses can be taken only on commission, can authorize commissions to take depositions of witnesses, to be issued, executed, and returned in the manner and subject to the regulations prescribed by the laws of such state, and the restrictions limiting the use of depositions taken de bene esse do not apply. Warren v. Younger (C. C. 1884) 18 Fed. 859.

2. Dedimus or commission—Right to grant.—A commission will not be granted by a federal court to take testimony in a law action when the more convenient method prescribed by section 1472, ante, is available. Henning v. Boyle (C. C. 1901) 112 Fed. 397; Turner v. Shackman (C. C. 1886) 27 Fed. 183, 184. But see Richter v. Jerome (1885) 5 Sup. Ct. 1162, 115 U. S. 55, 29 L. Ed. 345, holding that, where there is nothing to show that testimony cannot be taken under this section, the court would not order the taking of the testimony de bene esse.

This section does not authorize the granting of a dedimus to take the deposition of a defendant, where the only object appears to be to ascertain what he will swear to before placing him on the witness stand in court, especially where no answer has been filed, and the answer is not yet due. Turner v. Shackman (C. C. 1886) 27 Fed. 183.

An application to take depositions under a dedimus potestatem cannot be granted under section 1472, ante, which relates only to the taking of depositions de bene esse, and which section is expressly excluded from the operation of this section. North American Transportation & Trading Co. v. Howells (1903) 121 Fed. 694, 58 C. C. A. 442.

A commission for the examination of witnesses will not be awarded, even with the consent of the parties, until commissioners are named. Vanstophorst v. Maryland (1791) 2 Dall. 401, 1 L. Ed. 433.

A commission is not defective because the commissioners and their clerk were not sworn. Gilpins v. Consequa (C. C. 1813) Fed. Cas. No. 5,452.

The deposition of a witness, living out of the state, and more than 100 miles from court, must be taken under a commission. Bleecker v. Bond (C. C. 1819) Fed. Cas. No. 1,534.

A commission cannot be issued by the circuit court of the District of Columbia where the witness is within the jurisdiction of the court. U. S. v. Thomas (C. C. 1847) Fed. Cas. No. 16,476.

On an application for a dedimus potestatem, the court will consider the materiality of the testimony, and the purposes for which it is invoked. U. S. v. Parrott (C. C. 1859) Fed. Cas. No. 15,999.

Printed exhibits allowed to be taken from the files, and annexed to a commission, on filing photographic facsimiles in lieu thereof. Daly v. Maguire (C. C. 1868) Fed. Cas. No. 3,551.

The court will not inquire into the regularity of the issuance of a commission by a court of another circuit when its aid is sought to enforce it. In re Cole (C. C. 1879) Fed. Cas. No. 2,975.

The necessity for a dedimus potestatem must be made to appear to the court. Randall v. Venable (C. C. 1883) 17 Fed. 162, 163.

The circuit court had no power to grant a dedimus potestatem in a case appealed to the supreme court; the supersedeas being a bar. Richter v. Jerome (C. C. 1885) 25 Fed. 679, 682.

The United States circuit court, sitting in a state where, by state laws, depositions of witnesses can be taken only on commission, can authorize commissions to take depositions of witnesses, to be issued, executed, and returned in the manner and subject to the regulations prescribed by the laws of such state, and the restrictions limiting the use of depositions taken de bene esse do not apply. Warren v. Younger (C. C. 1884) 18 Fed. 859.

An affidavit that witnesses live more than 100 miles from the place of the trial of the action, without proof of a well-grounded apprehension of a failure or delay of justice, is insufficient for the issuance of a dedimus. Blood v. Morrin (C. C. 1905) 140 Fed. 918.

Defendant is not guilty of laches in not procuring commission until 10 months after plea, where it was procured immediately after replication filed. Buchanan v. Trotter (D. C. 1843) Fed. Cas. No. 2,075.

The provision of the Chinese exclusion acts for the examination before United States commissioners of Chinese persons alleged to be unlawfully in this country clothes them with a jurisdiction independent of the district court; and that court has no power to issue a dedimus potestatem to take testimony to be used in such an investigation since this section applies only to cases of which those courts have jurisdiction. U. S. v. Hom Hing (D. C. 1892) 48 Fed. 635.

3. —— "To prevent a failure or delay of justice."—The question whether the order is necessary in order to prevent a "failure or delay of justice" is for the court to determine in each case upon the facts presented. U. S. v. Cameron (C. C. 1883) 15 Fed. 794. Where witnesses for the defendant,

whose testimony was material, resided hundreds of miles beyond the limits of the district in which the case was to be tried, and where the defendants were unable to pay the cost of bringing them to the place of trial, the necessity for making an order for a dedimus potestatem to take their depositions sufficiently appeared. Id.

A commission to take depositions in another state will not be granted without an affidavit showing it to be necessary for the purposes of justice. Sutton v. Mandeville (C. C. 1803) Fed. Cas. No. 13,650.

See, also, Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117.

4. —— Execution of commission.—Where a commission for the examination of witnesses confers the power to execute it upon any one of several commissioners, it may be executed by one of them. The Griffin (C. C. 1858) Fed. Cas. No. 5,814, affirming (D. C. 1855) Fed. Cas. No. 5,789, and affirmed Howland v. Greenway (1859) 22 How. 491, 16 L. Ed. 391. But a commission directed to a number of commissioners must be executed by all of them. Armstrong v. Brown (C. C. 1803) Fed. Cas. No. 542; Guppe v. Same (C. C. 1805) Fed. Cas. No. 5,871; Munns v. De Nemours (C. C. 1811) Fed. Cas. No. 9,-926. And this is the rule, though the commissioner named by the adverse party, after proceeding some length in the examination, withdraws and refuses to complete it. Munns v. De Nemours (C. C. 1811) Fed. Cas. No. 9,-926.

A commission directed to A. and B. or either of them to take depositions authorizes the deposition of A. to be taken by B. Lonsdale v. Brown (C. C. 1818) Fed. Cas. No. 8,492.

Upon the granting of an open commission to examine witnesses in a remote jurisdiction, the adverse party may properly be given the right, at his election, to reserve his cross-examination until the direct testimony shall have been returned, and to then cross-examine, either orally or on written interrogatories. Maryland Trust Co. v. Kirby Lumber Co. (C. C. 1906) 149 Fed. 443.

An order for oral cross-examination of a witness when taking his deposition is, in effect, to turn proceedings into viva voce examination; and, if the power to make the order is discretionary with the court, it will only be exercised in a clear case of necessity. Coates v. Merrick Thread Co. (C. C. 1887) 41 Fed. 73.

Depositions must be taken at the place indicated in the commission. Boudereau v. Montgomery (C. C. 1821) Fed. Cas. No. 1,694; Rhoades v. Selin (C. C. 1827) Fed. Cas. No. 11,740. And the commissioner should state where the depositions were taken. Boudereau v. Montgomery (C. C. 1821) Fed. Cas. No. 1,694; Rhoades v. Selin (C. C. 1827) Fed. Cas. No. 11,740. CONTRA, see Jones v. Oregon Cent. Ry. Co. (C. C. 1875) Fed. Cas. No. 7,-486.

The time for taking testimony under a commission will be enlarged to let in newly-discovered evidence, where the party has not been guilty of any laches. The Ruby (C. C. 1830) Fed. Cas. No. 12,103.

Section 1537, post, does not require a federal court to follow a state statute as to the manner of taking depositions in a proceeding in rem by the United States for the forfeiture of merchandise under the customs revenue laws, (1) because there are no "like causes" in the state courts; and (2) because the provision does not apply to the evidence of witnesses, either as to its character or competency, or the mode of taking it. U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601. Section 1538, post, does not require the federal courts to conform to state laws as to the mere manner of executing commissions to take testimony, which may be regulated by the court, either by general rules, or by special directions accompanying the commission. Id. Where exhibits are not identified and attached to a deposition, as required by the instructions, it is proper to order the deposition returned for that purpose. Id.

Where the testimony of a witness is taken by consent on oral interrogatories before an examiner of the court of the district of his residence, for use in an action pending in another court, the former court has power to decide as to the materiality of questions asked, and may compel the witness to answer. In re Allis (C. C. 1890) 44 Fed. 216.

5. Application.—The right of parties to obtain testimony where it is necessary to prevent a failure or delay of justice, preserved by this section, must be pursued to, and on such application the court will not sanction a merely inquisitorial proceeding. Third Ave. Ry. Co. v. Krausz (1901) 112 Fed. 377, 50 C. C. A. 293.

The circuit court of the District of Columbia, sitting in Alexandria, will not grant a commission to examine witnesses in a suit at law, without affidavit showing it to be necessary for the purposes of justice. Sutton v. Mandeville (C. C. 1803) Fed. Cas. No. 13,650.

A party taking out a commission to take evidence in relation to pedigree is not bound to name the witnesses he intends to examine. Parker v. Nixon (C. C. 1831) Fed. Cas. No. 10,744.

Allegations of an application for a dedimus potestatem to take testimony before trial held sufficient to entitle plaintiffs to the relief demanded. Zych v. American Car & Foundry Co. (C. C. 1904) 127 Fed. 723.

6. Notice.—No notice is required where the witness resides over 100

miles from the place of trial. Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469. Notice of the time and place of taking depositions is necessary under a joint commission; but when the opposite party, after notice, fails or refuses to join, and the commission issues ex parte, notice is not necessary. Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469, affirmed (1850) 11 How. 375, 13 L. Ed. 736.

Notice given to the attorney at law of a motion for a dedimus is sufficient. Potts v. Skinner (C. C. 1882) Fed. Cas. No. 11,348.

Notice of a motion for a dedimus to take testimony may be given to the attorney at law. Irving v. Sutton (C. C. 1809) Fed. Cas. No. 7,078; Potts v. Skinner (C. C. 1882) Id. 11,348.

7. Taking depositions in foreign country.—Practice as to granting commissions to take evidence in foreign countries, see Cunningham v. Otis (C. C. 1812) Fed. Cas. No. 3,485.

Time of issue of commission to take deposition in a foreign country, and the filing of interrogatories and cross-interrogatories, and notice, see Frevall v. Bache (C. C. 1838) Fed. Cas. No. 5,113.

A motion for the appointment of commissioners to take testimony abroad is not grantable of course, and previous notice to the adverse party is necessary. U. S. v. Parrott (C. C. 1859) Fed. Cas. No. 15,999.

Depositions of witnesses in a foreign country cannot be taken, under section 1472; the remedy being under this section. Cortes Co. v. Tannhauser (C. C. 1883) 18 Fed. 667. They must be taken by commission. Stein v. Bowman (1839) 38 U. S. (13 Pet.) 209, 10 L. Ed. 129.

A commission will be allowed to the defendant in a criminal case to take depositions of witnesses residing abroad. U. S. v. Wilder (C. C. 1882) 14 Fed. 393.

The circuit court, having full power when sitting as a court of law to issue commissions to take testimony abroad, will not entertain any proceedings for such a purpose on its equity side. Peters v. Prevost (C. C. 1813) Fed. Cas. No. 11,032.

The circuit court has no power to issue a commission to take the testimony of a foreign witness, in cases pending in said court, on an appeal from a decision of the board of general appraisers, under Act June 10, 1890, c. 407, § 15, 26 Stat. 138. Bartram v. U. S. (C. C. 1901) 106 Fed. 878.

Where a commission is issued by a federal court, it is not governed by the statutes of any state, but by this section. U. S. v. Pings (D. C. 1880) 4 Fed. 714.

In a suit for infringing a patent, a commission to examine witnesses abroad should be granted in the case of a contest involving the chemistry of coloring compounds, when it is asserted by the moving party, and denied by the opposing party, that the art is so little practiced here that the best expert testimony can only be obtained by such a commission. Holliday & Sons v. Schultzeberge (C. C. 1893) 57 Fed. 660.

The oral cross-examination of witnesses on a commission abroad may be allowed as a condition of waiving objection of irregularity in the motion for the commission. The Louisiana (D. C. 1867) Fed. Cas. No. 8,536.

Where an application was made for a commission to examine a witness in the East Indies, it appearing that no one was known who could be named as commissioner except the wife of the witness, she was named as commissioner. The Norway (D. C. 1868) Fed. Cas. No. 10,358.

In an action against the consul general of a foreign country, defendant moved for a commission to take testimony in such country. The government of that country refused to allow plaintiff to enter its territory, and plaintiff furnished affidavits to show the nature of the investigation and the question to be raised, and that the commission was not likely to be properly executed in the plaintiff's absence, with due provision for his own defense. Held, that the commission should issue only on condition that defendant obtain from his government, and furnish to plaintiff, a safe conduct, allowing him to enter the country and return, and be present on the execution of the commission. Hollander v. Baiz (D. C. 1889) 40 Fed. 659.

Where, in a libel suit against a foreign consul by a plaintiff who had been expelled from the country which the consul represented, by order of its government, the consul applied for a commission to examine witnesses in such foreign country, the government of which refused to allow plaintiff to return there and attend such commission, as the government of such foreign country stood in the virtual relation of principal to defendant, because the alleged libel was published by him under orders from such government, except as to the proof of documents, the motion for a commission should be denied. Hollander v. Baiz (D. C. 1890) 43 Fed. 35.

It is immaterial that foreign depositions, directed to be addressed to the clerk and returned by mail, were forwarded through the embassy bag by mail to Washington, and thence to the clerk, to whom they were properly addressed, instead of being forwarded direct. U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601.

8. "According to common usage."—The mode of issuing and executing a dedimus granted in pursuance of this

section is regulated by common usage or practice. Jones v. Oregon Cent. Ry. (C. C. 1875) Fed. Cas. No. 7,486.

Depositions may be taken under a dedimus potestatem "according to common usage"; and "common usage" refers to the practice in courts of equity. Bischoffscheim v. Baltzer (C. C. 1882) 10 Fed. 1. It refers to the usage prevailing in the courts of the state in which the federal court may be sitting. U. S. v. Cameron (C. C. 1883) 15 Fed. 794. And means such usage as may from time to time become common and admits of changing practice as the new needs of the time require. The Titanic (D. C. 1913) 206 Fed. 500. But see U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601, holding that the phrase, "according to common usage" means according to the practice existing in 1874, when the section was enacted, and does not import that the federal courts must adopt all subsequent new regulations that may be enacted by state legislatures or adopted by the state practice.

"Common usage" means the statutory provisions of the state. Giles v. Paxson (C. C. 1888) 36 Fed. 882. But see Turner v. Shackman (C. C. 1886) 27 Fed. 183, holding that "common usage" cannot be established by a state statute.

"According to common usage" does not require a court of admiralty to conform to the practice in the state courts, and it may by rule provide a different method for taking depositions. The Westminster (D. C. 1899) 96 Fed. 766.

Depositions taken under a dedimus potestatem, according to common usage, are not to be considered to be taken de bene esse. Sergeant v. Biddle (1819) 17 U. S. (4 Wheat.) 508, 4 L. Ed. 627.

A deposition is not taken "according to common usage," if one of the parties to the action writes down the answers for the commissioner, at the request of the latter, in the absence of the other party to the suit, although it does not appear that any injury was thereby sustained. U. S. v. Pings (D. C. 1880) 4 Fed. 714.

Notice of time and place of taking is necessary under a joint commission, but if the opposite party fails to join, and the commission issues ex parte, notice is not necessary. Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469.

A witness examined under a dedimus should be sworn according to the law of the forum whence it issued. Jones v. Oregon Cent. Ry. Co. (C. C. 1875) Fed. Cas. No. 7,486.

See, also, Ex parte Fisk (1885) 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117.

9. —— Interrogatories.—Interrogatories in a commission should be answered separately, and failure therein is fatal to the whole commission, although the witness, in answering the general interrogatory, says that he knows nothing further material to either party. Ketland v. Bissett (C. C. 1804) Fed. Cas. No. 7,742.

If all the interrogatories, either in form or substance, are not put to the witnesses, the depositions cannot be read. Winthrop v. Union Ins. Co. (C. C. 1807) Fed. Cas. No. 17,901.

It is sufficient if all the interrogatories which accompany a commission are substantially, although not formally, answered. Nelson v. U. S. (C. C. 1816) Fed. Cas. No. 10,116.

A disagreement between parties as to interrogatories should be referred to a master in chancery to be settled by him subject to the review of the court on appeal from the report. Cocker v. Franklin Hemp & Bagging Co. (C. C. 1840) Fed. Cas. No. 2,930.

Under an ex parte commission, any of the interrogatories, except the last general one, may be omitted. Merrill v. Dawson (C. C. 1846) Fed. Cas. No. 9,469.

The filing of interrogatories in an equity case is not necessary where the evidence is to be derived chiefly from books not yet examined. Russell v. McLellan (C. C. 1847) Fed. Cas. No. 12,158.

Under rules of court requiring exceptions to interrogatories to be taken before commission issues, but which also permit exceptions to be taken on the trial to the admissibility of the evidence returned, where it might have been taken if the witness had been offered for oral examination, an exception to an interrogatory, which goes to the relevancy of the answer anticipated, can be better determined after the answer has been returned, and will not be sustained in advance of the examination. Leeds v. Evans (C. C. 1900) 99 Fed. 28.

Exceptions to interrogatories are waived unless they are propounded as objections before the commission issues. Cocker v. Franklin Hemp & Bagging Co. (C. C. 1840) Fed. Cas. No. 2,930.

10. Re-examination.—Where exhibits are not identified and attached to a deposition as required by the instructions, and the deposition is returned for that purpose, the right of the adverse party to further examine as to the identity of such exhibits is waived, if no request therefor is made. U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601.

11. Return of depositions and exhibits—Certificate.—Where the certificate states that the commissioners "have administered the oath to J. M., the clerk we are going to employ for the execution of the same," it sufficiently appears that they appointed a clerk and swore him. Keene v. Meade

(1830) 3 Pet. 1, 7 L. Ed. 581, reversing (C. C. 1826) Fed. Cas. No. 9,373.

It is proper to return with the deposition of a witness a copy of a deed referred to by him, whether the deed is admissible in evidence at the trial or not. Giles v. Paxson (C. C. 1888) 36 Fed. 882.

No formal certificate is necessary to be attached to exhibits in order to make them parts of the deposition in which reference is made to them. If the indorsements of the examining commissioner on the exhibits and depositions be made by the same person, and the exhibits are so described and marked by the commissioner that their identity is unmistakably established, this is sufficient. Bird v. Halsy (C. C. 1898) 87 Fed. 671.

No merit lies in attaching exhibits to depositions other than that of safety in preserving and identifying them as parts of the depositions. If this identification be made clear, and especially if it be not denied that they are the exhibits in question, the exhibits cannot be deprived of their character as part of the depositions because they are, for convenience or for any other reason, mailed to the clerk in a separate package. Id.

II. "DEPOSITIONS TO BE TAKEN IN PERPETUAM REI MEMORIAM"

12. Bill to perpetuate testimony.—A complainant may maintain a bill in equity in a Circuit Court to perpetuate testimony, where it shows that defendant charges that an article manufactured and sold by complainant infringes a patent owned by defendant, and threatens suits against complainant and its customers but refuses to bring such suits, and that complainant can prove that such patent is void by the testimony of certain designated witnesses but not otherwise. Westinghouse Mach. Co. v. Electric Storage Battery Co. (1909) 170 Fed. 430, 95 C. C. A. 600, 25 L. R. A. (N. S.) 673, reversing decree (C. C. 1908) 165 Fed. 992.

A. filed a bill in the United States circuit court to obtain an order to take the testimony of B. in perpetuam. The bill alleged that A. was using a process for which defendant had letters patent which were void for want of novelty; that A. feared that defendant would bring suit for an infringement, in which case B., 90 years old, would be a material witness. Held, that B.'s testimony would be admissible in such suit, and that a necessity was shown for perpetuating the testimony. New York & Baltimore Coffee Polishing Co. v. New York Coffee-Polishing Co. (C. C. 1881) 9 Fed. 578.

A bill for the taking of testimony in perpetuam rei memoriam will not be entertained if the matter in controversy can be made the subject of immediate judicial investigation by the party who files the bill. Id.

A bill to take depositions de bene esse must contain averments that a suit is pending in which the testimony will be material, that the depositions cannot be taken in the suit in the ordinary methods, and that the aid of a court of equity is required, as well as the facts to be proved by the witnesses, that the court may judge of their materiality, the necessity for taking the testimony, and danger of loss by delay. Richter v. Jerome (C. C. 1885) 25 Fed. 679, decree affirmed (1887) 8 Sup. Ct. 106, 123 U. S. 233, 31 L. Ed. 132.

A suit having been dismissed on demurrer, and an appeal from such dismissal having been taken to the United States supreme court, which probably would not be decided in less than two or three years, a bill to take depositions de bene esse of aged and infirm witnesses, whose testimony would be material if the decision were reversed and the case remanded for trial upon the merits, ought to be allowed. Id.

Failure to make an essential averment in a bill to take depositions de bene esse is ground for demurrer, but ordinarily the allegations of the bill cannot be put in issue by an answer to a greater extent than could similar allegations in an affidavit to take depositions de bene esse. Id.

Under this section, a bill alleging that defendant threatens to bring a suit against complainant for infringement of a patent, but has delayed doing so; that complainant claims the patent to be invalid, but can only establish such defense by the testimony of certain witnesses who reside in another state —does not state a case of necessity within the statute, the age or condition of health of the witnesses not being shown. Westinghouse Mach. Co. v. Electric Storage Battery Co. (C. C. 1908) 165 Fed. 992, decree reversed (1909) 170 Fed. 430, 95 C. C. A. 600, 25 L. R. A. (N. S.) 673.

See, also, Ex parte Fisk (1885) 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117.

13. Service of process.—Depositions in perpetuam rei memoriam under this section cannot be taken ex parte by a proceeding in equity without any service of process upon the defendants in interest, though they are out of the country. Green v. Compagnia Generale Italiana Di Navigation (D. C. 1897) 82 Fed. 490.

III. STATUTES NOT APPLYING

14. Practice.—The United States circuit court, sitting in a state where, by state laws, depositions of witnesses can be taken only on commission, can authorize commissions to take depositions of witnesses, to be issued, executed, and returned in the manner and subject to the regulations prescribed by the

laws of such state, and the restrictions limiting the use of depositions taken de bene esse do not apply. Warren v. Younger (C. C. 1884) 18 Fed. 859.

15. Certificate.—Depositions taken for use in the federal courts of Iowa, under this section, by virtue of a dedimus to a commissioner, need have no certificate that the commissioner is disinterested; sections 1472–1474, ante, not applying. Giles v. Paxson (C. C. 1888) 36 Fed. 882.

IV. ADMISSION OF DEPOSITIONS IN EVIDENCE

16. Admissibility.—A deposition, though merely to prove a pedigree, if taken by others than those named in the commission, cannot be read. Banert v. Day (C. C. 1814) Fed. Cas. No. 836. Nor can depositions be read where proper interrogatories are not answered. Richardson v. Golden (C. C. 1811) Fed. Cas. No. 11,782; Bell v. Davidson (C. C. 1818) Fed. Cas. No. 1,248; Dodge v. Israel (C. C. 1822) Fed. Cas. No. 3,952. Or are not put to the witness. Gilpins v. Consequa (C. C. 1813) Fed. Cas. No. 5,452. But depositions of several witnesses, taken under one commission, on one set of interrogations, a part of which only are to be propounded to each witness, are admissible in evidence. Fowler v. Merrill (1850) 52 U. S. (11 How.) 375, 13 L. Ed. 736.

Where an action was removed to the Circuit Court from a state court, and before the first day of the next succeeding term, within which defendant was required to file the record and appear, plaintiff applied for a commission to take the deposition of a witness, merely alleged to be a necessary and important witness and residing at such a distance that it was impossible to have him present in person, without any showing of necessity for haste in the taking of the testimony before the time for filing the record had expired, the commission was erroneously granted, and the deposition taken thereon inadmissible. North American Transportation & Trading Co. v. Howells (1903) 121 Fed. 694, 58 C. C. A. 442.

Depositions taken under a commission to another state cannot be read where the other party was not served with a copy of the interrogatories, and notice of the rule and of the names of the commissioners. Rhoades v. Selin (C. C. 1827) Fed. Cas. No. 11,740.

Testimony taken on a commission in blank sent abroad is admissible on proof that the names and materiality of the witnesses were unknown when the commission was sued out. The Infanta (D. C. 1848) Fed. Cas. No. 7,030.

A clerical error in the dedimus, whereby an initial of a party's name is changed, will not prevent the admission of the depositions. Meade v. Keane (C. C. 1826) Fed. Cas. No. 9,373.

Depositions taken under a commission issued to "A. C. Strong," a notary public of a certain county, are not inadmissible because they were taken and certified by "Alfred C. Strong," as a notary public of such county, who is shown to be the same person. Brown v. Ellis (D. C. 1900) 103 Fed. 834.

Depositions under a commission issued to a place where the commissioners are prohibited executing the commission, taken according to the law of the place, in the presence of the commissioners by the judge, are admissible. Winthrop v. Union Ins. Co. (C. C. 1807) Fed. Cas. No. 17,901.

A deposition held admissible in equity, where the direct interrogatories were fully answered, notwithstanding the witness died before cross-examination. Gass v. Stinson (C. C. 1837) Fed. Cas. No. 5,262.

Where a Chinese person, going to China, applied to perpetuate testimony with reference to his citizenship, and under an order appointing a referee to take such testimony and on notice to the United States introduced evidence that he was an American-born citizen, and filed the same in the regular way, such depositions, not being taken to be used in any court of the United States, but before the immigration officer on the person's return from China, were not conclusive on the United States of the fact of citizenship, and did not prevent such officers from denying entry, on the ground that the applicant was an alien Chinese person, not entitled to enter, established by other proof. Ex parte Wing You (1911) 190 Fed. 294, 111 C. C. A. 194.

Where a commission is allowed to the defendant in a criminal case to take depositions of witnesses residing abroad, the question whether such depositions can be admitted in evidence does not need to be decided until the trial, and, if they be not allowed to go before the jury, in case of conviction, will certainly be considered by the judge, who shall be called upon to exercise the large discretion given by the statute in imposing sentence. U. S. v. Wilder (C. C. 1882) 14 Fed. 393.

Section 1787, post, offers no obstruction to the use of a deposition taken according to common usage, the witness residing out of the district, but only 33 miles from the place of trial. Sergeant v. Biddle (1819) 17 U. S. (4 Wheat.) 508, 4 L. Ed. 627.

17. Objections.—An objection to the form in which testimony is taken before a referee or commissioner is waived unless the testimony is objected to when offered in evidence. Copper River Min. Co. v. McClellan (1905) 138 Fed. 333, 70 C. C. A. 623, writ of certiorari denied (1906) 26 Sup. Ct. 753, 200 U. S. 616, 50 L. Ed. 622.

Where defendant applied for the appointment of the commissioner, it waived its right to object that the condi-

tions prescribed as conditions precedent to the taking of proof to be used in the federal courts in advance of the trial did not obtain, and that the witnesses were not therefore required to appear and testify before the commissioner. Zych v. American Car & Foundry Co. (C. C. 1904) 127 Fed. 723.

Where a deposition is taken on a commission, the general rule is that all objections to it of a formal character, and such as might have been obviated if urged on examination of the witness, must be raised at such examination or on motion to suppress it. It is too late to raise such objections for the first time at the trial. York Mfg. Co. v. Illinois C. R. Co. (1865) 3 Wall. 107, 113, 18 L. Ed. 170.

Rule 27 of the supreme court of the United States provides that new evidence in admiralty cases, when admissible in that court, shall be taken under a commission issued from that court, or from any circuit court, under the direction of any judge thereof. Held, that when a commission to take such evidence was issued in the usual form by the clerk of the circuit court, and both parties joined in the execution thereof, neither party could afterwards object to the evidence on the ground that it did not appear by the record that the court ordered the commission to issue. Rich v. Lambert (1851) 53 U. S. (12 How.) 347, 13 L. Ed. 1017.

V. SUPPRESSION OF DEPOSITIONS

18. Motion.—A technical objection to evidence taken in a suit in equity must be made by motion to suppress before the cause is set for hearing. In re Holladay (C. C. 1886) 27 Fed. 830.

19. Grounds.—A commission to take testimony duly issued and executed under equity rule 67 will not be suppressed because, when received by the clerk, the envelope containing the testimony was open at one end, presenting the appearance of having been worn in the mail; the clerk having noted the facts on the package and filed it, since which time it has remained undisturbed in his office. Eiffert v. Craps (C. C. 1890) 44 Fed. 164.

A deposition will not be suppressed where the commission appears to have been properly executed, although the form of instructions to the commissioner, annexed to the commission, was not signed by the clerk or the defendant's counsel, as required by a rule of the court which issued it. U. S. v. Pings (D. C. 1880) 4 Fed. 714.

The fact that a commissioner to take depositions in a foreign country fails to certify, as directed in the commission, that "the examination was subscribed by the sworn interpreter," is immaterial, and not ground for suppressing the deposition, where the certificate shows that the interpreter was sworn, and the deposition is in fact subscribed by him. U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601.

CITED WITHOUT DEFINITE APPLICATION

Whitford v. Clark County (1886) 7 Sup. Ct. 306, 308, 119 U. S. 522, 30 L. Ed. 500; U. S. v. Julian (1896) 16 Sup. Ct. 801, 162 U. S. 324, 40 L. Ed. 984; Hanks Dental Ass'n v. International Tooth-Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989: Salt Lake City v. Smith (1900) 104 Fed. 457, 469, 43 C. C. A. 637; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560 (dissenting opinion); Jerman v. Stewart, Gwynne & Co. (C. C. 1882) 12 Fed. 271, 273; Smith v. Chicago & N. W. R. Co. (C. C. 1889) 38 Fed. 321, 322; Ferguson v. Dent (C. C. 1891) 46 Fed. 88, 89; Lowrey v. Kusworm (C. C. 1895) 66 Fed. 539, 540; Crocker-Wheeler Co. v. Bullock (C. C. 1904) 134 Fed. 241; Compania Azucarera Cubana v. Ingraham, Maxwell & Beals (C. C. 1910) 180 Fed. 516; Strong v. U. S. (D. C. 1888) 34 Fed. 17, 19; In re Williams (D. C. 1903) 123 Fed. 321, 325; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88.

§ 1478. (R. S. § 867.) Depositions in perpetuam, etc., admissible at discretion of the court.

Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in perpetuam rei memoriam, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof.

Act Feb. 20, 1812, c. 25, § 3, 2 Stat. 682.

Notes of Decisions

Construction and operation.—This section and sections 1479–1481, post, so far as they apply, were intended to provide a system to govern the parties in those courts. Ex parte Fisk (1885) 5 Sup. Ct. 724, 113 U. S. 713, 28 L. Ed. 1117.

This section does not limit the use of such depositions to any particular cases, nor to those taken in any particular manner, but leaves such matters to be determined by the laws of the state. Ohio Copper Mining Co. v. Hutchings (1909) 172 Fed. 201, 96 C. C. A. 653.

The effect of this section is not to exclude testimony taken under section 1477, ante, but to permit the courts of the United States to admit in evidence

testimony perpetuated according to state law. New York & B. Coffee-Polishing Co. v. New York Coffee Polishing Co. (C. C. 1881) 9 Fed. 578.

Admission of deposition in evidence.—Testimony taken under a commission not issued under any practice or rule of the court or of any other court, or in accordance with a statute, is not admissible in the orphans' court. Walsh v. Walsh (C. C. 1829) Fed. Cas. No. 17,117.

A deposition in perpetuam, which has not been recorded according to the law of the state where it is taken, is not competent evidence in the courts of the United States. Gould v. Gould (C. C. 1844) Fed. Cas. No. 5,637.

A deposition taken inter partes, under the state practice, for use there, cannot be employed in a trial in the federal courts except as authorized by this section. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554, 555.

Operation of state law.—2 How. St. Mich. § 7476, authorizing "any person who expects to be a party to a suit to be thereafter commenced in a court of record" to cause the testimony of any material witness to be taken conditionally and perpetuated, does not authorize the taking of a deposition which would be admissible under this section, where the suit has already been begun and disposed of by the court in which commenced, though liable to be remanded for trial or rehearing. Richter v. Jerome (C. C. 1885) 25 Fed. 679, 682.

Rev. St. Ohio, § 5878, concerning the perpetuation of testimony, provides that depositions taken under a petition to take testimony may be given in evidence by either party to the proceeding on a trial between them, or their privies or successors in interest, when the witnesses are dead, etc. Held, that where a life tenant had conveyed her interest in land, and her deposition was taken for the purpose of perpetuating testimony to show the owners of the fee, the deposition is admissible, in a suit for partition of the land between persons claiming as co-tenants, to prove the identity of co-tenants out of possession. McClaskey v. Barr (C. C. 1891) 47 Fed. 154, decree reversed Elder v. McClaskey (1895) 70 Fed. 529, 17 C. C. A. 251.

Cited without definite application, Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989; Salt Lake City v. Smith (1900) 104 Fed. 457, 469, 43 C. C. A. 637; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560 (dissenting opinion); Crocker-Wheeler Co. v. Bullock (C. C. 1904) 134 Fed. 241; Strong v. U. S. (D. C. 1888) 34 Fed. 17, 19; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88.

§ 1479. (R. S. § 868.) Deposition under a dedimus potestatem, how taken.

When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court.

Act Jan. 24, 1827, c. 4, § 1, 4 Stat. 197.

Notes of Decisions

Subpœnas.—The federal district court has no power to issue a summons to compel a witness to appear and testify on a commission from a court of a foreign country to its resident consul to take testimony to be used in a criminal prosecution. Spanish Consul's Petition (D. C. 1867) Fed. Cas. No. 13,202.

Enforcing obedience.—It is the duty of the court or judge within whose jurisdiction testimony is being taken in a suit pending in another district to compel the production of the evidence, even if the judge deems it incompetent, unless the witness or the evidence is privileged, or it cannot possibly be competent, and it would be an abuse of process to compel its production. Dowagiac Mfg. Co. v. Lochren (1906) 143 Fed. 211, 74 C. C. A. 341, 6 Ann. Cas. 573.

This section does not authorize a federal court to compel a witness to appear or to testify in a suit pending in

another district unless a commission for taking the testimony has been issued by the latter court, as provided by this section. In re Robert Gair Co. (1912) 196 Fed. 492, 116 C. C. A. 57.

Where the testimony of a witness is taken by consent on oral interrogatories before an examiner of the court of the district of his residence, for use in an action pending in another court, the former court has power to decide as to the materiality of questions asked, and may compel the witness to answer. In re Allis (C. C. 1890) 44 Fed. 216.

Contempt.—Where the nature of the inquiry does not appear from the commission, witnesses will not be held in contempt for refusal to make answers on examination. In re Glaser (C. C. 1869) Fed. Cas. No. 5,476.

An order to show cause why a witness should not be held in contempt, asked for to lay a foundation for a motion to issue a commission to take the testimony, will be refused where it appears that the order would be useless; but on a subsequent motion an order will be made to issue the commission. New York & Baltimore Coffee Polishing Co. v. New York Coffee Polishing Co. (D. C. 1882) 11 Fed. 813.

Cited without definite application, Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989; Alexander v. U. S. (1906) 26 Sup. Ct. 356, 358, 201 U. S. 117, 50 L. Ed. 686; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560 (dissenting opinion); In re Shephard (C. C. 1880) 3 Fed. 12, 13; Ex parte Moses (C. C. 1892) 53 Fed. 346, 348; Dancel v. Goodyear Shoe Machinery Co. (C. C. 1904) 128 Fed. 753; Crocker-Wheeler Co. v. Bullock (C. C. 1904) 134 Fed. 241; In re Carley (D. C. 1901) 106 Fed. 862; In re Williams (D. C. 1903) 123 Fed. 321, 325; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88.

§ 1480. (R. S. § 869.) Subpœna duces tecum under a dedimus potestatem.

When either party in such suit applies to any judge of a United States court in such district or Territory for a subpœna commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpœna, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpœna, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner, at the time and place stated in the subpœna, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.

Act Jan. 24, 1827, c. 4, § 2, 4 Stat. 199.

Notes of Decisions

Right to sue out writ of error.—Neither appearance before the grand jury of the alleged owner of certain books called for in a subpœna duces tecum directed to his attorney, nor an order appointing a referee to take testimony as to the ownership of such books, makes the owner a party to proceedings to punish the attorney for contempt, so that he has no standing to sue out a writ of error to review the judgment in such proceedings. Grant v. U. S. (1913) 33 Sup. Ct. 190, 227 U. S. 74, 57 L. Ed. 423, affirming judgment In re Grant (D. C.) 198 Fed. 708.

Practice as to issue and form of subpœna stated.—Practice in respect to the issue and form of subpœna duces tecum stated. U. S. v. Babcock (C. C. 1876) Fed. Cas. No. 14,484.

Affidavit.—It is sufficient in an affidavit for the production of a paper in the possession of the prosecution to aver that it "may be material" to the defense. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,694.

Grounds for issuance of subpœna and extent of remedy.—A subpœna duces tecum will not be ordered to compel the clerk of another court to produce original paper. Craig v. Richards (C. C. 1802) Fed. Cas. No. 3,337.

A subpœna duces tecum may issue to the president directing him to bring any paper of which the party praying it has a right to avail himself as testimony. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,692d.

Defendant held entitled to the production of the original letter in the President's hands; a copy not being sufficient. Id.

The court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material to his defense. Id.

In Virginia a motion for subpœna duces tecum is to the discretion of the court, and, as a legal means of obtaining testimony, it cannot be regularly opposed by the opposite party, in his character as such. Id.

Where it does not affirmatively appear that letters and executive orders in the hands of the president, which may be material to the defense of an accused, contain any matter which it would be imprudent to disclose, a subpœna duces tecum will issue. Id.

A subpœna duces tecum will be given for any witness to bring in the books who is supposed to have them. Russell v. McLellan (C. C. 1847) Fed. Cas. No. 12,158.

The federal courts will not grant a subpœna duces tecum for the purpose of bringing up the original papers in a cause in a state court. Dexter v. Sullivan (C. C. 1851) Fed. Cas. No. 3,868.

An officer of a corporation party to a suit, can be compelled by subpœna duces tecum to bring its books before a master to whom the cause is referred. Erie Ry. Co. v. Heath (C. C. 1871) Fed. Cas. No. 4,513.

It is the duty of the person to whom the writ is directed to use reasonable diligence to obey it, and to find and produce the required instruments of evidence if they are within his custody. U. S. v. Babcock (C. C. 1876) Fed. Cas. No. 14,484.

When, under the 67th rule in equity, a court has appointed a special examiner to take testimony in another district, a subpœna duces tecum may issue from the clerk's office of the latter district in the usual way, without a direct order of court, and the court of that district has power to punish a disobedience thereof. This section is restricted to the taking of depositions de bene esse, or in perpetuam rei memoriam and under a dedimus potestatem, according to the provisions of sections 1472, 1477, ante. Johnson Steel Street-Rail Co. v. North Branch Steel Co. (C. C. 1891) 48 Fed. 191.

This section shows that Congress, in legislating on this subject, has carefully restricted the power of the courts to cases in which the evidence is relevant and material. U. S. v. Terminal R. Ass'n (C. C. 1907) 154 Fed. 268.

Under this section, a witness whose deposition was taken in a federal district or territory other than that in which the suit was pending, while required to sign the deposition, cannot be compelled to surrender for attachment thereto original documents which he had been subpœnaed to produce; the party taking the deposition being at most only entitled to copies. Smith v. National Bank of D. O. Mills & Co. (C. C. 1910) 193 Fed. 255.

On application for a subpœna duces tecum directed to a consul, it must appear that the document is not an official paper protected by law from examination and seizure. In re Dillon (D. C. 1854) Fed. Cas. No. 3,914.

The vice president, who was also secretary and treasurer, of a foreign railroad corporation, having an office in New York, held could not be required to produce books of the company, which had been in his control, but several years before had been sent to the home office, in another state, and were there in charge of a co-ordinate officer, over whom he had no control. In re Sykes (D. C. 1878) Fed. Cas. No. 13,707.

A subpœna duces tecum requiring a military officer to produce official papers on file at headquarters at his department will be set aside, copies of such papers being admissible in evidence. Corbett v. Gibson (D. C. 1879) Fed. Cas. No. 3,221.

The secretary's regulations in respect to an inspection of customhouse books and papers does not make it unlawful for the collector to produce them in court under subpœna, or at the request of the district attorney. U. S. v. Hutton (D. C. 1879) Fed. Cas. No. 15,433.

The writ of subpœna duces tecum is strictly the assistance of a court to a litigant as such and nothing more. The court will not allow a party to turn it into a writ of replevin, nor allow it to be used to defeat, impair, or prejudice the rights of a witness, or to entitle a party to the judgment, discretion, or professional opinion or services of the witness. Elting v. U. S. (1892) 27 Ct. Cl. 158.

Right to second subpœna.—A second writ of subpœna duces tecum cannot issue after the first has been served and while it remains unexecuted and unreturned. Elting v. U. S. (1892) 27 Ct. Cl. 158.

Other remedies.—Since, under this section, either party may call the other

as a witness, and by subpœna duces tecum require him to produce books and papers, the complainant cannot give jurisdiction to a court of equity, in a proceeding where his remedy is otherwise perfect at law, by asking for a discovery. Paton v. Majors (C. C. 1891) 46 Fed. 210.

On a bill for an accounting, when the cause is at issue, a motion to inspect the books will not be granted if equivalent relief can be obtained by a subpœna duces tecum requiring the production of the books before the examiner. Clarke v. Eastern Building & Loan Ass'n (C. C. 1898) 89 Fed. 779.

Cited without definite application, Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989; Alexander v. U. S. (1906) 26 Sup. Ct. 356, 358, 201 U. S. 117, 50 L. Ed. 686; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560 (dissenting opinion); In re Shephard (C. C. 1880) 3 Fed. 12–13; Ex parte Moses (C. C. 1892) 53 Fed. 346, 348; Dancel v. Goodyear Shoe Machinery Co. (C. C. 1904) 128 Fed. 753; Brown v. McDonald (C. C. 1904) 130 Fed. 964 (reversed [1905] 133 Fed. 897, 67 C. C. A. 59); Crocker-Wheeler Co. v. Bullock (C. C. 1904) 134 Fed. 241; In re Carley (D. C. 1901) 106 Fed. 862; In re Williams (D. C. 1903) 123 Fed. 321, 325; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88.

§ 1481. (R. S. § 870.) Witnesses under a dedimus potestatem, when required to attend.

No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at, the place of examination, are paid or tendered to him at the time of the service of the subpœna.

Act Jan. 24, 1827, c. 4, §§ 1, 2, 4 Stat. 197, 199.

The "two preceding sections" mentioned in the first sentence of this section, were R. S. §§ 868, 869, ante, §§ 1479, 1480.

Notes of Decisions

Payment or tender of fees.—Where fees of travel and one day's attendance, demanded by a witness at the time of the service of the subpœna in a civil cause in the federal court, are not paid, the witness is not liable for contempt for failure to attend. In re Thomas (C. C. 1871) Fed. Cas. No. 13,889.

The fees must be paid or tendered at the time the summons or subpœna is served. In re Griffen (D. C. 1868) Fed. Cas. No. 5,810.

A failure to tender travel fees to a witness subpœnaed by the government will not excuse his failure to appear, if he has means to travel. U. S. v. Durling (D. C. 1869) Fed. Cas. No. 15,010.

Cited without definite application, Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989; Dowagiac Mfg. Co. v. Lochren (1906) 143 Fed. 211, 74 C. C. A. 341, 6 Ann. Cas. 573; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560 (dissenting opinion); Tomlinson v. Moore (C. C. 1910) 189 Fed. 845; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88; Dubois v. U. S. (1890) 25 Ct. Cl. 195.

§ 1482. (R. S. § 871.) Depositions in District of Columbia in suits pending elsewhere.

When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the supreme court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified.

Act March 3, 1869, c. 128, § 1, 15 Stat. 324.

§ 1483. (R. S. § 872.) Same subject; when no commission nor notice.

When it satisfactorily appears by affidavit to any justice of the supreme court of the District of Columbia, or to any commissioner for taking depositions appointed by said court—First. That any person within said District is a material witness for either party in a suit pending in any State or territorial or foreign court; Second. That no commission nor notice to take the testimony of such witness has been issued or given; and Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, such officer shall issue his summons, requiring the witness to appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit.

Act March 3, 1869, c. 128, § 2, 15 Stat. 325.

§ 1484. (R. S. § 873.) Same subject; manner of taking and transmitting the deposition.

Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit.

Act March 3, 1869, c. 128, § 3, 15 Stat. 325.

The "two preceding sections" mentioned in the first sentence of this section were R. S. §§ 871, 872, ante, §§ 1482, 1483.

§ 1485. (R. S. § 874.) Same subject; witness fees.

Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.

Act March 3, 1869, c. 128, § 4, 15 Stat. 325.

The "said provisions relating to the District of Columbia," mentioned in this section, were those of R. S. §§ 872, 873, ante, §§ 1483, 1484.

Provisions relating to the fees of witnesses were made by R. S. §§ 848–851, ante, §§ 1452–1456.

§ 1486. (R. S. § 875, as amended, Act Feb. 27, 1877, c. 69, § 1.) Letters rogatory from United States courts or from courts of foreign countries to United States courts.

When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the Government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. When letters rogatory are addressed from any court of a

foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts.

Act March 3, 1863, c. 95, § 4, 12 Stat. 770. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241.

This section as enacted in the Revised Statutes contained only the provisions relating to the return of commissions or letters rogatory to take the testimony of witnesses in foreign countries, which ended with the words "the method of returning the same." The further provision, relating to letters rogatory from courts of foreign countries, was added by amendment by a provision of Act Feb. 27, 1877, c. 69, § 1, cited above.

Provisions for taking testimony of witnesses residing in the United States for use in suits in courts of foreign countries were made by R. S. §§ 4071–4074, post, §§ 7619–7622.

Notes of Decisions

History and operation of statute.—This section treats of letters used in cases in which the United States as a party or as an interest, but does not limit the power of the court to issue letters. De Villeneuve v. Morning Journal Ass'n (D. C. 1913) 206 Fed. 70.

Prior to the enactment of Act March 2, 1855, c. 140, no law of the United States existed for the execution of foreign rogatory commissions to take testimony in the United States. (1855) 7 Op. Atty. Gen. 56.

Letters rogatory.—Letters rogatory from the first district judge of Vera Cruz, Mexico, stating that, for the purpose of clearing up the details of a certain importation, he has made a decree directing the issue of letters rogatory, which decree purports to have been made in proceedings relating to an investigation as to the smuggling of certain cotton, do not show that the "proceedings" amount to a "suit for the recovery of money or property," within the meaning of section 7619, and do not warrant an order directing the attendance of a witness to answer the interrogatories. In re Letters Rogatory from First District Judge of Vera Cruz (C. C. 1888) 36 Fed. 306.

—— Power to issue and grounds for issuance.—The circuit court will issue letters rogatory, for the purpose of obtaining testimony, when the government of the place where the evidence is to be obtained will not permit a commission to be executed. Nelson v. U. S. (C. C. 1816) Fed. Cas. No. 10,116.

The power of the United States courts to authorize the taking of depositions on letters rogatory from courts of foreign jurisdictions exists by international comity; but no comity of any kind can be invoked by a mere investigating committee appointed by congress. In re Pacific Ry. Commission (C. C. 1887) 32 Fed. 241, 256.

Letters rogatory may be issued from a circuit court, where testimony cannot otherwise be obtained in foreign jurisdictions, but it must be shown with certainty that a commission is not adequate, preferably by the issuance of such commission and its return, showing the impossibility, after proper efforts, of obtaining the desired testimony thereunder. Gross v. Palmer (C. C. 1900) 105 Fed. 833.

A federal court has power to issue letters rogatory to obtain the testimony of witnesses in foreign jurisdictions, where a commission is likely to prove inadequate. De Villeneuve v. Morning Journal Ass'n (D. C. 1913) 206 Fed. 70.

Certificate.—The certificate of a consul of the United States, under his seal, is not sufficient. A certificate of the proceedings of a court under the seal of a person who states himself to be the secretary of foreign affairs in Portugal, is not evidence. If the decrees of the Portuguese colonies are transmitted to the seat of government and registered in the department of state, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient prima facie evidence. Church v. Hubbart (1804) 2 Cranch, 187, 2 L. Ed. 249.

"Read in evidence."—It is no objection to reading a deposition taken abroad that the witnesses had previously been examined and cross-examined under a commission in the United States. Winthrop v. Union Ins. Co. (C. C. 1807) Fed. Cas. No. 17,901.

§ 1487. (R. S. § 876.) Subpœnas for witnesses to run into another district.

Subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: Provided, That in civil causes the witnesses living out of the dis-

trict in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.

Act March 2, 1793, c. 22, § 6, 1 Stat. 335.

In a civil proceeding by the United States under the anti-trust laws, witnesses may be subpœnaed from outside the 100-mile radius, upon the court's permission being first obtained, under Act Oct. 15, 1914, c. 323, § 13, post, § 8835l.

Notes of Decisions

Construction and operation.—This provision was enacted for the protection of witnesses, and has not been changed by the bankruptcy law, so far as it applies to matters before the Circuit or District Court. In re Cole (D. C. 1904) 133 Fed. 414.

Except by act of Congress, neither the District Court nor one of its commissioners has power to summon a witness at his residence in another district, whether his presence be desired before the court itself or before the commissioner. U. S. v. Stern (D. C. 1910) 177 Fed. 479.

The only limitation placed by this section was for the purpose of extending protection to the witness in not compelling him to appear except within certain limits. In re Washington Steel & Bolt Co. (D. C. 1914) 210 Fed. 984.

Issuance of subpœna—Necessity and right.—For a witness whose deposition is taken because he lives beyond 100 miles from the place of trial it is not necessary to issue a subpœna. Patapsco Ins. Co. v. Southgate (1831) 5 Pet. 604, 616, 8 L. Ed. 243.

A United States court, proceeding under state laws in proceedings supplementary to execution, is not affected by a provision of such laws that a witness cannot be compelled to attend in such proceedings at a place without the county of his residence or place of business; but such court may issue subpœnas for witnesses within its district or to compel the attendance of witnesses from other districts who live within 100 miles. Meyer v. Consolidated Ice Co. (C. C. 1908) 163 Fed. 400.

This section does not authorize either a district judge or a United States commissioner to summon a witness in a criminal case beyond the state to appear at a preliminary bearing before the commissioner, such hearing not being one of the stages of the case before the court. U. S. v. Stern (D. C. 1910) 177 Fed. 479.

Fees and mileage.—The object of this section is to protect a witness against being compelled to go far from home against his will, but does not render voluntary attendance, reasonable compensation, or taxation of the fees of any witness unlawful. U. S. v. Sanborn (C. C. 1886) 28 Fed. 299, 303.

Witnesses voluntarily attending a court more than 100 miles distant from their residences can only recover mileage for 100 miles. Eastman v. Sherry (C. C. 1889) 37 Fed. 844, 846.

Section 1472, ante, when construed in connection with this section, justifies the inference that it was the intention of Congress to limit the allowance of mileage to the distance of 100 miles, where the witness lives in another district. The Vernon (D. C. 1888) 36 Fed. 113, 116.

Compelling attendance of witness.—The attendance of a witness living within 100 miles, but outside, of the District of Columbia, may be compelled by the circuit court of the District. Lewis v. Mandeville (C. C. 1806) Fed. Cas. No. 8,326; Voss v. Luke (C. C. 1806) Fed. Cas. No. 17,014; Hodgson v. Butts (C. C. 1807) Fed. Cas. No. 6,563; Sommerville v. French (C. C. 1807) Fed. Cas. No. 13,173; Gustine v. Ringgold (C.C. 1831) Fed.Cas.No. 5,877.

Judges of a county court are not excused from obeying a subpœna to appear as witnesses on the ground that the judges of the state supreme court are holding a nisi prius court in the county, and that the occasion seems to require respectful attention to them on the part of the county judges. U. S. v. Caldwell (C. C. 1795) Fed. Cas. No. 14,708.

An attachment will not be granted against a witness, unless a subpœna has been previously issued, and actually served, and all the documents upon which it is awarded must be filed with the court. Id.

Witnesses residing more than 100 miles from the place of trial, and out of the district, cannot be compelled to attend. Henry v. Ricketts (C. C. 1809) Fed. Cas. No. 6,386.

A witness residing in Virginia cannot be compelled, by attachment, to attend the circuit court of the District of Columbia, in a criminal cause. Ex parte Pleasants (C. C. 1833) Fed. Cas. No. 11,225.

The absence of a witness on the hearing of an admiralty appeal is no ground of continuance, where he failed to attend in the court below, and no effort was made to secure his attendance in the circuit court until five days before the case on appeal was called for trial. Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794.

Granting of attachment for disobedience of subpœna running beyond the district is discretionary, and will be refused where circumstances render it oppressive. Ex parte Beebees (C. C. 1851) Fed. Cas. No. 1,220.

On a motion for an attachment against witnesses, the court will not

examine to determine whether the foreign suit is real or fictitious. Ex parte Judson (C. C. 1853) Fed. Cas. No. 7,561.

Where a witness living in another state and district fails to obey a subpœna, and an attachment is issued for him, such attachment should be directed to the marshal of the court issuing it. U. S. v. Potter (C. C. 1858) Fed. Cas. No. 16,075.

A person brought from another state under a writ of habeas corpus ad testificandum, and discharged on habeas corpus, must be sent back in charge of the marshal of the district. In re Hamilton (D. C. 1867) Fed. Cas. No. 5,976.

Bankr. Act July 1, 1898, § 41, post, § 9625, enacts that no person shall be required to attend as a witness before a referee in bankruptcy at a place outside of the state of his residence, and more than 100 miles from such place of residence. The rule in force when the bankrupt law was adopted, with respect to the power to compel the personal attendance of witnesses, was embodied in this section, which declares that subpœnas for witnesses who are required to attend a court of the United States in any district may run into any other district; provided that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than 100 miles from the place of holding the same. Held, that one cannot be compelled to attend a reference in bankruptcy within the state of his residence, but at a distance of more than 100 miles from where he resides. In re Hemstreet (D. C. 1902) 117 Fed. 568.

Cited without definite application, Sergeant v. Biddle (1819) 4 Wheat. 508, 511, 4 L. Ed. 627; Texas & P. Ry. Co. v. Nelson (1892) 50 Fed. 814, 816, 1 C. C. A. 688; In re Johnson & Knox Lumber Co. (1907) 151 Fed. 207, 80 C. C. A. 259; Atchison v. Morris (C. C. 1882) 11 Fed. 582; Smith v. Chicago & N. W. R. Co. (C. C. 1889) 38 Fed. 321, 322; Hanchett v. Humphrey (C. C. 1899) 93 Fed. 895, 898; Jennings v. Menaugh (C. C. 1902) 118 Fed. 612; Blood v. Morrin (C. C. 1905) 140 Fed. 918; West Pub. Co. v. Edward Thompson Co. (C. C. 1907) 151 Fed. 138; Tomlinson v. Moore (C. C. 1910) 189 Fed. 845; The L. B. X. (D. C. 1898) 88 Fed. 290, 296; In re Williams (D. C. 1903) 123 Fed. 321, 325; U. S. v. National Surety Co. (D. C. 1909) 168 Fed. 314.

§ 1488. (R. S. § 877.) Witnesses; form of subpœna; attendance under.

Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpœnaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney.

Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 169.

Provisions relating to the issuance of subpœnas to witnesses and the attendance of such witnesses to give testimony for use in patent causes were made by R. S. §§ 4906–4908, post, §§ 9451–9453.

Provisions relating to subpœnas to witnesses in hearings before registers and receivers of land offices were made by Act Jan. 31, 1903, c. 344, §§ 1, 3, post, §§ 4499, 4501.

Provisions for subpœnas to witnesses to appear before courts-martial are contained in the new articles of war, Act Aug. 29, 1916, c. 418, § 3, post, § 2308a.

Notes of Decisions

Construction and operation. — This section does not apply to hearings before commissioners. Puleston v. U. S. (C. C. 1898) 85 Fed. 570, 575.

Form of subpœna. — This section should not be construed to forbid such subpœnas from being entitled in each cause in which the witnesses summoned under them are to testify; for if such subpœnas are issued generally, without reference to the cause in which the witnesses are especially wanted, the accused person has no means of learning with certainty who are the leading witnesses against him whom he is to confront at his trial, and the guaranty of the sixth article of the amendments to the national constitution is thereby rendered useless to him, in every case in which his ignorance as to who the leading witnesses of the prosecution are to be works a surprise upon him. U. S. v. Ralston (C. C. 1883) 17 Fed. 895.

Under this section the witnesses for the United States must be summoned to testify, not only in the cause in which the subpœna is entitled, but generally for the United States, "before the grand or petit jury, or both." Id.

The names of as many witnesses in the same cause as convenience of service will permit are to be included in one subpœna, requiring the witnesses to attend and testify generally, i. e., either before the grand jury or petit jury, or both. In re Shaw (C. C. 1909) 172 Fed. 520.

Service of subpœna.—It is not necessary that the subpœna for witnesses should be served by the marshal. Cum-

mings v. Akron Cement & Plaster Co. (C. C. 1869) Fed. Cas. No. 3,473; In re Schwartz (C. C. 1877) Id. 12,502; Gordon v. Scott (D. C. 1868) Fed. Cas. No. 5,620.

The indorsement, by a witness, of "Accepted" on a subpœna never placed in the hands of an officer, will not take the place of service of the subpœna. Dreskill v. Parish (C. C. 1851) Fed. Cas. Nos. 4,075, 4,076.

A marshal should be allowed the usual fees for serving subpœnas or other process, even when such process is unnecessary or contrary to act of congress, if issued without connivance or procurement on his part. Donahower v. U. S. (C. C. 1896) 77 Fed. 153, affirmed (1898) 85 Fed. 547, 29 C. C. A. 342.

Witness before grand jury.—A subpœna compelling witnesses to appear and testify before a federal grand jury must either disclose the name or names of the persons against whom the inquiry is instituted, or the subject of the investigation. In re Shaw (C. C. 1909) 172 Fed. 520.

The evidence that shall be received before a grand jury is not subject to judicial control. In re Kittle (C. C. 1910) 180 Fed. 946.

As a general rule, a grand jury should hear no other evidence than that adduced by the prosecution; but they are sworn "to inquire and true presentment make," and if, in course of their inquiries, they have reason to believe that there is other evidence not presented, and within reach, which would qualify or explain away the charge under investigation, it would be their duty to order such evidence to be produced. U. S. v. Kilpatrick (D. C. 1883) 16 Fed. 765.

Evidence of confessions should never be admitted before a grand jury, except under the direction of the court, or unless the prosecuting officer of the state is present and can make the full preliminary inquiries necessary to render the evidence admissible. Id.

Investigations before grand juries must be made in accordance with the well-established rules of evidence, and they must hear the best legal proofs of which the case admits. No evidence should be received by a grand jury which would not be admissible in a court upon the trial of a cause. Hearsay evidence upon questions before a grand jury is no more admissible than before the court. Id.

Whether a witness is or is not an expert as to any particular science or art is to be determined by the court before he can be admitted to testify before a grand jury. Id.

A witness before a grand jury has no privilege to have his testimony treated as a confidential communication, but he ought to be considered as deposing under all the obligations of an oath in a judicial proceeding. Id.

Subpœna duces tecum.—A subpœna duces tecum directed to a corporation is not illegal because it does not conform to the provisions of this section that witnesses required on the part of the United States shall be subpœnaed "to attend to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney." A subpœna duces tecum is not invalid because it contains no ad testificandum clause, but simply directs a corporation, which could not give oral testimony, to produce books. The officer of a corporation having in his possession the books of the corporation, described in a subpœna duces tecum directed to the corporation, must produce the books or be held in contempt. Wilson v. U. S. (1911) 31 Sup. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

A subpœna duces tecum can only be used to compel the production of documentary evidence, books, papers, accounts, and the like. In re Shephard (C. C. 1880) 3 Fed. 12. It will not be issued to compel the production by an attorney of a letter given him by his client as a paper material to his defense, which the attorney declines to deliver on the ground of privilege; no reason appearing why such process cannot be served on the client. Arnold v. Chesebrough (C. C. 1886) 41 Fed. 74.

The fact that a subpœna requires a witness to produce books and papers which he cannot lawfully be required to produce does not affect the legality of the issuance of the subpœna nor the obligation of the witness to appear in obedience to it. Leber v. U. S. (1909) 170 Fed. 881, 96 C. C. A. 57.

A subpœna duces tecum addressed to a witness whose testimony is taken for use in a pending case in another district goes only on order of the court. It was a proper exercise of discretion for the court to refuse to issue a subpœna duces tecum in a suit for infringement of a patent to compel the production of a document irrelevant to the issues, and which could only furnish information as to other possible infringers. Vacuum Cleaner Co. v. Platt (1912) 196 Fed. 398, 116 C. C. A. 220.

A subpœna duces tecum requiring the production of books of a corporation before a grand jury held not invalid because there was no charge pending before the grand jury against the corporation or its officers or stockholders. Nor because it contained no ad testificandum clause. Norcross v. U. S. (1913) 209 Fed. 13, 126 C. C. A. 155.

Complainant in an action for the infringement of a patent made admissions, on an application for another patent on which letters never issued, which defendant contends greatly restrict the claim of the patent in suit. Held, that complainant could not refuse obedience to a subpœna duces tecum to produce such application, and the correspondence with the patent

office in regard thereto, on the ground that such documents, if produced, would be immaterial, as the court will not pass on that question until the evidence is before it. Edison Electric Light Co. v. United States Electric Lighting Co. (C. C. 1890) 44 Fed. 294. Defendant, in an action for infringement of a patent, claimed that complainant, in a divisional application upon which letters patent were never issued, made admissions which greatly restrict the claim of the patent in suit, and, a foundation for secondary evidence being laid, sought to compel complainant to bring into court a copy thereof, which was in its possession. Held, that a subpœna duces tecum was the proper method when the paper was identified by a specific description. Id. (C. C. 1891) 45 Fed. 55.

The president of a corporation which is a party to a suit in equity may be compelled, by subpœna duces tecum, to produce drawings of the company material to the issue. Johnson Steel Street-Rail Co. v. North Branch Steel Co. (C. C. 1891) 48 Fed. 195. A subpœna duces tecum can only be used to require the production of documents, and a piece of metal in the nature of a form or model is not the subject thereof. Johnson Steel Street-Rail Co. v. North Branch Steel Co. (C. C. 1891) 48 Fed. 191. A subpœna duces tecum, requiring a witness not a party to the suit to produce certain drawings, must be obeyed, although the papers relate to a valuable secret method of producing a manufactured article. Id. The word "document," as applied to instruments the production of which may be required by subpœna duces tecum, includes any instrument on which is recorded by means of letters, figures, or marks, matters which may be used in evidence, and applies to writings, to words printed, lithographed, or photographed, to seals, plates, or stones on which inscriptions are cut or engraved, to photographs and pictures, and to maps and plans. Id.

An internal revenue collector is not justified in refusing to produce, in obedience to a subpœna duces tecum issued by a state court, the application or return made by a person who desires to pay the tax imposed on persons engaging in the retail liquor business because of alleged instructions from the commissioner of internal revenue not to produce such papers for use in evidence in the state court. In re Hirsch (C. C. 1896) 74 Fed. 928, order affirmed (1898) 87 Fed. 1005, 31 C. C. A. 350. An internal revenue collector is not justified in refusing to produce, in obedience to a subpœna duces tecum issued by a state court, the application or return made by a person to obtain a retail liquor license, either by the nature of such documents or instructions from the commissioner of internal revenue. Id.

A general averment in a petition that a large number of books, records, and papers of a defendant, specified, are material and necessary for plaintiff's use in a suit, is not sufficient to authorize the issuance of a subpœna duces tecum to compel their production. Dancel v. Goodyear Shoe Machinery Co. (C. C. 1904) 128 Fed. 753.

A court will not punish a party for contempt for failure to obey a subpœna duces tecum requiring the production of a large list of books and papers, many of which apparently can have no bearing on the issues raised by the pleadings, but the party applying will be required to take out separate subpœnas, each of which may then be considered on its merits. Miller v. Mutual Reserve Fund Life Ass'n (C. C. 1905) 139 Fed. 864.

A corporation may be required to produce its books and papers before a grand jury engaged in investigating its acts within reasonable limits, and a subpœna which requires the production of its minute books for three years and letter copy books covering a period of three or four months is not too broad and sweeping. U. S. v. American Tobacco Co. (C. C. 1906) 146 Fed. 557.

A witness cannot excuse his failure to produce books and papers in obedience to a subpœna duces tecum on the ground that the evidence called for is immaterial, irrelevant, or incompetent under the issues in the case that question being one for the court to determine when the evidence is offered. To entitle a party to a subpœna duces tecum to require a witness to produce books and papers, it is not necessary that the court should be satisfied beyond a reasonable doubt of their relevancy and materiality as evidence, but a showing which establishes a reasonable ground to believe they may be so is sufficient, especially where the application is made by the United States in a suit of public interest and importance. The fourth constitutional amendment, prohibiting unreasonable searches and seizures, affords no protection to a witness for his refusal to produce books and papers admittedly in his possession in obedience to a subpœna duces tecum issued by a court of equity. A court of equity has power to compel the production of books and papers by virtue of its inherent and general jurisdiction, and this power is not confined to the parties to the suit, but extends to third persons. U. S. v. Terminal R. Ass'n of St. Louis (C. C. 1906) 148 Fed. 486.

A petition for a subpœna duces tecum is sufficiently definite with respect to the books or documents required, where the description is specific enough to enable the witness to produce them without uncertainty. To entitle a party to a subpœna duces tecum requiring a witness not a party to the action to produce books and documents in his

possession, it is not sufficient to allege merely that the documents are material and revelant to the issues in the case; but the facts that will enable the court to determine that they are prima facie material and relevant must be set out. U. S. v. Terminal R. Ass'n (C. C. 1907) 154 Fed. 268.

A subpœna duces tecum requiring an officer of a railroad company to produce before a federal grand jury letters, papers, memoranda, and documents relating to certain claims designated by number, and all papers, documents, books, and memoranda showing the final disposition of the claims and the method by which they were paid or disposed of, etc., was not objectionable for unreasonableness. Santa Fé Pac. R. Co. v. Davidson (C. C. 1906) 149 Fed. 603.

A subpœna duces tecum directing a corporation to appear before a federal grand inquest and produce a large quantity of contracts, mortgages, leases, agreements, correspondence, etc., and to testify generally with reference to alleged acts in violation of Act Congress July 2, 1890, c. 647, to protect trade against unlawful restraint and monopolies, etc., held fatally defective as unreasonable. In re American Sugar Refining Co. (C. C. 1910) 178 Fed. 109, writ of error dismissed (1911) American Sugar Refining Co. v. U. S., 32 Sup. Ct. 532, 223 U. S. 743, 56 L. Ed. 639.

A subpœna duces tecum may be properly directed to a corporation requiring it to produce its books for examination before a grand jury; the writ being complied with when the books have been presented in actual grand jury session and are taken away again by the messenger of the corporation as soon as the particular session adjourns, they remaining with the grand jury during the session. Id.

A subpœna duces tecum, issued at the instance of complainant in an infringement suit, to require the production of books and records of defendant, set aside as too broad in its requirements. Hoppe v. W. R. Ostrander & Co. (C. C. 1910) 183 Fed. 786.

When the district attorney, either upon his own motion or at the instance of the grand jury, applies for a subpœna duces tecum, he should state that there is a question either pending before, or which is intended to be brought before, the grand jury or the court, in which certain telegrams sent from or received at the telegraph office in charge of the witness named are believed to be pertinent to the question to be considered, and should state the name of the parties sending or receiving the telegrams, and should further state the periods between which, or the day upon which, they were sent or received, which should be a reasonable time; or, if the names of the parties should not be known, then the time and the subject-matter which the dispatches contain, or to which they relate, should be stated. The subpœna should describe the telegrams required to be produced as they are described in the application for the writ, either naming the parties sending or receiving them and the subject-matter to what they relate, or, if the names are unknown, then the subject-matter and the time or the periods between which they were sent or received. It is the duty of the witness subpœnaed to appear before the grand jury or court and produce the telegrams stated in the subpœna, and if he has doubts as to whether or not he should produce any telegram called for, he may submit it to the inspection of the court, which may decide on the question of its production. U. S. v. Hunter (D. C. 1882) 15 Fed. 712.

A subpœna duces tecum, requiring a witness to appear before the federal grand jury, and bring telegrams, will not be quashed because no fees were tendered in advance. A subpœna duces tecum, directed to the superintendent of a telegraph company, to produce telegrams between a number of parties, is not defective merely because it does not describe the messages by date, or identify the particular ones required, if they are described with such particularity as appears to be practicable. In re Storror (D. C. 1894) 63 Fed. 564.

Discharge of witness.—Under the statute it is proper that the district attorney should officially inform the clerk of the discharge of a witness, but the discharge should not be filed. U. S. v. Taylor (1893) 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335, reversing (C. C. 1891) 45 Fed. 531.

The clerks of the federal courts are entitled to fees for filing the discharges given by the district attorney to witnesses for the government, since this section provides that such witnesses shall not depart without leave of the court or the district attorney, and it is the approved practice to give them written discharges for use in drawing their pay from the marshal. U. S. v. Van Duzee (1892) 52 Fed. 930, 3 C. C. A. 361, affirming Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643.

It is the duty of the district attorney to furnish written discharges of witnesses, and it is proper that the files of the court should show that discharges have been granted. Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643, 645, affirmed (1892) 52 Fed. 930, 3 C. C. A. 361.

Cited without definite application, Texas & P. Ry. Co. v. Nelson (1892) 50 Fed. 814, 816, 1 C. C. A. 688.

§ 1489. (R. S. § 878.) Witnesses in behalf of indigent defendants in criminal cases.

Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

Act Aug. 8, 1846, c. 98, § 11, 9 Stat. 74.

Notes of Decisions

"Person indicted."—This section gives no authority to order subpœnas for one against whom a bill of indictment is pending before a grand jury. U. S. v. Stewart (D. C. 1891) 44 Fed. 483.

Affidavit or application.—Statements made in an application filed under this section are competent to contradict the testimony of the applicant and are not within the meaning of R. S. § 860. Tucker v. U. S. (1894) 14 Sup. Ct. 299, 301, 151 U. S. 164, 38 L. Ed. 112.

All applications in criminal cases for summoning witnesses should be made to appear, with the action thereon, on the records, or among the files of the court. Van Duzee v. U. S. (D. C. 1896) 73 Fed. 794.

Limiting number of witnesses.—Under this section it was within the discretion of the trial court to limit the number of defendant's witnesses to be so subpœnaed to four on each particular point named in defendant's præcipe. O'Hara v. U. S. (1904) 129 Fed. 551, 64 C. C. A. 81.

Fees.—An allowance to a clerk of a federal court of charges for a transcript of record on writ of error in criminal proceedings, ordered by the court on behalf of an indigent defendant, is not precluded on the theory that this section is exclusive, and does not cover the charge for such service. U. S. v. Jones (1904) 24 S. Ct. 561, 562, 193 U. S. 528, 48 L. Ed. 776, modifying judgment (1902) 37 Ct. Cl. 565, and affirming judgment (1902) 37 Ct. Cl. 571.

Compensation is properly allowed a clerk of a federal court for services in connection with affidavits of defendants in criminal cases of inability to pay costs. Id.

Charges for services of a clerk of a federal court on behalf of indigent defendants in criminal cases, which consist in administering oaths by order of court to defendant's witnesses, in administering oaths to affidavits of poverty, and affixing jurats, in filing and entering applications for process, in filing and entering motions of defendants for new trial, and in rendering services to defendant in a capital case, by order of court, in prosecution of writ of error, are properly allowed under this section. U. S. v. Jones (1904) 24 Sup. Ct. 561, 563, 193 U. S. 528, 48 L. Ed. 776, modifying judgment (1902) 37 Ct. Cl. 565, and affirming judgment (1902) 37 Ct. Cl. 571.

The clerk is entitled to charge 10 cents for filing orders of court for the subpœna of poor persons, witnesses, who have applied for such order. Marsh v. U. S. (D. C. 1898) 88 Fed. 879.

Discretion to subpœna witnesses.—Whether or not the trial should be delayed for several days to grant defendant's application, made just before he called his last witness, for process for additional witnesses, to be served at the expense of the government, is in the discretion of the trial court, and its refusal to grant the application is no ground for a new trial, especially where the additional evidence does not seem to be important. Crumpton v. U. S. (1891) 11 Sup. Ct. 355, 356, 138 U. S. 361, 34 L. Ed. 958.

The summoning of witnesses at the expense of the government is left to the discretion of the trial court, and its action is not reviewable. Goldsby v. U. S. (1895) 16 Sup. Ct. 216, 218, 160 U. S. 70, 40 L. Ed. 343.

Cited without definite application, U. S. v. Van Duzee (1891) 11 Sup. Ct. 758, 760, 140 U. S. 169, 35 L. Ed. 399; Bristol v. U. S. (1904) 129 Fed. 87, 63 C. C. A. 529; Breese v. Same (1913) 203 Fed. 824, 122 C. C. A. 142; In re Roessler & Hasslacher Chemical Co. (C. C. 1891) 49 Fed. 271, 272 (affirmed [1892] 56 Fed. 481, 4 C. C. A. 1).

§ 1490. (R. S. § 879.) Recognizance of witnesses at the hearing of charges in criminal cases.

Any judge or other officer who may be authorized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost.

Act Sept. 24, 1789, c. 20, § 33, 1 Stat. 91. Act Aug. 23, 1842, c. 188, § 2, 5 Stat. 517. Act Aug. 8, 1846, c. 98, § 7, 9 Stat. 73.

Provisions for the return of the recognizances, and the removal of witnesses committed, to the district where the trial is to be had, were made by R. S. § 1014, post, § 1674.

Notes of Decisions

Taking of recognizances.—A commissioner has no authority, under this section, to charge for taking recognizances of witnesses to appear at an adjourned hearing before him, as the power given by it "to any judge or other officer" to take recognizances of any witness produced against the prisoner "for his appearance to testify in the case" refers only to taking recognizances of witnesses to appear before the court having cognizance of the offense. Hallett v. U. S. (C. C. 1894) 63 Fed. 817.

Where there is any doubt whether witnesses for the prosecution will appear, they should be recognized. U. S. v. Durling (D. C. 1869) Fed. Cas. No. 15,010.

Discharge on own recognizance.—One arrested as a witness for the United States in a criminal case, under Act Aug. 8, 1846, § 7, discharged on his own recognizance, under circumstances of peculiar hardship. U. S. v. Lloyd (C. C. 1860) Fed. Cas. No. 15,614.

Attendance of witness.—Where a witness appears in court at the term mentioned in his recognizance, and the same is not respited, he is not bound to attend at the following term to which the cause is continued. U. S. v. Butler (C. C. 1807) Fed. Cas. No. 14,-698.

Order of commitment.—An order to commit a witness for not recognizing in a criminal case to appear and testify, or for a contempt of court, need not be in writing and sealed. Ex parte Paris (C. C. 1847) Fed. Cas. No. 10,-714.

§ 1491. (R. S. § 880.) Vermont; recognizance of witnesses, how taken.

In the district of Vermont, all recognizances of witnesses, taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the district or circuit court thereof, shall be to the circuit court next thereafter to be held in the said district.

Act April 29, 1802, c. 31, § 29, 2 Stat. 167.

§ 1492. (R. S. § 881.) Recognizance of witnesses required at any time on application of district attorney.

Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any criminal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and, for that purpose, may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the

officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge.

Act Aug. 8, 1846, c. 98, § 7, 9 Stat. 73.

§ 1493. (Act March 3, 1887, c. 397, § 2.) Attachment for witness, without previous subpœna, in prosecutions for bigamy, etc.

In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, whether before a United States commissioner, justice, judge, a grand jury, or any court, an attachment for any witness may be issued by the court, judge, or commissioner, without a previous subpœna, compelling the immediate attendance of such witness, when it shall appear by oath or affirmation, to the commissioner, justice, judge, or court, as the case may be, that there is reasonable ground to believe that such witness will unlawfully fail to obey a subpœna issued and served in the usual course in such cases; and in such case the usual witness-fee shall be paid to such witness so attached: Provided, That the person so attached may at any time secure his or her discharge from custody by executing a recognizance with sufficient surety, conditioned for the appearance of such person at the proper time, as a witness in the cause or proceeding wherein the attachment may be issued. (24 Stat. 635.)

This section was part of the Edmunds-Tucker Act, cited above.

See notes to section 1 of this act, ante, § 1466.

§ 1494. (R. S. § 882.) Copies of Department records and papers.

Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.

Act Sept. 15, 1789, c. 14, § 5, 1 Stat. 69. Act Feb. 22, 1849, c. 61, § 3, 9 Stat. 347. Act May 31, 1854, c. 60, § 2, 10 Stat. 297.

Similar provisions relating to copies or transcripts of documents, records, etc., in various offices, are contained in the following sections of this chapter.

A similar provision relating to copies of documents, etc., in the office of the Commissioner of Indian Affairs, was made by Act July 26, 1892, c. 256, § 3, ante, § 719.

Certified copies of papers, documents, certificates, and records required to be used, filed, recorded, or kept under the provisions of the Naturalization Act of June 29, 1906, c. 3592, are to be admitted in evidence equally with the originals, by section 28 of said act, post, § 4383.

Copies of schedules and tariffs of rates, etc., and of contracts, etc., between common carriers, filed with the Interstate Commerce Commission, and statistics, etc., in annual reports of carriers to the Commission, preserved as public records in the custody of the secretary of the Commission, are prima facie evidence of what they purport to be, and copies of and extracts from them, certified by the secretary under seal, are to be received in evidence equally with the originals, by provisions of section 16 of the Interstate Commerce Act of Feb. 4, 1887, c. 104, as amended by Act June 29, 1906, c. 3591, § 5, post, § 8584.

Notes of Decisions

Copies of books.—Volumes—as the American State Papers—published under the authority of congress are competent evidence. Bryan v. Forsyth (1856) 19 How. 334, 338, 15 L. Ed. 674; Magruder v. Perpall (1871) 13 Fla. 602; Dutillet v. Blanchard (1859) 14 La. Ann. 97; Clemens v. Meyer (1892) 44 La. Ann. 390, 10 South. 797; Nixon v. Porter (1858) 34 Miss. 697, 69 Am. Dec. 408.

Copies of records.—A transcript of a record in the pension office, certified as a true copy by the commissioner of pensions, and accompanied by a certificate by the acting secretary of the interior, under the seal of the department, as to the official character of the commissioner, and the faith and credit to which his attestations were entitled, was admissible. Ballew v. U. S. (1895) 16 S. Ct. 263, 160 U. S. 187, 40 L. Ed. 388.

Certified copies of the patent office record of instruments purporting to be assignments are not prima facie proof of the execution or genuineness of the instruments. City of New York v. American Cable Ry. Co. (1894) 60 Fed. 1016, 9 C. C. A. 336, disapprov-

ing Dederick v. Whitman Agricultural Co. (C. C. 1886) 26 Fed. 763, and National Folding Box & Paper Co. v. American Paper Pail & Box Co. (C. C. 1893) 55 Fed. 488.

The records of the Pension Office are admissible to prove the granting of a pension. Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307.

A copy of a manifest taken from the books of a custom house is a copy of a record, and it may be given in evidence when properly proved. U. S. v. Johns (C. C. 1806) Fed. Cas. No. 15,-481.

Certified copies of patent office records of assignments are not primary evidence of such assignments, and are only admissible to prove title to a patent where proper foundation is laid by showing the existence of the original instruments, and that they are lost or destroyed, or that it is out of complainant's power to produce them. National Cash Register Co. v. Navy Cash-Register Co. (C. C. 1900) 99 Fed. 89.

The records of an executive department need not be produced in evidence, but their contents must be shown by authenticated copies, and not by parol. Nock v. U. S. (1866) 2 Ct. Cl. 451.

There being no statute making the certificate of a federal collector of internal revenue that a paper is a copy of a bond on file in his office evidence of that fact in the courts, such copy so certified is inadmissible. Taylor v. Simmons (1885) 75 Ga. 13.

A certificate of the land-office commissioner is competent evidence of the location of half-breed scrip under Act July 17, 1854, although no copy of the scrip is attached to the certificate. Wilcox v. Jackson (1883) 109 Ill. 261.

The public records in the office of the collector of internal revenue may be proved by an examined copy made and sworn to by any competent witness. State v. Loughlin (1890) 66 N. H. 266, 20 Atl. 981.

A copy of a part of the approved roll of Seminole freedmen, not authenticated by any seal, is inadmissible. Newsom v. Langford (Tex. Civ. App. 1915) 174 S. W. 1036.

—— **Census returns.**—Copies of United States census returns, certified by the Secretary of the Interior, showing the ages of members of decedents' family, were admissible as bearing upon an issue as to the ages of decedents at the time they executed a deed in 1853. Priddy v. Boice (1906) 99 S. W. 1055, 201 Mo. 309.

—— **Records of weather bureau.**—The records of the United States weather bureau, made under the supervision of the director and forecaster in the performance of his duty, were admissible in evidence to prove weather conditions and the velocity of the wind at a particular time and place. Commonwealth v. Dorr (1914) 103 N. E. 902, 216 Mass. 314.

Copies of papers.—A document authenticated by the postmaster general, under the seal of the department, reciting the imposition of a fine upon a mail-route contractor for nonperformance of his contract, as authorized by section 7450, post, is admissible as evidence of such fact, under this section, and is sufficient, prima facie, to support a charge against the contractor, in his account with the department, of the amount of the fine. U. S. v. McCoy (1900) 104 Fed. 669, 44 C. C. A. 125.

A paper purporting to be "a certified extract from the general draft of certain districts as framed by the surveyor general, remaining in his office, under the seal of the office," is not evidence. Griffith v. Tunckhouser (C. C. 1817) Fed. Cas. No. 5,823.

Under a bill to restrain an infringement of a patent, certified copies of certain documents on file in the patent office, which tended to show that complainant, on being notified that a certain claim made by her interfered with that of another applicant, waived an appeal, and struck out such claim from her application, were admissible in proof of such facts, which were pertinent to the issue, though such documents did not purport to be anything in the nature of a record. Toohey v. Harding (C. C. 1880) 1 Fed. 174.

Copies of documents relating to the condemnation and sale of a vessel were certified by the British consul to be copies of official documents on file in his office, and had been proved by deposition a considerable time before the trial, so that the parties were not taken by surprise. Held, that they were admissible in evidence. The J. F. Spencer (D. C. 1869) Fed. Cas. No. 7,315.

A copy of a survey of a vessel, not purporting to have been made by any one connected with her, is not admissible against her, no witness able to prove or disprove its correctness being called or shown to be within reach. The Vivid (D. C. 1870) Fed. Cas. No. 16,-978.

A paper purporting to be the copy of an official order, and certified to be such by a colonel of volunteers, and attached to the deposition of one who has never seen the original, is not sufficiently proven, and is but secondary evidence. The presumption is that better evidence can be found among the records of the War Department. Burroughs v. U. S. (1868) 4 Ct. Cl. 555.

Transcripts from the records of the executive departments, when authenticated by the seal of the department, are evidence, both at the common law and by statute; but the words "documents and papers," used in the acts of Congress, cannot be held to mean every document or paper on file, but such only as were made by an officer or agent

of the government in the course of his official duty. Official documents, duly certified, need no further proof; but other documents, though on file, do not, by the mere fact of certification, become so authenticated as to entitle them to be read in evidence. Block v. U. S. (1871) 7 Ct. Cl. 406.

A receipt for property captured, procured from a military governor by a claimant, and by him filed in an executive department, is not a public document, and an authenticated copy cannot be read in evidence. The original must be produced and proved according to the rules of the law of evidence. Id.

A document purporting to be a printed report of a congressional subcommittee, which is not authenticated, does not purport to be a part of the authenticated journal, is not identified by it, and is not a record required to be kept or a publication required to be made, is not a document entitled to admission in evidence. Marks v. Orth (1889) 121 Ind. 10, 22 N. E. 668.

Where a public document is communicated by the president of the United States to the senate, a copy of such document, printed by order of the senate, is as competent evidence as the original itself could be, to a fact alleged therein. Whiton v. Albany City Ins. Co. (1871) 109 Mass. 24.

Exemplified copies of pension vouchers executed 30 years before, made pursuant to this section, prove themselves, and are admissible in evidence. Murphy v. Cady (1906) 108 N. W. 493, 145 Mich. 33, 13 Detroit Leg. N. 412.

A copy, duly authenticated from the records of the war department, of the letter addressed by the president to the governors of various states in 1862, calling for troops, is admissible in evidence to prove the call. Crowell v. Hopkinton (1863) 45 N. H. 9.

A transcript from the treasury department of the United States, purporting to contain copies of payment to defendant, a United States marshal, and vouchers of certain deputy marshals, is not open to the objection that it is not admissible in evidence because it does not contain all his accounts. Wallace v. Douglas (1894) 114 N. C. 450, 19 S. E. 668.

Under this section, certified copy of certificate given by tax commissioners held admissible. Stephens v. Long (1912) 75 S. E. 530, 92 S. C. 65.

A letter from the commissioner of the general land office at Washington, D. C., to the register and receiver of a United States land office in Wisconsin, not authenticated as a legal certificate, held inadmissible to prove the facts therein stated as to the canceling at the former office of an entry made in, and a certificate issued from, the latter. Bovee v. McLean (1869) 24 Wis. 225.

Authentication.—A certified copy made evidence by statute must show that the statutory requirements have been complied with. U. S. v. Robinson (C. C. 1846) Fed. Cas. No. 16,178.

The mode of authentication, as prescribed by law of transcripts from the executive department, must be strictly pursued, to make them evidence against public debtors. U. S. v. Harrill (C. C. 1857) Fed. Cas. No. 15,310.

The copy of a collector's bond is sufficiently authenticated by the certificate of the secretary of the treasury in a suit on the bond, where the original was in the custody of that department and was wholly disconnected from the transcript certified by the register of the treasury. Chadwick v. U. S. (C. C. 1880) 3 Fed. 750, 752.

Papers certified by the Secretary of the Treasury to have been "a part of the archives of the late so-called Confederate government" cannot be admitted in evidence unless proved by proper testimony. The certificate does not establish their authenticity; nor can the government, as defendants in this court, be exempted from the rules of evidence which apply to claimants. Schaben v. U. S. (1870) 6 Ct. Cl. 230.

The statutes providing for the authentication of copies of books, papers, and documents in the executive departments employ substantially the same language that is used by common-law writers on the same subject, and they must be understood and interpreted by the same reasons that govern at the common law. Block v. U. S. (1871) 7 Ct. Cl. 406.

The seal of the treasury department of the United States, and the signature of the secretary, are sufficient evidence to authenticate the official acts of the secretary, in a state court. White v. St. Guirons (Ala. 1824) Minor, 331.

A copy of an assignment of lands by the Creek tribe of Indians to other Creeks under the treaty of 1812 is properly authenticated by the certificate of the commissioner of Indian affairs, accompanied by the seal of the war department. Johnson v. McGehee (1840) 1 Ala. 186.

In a suit on the bond of a defaulting federal officer, transcripts of the government records, showing a statement of the account of such officer, to be admissible in evidence, must be certified to or authenticated as required by this section. Ewing v. U. S. (1894) 3 App. D. C. 353.

Since, under this section, copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, are to be admitted in evidence equally with the originals thereof, a copy of a contract, indorsed: "A true copy. A. B., Captain Corps of Engineers"—and having the seal of the chief engineer of the

war department affixed to it, is admissible. American Surety Co. v. U. S. (1898) 77 Ill. App. 106.

A paper purporting to be a copy from the records of the auditor of the treasury of the United States, certified by the auditor to be a true copy, but without his official seal, is not admissible in evidence. Wickliffe v. Hill (1823) 13 Ky. (3 Litt.) 330.

"Evidence equally with the originals."—In an action upon an official bond, if the execution thereof is denied, it cannot be proved by a copy certified by the secretary of the treasury under this section; but a copy certified by the register of the treasury under the seal of the department, under section 1498, post, is sufficient proof of such execution, it being declared to have the same force as the original when duly authenticated or proved in court. U. S. v. Humason (C. C. 1881) 8 Fed. 71.

Transcripts from the books of the United States treasury are competent evidence in trials of suits against officers of the United States, brought on their accounts; but they are evidence only, and it is in the discretion of courts and juries to give them what weight they may deem proper in the trials in which the transcripts are used. U. S. v. Ralston (C. C. 1883) 17 Fed. 895.

This section only makes a copy equivalent to the original, and where the original is not competent, if produced, a copy is incompetent. Ex parte La Mantia (D. C. 1913) 206 Fed. 330.

A census is not a record which imparts absolute verity. Western Cherokee Indians v. U. S. (1891) 27 Ct. Cl. 1.

The United States census report, showing the population of the county, is not conclusive evidence that the population was in fact as given in such report. State v. Davis (1902) 92 N. W. 740, 66 Neb. 333.

—— **Originals.**—A communication purporting to be a report from an assistant quartermaster to his chief, but dated after the writer has left the military service, is not an official report, and cannot be admitted in evidence. Brandeis v. U. S. (1867) 3 Ct. Cl. 99.

A letter of the Secretary of the Navy, addressed to the clerk of the Court of Claims, in relation to a matter in question before said court, is not competent evidence. Mason v. U. S. (1868) 4 Ct. Cl. 495.

Letters written to an assistant quartermaster by his employés, and letters written by a quartermaster after he has left the service, have not the characteristics of official reports, and are not competent evidence. Lender v. U. S. (1869) 5 Ct. Cl. 544.

A letter, written by an ex-quartermaster to the adjutant general, inclosing an account showing the sales of captured property, is, with the account, competent evidence for the claimant to fix the amount of the proceeds when transmitted to the Court of Claims, properly authenticated by the War Department. Furman v. U. S. (1869) 5 Ct. Cl. 579.

Ex parte affidavits on file in an executive department cannot be used by the government to establish the fact that the captured property which is the subject of the suit belonged to the Confederate government, and not to the claimants' vendor. If such affidavits can be brought into the case as a part of a treasury agent's official report, it is only as evidence to show the ground upon which the agent based his seizure, and not to establish the substantive fact that the right of seizure did in fact exist. Wilde v. U. S. (1871) 7 Ct. Cl. 415.

The official correspondence of the commissioner of the general land office and of the register and receiver of the United States land offices is admissible in evidence to prove the official acts of those officers. Carman v. Johnson (1859) 29 Mo. 84.

Cited without definite application, Auffmordt v. Hedden (1890) 11 Sup. Ct. 103, 105, 137 U. S. 310, 34 L. Ed. 674; Oakes v. U. S. (1899) 19 Sup. Ct. 864, 877, 174 U. S. 778, 43 L. Ed. 1169; Wynne v. Same (1910) 30 Sup. Ct. 447, 450, 217 U. S. 234, 54 L. Ed. 748; U. S. v. Scott (C. C. 1885) 25 Fed. 470, 474.

§ 1495. (R. S. § 883.) Copies of records, etc., in office of Solicitor of the Treasury.

Copies of any documents, records, books, or papers in the office of the Solicitor of the Treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as Solicitor for the time, shall be evidence equally with the originals.

Act Feb. 22, 1849, c. 61, § 2, 9 Stat. 347.

Notes of Decisions

Best evidence.—While the original record, or an authenticated copy under this section, may not be the only competent proof that the one from whom the money is withheld is a pensioner, it is the best evidence, and so long as it exists parol proof cannot be substituted for it. U. S. v. Scott (C. C. 1885) 25 Fed. 470, 473.

Cited without definite application, Chadwick v. U. S. (C. C. 1880) 3 Fed. 750, 753.

§ 1496. (R. S. § 884.) Instruments and papers of Comptroller of the Currency.

Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

Act June 3, 1864, c. 106, § 2, 13 Stat. 100.

Notes of Decisions

Copy of court order.—A copy of an order of a court authorizing the receiver of a national bank to sell the assets of the bank, authenticated by the Comptroller of the Currency, as required by this section, but which order was never recorded or made a minute in any court, is inadmissible to establish such order as an order of a court of record. Tourtelot v. Booker (Tex. Civ. App. 1913) 160 S. W. 293.

Certificate.—The commission of a receiver of a national bank issued by the comptroller of the currency, signed by him, and attested with his seal of office, is a certificate, within the meaning of this section. Davis' Estate v. Watkins (1898) 76 N. W. 575, 56 Neb. 288.

§ 1497. (R. S. § 885.) Organization certificates of national banks.

Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.

Act June 3, 1864, c. 106, § 6, 13 Stat. 101.

Provisions relating to the requisites of the certificates, and the acknowledgment and filing thereof, were made by R. S. §§ 5134, 5135, post, §§ 9659, 9660.

Notes of Decisions

Validity.—The act of congress, prescribing a mode of proving the organization of national banks, is not in derogation of any state law. First Nat. Bank v. Randall (Tex. 1880) 1 White & W. Civ. Cas. Ct. App. § 972.

Copies of organization certificates.—A copy of the organization and certificate of a national bank, duly certified by the comptroller of currency of the United States, and authenticated by his official seal, and the deposition of the cashier of said bank, is sufficient evidence of its corporate existence. Hanover Nat. Bank v. Johnson (1890) 90 Ala. 549, 8 South. 42.

Under this section, a copy of the certificate of the organization of a national bank so certified is admissible in evidence in a state court. Tapley v. Martin (1874) 116 Mass. 275.

A certificate of the comptroller of currency that a bank had been duly organized, with the testimony of a bookkeeper of another bank that such bank had done a regular banking business, was sufficient to show that such bank was a de facto banking corporation. Merchants' Nat. Bank v. Glendon Co. (1876) 120 Mass. 97.

In a suit by a United States bank, an exemplification of the charter must be produced to prove the corporation. U. S. Bank v. Stearns (N. Y. 1836) 15 Wend. 314.

A copy of the certificate of the organization of a national bank, certified by the comptroller of the currency, as required by the national banking act of congress, and the certificate of the comptroller authorizing it to commence business, together with other facts tending to show it had acted as a corporation under the certificate, is sufficient evidence of incorporation. Merchants' Exch. Nat. Bank v. Cardozo (1872) 35 N. Y. Super. Ct. (3 Jones & S.) 162.

The certificate of organization of a national bank, issued by the comptroller of the currency, is competent evidence of the incorporation of the bank. National Bank of Commerce v. Galland (1896) 14 Wash. 502, 45 Pac. 35.

§ 1498. (R. S. § 886.) Transcripts from books, etc., of the Treasury, in suits against delinquents.

When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the Register and authenticated under the seal of the De-

partment, or, when the suit involves the accounts of the War or Navy Departments, certified by the Auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the original on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: Provided, That where suit is brought upon a bond or other sealed instrument, and the defendant pleads "non est factum," or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit.

Act March 3, 1797, c. 20, § 2, 1 Stat. 512. Act March 3, 1817, c. 45, § 11, 3 Stat. 367.

The transcripts provided for by this section were required to be certified by the Secretary or the Assistant Secretary of the Treasury, under the seal of the Department, by Act July 31, 1894, c. 174, § 17, as amended by Act March 2, 1895, c. 177, § 10, post, § 1499.

Notes of Decisions

Construction and operation of statute.—The act proceeds on the theory that the officers of the United States shall make up the account of every revenue officer and adjust the same on its books, and the account so stated and adjusted stands as and for the sum for which the officer is liable to the government, and a statement from the books is prima facie evidence only, and the court may not regulate the manner in which the departments of the government shall keep their books or prescribe the minuteness of detail. U. S. v. Gaussen (1873) 19 Wall. 198, 212, 22 L. Ed. 41.

The provision in this section relating to the admission of authenticated copies of bonds, contracts, and other papers, is not restricted to suits commenced under the authority given by this section, but applies to all cases where the evidence is required. U. S. v. Lent (C. C. 1825) Fed. Cas. No. 15,593.

This section applies only to suits against persons accountable for public moneys as such, and is inapplicable to an action for moneys alleged to have been paid to defendant by the mistake of a government disbursing officer. U. S. v. Radowitz (C. C. 1879) Fed. Cas. No. 16,112.

The contents of a letter from a collector of internal revenue to the commissioner in an action on the collector's bond can only be proved by a copy of the same duly certified from the treasury department. Chadwick v. U. S. (C. C. 1880) 3 Fed. 750.

This section has no application to an action on a collector's bond, where the bond was not annexed to the transcript. Chadwick v. U. S. (C. C. 1880) 3 Fed. 750, 752.

"Person accountable for public money."—A public officer who receives money in advance for the contingencies of his office is a receiver of public money within the meaning of this section. U. S. v. Lee (C. C. 1824) Fed. Cas. No. 15,585.

An Indian agent of the United States, a part of whose duties is to receive and disburse public moneys, is a "person accountable for public money," within the meaning of this section; and under this section the treasury transcript is sufficient to establish an indebtedness of such agent to the government. U. S. v. Allen (C. C. 1888) 36 Fed. 174.

An action on the official bond of the superintendent of a mint, which proceeds on his alleged failure to safely keep money and bullion intrusted to his care, is not a suit founded on the "delinquency of a revenue officer, or other person accountable for public money," within the meaning of this section. U. S. v. Bosbyshell (D. C. 1896) 73 Fed. 616, judgment affirmed Bosbyshell v. U. S. (1896) 77 Fed. 944, 23 C. C. A. 581.

Admissibility of transcript, in general.—The copy may be strictly accurate; yet, if the seal be not affixed or the certificate be defective, the paper cannot be received as evidence. Smith v. U. S. (1831) 5 Pet. 292, 300, 8 L. Ed. 130.

Under this section bills of exchange and orders for money on the treasury are made evidence without proof of the

handwriting of the drawer. U. S. v. Jones (1834) 8 Pet. 375, 382, 8 L. Ed. 979.

Where, in an action by the United States, a treasury transcript is produced in evidence by the government, defendant is entitled to the credits given to him in the account, and in claiming those credits he does not waive any objection to the items on the debit side of the account. U. S. v. Jones (1834) 33 U. S. (8 Pet.) 387, 8 L. Ed. 983.

A treasury account, which contains credits as well as debits, is evidence as well for defendant as the government, when used by the latter; and, unless there can be an abandonment of the suit by the government, it has no right to withdraw from the jury any part of the credits relied on by defendant. Id.

A treasury transcript was admissible in evidence in a suit by the United States against their debtor, though authenticated copies of the receipts which the debtor had given for money did not accompany the transcript. Bruce v. U. S. (1854) 17 How. 437, 439, 15 L. Ed. 129.

A transcript of the accounts rendered by a collector when not partial or fragmentary is evidence against the surety on his official bond. U. S. v. Gaussen (1873) 19 Wall. 198, 212, 22 L. Ed. 41.

In a suit upon a disbursing officer's bond, transcripts from the books and proceedings of the treasury department, certified as required by Rev. St. § 886, were competent evidence, the transcripts, considered as a whole, showing the full account, and not mere balances. Moses v. U. S. (1897) 17 Sup. Ct. 682, 692, 166 U. S. 571, 41 L. Ed. 1119.

Where, in an action on the bond of an Indian agent, the transcript of the books and proceedings in the Treasury Department contained a debit and credit statement of the account and a showing of the items in dispute, it was not objectionable because it also contains explanatory memoranda showing the grounds of the rulings of the accounting officers concerning the items rejected, and, in some instances, the evidence on which they relied, nor because it contained some items of credit or debit concerning which it was not competent evidence. U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390.

As to power of the third auditor to authenticate copies of accounts, etc., of the treasury department, see U. S. v. Griffith (C. C. 1822) Fed. Cas. No. 15,263.

The treasury transcripts are admissible in a suit in a case of delinquency of a revenue officer or other person accountable for public moneys. U. S. v. Cutter (C. C. 1856) Fed. Cas. No. 14,911.

Copies of accounts and papers in the office of the quartermaster general, certified by the third auditor of the treasury, whose official character is certified to by the secretary of the treasury, are admissible in evidence. Thompson v. Smith (C. C. 1869) Fed. Cas. No. 13,976.

A certified transcript of the account of a collector of internal revenue is admissible in evidence in a separate action against his sureties. Chadwick v. U. S. (C. C. 1880) 3 Fed. 750.

Under this section, in an action by the United States against one who bid for a contract to supply hay to the war department, for the bidder's refusal to comply therewith, it was error to exclude a proper transcript, in which were included the notice to the bidder of the acceptance of his bid, and copies of the proposed contract, and the bond to secure its performance, which were sent him with the notice, and a letter from him declining to execute the contract, and an itemized account of the purchases because of the bidder's default. U. S. v. Drachman (1896) 43 Pac. 222.

In an action on a bond given by one proposing to supply the government with hay, it was proper to admit a certified transcript showing the transaction connected with the bid, the failure to comply with the proposal, the subsequent purchase of hay by the department, and its cost, and containing copies of said bid, the bond sued on, and the correspondence with the bidder. Dennis v. U. S. (1898) 52 P. 353, 5 Ariz. 313.

Requisites and sufficiency of certified account.—In an action by the United States on a bond, defendant was entitled to a certified statement of his credits as allowed by the accounting officers, and had a right to claim full benefit of them, and the government had no right to withdraw credits fairly allowed. U. S. v. Jones (1834) 8 Pet. 375, 384, 8 L. Ed. 979.

Every transcript of accounts from the treasury, which contains items of payments made to others on the authority of the person charged, should have annexed to it a duly certified copy of the instrument which authorizes such payments. Id.

Where a collector's accounts are returned to the treasury quarterly and the date of commencement and expiration of his term of office is on some intermediate date between the beginning and end of the quarter, a restatement and transcript of his account up to the end of his term certified in the form required by the statute is legal evidence in a suit against his sureties. U. S. v. Irving (1843) 1 How. 250, 259, 11 L. Ed. 120.

When treasury transcripts are offered in evidence, although they are not evidence of the indebtedness of the defendant as to money which came into his hands in the course of duty, yet they are so when they arise out of the official transactions of a collector with

the treasury, and are substantial copies of his returns. These transcripts need not contain the particular items in each return, and it is sufficient if they state the aggregate amount, and refer to an abstract containing the items. Hoyt v. U. S. (1850) 10 How. 109, 132, 13 L. Ed. 348.

It is not necessary that every account with any delinquent officer and all of every account shall be transcribed as evidence in suits against the delinquent officer; but an extract from the books of the treasury, when authenticated to be a copy, may be given in evidence, though a garbled or mutilated statement is not evidence, and the statement presented must be complete in itself, and give both sides of the account as the same stands on the books. U. S. v. Gaussen (1873) 19 Wall. 198, 212, 22 L. Ed. 41.

The transcript from the books and proceedings of the treasury department must be a transcript of the entire account as it stands on the books, and must include debits as well as credits. Harvey v. U. S. (1899) 97 Fed. 452, 38 C. C. A. 267.

This section contemplates the certification only of a bookkeeper's plain statement of account; and a statement made in a certified copy of a postmaster's account, after showing that a charge was made against him, that it was on account of money paid by him to a laborer "for which no service was performed," is not admissible in evidence against him. Nagle v. U. S. (1906) 145 Fed. 302, 76 C. C. A. 181.

An account duly authenticated from the treasury department is not per se evidence of a balance due on a former account, or of items transferred from the account of another person, or of items recharged. U. S. v. Kuhn (C. C. 1833) Fed. Cas. No. 15,545.

A transcript from the treasury, which contains sums charged in gross as balances, is not evidence as to such balances. The original items must be stated. U. S. v. Edwards (C. C. 1839) Fed. Cas. No. 15,026; Same v. Hilliard (C. C. 1843) Id. 15,368.

In an action on a bond of a disbursing officer, the sureties may prove that a disputed item of credit claimed has been presented to and disallowed by the proper accounting officers, though the treasury transcript does not show such fact. U. S. v. Corwin (C. C. 1857) Fed. Cas. No. 14,870.

In an action on the bond of a special Indian agent, a treasury transcript containing a charge "for government property received at the W. agency, and not properly accounted for," but not showing of what the property consisted, nor how the value was ascertained, is insufficient to warrant a judgment for the value of such property, and is not aided by a paper attached thereto describing the property by items, apparently compiled from the original returns and other documents on file; such paper not being admissible under this section, but such a transcript, showing what moneys defendant received as such agent, is admissible. U. S. v. Smith (C. C. 1888) 35 Fed. 490.

A disbursing officer's accounts may, under some circumstances and in reference to certain matters, be restated by the treasury, and when so restated may be used to make a prima facie case against him. U. S. v. Butler (C. C. 1902) 114 Fed. 582.

A certified statement of a balance due, and a report thereof to the comptroller, is not such a transcript from the books and proceedings of the treasury as may be given in evidence under this section. U. S. v. Patterson (D. C. 1829) Fed. Cas. No. 16,008.

The auditor's report of a balance due from a person accountable for public money is not evidence in an action for the debt. Id.

The government, in an action on the bond of a disbursing agent, conditioned on his accounting for public moneys coming into his hands, and on his not presenting any fraudulent claim, based on the failure of the officer to account for public moneys in his hands, and not based on the fact that he made material misrepresentations as to claims presented for payment, need only prove that there were public funds in the agent's hands in the amount alleged, and that he had failed to pay them over to the government, which fact might be established by the certified transcript of his account with the government, as shown by the books of the Treasury Department, made legal evidence by this section. Ewing v. U. S. (Ariz. 1907) 89 P. 593.

In an action by the United States on the bond of an alleged delinquent disbursing officer, a duly certified and authenticated transcript from the Treasury Department of the accounts of the disbursing officer, offered in evidence by the United States under this section, is not inadmissible because it fails to include all of the transactions of such official with the United States during his term of service, especially where it is the practice of the accounting officials to keep an account with each disbursing officer for each appropriation made by Congress which is disbursed by him; but only the transactions connected with the appropriations for which such official is alleged to be in default need be shown by such transcript. Goff v. U. S. (1903) 22 App. D. C. 512.

Necessity and sufficiency of certificate.—It is the seal which authenticates the transcript. Smith v. U. S., (1831) 5 Pet. 292, 300, 8 L. Ed. 130.

The account of a delinquent public officer, accountable for public money, as finally adjusted by the proper officers, is not admissible as evidence un-

der this section, where the certificate states that the transcript to which it is annexed is a copy of the original on file; but the certificate should be of such a character as to give the court as well as the parties an assurance that the transcript offered as evidence exhibits any of the final adjustment of the accounts of the delinquent officer as shown not by mere copies of original papers on the files, but upon the books and records of the department. U. S. v. Pinson (1880) 102 U. S. 548, 551, 26 L. Ed. 226.

A certificate attached to transcripts from the books and proceedings of the Treasury Department, by an Auditor, authenticated by the seal of the Treasury Department, certifying that they are such transcripts, and that the papers annexed thereto are true copies of the originals on file, and of the whole of such originals, is a full compliance with this section. Moses v. U. S. (1897) 17 Sup. Ct. 682, 692, 166 U. S. 571, 41 L. Ed. 1119.

A register of the treasury department is not authorized to certify to copies of papers on file in his office. Bleecker v. Bond (C. C. 1819) Fed. Cas. No. 1,534.

The copy of a collector's bond is sufficiently authenticated by the certificate of the secretary of the treasury, in a suit upon the bond, where the original was in the custody of that department, and was wholly disconnected from the transcript certified by the register of the treasury. Chadwick v. U. S. (C. C. 1880) 3 Fed. 750.

In an action upon an official bond, if the execution thereof is denied, it cannot be proved by a copy certified by the secretary of the treasury, under section 1494, ante, but a copy certified by the register of the treasury under the seal of the department, under this section, is sufficient proof of such execution; it being declared to have the same force as the original when duly authenticated or proved in court. U. S. v. Humason (C. C. 1881) 8 Fed. 71.

In a suit on the bond of a defaulting federal officer, transcripts of the government records, showing a statement of the account of such officer, to be admissible in evidence must be certified to or authenticated as required by this section. Ewing v. U. S. (1894) 3 App. D. C. 353.

—— Based on personal knowledge.—The officers of the treasury cannot certify facts which do not come within their own knowledge. U. S. v. Jones (1834) 8 Pet. 375, 380, 8 L. Ed. 979.

Probative effect of transcript.—An account stated in the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under an act of congress, and such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books, and where moneys come into the hands of an individual, not through the officers of the treasury, the books of the treasury do not exhibit the facts, and the claim must be established, not by the treasury statement, but by the evidence on which that statement was made. U. S. v. Buford (1830) 3 Pet. 12, 29, 7 L. Ed. 585.

An account stated at the treasury department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of congress, but such a statement can only be regarded as establishing items for money disbursed through the ordinary channels of the department, where the transactions are shown by its books. U. S. v. Jones (1834) 8 Pet. 375, 381, 8 L. Ed. 979.

Treasury settlements are only prima facie evidence of the correctness of the balance certified, but it is as competent for the accounting officers to correct mistakes and restate the balance as it is for the judge to change his decree during the term in which it was entered. Soule v. U. S. (1879) 100 U. S. 8, 11, 25 L. Ed. 536.

In a suit brought in the case of a delinquent naval officer, a transcript of the books of the treasury department, certified by the fourth auditor, and with a certificate annexed, signed by the secretary of the treasury, and sealed with the department seal, attesting the official character of the said auditor, is sufficient for all purposes of evidence. U. S. v. Bell (1884) 4 Sup. Ct. 498, 499, 111 U. S. 477, 28 L. Ed. 477.

A fragmentary and incomplete transcript from the books of the treasury department, containing the accounts of a former United States marshal, which covers only a portion of his term, and contains no item of his accounts during the last two years of his incumbency, is insufficient to warrant a judgment against his sureties in an action brought 33 years after his term expired, and long after his death, for the items of expenditures shown thereby to have been claimed by him and rejected or suspended by the department. Harvey v. U. S. (1899) 97 Fed. 452, 38 C. C. A. 267.

In the absence of countervailing evidence in an action on the bond of an Indian agent, the introduction of a duly certified transcript of the books and proceedings of the Treasury Department established a prima facie case in favor of the government entitling it to judgment. U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390.

A transcript from the treasury books charging the balance of a former set-

tlement is not per se evidence warranting a verdict for such balance. U. S. v. Laub (C. C. 1836) Fed. Cas. No. 15,568.

The transcript of the books and proceedings of the treasury department in relation to the accounts of persons accountable for public money, is prima facie evidence of the facts stated therein, so far as the same are authorized by law. U. S. v. Eggleston (C. C. 1877) Fed. Cas. No. 15,027.

Transcripts from the books of the United States treasury are competent evidence in trials of suits against officers of the United States, brought on their accounts; but they are evidence only, and it is in the discretion of the courts and juries to give them what weight they may deem proper in the trials in which the transcripts are used. U. S. v. Ralston (C. C. 1883) 17 Fed. 895.

Though certified copies of the books and accounts of the treasury department are by statute made evidence in favor of the government in actions against alleged delinquents, they are not conclusive, and, if a reply is made thereto, the case is to be decided on all the evidence. U. S. v. Young (C. C. 1890) 44 Fed. 168.

The effect of this provision is to require that these transcripts shall be admitted as competent evidence in a trial, to be allowed such weight as the court and jury shall in each cause deem to be due to them. The Rhode Island (D. C. 1883) 17 Fed. 554.

In an action by the United States against an army officer charged with accountability for supplies, the certificate of the appropriate auditor of the Treasury Department, properly authenticated in accordance with this section showing property unaccounted for by defendant, when introduced in evidence makes a prima facie case for the government both as to the property and its value, properly charged at its cost to the government. U. S. v. Du Perow (D. C. 1913) 208 Fed. 895.

Under this section the transcript does not necessarily make a prima facie case in favor of the government. Dennis v. U. S. (1898) 52 P. 353, 5 Ariz. 313.

—— Impeachment. — A defendant, sued by the government, may impeach evidence certified under this section, and, under peculiar circumstances of alleged fraud, the court in its discretion may require the production of the original instrument. U. S. v. Jones (1834) 8 Pet. 375, 382, 8 L. Ed. 979.

Cited without definite application, Walton v. U. S. (1824) 9 Wheat. 651, 654, 6 L. Ed. 182; Bechtel v. Same (1879) 101 U. S. 597, 599, 25 L. Ed. 1019; U. S. v. Brendel (1905) 136 Fed. 737, 740, 69 C. C. A. 389; Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335).

§ 1499. (Act July 31, 1894, c. 174, § 17, as amended, Act March 2, 1895, c. 177, § 10.) Transcripts from books, etc., of the Treasury, to be certified by Secretary or Assistant Secretary under seal of Department.

The transcripts from the books and proceedings of the Department of the Treasury and the copies of bonds, contracts and other papers provided for in section eight hundred and eighty-six of the Revised Statutes shall hereafter be certified by the Secretary or an Assistant Secretary of the Treasury under the seal of the Department. (28 Stat. 210. 28 Stat. 809.)

This section was part of the Dockery Act of July 31, 1894, c. 174, cited above.

The section, as originally enacted, required transcripts from the books and proceedings of the Department to be certified by the Secretary or an Assistant Secretary, and copies of contracts and other papers to be certified by the Auditor having custody of them. It was amended by Act March 2, 1895, c. 177, § 10, also cited above, to require all transcripts and copies provided for in R. S. § 886 to be certified by the Secretary or an Assistant Secretary, under the seal of the Department, as set forth here.

R. S. § 886, mentioned in this section, is set forth ante, § 1498.

Notes of Decisions

Certificate.—A copy of a bond given by a public officer, certified under seal of the Treasury Department by an acting secretary of the treasury, is admissible in evidence in a suit by the United States on such bond, under this section. Laffan v. U. S. (1903) 122 Fed. 333, 58 C. C. A. 495.

Where, in an action on the bond of a United States Indian agent, a transcript of the books and proceedings of the Treasury Department, certified and authenticated by the Register of the Treasury, as required by section 1498, ante, was offered in evidence, it was immaterial that it was not certified by the Secretary or the Assistant Secretary of the Treasury, as required by this section. U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390.

§ 1500. (R. S. § 887.) Transcripts from books of the Treasury, in indictments for embezzlement of public moneys.

Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section.

Act Aug. 6, 1846, c. 90, § 16, 9 Stat. 63. Act March 3, 1797, c. 20, § 1, 1 Stat. 512.

§ 1501. (R. S. § 888.) Copies of returns in returns-office.

A copy of any return of a contract returned and filed in the returns-office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns-office.

Act June 2, 1862, c. 93, § 4, 12 Stat. 412.

The filing of copies of certain contracts made on behalf of the Government in the returns-office was required by R. S. § 3744, post, § 6895.

Cited without definite application, Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335).

§ 1502. (R. S. § 889.) Copies of Post-Office records and of Auditor's statement of accounts.

Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Sixth Auditor, and transcripts from the money-order account-books of the Post-Office Department, when certified by the Sixth Auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.

Act July 2, 1836, c. 270, § 15, 5 Stat. 82. Act May 17, 1864, c. 87, § 11, 13 Stat. 78. Act July 27, 1868, c. 246, § 18, 15 Stat. 197. Act March 3, 1825, c. 64, § 38, 4 Stat. 113.

The designation of the Sixth Auditor was changed to Auditor for the Post-Office Department by Act July 31, 1894, c. 174, § 3, ante, § 417.

Notes of Decisions

Papers admissible in evidence.— Treasury transcripts, offered in evidence in a suit on a postmaster's bond, need not contain the statement of credits claimed by the postmaster and disallowed by the proper officers of the government. U. S. v. Hodge (1851) 13 How. 478, 481, 14 L. Ed. 231.

An order of the postmaster general reciting that he is satisfied that a postmaster has made false returns and fixing a compensation which he deems reasonable is, in an action on the official bond of the postmaster for moneys illegally withheld according to the false returns, admissible in evidence by reason of this section; but the order is only prima facie evidence, which may be contradicted by other evidence. U. S. v. Dumas (1893) 13 Sup. Ct. 872, 874, 149 U. S. 278, 37 L. Ed. 734.

A certified account from the books of the Auditor for the Postoffice Department, showing the state of an account with a contractor for carrying the mail who was alleged to have failed to perform his contract, was competent at least for the purpose of showing the amount of the indebtedness, if any, existing. U. S. v. McCoy (1904) 24 Sup. Ct. 528; 530, 193 U. S. 593, 48 L. Ed. 805.

In a suit on a postmaster's bond, a duly certified transcript of the books of the treasury department, showing the account between him and the government, is competent evidence, and is sufficient to establish a prima facie case. U. S. v. Carlovitz (1897) 80 Fed. 852, 854, 26 C. C. A. 188.

On the trial of an assistant postmaster for embezzlement of money belonging to the United States, quarterly reports of the office, shown to be in the

handwriting of the defendant, and to have been prepared by him, although signed by the postmaster, when properly certified as required by this section, are admissible against the defendant to establish the amount of money with which the office was chargeable. McBride v. U. S. (1900) 101 Fed. 821, 42 C. C. A. 38.

The return of a postmaster for a full quarter is evidence against his surety to show an average liability for a part of the quarter. Lawrence v. U. S. (C. C. 1841) Fed. Cas. No. 8,145.

A transcript, from the post office department, of the balances struck by the postmaster is sufficient to charge him. Id.

In a prosecution against a postmaster for making a false return to the auditor, held proper to admit in evidence the transcript of the report described in the indictment duly certified by one of the auditors of the treasury for the post office department. U. S. v. Snyder (C. C. 1882) 14 Fed. 554, 557.

An order made by the postmaster general, stating that false returns of business had been made by the defendant postmaster, and allowing, instead of the commissions on said returns, a stated compensation, is admissible in evidence, by virtue of this section, in an action by the United States against said postmaster for moneys illegally retained by him. U. S. v. Marks (1898) 52 P. 778, 5 Ariz. 404.

Quære, whether, in the prosecution of a former Post Office Department official and others for conspiracy to defraud the United States in procuring the purchase by the government of necessary articles at an excessive price, where it appears that the purchases were made on orders initialed by him, which orders and other papers connected with them were audited as a matter of routine in the Sixth Auditor's Office of the Department, the papers purporting to bear his initials taken from the files of such office are not admissible in evidence under this section, without proof of the genuineness of such initials. Lorenz v. U. S. (1904) 24 App. D. C. 337.

If certified copies of departmental records are admissible in evidence under this section, there is no good reason why the originals should not be admitted. Id.

In assumpsit by a subcontractor, against a contractor for carrying United States mail, for the subcontractor's proportion of the compensation, received from the post office department, a letter of the Postmaster General was offered in evidence by defendant, and admitted without objection, to prove defaults committed by plaintiff in executing that part of the contract which was underlet to him. Plaintiff offered a certificate of the Postmaster General showing the defaults, and the times and places where they occurred, and defendant objected thereto. Held, that the certificate was not competent evidence for any purpose. Wilkinson v. Jett (Va. 1836) 7 Leigh, 115, 30 Am. Dec. 493.

Cited without definite application, U. S. v. Barker (1900) 100 Fed. 34, 35, 40 C. C. A. 264; Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335).

§ 1503. (R. S. § 890.) Copies of statements of demands by Post-Office Department.

In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the Sixth Auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster-General or the Auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the post-office where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due.

Act July 27, 1868, c. 246, § 19, 15 Stat. 197.

See note to R. S. § 889, ante, § 1502, as to change in designation of Sixth Auditor.

Notes of Decisions

Certificate showing defaults.—In assumpsit by a subcontractor, against a contractor for carrying United States mail, for the subcontractor's proportion of the compensation, received from the post office department, a letter of the

Postmaster General was offered in evidence by defendant, and admitted without objection, to prove defaults committed by plaintiff in executing that part of the contract which was underlet to him. Plaintiff offered a certificate of the Postmaster General showing the defaults, and the times and places where they occurred, and defendant objected thereto. Held, that the certificate was not competent evidence for any purpose. Wilkinson v. Jett (Va. 1836) 7 Leigh, 115, 30 Am. Dec. 493.

Cited without definite application, U. S. v. Barker (1900) 100 Fed. 34, 35, 40 C. C. A. 264.

§ 1504. (R. S. § 891.) Copies of records, etc., of General Land-Office.

Copies of any records, books, or papers in the General Land-Office, authenticated by the seal and certified by the Commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record.

Act April 25, 1812, c. 68, § 4, 2 Stat. 717. Act March 3, 1843, c. 95, §§ 1, 2, 5 Stat. 627, 628. Act July 4, 1836, c. 352, §§ 2, 7, 5 Stat. 109, 111.

Provisions, similar to those of this section, for certification of patents and of records, etc., in the General Land-Office, by the Recorder, as well as by the Commissioner, as provided by this section, were made by Act April 19, 1904, c. 1396, 33 Stat. 185, but that act was repealed by a provision of Act Aug. 24, 1912, c. 370, § 5, ante, § 677.

The transmission and authentication, for use as evidence in the courts, of original papers on file in the General Land-Office were provided for by Act April 19, 1904, c. 1398, ante, § 701.

Registers and receivers of land-offices were authorized to furnish transcripts of records in their offices for individuals, and such transcripts, when duly certified, were made admissible as evidence by Act March 22, 1904, c. 748, post, § 4474.

It was made the duty of the Commissioner of the General Land-Office to prepare the copies required for use as evidence by R. S. § 2469, ante, § 709.

A similar provision relating to the literal exemplification of records was made by R. S. § 2470, ante, § 710.

Copies of plats or surveys, or transcripts from the records of the office of the surveyor-general of Louisiana, duly certified by him, were made admissible as evidence in all United States and territorial courts, by R. S. § 2225, post, § 4459.

Notes of Decisions

1. Operation of statute.
2. Copies of records.
3. Copies of papers.
4. —— Letters.
5. —— Government patents.
6. Certification.
7. —— By whom made.
8. Probative effect.
9. —— "Evidence equally."
10. Originals.

1. Operation of statute.—This section does not forbid a party from showing by extrinsic proof, otherwise legitimate, what the contents of the lost original really were, when it is shown that the record itself, or the transcript from it, is not a true copy, and the party is not necessarily deprived of his rights on account of the defective record in the general land office. Campbell v. Laclede Gaslight Co. (1886) 7 S. Ct. 278, 119 U. S. 445, 30 L. Ed. 459.

2. Copies of records.—A transcript of records of land office, showing the proceedings in relation to the location of a land warrant, is competent evidence of title. Culver v. Uthe (1890) 10 Sup. Ct. 415, 416, 133 U. S. 655, 33 L. Ed. 776.

A certified copy of the records of the General Land Office, including the certificate of local land officers that, on the records of their office, there were no homestead, pre-emption, or other valid claims to certain lands within the place limits of the grant to the Atlantic & Pacific Railroad Company, made by Act July 27, 1866, c. 278, 14 Stat. 292, and that the land had not been returned or denominated as swamp or mineral land, is competent evidence on the question of the title of one claiming as grantee from the railroad company. Howard v. Perrin (1906) 26 Sup. Ct. 195, 196, 200 U. S. 71, 50 L. Ed. 374.

An exemplification from the records of the land office of a list of lands selected by the agent of the state under a railroad grant is not insufficient because it includes only the lands in such list which are involved in the case at issue, it appearing that such a certification complies with the practice of the land office. Tillotson v. Webber (1893) 96 Mich. 144, 55 N. W. 837.

3. Copies of papers. — A certified transcript of papers on file in the general land office is admissible in evidence

for the purpose of proving the contents of such instruments. Sprayberry v. State (1878) 62 Ala. 459.

An exemplification, certified by the commissioner of the general land office, of a railway map, is admissible in evidence, with like effect as the original. Rierson v. St. Louis & S. F. Ry. Co. (1898) 51 P. 901, 59 Kan. 32.

The assignment of a land office certificate for the purchase of lands, when filed in the office of the commissioner of the general land office, in order to procure the issuing of a patent to the assignee, may be proved by an exemplified copy authenticated by the commissioner. Clark v. Hall (1869) 19 Mich. 356.

In an action to enforce a contract for the sale of land, written on the back of the land office certificate, which was transmitted to the general land office at Washington, and could not be removed therefrom, a copy thereof, with the indorsements thereon, certified by the commissioner under the seal of his office, was admissible to prove the contract. Sayward v. Gardner (1892) 5 Wash. St. 247, 31 Pac. 761, 33 Pac. 389.

4. —— **Letters.**—A copy of the official letter of the assistant commissioner, exemplified from the records of the general land office, canceling a homestead entry and changing it to a cash entry, is proof of the cancellation of such entry. Holmes v. State (1895) 108 Ala. 24, 18 South. 529.

A letter of the commissioner of the land office, affecting the title to lands entered from the United States government, may be proved by an authenticated copy. Davis v. Freeland (1856) 32 Miss. 645.

5. —— **Government patents.**—An exemplified copy of a patent, certified by the commissioner of the general land office, is admissible in evidence without proof of the loss of the original. Jones v. Walker (1872) 47 Ala. 175; Woodstock Iron Co. v. Roberts (1889) 87 Ala. 436, 6 South. 349; Ross v. Goodwin (1889) 88 Ala. 390, 6 South. 682; Beasley v. Clarke (1894) 102 Ala. 254, 14 South. 744; Barton v. Murrain (1858) 27 Mo. 235, 72 Am. Dec. 259; Avery v. Adams (1879) 69 Mo. 603.

This section does not dispense with signing and countersigning a patent; but the record, to prove a valid patent, must still show it was signed and countersigned. McGarrahan v. New Idria Min. Co. (1877) 96 U. S. 316, 322, 24 L. Ed. 630.

A certified copy of a patent for land by the recorder of a county is not evidence, as there is no law requiring patents to be recorded in the county. Lyell v. Maynard (C. C. 1853) Fed. Cas. No. 8,619.

The record of patents issued when Andrew Jackson was president, and Elijah Hayward commissioner of the land office, of which time the court takes judicial notice, showing the patents as having been signed by "A. J." as president, and "E. H." as commissioner, are admissible in evidence, and the initials on the record are presumptive evidence that the names appeared in full on the patents. Liddon v. Hodnett (1886) 22 Fla. 442.

The exemplification of the record of a patent, recorded in the general land office, under the hand of the commissioner and the seal of the general land office, is evidence of the facts therein contained. Ropes v. Kemps (1896) 20 So. 992, 38 Fla. 233.

A certified copy of a patent to lands, issued by the government, was properly admitted in evidence, though not embraced within the statute relating to copies of records as evidence, since all public acts of congress for the disposition of public lands, and of public officers in their execution, required to be kept, may be shown either by record or by copy duly certified by the officer. Lane v. Bommelman (1855) 17 Ill. (7 Peck) 95.

The original of a government patent being lost, an official copy under seal is admissible evidence. Lacey v. Davis (1856) 4 Mich. 140, 66 Am. Dec. 524.

It is error to admit in evidence the patent from the United States to a mining company; the laws of the United States requiring all patents from the general land office to be recorded in that office, from which exemplifications authenticated by the seal and certificate of the commissioner may be obtained as evidence. Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 5 Utah, 3, 11 Pac. 515.

Copies of the records of the general land office are admissible in evidence when certified, under this section shall be competent evidence in all cases in which the originals would be competent. McLane v. Bovee (1874) 35 Wis. 27.

6. **Certification.**—Where the records of a local land office are burned, and a book is prepared by the commissioner of the general land office as a substitute for the original tract book thus destroyed, and is transmitted by him in the regular course of his official duty to the register and receiver of the local office for use in disposing of the public lands in that district, the book is an official book, and is admissible in evidence as such, and does not have to be certified by the commissioner, as provided by this section, for admission in evidence of copies of records, books, or papers from his office. Jesse D. Carr Land & Live Stock Co. v. U. S. (1902) 118 Fed. 821, 55 C. C. A. 433.

An affidavit made in connection with a warrant of survey, but not certified as an office paper in the land office, is inadmissible. Lanning v. Dolph (C. C. 1826) Fed. Cas. No. 8,073.

The seal of the general land office,

and the signature of the commissioner thereof to copies of papers required by law to be deposited in that office, prima facie prove themselves. Harris v. Barnett (Ind. 1837) 4 Blackf. 369.

An exemplified copy of a United States patent, which shows that it was signed by the president and countersigned by the commissioner of the general land office by initials only in each case, is admissible. Briggs v. Holmstrong (1880) 72 Mo. 337.

7. —— **By whom made.**—A transcript from the books or papers on file in the general land office, or to the Indian bureau of the department of the interior, if properly certified under the seal of the department by the "acting commissioner," is admissible in evidence. Stephens v. Westwood (1854) 25 Ala. 716; Woodstock Iron Co. v. Roberts (1888) 87 Ala. 436, 6 South. 349.

A copy of the commissioner's certificate for adjusting land claims must be certified by the register of the land office, and not the surveyor general. Boatner v. Scott (La. 1842) 1 Rob. 546.

A copy of a paper certified by one as "acting commissioner of the general land office," with the seal of the office attached, does not show a vacancy in the office of commissioner, and is admissible. Murray v. Polglase (1896) 17 Mont. 455, 43 Pac. 505.

8. **Probative effect.**—A patent under the seal of the United States is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. U. S. v. Arredondo (1832) 6 Pet. 691, 728, 8 L. Ed. 547.

The record of a patent issued by authority of the United States is a public act, and a second or duplicate patent issuing thereon is of as high authority as evidence as the original. Hines v. Greenlee (1841) 3 Ala. 73.

An exemplification of any record in the land office is, as evidence, of equal authority with the original. Lee v. Getty (1861) 26 Ill. (16 Peck.) 76.

A transcript of the record of a United States patent of lands, certified by the Commissioner of the General Land Office to be "a true and literal exemplification from the record in this office," is sufficiently certified under this section to be admitted in evidence. Boyce v. Stambaugh (1876) 34 Mich. 348.

9. —— **"Evidence equally."**—The words "evidence equally" were not intended to mean that in all cases the copy should have the same probative force as the original instrument, but that it should be regarded as of the same class in the grades of evidence as to written or parol, and primary and secondary, and they do not mean that, when the existence of the instrument is conceded, but a question arises as to some particular word or figure, the copy would be as convincing as the original. Campbell v. Laclede Gaslight Co. (1886) 7 Sup. Ct. 278, 280, 119 U. S. 445, 30 L. Ed. 459.

10. **Originals.**—The original book of entries of the United States land office is competent evidence to show that an actual entry has been made. Welborn v. Spears (1856) 32 Miss. 138.

§ 1505. (R. S. § 892.) Copies of records, etc., of Patent-Office.

Written or printed copies of any records, books, papers, or drawings belonging to the Patent-Office, and of letters-patent authenticated by the seal and certified by the Commissioner or Acting Commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof.

Act July 8, 1870, c. 230, § 57, 16 Stat. 207.

Provisions similar to those of this section, but applying to copies of records, etc., relating to trade-marks, belonging to the Patent-Office, and of certificates of registration of trade-marks, providing for their authentication for use as evidence, were made by Act Feb. 20, 1905, c. 592, § 11, post, § 9496.

Notes of Decisions

Books.—The certificate of the commissioner of patents is incompetent to prove the contents of any printed volume which may be in and belong to the library of the patent office, but production of the book itself, or a duly sworn and proved translation of it, is the only way in which its contents can be established. Gaylord v. Case (1877) 5 Ohio Dec. 413, 5 Am. Law Rec. 494.

Copies of papers.—Certified copies of the patent office record of instruments purporting to be assignments are not prima facie proof of the execution or genuineness of the instruments. City of New York v. American Cable Ry. Co. (1894) 60 Fed. 1016, 9 C. C. A. 336, disapproving Dederick v. Whitman Agricultural Co. (C. C. 1886) 26 Fed. 763, and National Folding Box & Paper Co. v. American Paper Pail & Box Co. (C. C. 1893) 55 Fed. 488.

A certified copy of an assignment from the patent office is prima facie evidence of the genuineness of the original, and is admissible. Lee v. Blandy

(C. C. 1860) Fed. Cas. No. 8,182; Goodyear v. Blake (C. C. 1869) Id. 5,-560.

Under a bill to restrain an infringement of a patent, certified copies of certain documents on file in the patent office, which tended to show that complainant, on being notified that a certain claim made by her interfered with that of another applicant, waived an appeal, and struck out such claim from her application, were admissible in proof of such facts, which were pertinent to the issue, though such documents did not purport to be anything in the nature of a record. Toohey v. Harding (C. C. 1880) 1 Fed. 174.

Certified copies of patent office records of assignments are not primary evidence of such assignments, and are only admissible to prove title to a patent where proper foundation is laid by showing the existence of the original instruments, and that they are lost or destroyed, or that it is out of complainant's power to produce them. National Cash Register Co. v. Navy Cash-Register Co. (C. C. 1900) 99 Fed. 89.

Letters patent may be proved by production of the original, or by a copy of the record certified by the Commissioner of Patents or his chief assistant. C. B. Ensign & Co. v. Coffelt (Ark. 1912) 145 S. W. 231.

An exemplification of letters patent for an improvement granted by the United States, certified by the secretary of state under the seal of his department, is admissible in evidence, the original document being of a public nature. Peck v. Farrington (N. Y. 1832) 9 Wend. 44.

An officially certified copy of a patent is the primary evidence thereof. A certificate of the specifications and issue of a patent, signed and sealed by the United States commissioner of patents, is inadmissible. Davis v. Gray (1867) 17 Ohio St. 330.

"Belonging to the patent office."—The record of assignments in the patent office is a record "belonging to the patent office," within the literal terms of this section. Standard Elevator Co. v. Crane Elevator Co. (1896) 76 Fed. 767, 790, 22 C. C. A. 549.

Authentication.—A copy of a French patent, certified by the director of the national conservatory of arts and manufactures, under its seal, and verified by the ministers of agriculture and commerce, and of foreign affairs, under their seals, but not under the great seal of France, was properly authenticated. Schoerken v. Swift & Courtney & Beecher Co. (C. C. 1881) 7 Fed. 469.

The filing with the proper county clerk, by the vendor of a patent right, the required affidavit, and a purported copy of his letters patent, without such official attestation as would render it admissible in evidence, was not such compliance with the statute as would make valid a note and mortgage executed by the vendee for such patent right. Mayfield v. Sears (1892) 133 Ind. 86, 32 N. E. 816.

Effect as evidence.—A certified copy of the record of an assignment of a patent with the acknowledgment thereto, although made original evidence by this section, does not prove the genuineness or due execution of the original assignment. Eastern Dynamite Co. v. Keystone Powder Mfg. Co. (C. C. 1908) 164 Fed. 47.

Cited without definite application, Paine v. Trask (1893) 56 Fed. 233, 234, 5 C. C. A. 497; Saunders v. Allen (1894) 60 Fed. 610, 613, 9 C. C. A. 157; Edison Electric Light Co. v. United States Electric Light Co. (C. C. 1890) 44 Fed. 294, 295; Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335).

§ 1506. (R. S. § 893.) Copies of foreign letters-patent.

Copies of the specifications and drawings of foreign letters-patent, certified as provided in the preceding section, shall be prima-facie evidence of the fact of the granting of such letters-patent, and of the date and contents thereof.

Act July 8, 1870, c. 230, § 57, 16 Stat. 207.

Notes of Decisions

See Schoerken v. Swift & Courtney & Beecher Co. (C. C. 1881) 7 Fed. 469. See, also, note under § 1505, ante.

Cited without definite application, Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335).

§ 1507. (R. S. § 894.) Printed copies of specifications and drawings of patents.

The printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the district courts, shall, when

certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained.

Res. Jan. 11, 1871, No. 5, 16 Stat. 590.

Notes of Decisions

Use of copy of specifications.—A defendant, when sued by a patentee for an alleged violation of his patent right, has a right to a copy of the specifications for use on the trial, in order to enable him to show, if he can, that the specification does not contain the whole truth relative to the discovery, or that it contains more than is necessary to the effect desired; and as the law gives this privilege, it by implication gives the right of using the specification openly and publicly in court. (1820) 1 Op. Atty. Gen. 376.

§ 1508. (R. S. § 895.) Extracts from the Journals of Congress.

Extracts from the Journals of the Senate, or of the House of Representatives, and of the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or by the Clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court.

Act Aug. 8, 1846, c. 107, § 1, 9 Stat. 80.

Notes of Decisions

Conclusiveness of enrolled bill.—A holding that an enrolled bill, properly signed by the presiding officers of both houses of Congress and by the President, is conclusive as to what is the law, is not inconsistent with this section. Field v. Clark (1892) 12 Sup. Ct. 495, 500, 143 U. S. 649, 36 L. Ed. 294.

Cited without definite application, U. S. v. Burr (1895) 15 Sup. Ct. 1002, 1005, 159 U. S. 78, 40 L. Ed. 82.

§ 1509. (R. S. § 896.) Copies of records, etc., in offices of United States consuls, etc.

Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.

Act Jan. 8, 1869, c. 7, 15 Stat. 266.

A similar provision relating to copies of protests before consuls and vice-consuls was made by R. S. § 1707, post, § 3160.

§ 1510. (R. S. § 897.) Certain books and papers in offices of district and circuit courts in Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas.

The transcripts into new books, made by the clerks of the district courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seven, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the circuit courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had.

Act June 27, 1864, c. 165, §§ 2, 4, 13 Stat. 199.

The circuit courts were abolished and their powers and duties were conferred and imposed on the district courts, and their records, etc., and all suits and proceedings pending in them were directed to be transferred to the district courts, by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

§ 1511. (R. S. § 898.) Transcribed records in the clerks' offices of western district of North Carolina.

The transcripts into new books made by the clerks of the circuit and district courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit and district courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed.

Act June 4, 1872, c. 282, § 10, 17 Stat. 217.
See note to preceding section.

§ 1512. (Act Aug. 5, 1886, c. 928, § 9.) Transcribed records in the clerks' offices of former district of California.

Either of the clerks of the circuit and district courts for the said northern district of California is hereby authorized, at the request of the district judge of said southern district, and at the cost of the parties requiring the same, to make transcripts of any of the records, files, or papers of the district and circuit courts of the United States, remaining in the office of the clerks of the present district of California, and of all matters and proceedings which relate to or concern liens upon or titles to real estate situated in said southern district; and such transcripts, when so made by either of said clerks, shall be certified to be true and correct by the clerk making the same, and the same, when so made and certified, and filed in the proper court, shall constitute the record in such court, and shall be evidence in all courts and places equally with said originals. (24 Stat. 310.)

This section was part of Act Aug. 5, 1886, cited above, other sections of which detached certain counties named from the then existing district of California, to form the southern district of California, and constituted the remaining counties the northern district of California, which are the districts mentioned under those names in this section. Such other sections were incorporated in and superseded by Jud. Code, § 72, ante, § 1057.
See note to R. S. § 897, ante, § 1510.

§ 1513. (R. S. § 899.) When original records are lost or destroyed.

When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had.

Act March 3, 1871, c. 111, § 1, 16 Stat. 474.

Notes of Decisions

Exclusiveness of remedy.—The proceedings to restore records in the federal courts must conform to the act of congress, and not to the state statute. Turner v. Newman (C. C. 1872) Fed. Cas. No. 14,262.

Copy of certified copy.—Where the records of a court were burned during the rebellion, a copy of an officially certified copy may be received in evidence, where the certified copy, if in existence, is not in the custody of the party offering the evidence or within his control, and there is no positive evidence of its existence, though evidence was offered which tended to show that it existed. Nash v. Williams (1873) 20 Wall. 226, 246, 22 L. Ed. 254.

§ 1514. (R. S. § 900.) Same subject.

When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of if shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed.

Act March 3, 1871, c. 111, § 2, 16 Stat. 475.

Cited without definite application, Gableman v. Peoria, D. & E. R. Co. (1900) 21 Sup. Ct. 171, 173, 179 U. S. 335, 45 L. Ed. 220; Mooney v. Buford & George Mfg. Co. (1896) 72 Fed. 32, 36, 18 C. C. A. 421; Marsh v. U. S. (D. C. 1898) 88 Fed. 879, 884.

§ 1515. (R. S. § 901.) Same subject.

When any cause has been removed to the Supreme Court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

Act March 3, 1871, c. 111, § 3, 16 Stat. 475.

§ 1516. (R. S. § 902, as amended, Act Jan. 31, 1879, c. 39, § 1.) Restoration of records lost or destroyed.

In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal.

Act March 18, 1872, c. 56, § 1, 17 Stat. 40. Act Jan. 31, 1879, c. 39, § 1, 20 Stat. 277.

This section and R. S. §§ 903, 904, as enacted in the Revised Statutes, applied only to records of the circuit and district courts of the northern district of Illinois, destroyed by fire October 9, 1871. The amendments by Act Jan. 31, 1879, c. 39, cited above, made all three sections applicable to such records of all courts of the United States, and added further provisions on the subject.

§ 1517. (R. S. § 903, as amended, Act Jan. 31, 1879, c. 39, § 2.) Same subject.

A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pur-

suance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to.

Act March 18, 1872, c. 56, § 2, 17 Stat. 41. Act Jan. 31, 1879, c. 39, § 2, 20 Stat. 277.

See note to R. S. § 902, ante, § 1516, as to amendments by Act Jan. 31, 1879, c. 39, cited above.

§ 1518. (R. S. § 904, as amended, Act Jan. 31, 1879, c. 39, § 3.) Same subject.

Whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files to be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judge shall think proper.

Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.

Act March 18, 1872, c. 56, § 3, 17 Stat. 41. Act Jan. 31, 1879, c. 39, § 3, 20 Stat. 277.

See note to R. S. § 902, ante, § 1516, as to amendments by Act Jan. 31, 1879, c. 39, cited above.

§ 1519. (R. S. § 905.) Authentication of legislative acts and proof of judicial proceedings of State, etc.

The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the

United States as they have by law or usage in the courts of the State from which they are taken.

Act May 26, 1790, c. 11, 1 Stat. 122. Act March 27, 1804, c. 56, § 2, 2 Stat. 299.

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See, also, notes under Const. art. 3, § 1; art. 4, § 1; and art. 6, cl. 1, post.

As to proof of nonjudicial records, see § 1520, post.

I. AUTHENTICATION OF LEGISLATIVE ACTS

1. Proof of foreign statutes.—The appropriate evidence of the written laws of a foreign state or territory is that prescribed by this section and by Code Civ. Proc. Neb. §§ 419, 420. Hewitt v. Bank of Indian Territory (1902) 92 N. W. 741, 64 Neb. 463 (reversing judgment on rehearing [1902] 90 N. W. 250, 64 Neb. 463). The written law of another state is proven, under this section, by a printed copy thereof duly attested. Ridpath v. Heller (1913) 129 P. 1054, 46 Mont. 586.

Public laws of a state may be read in the Supreme Court, but private laws and special proceedings of the state must be proved in the ordinary manner, and the Supreme Court cannot go into an inquiry as to the existence of such facts, if they are not found in the record. Leland v. Wilkinson (1832) 6 Pet. 317, 322, 8 L. Ed. 412.

A copy of a legislative act of another state, certified as made from one of the law records of the state in the court of appeals, is inadmissible. A copy from the original in the state archives is better. Union Bank v. Freeman (La. 1843) 3 Rob. 485.

2. Necessity of proof.—No court is to be charged with knowledge of foreign laws; but they are well understood to be facts which must, like other facts, be proved before they can be received in a court of justice. Hanley v. Donoghue (1885) 6 Sup. Ct. 242, 243, 116 U. S. 1, 29 L. Ed. 535.

The law of the state must be produced to prove the rate of interest allowed therein. Jaffray v. Dennis (C. C. 1808) Fed. Cas. No. 7,171.

3. —— **Judicial notice.**—This section does not require one state to take judicial notice of the laws of another state. Norman v. Pennsylvania Fire Ins. Co. (1911) 141 S. W. 618, 237 Mo. 576; Same v. Connecticut Fire Ins. Co. (1911) 141 S. W. 620, 237 Mo. 585; Tourtelot v. Booker (Tex. Civ. App. 1913) 160 S. W. 293. Though in Buffum v. Stimpson (1863) 87 Mass. (5 Allen) 591, 81 Am. Dec. 767, the court seems to have judicially noticed the Constitution of another state, so far as it established the jurisdiction of courts. And so as to laws of other states in Hanley v. Donoghue (1885) 6 Sup. Ct. 242, 243, 116 U. S. 1, 29 L. Ed. 535. Nor does the United States supreme court, on writ of error to the highest court of a state, take judicial notice of the law of another state not proved in that court, and made part of the record sent up, unless by the local law that court takes judicial notice of it. Renaud v. Abbott (1886) 6 Sup. Ct. 1194, 1197, 116 U. S. 277, 29 L. Ed. 629.

A circuit court of the United States is required to have judicial knowledge of the general laws of the different states affecting the rights of litigants. Hathaway v. Mutual Life Ins. Co. (C. C. 1900) 99 Fed. 534, 536.

See, also, notes under §§ 1537, 1538, post.

4. **"Country subject to the jurisdiction."**—The provisions of this and the following sections must be treated as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States which are not parts of the United States. Downes v. Bidwell (1901) 21 Sup. Ct. 770, 783, 182 U. S. 244, 45 L. Ed. 1088; De Pass v. Bidwell (C. C. 1903) 124 Fed. 615.

5. **Requisites and sufficiency of authentication.**—A state law certified by the clerk of the executive council and the seal of the state is sufficiently proved. United States v. Johns (C. C. 1806) Fed. Cas. No. 15,481.

Forms of authenticating the legislative proceedings of one state to make them admissible in evidence in other states, see Craig v. Brown (C. C. 1816) Fed. Cas. No. 3,328.

Under Code 1876, § 3045, a certified transcript of the statutes of a foreign state as deposited in the office of its secretary, or a printed form purporting on its face to be issued by its authority, is sufficient proof of the existence of the statute. Cubbedge v. Napier (1878) 62 Ala. 518.

The statutes of another state cannot be proved by certified extracts by a notary public of such state. Bowles v. Eddy (1878) 33 Ark. 645.

An act certified by the secretary of state, to which is appended a certificate of the governor, with the seal of the state affixed, certifying to the official character of the person signing himself as secretary, and that full faith and credit are to be given to his official acts, is not a compliance with this section. Lafayette Bank v. Stone (1837) 2 Ill. (1 Scam.) 424.

There is a sufficient authentication, without any other proof or attestation of any officer, of an act of another state introduced in evidence, authenticated by the secretary of state by annexing the seal of state thereto as provided by this section; and the fact that it does not appear upon the face of the act that the governor signed it will not render it inadmissible. Hudson v. Green Hill Seminary Corp. (1885) 113 Ill. 618.

Statutes of another state, authenticated as directed by this section, are admissible in evidence, though not authenticated as required by the law of the state in which they are offered. Ansley v. Meikle (1881) 81 Ind. 260.

A statute of another state, authenticated by the great seal and certificate of the secretary of state, is admissible. Lapice v. Smith (1839) 13 La. 91, 33 Am. Dec. 555; Commercial Bank of Natchez v. King (La. 1842) 3 Rob. 243.

Legislative acts of another state or extracts from its executive minutes, attested by the secretary, whose capacity and attestation, as in due form, are certified under the great seal by the governor, are sufficiently proved. Philadelphia Bank v. Lambeth (La. 1843) 4 Rob. 463.

A copy of an act of the legislature of Maryland, made and certified as true by the clerk of the appellate court, and accompanied by a certificate of the governor of Maryland to the official capacity, etc., of the clerk, held sufficiently authenticated under the act of congress to entitle it to be read in evidence in the courts of other states. Succession of Rice (1869) 21 La. Ann. 614.

Foreign laws may be proved by a certificate under the hand and private seal of the secretary of state, with a certificate of the governor, under the seal of the state, as to the official character of the secretary. State v. Jackson (1830) 13 N. C. (2 Dev.) 563.

A transcript of a statute of another state, authenticated by the certificate of the secretary of the commonwealth, under his hand and seal, accompanied by the declaration of the governor, under the great seal of the state, that he is secretary, and that full faith and credit ought to be given to his official acts accordingly, is proper evidence for the jury that it is a copy of the law of said state. Warner v. Commonwealth (1817) 2 Va. Cas. 95.

A statute of Ohio, certified by the secretary of state, under the great seal of the state, to be correctly copied from the original rolls in his office, is duly authenticated according to this section. Wilson v. Lazier (Va. 1854) 11 Grat. 477.

6. —— **Seal.**—Under this section a legislative act of another state must be

authenticated under the seal of state. Craig v. Brown (C. C. 1816) Fed. Cas. No. 3,328; Union Bank v. Freeman (La. 1843) 3 Rob. 485; Commonwealth Ins. Co. v. Labuzan (1860) 15 La. Ann. 295; State v. Twitty (1823) 9 N. C. (2 Hawks) 441, 11 Am. Dec. 779.

The seal of another state, affixed to a copy of an act of its legislature for the purpose of authenticating the same, proves itself and imports absolute verity, and is presumed, until the contrary appears, to have been affixed by the proper officer. U. S. v. Johns (C. C. 1806) Fed. Cas. No. 15,481; Robinson v. Gilman (1841) 20 Me. pt. 2 (7 Shep.) 299; State v. Carr (1831) 5 N. H. 367; Coit v. Millikin (N. Y. 1845) 1 Denio, 376; Lincoln v. Battelld (N. Y. C. C. 1829) 6 Wend. 475.

The public seal of another state, affixed to a written law of that state, is admissible as evidence of such law, under Cobbey's Ann. St. 1903, § 1405. Rieck v. Griffen (1905) 103 N. W. 1061, 74 Neb. 102.

In the absence of contrary proof, it must be presumed that the annexation of the seal was made by an officer having custody thereof and authorized to act. U. S. v. Amedy (1826) 11 Wheat. 392, 407, 6 L. Ed. 502.

A statute of one state may be proved in another by an exemplification under the great seal of the state, affixed by the person to whom the custody or use of it has been legally confided, and accompanied by a certificate of the object for which it is used. Wilson v. Walker (Ala. 1830) 3 Stew. 211.

To be admissible in evidence, the act of the legislature of another state must be authenticated by the seal of the state. The seal of the secretary of state cannot be considered as the seal of the state. Sisk v. Woodruff (1853) 15 Ill. (5 Peck) 15.

In order to make a certified copy from the secretary of state of an act of assembly of another state admissible in evidence under the law, it is sufficient that the seal of the state be attached to the certificate required from the governor. It need not be attached to the certificate of the secretary. State v. Cheek (1851) 35 N. C. (13 Ired.) 114.

A law of another state is held in Virginia to be sufficiently authenticated if it has the seal of the state affixed thereto, the particular officer entitled to affix the seal depending upon the regulations of the respective states. Hunter v. Fulcher (Va. 1827) 5 Rand. 126, 16 Am. Dec. 738.

7. —— **Attestation.**—The exemplification of a statute under the seal of state is admissible evidence without attestation of any public officer. Henthorn v. Shepherd (Ind. 1822) 1 Blackf. 157.

8. **Evidentiary effect of authenticated statute.**—A duly authenticated copy of the section of a foreign statute on which a party relies is sufficient. If the opposite party believe that other provisions are favorable to him, he must produce them. If surprised, the court will, on a proper showing, grant time to produce the entire statute. Sullivan v. Williams (1847) 2 La. Ann. 876.

A copy of several consecutive sections of an act of another state, taken from a digest of several statutes, and certified to be a true copy by the secretary of state, should be received as prima facie evidence of the whole law of the state upon the subject treated of in the section. Succession of Grant (La. 1859) 14 La. Ann. 795.

An authenticated copy of that section only of the law of another state upon which a party relies is sufficient, in a suit in Virginia, without a copy of the whole law. Hunter v. Fulcher (Va. 1827) 5 Rand. 126, 16 Am. Dec. 738.

9. **Proof by statute book.**—Where a statute makes it a felony to steal the notes of any particular incorporated bank, the act of incorporation becomes a public statute, and may be proved by the statute book. United States v. Porte (C. C. 1806) Fed. Cas. No. 16,070.

A state statute book purporting to be published by legislative authority held admissible evidence of the laws of the state, though not authenticated. Commercial & Farmers' Bank v. Patterson (C. C. 1822) Fed. Cas. No. 3,056.

The charter of a corporation may be proved by the pamphlet laws of the state, published by the authority of the legislature. Rockville & W. Turnpike Road v. Andrews (C. C. 1824) Fed. Cas. No. 11,984.

Under this section the printed copies of the statute laws of Nebraska, purporting to be published under its authority are prima facie evidence of the passage and existence of the laws therein contained, in the courts of the United States. City of Beatrice v. Edminson (1902) 117 Fed. 427, 54 C. C. A. 601.

Under the express terms of Burns' Ann. St. Ind. 1908, § 473, printed statute books of other states purporting to be printed under the authority of those states and certified to by the Secretary of State are admissible in evidence. New York, C. & St. L. Ry. Co. v. Lind (Ind. 1913) 102 N. E. 449.

A book purporting to contain the statutes of another state, and to have been printed by legislative authority, not authenticated according to this section, is inadmissible to prove a statute of that state. But its printed statutes from the office of the secretary, and received by the executive, of this state, from the executive of the other, are prima facie evidence of the laws it contains. Wakeman v. Marquand (La. 1826) 5 Mart. (N. S.) 265.

10. Parol evidence.—The existence, tenor, and effect of the law of the place of payment of negotiable paper, determining the question as to due presentment of a bill of exchange, may be proved by parol. Indseth v. Pierce (C. C. 1879) Fed. Cas. No. 7,026.

11. Laws of foreign countries.—Foreign written laws must be proved by the laws themselves. Robinson v. Clifford (C. C. 1807) Fed. Cas. No. 11,948; Consequa v. Willings (C. C. 1816) Fed. Cas. No. 3,128; United States v. Ortega (C. C. 1825) Fed. Cas. No. 15,971. But, if they cannot be procured, inferior evidence may be received. Seton v. Delaware Ins. Co. (C. C. 1808) Fed. Cas. No. 12,675; Consequa v. Willings (C. C. 1816) Fed. Cas. No. 3,128; United States v. Gardiner (C. C. 1853) Fed. Cas. No. 15,186a.

II. PROOF OF JUDICIAL PROCEEDINGS

(A) Construction, operation, and validity of statutory provision

12. Rule of evidence.—This section prescribes a rule of evidence rather than one of jurisdiction. Claflin v. McDermott (C. C. 1882) 12 Fed. 375; Israel v. Israel (C. C. 1904) 130 Fed. 237; Clifford v. Williams (C. C. 1904) 131 Fed. 100, 105; Beauchamp v. Bertig (Ark. 1909) 119 S. W. 75; De Vall v. De Vall (Or. 1910) 109 P. 755.

13. Pleading and evidence.—Where the bill, in a suit which involves the construction of a will which was probated in Massachusetts, contains an indirect allegation that all the proceedings referred to have been approved by a Massachusetts probate court, but does not allege that the probate court on its equity side construed the will, it does not show an adjudication which will defeat the jurisdiction of a federal court to construe the will, as a distinction is preserved in Massachusetts between the jurisdiction of the probate court, acting strictly as such, and having no power to construe wills, and its special equity jurisdiction, conferred by statute, to construe such instruments. Sherman v. American Congregational Ass'n (1902) 113 Fed. 609, 51 C. C. A. 329, affirming decree (C. C. 1899) 98 Fed. 495.

In an action on a judgment of a state court of record alleged to be in full force and effect, it is not necessary that the complaint should allege that no appeal from the judgment has ever been taken, nor that the time for appeal has expired. A. Coolot Co. v. L. Kahner & Co. (1905) 140 Fed. 836, 72 C. C. A. 248.

In a declaration on a judgment against A. and B., rendered in the Fifth district court of the city of New Orleans, a court of general jurisdiction, it was held that, A. and B. being residents of New Hampshire when the judgment was rendered, failure of the plaintiff to allege that they were duly served with notice of the suit, or that they appeared and answered thereto, made the declaration demurrable; that failure to set forth the terms, nature, or date of the contract on which such judgment was founded, or the place of making such judgment, was no ground of demurrer. Wilbur v. Abbot (C. C. 1880) 6 Fed. 814.

As the original debt is not merged in a judgment rendered in a foreign court, a certified copy of such judgment may be used as evidence by either party, in a suit on the original cause of action, without a formal allegation in the pleadings. New York, L. E. & W. R. Co. v. McHenry (C. C. 1883) 17 Fed. 414, appeal dismissed McHenry v. New York, L. E. & W. R. Co. (1888) 9 Sup. Ct. 800, 131 U. S. 440, 33 L. Ed. 224.

In an action on a judgment rendered by a court of another state, a defense based on alleged want of authority of that court to render such judgment must show facts tending to impeach the jurisdiction of that court, either as to the subject-matter or the person. L'Engle v. Gates (C. C. 1896) 74 Fed. 513.

A suit was commenced by attachment issued September 11, 1841. Plaintiff filed a declaration in assumpsit on April 29, 1842, to which defendants, on the same day, pleaded non assumpsit, and on June 10, 1842, under leave to amend, they pleaded that plaintiff ought not further to maintain his action, because on April 23, 1842, he had recovered a judgment against defendants in the district court for the city and county of Philadelphia, in the state of Pennsylvania, for the same cause of action, in a suit commenced in said court since the issuing of the original writ in this case, which judgment remained unreversed and in full force and effect. Held, that this defense was directed against the right of plaintiff to recover in the form of action adopted by it, and could not be pleaded in abatement puis darrein continuance, but was properly interposed as a special plea in bar to the further maintenance of the action. Bank of United States v. Merchants' Bank (Md. 1848) 7 Gill, 415.

An exemplified copy of an order of the New York supreme court, forbidding the bringing, continuing, or maintaining any suit against a certain life insurance company, was filed with the clerk of a Maryland court of common pleas, and a copy served on the attorney of a party who had sued the company therein, and motion made for a continuance of the cause. Held that, if it was desired to have the question as to whether the restraining order was effective to prevent the prosecution of the action determined by the Maryland appellate court, it should have been raised by a plea, or in some other

mode than by an application for a continuance. Universal Life Ins. Co. v. Bachus (1879) 51 Md. 28.

Where a suit is instituted on the same cause of action on which suit is pending in another state, a judgment in the courts of such other state, rendered during the pendency of the suit here, being pleaded in the domestic action before any other plea is filed in the cause, need not be pleaded strictly puis darrein continuance. Rogers v. Odell (1859) 39 N. H. 452.

It is not necessary to plead the judgment of a court of a sister state in order to make it admissible or conclusive between the same parties or their privies, on the same subject-matter, in an action in a different form. Marsh v. Pier (Pa. 1833) 4 Rawle, 273, 26 Am. Dec. 131.

The judgment of another state, rendered by a court having jurisdiction, is admissible in evidence under the general issue. Taylor v. Smith (Tenn. Ch. App. 1896) 36 S. W. 970.

14. "Records and judicial proceedings."—This act is limited to the records and judicial proceedings of state courts. Turnbull v. Payson (1877) 95 U. S. 418, 422, 24 L. Ed. 437. This section applies only to personal obligations, duties, contracts, and liabilities other than those which affect interests in real estate. Courtney v. Henry (1904) 114 Ill. App. 635.

An examination under this section proceeding supplementary to execution is a "judicial proceeding." In re Rooney (D. C. 1871) Fed. Cas. No. 12,032.

The proceedings of courts of probate are judicial proceedings, and may be authenticated under this section. Houze v. Houze (1856) 16 Tex. 598. Therefore the probate of a will is a judicial proceeding, to be so authenticated. Balfour v. Chew (La. 1827) 5 Mart. (N. S.) 517; Johnson v. Rannels (1828) 6 Mart. (N. S.) 621; Succession of Bowles (1842) 3 Rob. 33; Case v. McGee (1855) 8 Md. 9.

A decree of a court of chancery is within this section. Patrick v. Gibbs (1856) 17 Tex. 275.

An office copy of a deed acknowledged and recorded in the court of another state, though a part of the consideration was the compromise of a suit, is not such a record in a judicial proceeding as can be admitted under this section. Warren v. Wade (1860) 52 N. C. (7 Jones, Law) 494. Nor is a power of attorney admitted to record in another state. Parham v. Murphee (La. 1826) 4 Mart. (N. S.) 355; Reynolds v. Rowley (1842) 3 Rob. 201. Or a report of proceedings of a board of supervisors, in the absence of a certification of the presiding officer. Ex parte Felker (1912) 58 So. 94, 3 Ala. App. 231.

An indenture of apprenticeship, recorded in one state under the laws thereof, was sought to be proved in the courts of another state by a properly authenticated copy of the record. Held that, if this was not a judicial record, it did not come within the provisions of this section, and that the copy of the record was not alone sufficient to prove the indenture. Moore v. Ann (1848) 48 Ky. (9 B. Mon.) 36.

15. —— Sufficiency as certified.—In an action upon a foreign judgment which is certified in conformity to this section it is immaterial that the transcript so certified shows no placita; this requirement in Illinois decisions being with reference to direct, and having no application to collateral, proceedings. The form of entry of a judgment depends on the law of the place of entry, and a foreign transcript, certified in conformity to this section, will be presumed a full copy of the entire record, and sufficient. McMillan v. Lovejoy (1886) 115 Ill. 498, 4 N. E. 772.

A transcript of a judgment for costs entered by the United States Circuit Court of Appeals sufficiently establishes the same in an action of debt, without the transcript of such judgment being accompanied by a full transcript of all the records and proceedings in the cause. Santa Clara Valley Mill & Lumber Co. v. Prescott (1906) 127 Ill. App. 644.

The fact that a judgment was entered and that there is a record thereof, if shown by the authentication, is a compliance with this section. Joslin v. Fuller (1911) 166 Ill. App. 43.

The transcript from another state was, after the title of the case and minutes of service, "June 14, 1838, judgment sec. reg. for want of plea. January 9, 1839, sum ascertained at $155.07. Interest from June 14, 1838. Fi. fa. for debt, interest and costs to March term, 1839." Held, that from this it did not sufficiently appear that there ever had been any judgment, and that, although it might be all that was needed according to the statute or rules of court of the other state, yet the court would not so presume, in the absence of some proof of the statutes or rules. Taylor v. Runyan (1856) 3 Iowa (3 Clarke) 474.

No particular form of words is necessary to show the rendition of a judgment. A transcript of a judgment of a sister state, which indicates the time, place, parties, matters in dispute, and adjudication thereon, is sufficient. Church v. Crossman (1875) 41 Iowa, 373.

A transcript of the judgment of a sister state on which execution has been issued and certified, as required by this section, will be deemed to contain a complete copy of the judgment, though it differs in form from the form of judgment used in Kentucky. Montgomery v. Consolidated Boat Store Co.

(1903) 72 S. W. 816, 115 Ky. 156, 24 Ky. Law Rep. 2004, 103 Am. St. Rep. 302.

It is not a valid objection to the completeness of the record of a judgment of a sister state that it does not contain the reasons on which the judgment was founded, since the grounds on which a judgment is based form no part of the decree. West Feliciana R. Co. v. Thornton (1857) 12 La. Ann. 736, 68 Am. Dec. 778.

In an action upon the decree of a court of another state, the defendant pleaded nul tiel record. The record offered was duly authenticated according to this section, and was certified by the clerk to be a true transcript of the record and proceedings in the cause, with all things touching the same, as fully as they existed among the records of his office. Held that, where it appeared upon the face of the record that the matters in controversy were submitted to the judicial action of the court, such record was sufficient, although it appeared by inference therefrom that some of the original papers were not transcribed, and although it did not appear that the decree was signed by the judge or clerk of the court. McCormick v. Deaver (1864) 22 Md. 187.

A foreign judgment is sufficiently shown where the certified judgment roll contains a full record of the proceedings, including the declaration, summons, and proof of service, verdict, and judgment. Gunn v. Peakes (1886) 36 Minn. 177, 30 N. W. 466; Bowman v. Hekla Fire Ins. Co. (1894) 58 Minn. 173, 59 N. W. 943; Same v. St. Paul German Ins. Co. (1894) 58 Minn. 176, 59 N. W. 943.

The transcript of a judgment of divorce in another state is sufficient if it contain a copy of the complaint, with the indorsements thereon, the summons, with the return of service and file marks indorsed, and a copy of the decree. Williams v. Williams (1893) 53 Mo. App. 617.

A copy of the sentence of a court of admiralty, under the seal of the court, signed by the actuary in the absence of the register, and accompanied with proof of the seal and signature, was a sufficient authentication, though not signed by the judge. Gardere v. Columbian Ins. Co. (N. Y. 1811) 7 Johns. 514.

Under this section, parts of the record of a judgment may be attested and certified at the same time, and those parts at the same time attached together, attested, and certified as a true copy of the whole record, without recopying the same. Erb v. Scott (1850) 14 Pa. St. (2 Harris) 20.

A new record made up by the court of another state to supply the place of one destroyed during the war, duly certified under this section, is sufficient. Robinson v. Simons (Pa. 1869) 7 Phila. 127.

In an action on a judgment of another state, the certificate to the record of said judgment was that "the foregoing copy of record is truly taken and correctly copied from the records of judgment of such court remaining in my office." Held, that the presumption was that it was a copy of the whole record. Reber v. Wright (1871) 68 Pa. (18 P. F. Smith) 471.

Where, in an action on a foreign judgment, a copy of the record is introduced, which purports to be a record, and not a transcript, of the minutes, and it is certified as a copy of the record of the foreign court and a full transcript of the proceedings in the case, it will be presumed to be a full copy of the entire record. Shilling v. Seigle (1904) 56 A. 957, 207 Pa. 381.

An exemplification of a record of the city court of New York, purporting to be the transcript of a judgment rendered in that court, duly attested by the clerk, and certified by the chief justice to be in due form of law, must be taken to be such as constitutes a judgment by the laws of New York. Wadsworth v. Letson (S. C. 1843) 2 Speer, 277.

Though a transcript of a record from another state, produced to show the insolvency of an estate in that state, was not authenticated as a complete record, the decree adjudging the estate to be insolvent was sufficient, where sufficiently authenticated. Saint v. Taylor (1873) 59 Tenn. (12 Heisk.) 488.

A judgment against a foreign corporation was rendered in the district court of Idaho, where the statute (Rev. St. Idaho, § 2653) required every foreign corporation to designate some person residing in the county in which it had its principal place of business in the territory on whom process might be served, and file such designation with the clerk of the district court for such county, and provided that a copy of such designation, certified by said officer, should be evidence of such appointment. Held, that what purported to be a copy of the designation of a certain person as agent of such corporation, certified as of record in the district court where the judgment was rendered, but not as a part of the proceedings in the cause, was not a part of the record of the judgment, or of the court in which the judgment was rendered. Cunningham v. Spokane Hydraulic Co. (1898) 52 P. 235, 18 Wash. 524.

16. —— Admissibility in evidence.—If a clerk certify, at the foot of a paper purporting to be a record, "that the aforegoing is truly taken from the record of proceedings" of his court, and if the judge, chief justice, or presiding magistrate certify that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is a full copy of all the proceed-

ings in the case, and is admissible in evidence. But if the writing produced do not purport to be a record, but a mere transcript of the minutes extracted from the docket, it is not admissible. Ferguson v. Harwood (1815) 7 Cranch, 408, 412, 3 L. Ed. 386.

Where, during the pendency of an action in the superior court of Montgomery county, Ohio, that court was abolished and pending proceedings transferred to the court of common pleas of that county by Act Ohio March 19, 1885 (82 Ohio Laws, p. 84), it was no objection to a certified transcript of a judgment rendered in such action, when offered in evidence in an action on the judgment, that certain of the proceedings appeared to have been taken in the superior court and others in the court of common pleas. Bohlander v. Heikes (1909) 168 Fed. 886, 94 C. C. A. 298.

The courts of a state will not receive, as evidence of a foreign judgment, in a suit brought upon it, any record thereof which does not show on its face that the defendant, if a foreign corporation, was doing business in that state. This is a substantive jurisdictional averment that must affirmatively appear, and not be left to any inference from the bare return of the officer that he has served an "agent." Henning v. Planters' Ins. Co. (C. C. 1886) 28 Fed. 440.

In an action brought in another state on a judgment recovered against an insurance company by service on the insurance commissioner, the record of such judgment must affirmatively show such jurisdictional fact. Hazeltine v. Mississippi Val. Fire Ins. Co. (C. C. 1893) 55 Fed. 743.

This section is inapplicable to the reception or effect of an indictment found in another state or district as evidence before a committing magistrate. In re Dana (D. C. 1895) 68 Fed. 886, 895.

Judgments and the proceedings in the causes in which they were rendered can only be proved by the production of the record itself, or by a certified or examined copy by the clerk of the court. They are not sufficiently verified by the oath of a witness that he was at one time clerk of the court, and that certain papers exhibited to him as records of the court were issued and filed by him when he was clerk of the court, and are in his handwriting and that of his deputies, and he believes they are the records of the court, and of another witness that he received the records from the clerk of the court, as the records of the suits to which they relate. Lyon v. Bolling (1848) 14 Ala. 753.

Extracts from the bench docket and the opinion of the judge in a court of another state are not parts of the record, and should have been excluded when offered in evidence with it. Gunn v. Howell (1859) 35 Ala. 144.

The probate of a will in Georgia is shown by a transcript of a court of ordinary which contains an affidavit by one of the subscribing witnesses, that "he believes that he assigned his name at the last part of the within instrument of writing," taken before "J. Thigpen, J. P.," and an entry that the executors were sworn, and which shows that the executors discharged several of their duties, and were recognized as executors by the court. Jemison v. Smith (1861) 37 Ala. 185.

A transcript from a court in another state cannot be admitted in evidence when it fails to show that the person certifying was judge of the particular court from the records of which the transcript was taken. Brown v. Johnson (1868) 42 Ala. 208.

A record which does not contain a writ, or show a service, nor an appearance of the party, nor any issue nor any act done by attorney, is not admissible, although it states that "the parties appeared by their attorneys." Buford v. Hickman (Super. Ct. Ark. 1834) Fed. Cas. No. 2,114a.

A record of a judgment of another state is admissible in evidence, where certified under this section. Parke v. Williams (1857) 7 Cal. 247.

An action brought in the federal circuit court, in the name of a legatee under a will, against the executor to have certain gifts declared void, was dismissed. Held, that a copy of the record of such case was admissible on an appeal by another legatee to the superior court of Connecticut from a probate decree giving validity to such gifts on settling the executor's accounts, though the latter legatee was not a party to the prior action. Appeal of Buckingham (1891) 60 Conn. 143, 22 Atl. 509.

The transcript of a judgment in a suit in courts of record of another state which does not show that process against the defendant was ever issued, or that plaintiff appeared by person or his attorney, is inadmissible in an action thereon. Drake v. Granger (1886) 22 Fla. 348.

A will executed in another state, and which has been proved there, is admissible in the courts of Illinois without having been admitted to probate in Illinois, provided the record of the probate proceedings is authenticated in conformity with this section. Newman v. Willetts (1869) 52 Ill. 98.

Memoranda of proceedings in a court of another state, indorsed on a paper filed in the case, and signed by the judge, are not admissible in evidence as the record of such court. Atwood v. Buck (1885) 113 Ill. 268.

If the judgment of a sister state is relied upon to establish any particular state of facts upon which the judgment was based, or as a matter of estoppel, then the entire record must be produced, but, when it is only sought to prove the contents and existence of the judgment, an authenticated copy of the judgment itself is admissible in evi-

dence and sufficient. Chamberlain v. Britton (1907) 136 Ill. App. 290, judgment affirmed Britton v. Chamberlain (1908) 84 N. E. 895, 234 Ill. 246.

The absence of the placita is not a valid objection to the introduction of the transcript purporting to show a judgment of a sister state. Joslin v. Fuller (1911) 166 Ill. App. 43.

A transcript of judgment in another state, containing no date, and not professing to be a complete copy of the proceedings in the case, held not admissible. Kusler v. Crofoot (1881) 78 Ind. 597.

A transcript of record duly authenticated by the clerk cannot be excluded as evidence because it fails to show that the entry of judgment was signed by the judge. Anderson v. Ackerman (1883) 88 Ind. 481.

In an action on a judgment of a sister state, mere formal irregularities constitute no ground for rejecting a duly-certified record of such judgment. Bailey v. Martin (1889) 119 Ind. 103, 21 N. E. 346.

Probate of a will in another state, certified under the hand of the judge of probate, with the seal of the court, and by the judge of the court of common pleas in that state, is admissible in evidence. Greasons v. Davis (1859) 9 Iowa, 219.

A duly authenticated copy of a foreign judgment entry from a court of record possessing general original jurisdiction may in some cases be introduced in evidence without introducing the rest of the record. Haynes v. Cowen (1875) 15 Kan. 637.

Transcripts of the records of the court of probate of wills and testaments of the Missouri territory, certified since the establishment of the state by the officers of the county court, where the record purports to be kept, are competent evidence without proof of the laws of the state. Thomas v. Tanner (1827) 22 Ky. (6 T. B. Mon.) 52.

Records of suits prosecuted in any state in the Union, when certified to by the clerk, and with the seal of the court annexed, together with a certificate of the judge thereof that the person certifying is the clerk, and that he has duly certified, are competent evidence in the courts of Kentucky. Helm v. Shackleford (1831) 28 Ky. (5 J. J. Marsh.) 390.

The record of a suit pending in another state is inadmissible, when irrelevant or controverting judgment, in a suit between the same parties and another here. Skipwith v. His Creditors (1841) 19 La. 198.

The plaintiff, who claimed certain slaves under a trust deed, secured an injunction decree in Tennessee against defendant, restraining defendant's disposition of the property. Defendant having brought the slaves to Louisiana, plaintiff sued for their recovery in this state, and introduced the record of the Tennessee decree, embodied in the transcript of which was a copy of the trust deed, which had been introduced in evidence in the Tennessee suit and incorporated in the decree. Defendant objected to the introduction of that portion of the transcript embracing the deed, on the ground that it was but a copy of a copy. Held, that it would be presumed that the deed was properly proved in the Tennessee suit, and that defendant's objection was untenable, especially as plaintiff relied not so much on the conveyance as on the decree of the Tennessee court itself. Jordan v. Black (La. 1842) 1 Rob. 575.

In an action on a Pennsylvania judgment, the record of the proceedings in the action in which it was rendered is not inadmissible, because it does not contain the bill of exchange, which was the foundation of the action, the plea or defense, or the rule for a new trial, when it does show personal service on the defendant, his appearance, that in his affidavit of defense he admitted the existence of the bill, and that after a verdict against him he obtained a new trial. Hockaday v. Skeggs (1866) 18 La. Ann. 681.

A document consisting of many papers bound together with a tape was offered as a copy of the record of proceedings in bankruptcy in the district court of another state. Prefixed to these papers, and under the seal of the court, was a certificate of the clerk to the effect that "the papers hereunto annexed are each and all true copies of the record," etc. There were no marks upon the papers annexed to this certificate by which their identity could be proved. Upon one of the papers was a certificate of the clerk that it was a true copy of petition, etc., and others were certified as "a true copy." Held, that this document, offered as a whole, was not a legally authenticated copy of record, and was rightly rejected. Pike v. Crehore (1855) 40 Me. 503.

The record of a judgment had in a foreign court was certified by the clerk under this section; his certificate stating "the above to be a true transcript," except the præcipe, declaration, and verdict. After the admission of this record, part of the record to which the papers in evidence referred was introduced, being certified merely by the clerk. Held, that neither that part of the record certified under this section, nor those portions certified by the clerk, nor the two taken together, were admissible, for Code Md. art. 35, § 40, provides that an exemplification of the record under the hands of the keeper of the same and the seal of the court where such record shall be filed shall be evidence to prove any debt of record made or entered in any other state; while section 64 of that article provides that short copies of judgments or decrees rendered by any court of record in the state shall be admissible in any

other court, and thus an exemplification of the record must contain all material parts of the record, and a mere certificate of the clerk as a portion thereof is not an exemplification. Mundy v. Jacques (1911) 81 A. 289, 116 Md. 11.

A transcript of a judgment of a court of general jurisdiction in another state contained a copy of the summons to the defendant to answer in a plea of trespass on the case in assumpsit; a return of the officer thereon, showing personal service on the defendant; a copy of the plaintiff's declaration and statement of his claim; a copy of the "continued docket entry," giving the names of the parties, and showing the issuing of a summons, the filing of the plaintiff's declaration and statement, and entry of judgment; and also a copy of the "judgment docket entry," under the names of the parties, showing the date of the judgment, the amount of the debt, and the amount of the costs. Held admissible in evidence over the objection that it did not contain a sufficient record or statement of a judgment or adjudication against the defendant. Brainard v. Fowler (1876) 119 Mass. 262.

Where two actions of contract were brought against the same defendants upon the judgments of the court of another state, it was held that a duly certified copy of the record of one of the original cases, including a transcript of the testimony taken before the master appointed by the court, was a proper mode of proving that the testimony was in fact taken in the original case, and what the testimony was, if competent. American Tube & Iron Co. v. Crafts (1892) 156 Mass. 257, 30 N. E. 1024.

Where, in an action on decrees rendered in another state, the record thereof was duly attested and authenticated, the certificate stating that "the writings annexed are true copies of originals on file and of record * * * and that said originals together constitute the record of the proceedings," it was properly admitted in evidence as against the objection that the copies contained in the record did not include certain papers which appeared by the "calendar entries" to have been filed in the case. Wells v. Wells (1911) 95 N. E. 845, 209 Mass. 282.

In an action on two decrees of another state, that the certified copy of the record offered in evidence contained a clerical error in the second decree, by misreciting the date of the decree declared on in the first case, was immaterial, as affecting its admissibility in evidence. Id.

A mere transcript from the record of the probate court of another state is not legal evidence to establish heirship. Lehr v. Tarball (1838) 3 Miss. (2 How.) 905.

Suit was instituted on a judgment obtained in another state. From the transcript it appeared that the court in which the judgment was recovered had been abolished, and its records removed to the court from which the transcript issued, and that this court had issued two executions on the judgment. The transcript was properly certified, but the law authorizing the transfer was not produced. Held, the transcript was admissible in evidence. Manning v. Hogan (1858) 26 Mo. 570.

A judicial record of another state, authenticated as provided by Code Civ. Proc. Neb. § 414, is admissible in evidence without further proof that the court from which it comes is one of record. Brown v. Collins (1901) 96 N. W. 173, 2 Neb. (Unof.) 149.

A record of a judgment otherwise complete, but lacking the signature of the judge, is imperfect as a record of judgment; and a transcript of it, though duly attested, etc., intended for use in evidence in the courts of a different state, should not be admitted. Morris v. Patchin (1862) 24 N. Y. 394, 82 Am. Dec. 311.

A judgment of a sister state in an equitable action is admissible in evidence, though the testimony referred to in the report of the master in such action, as returned therewith as part of the record, does not accompany the record of the judgment; it being certified as a complete transcript of the record; and it not being shown that in such state evidence taken by the master forms part of the judgment record. Williams v. Lindblom (1895) 90 Hun, 370, 35 N. Y. Supp. 812.

Where, in an action on a foreign judgment, which was proved by an exemplified copy of the record of the court rendering it, the record shows that the action was one for conversion, the court's statement, in determining a motion for new trial, that the act which made defendant liable for conversion was fraudulent, does not change the record, since as to such question the court's opinion cannot be received as evidence. Burnham v. Pidcock (1901) 68 N. Y. S. 1007, 58 App. Div. 273, affirming judgment (1900) 66 N. Y. S. 806, 33 Misc. Rep. 65.

Where, in an action on a foreign judgment, the judgment was proved by an exemplified copy of the record of the court rendering it, which contained an opinion by the court on a review of the proceedings after trial, it was error to refuse to admit such opinion in evidence, since it will be presumed to have been made under the law of the state where the judgment was recovered, though it would not have been as part of the record in the state where offered. Id.

The record of a judgment in Pennsylvania, which has been destroyed by fire, and there properly restored, is evidence of a judgment when brought to Ohio. Poorman v. Crane (Ohio, 1833) Wright, 347.

A transcript of a judgment from a circuit court of Indiana, duly authenticated by the proper officers, is admissible in evidence, though it does not show that it was signed by the presiding judge. Dean v. Stone (1894) 2 Okl. 13, 35 Pac. 578.

The record of a judgment of a sister state is admissible in evidence, where properly exemplified, prior to Act July 6, 1797, though the exemplification is not stamped; that act only requiring stamps to be affixed to exemplifications passing the seal of the court after its enactment. Frey v. Wells (Pa. 1808) 4 Yeates, 497.

Where a certificate of the record of a judgment in another state on which suit is based is that "the foregoing copy or record is truly taken and correctly copied from the records of judgments of such court remaining in my office," the presumption is that it is a copy of the whole record, and hence the objection to its introduction that it is only a partial record is not well taken. Reber v. Wright (1871) 68 Pa. St. (18 P. F. Smith) 471.

A verdict alone cannot be received as evidence of a judgment of another state, though it seems our courts have given effect to such judgments whenever they have found a single word or act of the court from which a judgment might be inferred. Hinckle v. Carruth (S. C. 1814) 3 Brev. 402.

Where the certificates of a foreign judgment were in accordance with this section and accompanied by the certificates of the judges of the court in which it was rendered that it was in conformity with the proceedings in that state, they were admissible, and it was not necessary that the cause of action for the judgment certified be set forth. Gregory v. Williams (S. C. 1824) Harp. 417.

In an action on a judgment of another state, it is error to exclude as evidence a transcript of the judgment simply because it is without a caption. Taylor v. Smith (Tenn. Ch. App. 1896) 36 S. W. 970.

Where plaintiff began an action in a state court, but it was removed to a federal court, where she dismissed it, and in a second suit sought to show that the first was not barred by limitations, and the original papers in the first suit in the state court were lost, the transcript of the judgment of the federal court was incompetent, because only a part of the record to be proved. Southern Ry. Co. v. Seymour (1904) 83 S. W. 674, 113 Tenn. 523.

In a suit on a foreign judgment, it is error to exclude as evidence a certified copy of the judgment, duly authenticated, as required by law, on the ground that it does not show the identity of plaintiff in the suit with plaintiff in the judgment, as the parties may be identified by parol. Missouri Glass Co. v. Gregg (Tex. 1890) 16 S. W. 174.

A copy of the proceedings of a probate court of another state in the adoption of a child is admissible in the absence of evidence to overcome the presumption that the court had jurisdiction. Brown v. Mitchell (1895) 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64.

In trespass to try title, certified copies of the record in proceedings in a foreign state, over which the court in which the proceedings were had had no jurisdiction, were not admissible in evidence. Wren v. Howland (1903) 75 S. W. 894, 33 Tex. Civ. App. 87.

Where certified copies of the record in a proceeding in a foreign state were not admissible in evidence, because the court in which such proceedings were had was without jurisdiction, partial contents of such copies were not admissible to prove statements therein contained. Id.

The court of one state will presume that a court of a foreign state having general jurisdiction had jurisdiction to try title to lands in equity, and a record of such state cannot be objected to for want of such jurisdiction. Burtners v. Keran (Va. 1873) 24 Grat. 42.

Where the record of a foreign judgment does not show service of process, or an appearance by the defendant against whom suit is brought on said judgment in another state, such record is inadmissible. Cunningham v. Spokane Hydraulic Co. (1898) 52 P. 235, 18 Wash. 524.

A foreign judgment, which did not originally show service on the defendant, is admissible in evidence in an action thereon after having been amended on due notice, so as to show that fact affirmatively. Cunningham v. Spokane Hydraulic Min. Co. (1898) 55 P. 756, 20 Wash. 450, 72 Am. St. Rep. 113.

17. —— **Evidentiary effect.**—By this section Congress did not provide only for the admission of records as evidence, but declared the effect thereof as evidence, by declaring what faith and credit should be given thereto. Mills v. Duryee (1813) 7 Cranch, 481, 484, 3 L. Ed. 411.

A mere copy of docket entries not substantially in the form of a judgment is not sufficient evidence of a judgment. Leveringe v. Dayton (C. C. 1827) Fed. Cas. No. 8,288.

Judgments obtained in another state are in this state only contract debts, and do not authorize the exercise of auxiliary jurisdiction. They do not have the force and operation of domestic judgments, except for purposes of evidence. Walser v. Seligman (C. C. 1882) 13 Fed. 415.

In an action on a judgment of a sister state, it is not necessary to show that service was had on the residents of such state. Hale v. Tyler (C. C. 1900) 104 Fed. 757.

The probate of a will in one state will be admitted in the courts of another, without proof of the statute which gives the foreign court jurisdiction, upon the

proceedings being duly authenticated. Puryear v. Beard (1848) 14 Ala. 121.

A transcript of the record of a court of probate of another state appointing an administrator, if authenticated in accordance with this section, and certified by the proper officer to be a true and perfect copy of the record of the letters of administration, will establish the appointee's right to sue as administrator in this state without proof of oath or bond. Carmichael v. Saint (1855) 16 Ark. 28.

Where the record of a foreign suit shows that an execution issued, and certain proceedings thereon were had, and the exemplification of the record does not set out a copy of such execution, the evidence is demurrable, since the contents thereof cannot be stated when the execution is a matter of file or record, and a certified copy is the highest and best evidence thereof. Howell v. Shands (1866) 35 Ga. 66.

A transcript of a decree rendered by a court of another state, which is certified under this section is sufficient evidence of the validity of the decree, though it does not appear that the decree or the minutes of the court were signed by the chancellor. McFarland v. Fricks (1896) 99 Ga. 104, 24 S. E. 868.

Jurisdiction of a court to render a judgment against the defendant is sufficiently shown by the transcript thereof where such transcript contains an appearance by the defendant. Reed v. Light (1908) 138 Ill. App. 611, judgment affirmed Light v. Reed (1908) 85 N. E. 282, 234 Ill. 626.

An objection that the transcript of the foreign judgment in suit shows on its face a matter still pending in the foreign court by using the words "pending in said court," is without merit, where it shows the entry of a final judgment, which had not been satisfied when the transcript was made. Gates v. Newman (1897) 46 N. E. 654, 18 Ind. App. 392.

In an action by the assignees of a judgment to recover on it in another state, a certified copy of the assignment recorded in the court where the judgment was rendered, and made a part of the record of that judgment, is competent evidence of the assignment. Caughran v. Gilman (1890) 81 Iowa, 442, 46 N. W. 1005.

An exemplification of a judgment of another state for the defendant, in a suit by an assignee against the obligor of a note, on a plea of the statute of limitations, is sufficient, without producing the statute, in an action by the assignee against the assignor. Scott v. Cleveland (1825) 19 Ky. (3 T. B. Mon.) 62.

An authenticated copy of the certificate of probate is sufficient to prove the rightful appointment of an executor in another state. Smith v. Roach (1846) 46 Ky. (7 B. Mon.) 17.

The record of the proceedings of a regularly constituted tribunal of any state is, in this state, prima facie evidence of its conformity to law, and of the jurisdiction of such tribunal in the premises. Manion v. Titsworth (1857) 57 Ky. (18 B. Mon.) 582.

A foreign judgment duly certified as a judgment of a court of record of a sister state will be accepted as a judgment in due form though it is not signed. Barringer v. Dauernheim (1911) 53 So. 923, 127 La. 679.

It is an acknowledged and fixed principle of universal obligation, resulting from the comity and respect due one judicial tribunal to another, that a judgment of a court of record of a sister state is in itself prima facie evidence of jurisdiction; and it is not necessary for the party pleading such judgment to set out affirmatively in his plea the jurisdiction and facts upon which the power and authority of the court pronouncing judgment depend. Bank of United States v. Merchants' Bank (Md. 1848) 7 Gill. 415.

The judgment of a court of general jurisdiction of another state is sufficiently proved by certified copies of all the papers filed in the cause, showing the subject-matter of the suit, together with a certified copy of a record entitled "Judgment Roll on Failure to Answer," which, after reciting the service of summons, with a copy of the complaint, on one of the defendants, the failure to serve an answer or demurrer as required by the summons, and assessment of damages by the clerk, declares that "it is hereby adjudged" that the plaintiff recover the amount due, with costs, and that execution issue against the sole property of the defendant served with process, and the joint property of both defendants. It is immaterial that no term is named in such record. Knapp v. Abell (1865) 92 Mass. (10 Allen) 485.

In an action on a judgment of a district court of California, rendered upon a default, the copy of the judgment roll showed that the summons was signed, "W. H., Clerk, by F. F. S., Deputy Clerk." The officer's return of service was signed, "J. A., Sheriff, by W. M., Deputy Sheriff." The judgment bore no date, except that of its recording. The certificate of the clerk to the roll stated that he was the county clerk of the city and county of San Francisco, and ex officio clerk of the district court, and was under seal, and signed, "W. H., County Clerk." The certificate by the judge recited that the district court was a court of record, having a clerk and seal; that W. H. was county clerk, and was, at the time of signing the attestation, ex officio clerk of the district court. Held, that exceptions to a refusal by the trial judge to rule that the copy of the record showed no legal process or valid summons, that there was no sufficient evidence of the date of the alleged

judgment, or that any judgment was rendered as alleged, were frivolous. Boswell v. Cutter (1875) 117 Mass. 69.

The provision requiring full faith and credit to be given to judgments of courts of the various states relates to their effect as evidence. Marshall v. R. M. Owen & Co. (1912) 137 N. W. 204, 171 Mich. 232.

The copy of a foreign will, and the probate thereof, as the same appear of record, duly authenticated, are competent evidence to prove the existence of the original will, the probate thereof, and the appointment, acceptance, and qualification of the executors of the same. First Nat. Bank v. Kidd (1874) 20 Minn. 234 (Gil. 212).

The record of a judgment obtained in another state is prima facie evidence of the jurisdiction of the court whence it issued. Moulin v. Trenton Mut. Life & Fire Ins. Co. (1853) 24 N. J. Law (4 Zab.) 222.

Action on a judgment recovered in Mississippi in 1842. The transcript of the record, attested by the clerk of the circuit court in and for the county of Adams, set forth that the judgment was recovered in the circuit court held before the presiding judge of the Third judicial district. The authenticity of the clerk's attestation was certified by the judge, describing himself in his certificate, dated in 1857, as "presiding judge of the First judicial district of the state of Mississippi, which included the county of Adams." Held, that this certificate proved itself, and was sufficient prima facie evidence that Adams county was within the jurisdiction of the judge, and of the official character he claimed to possess. Hatcher v. Rocheleau (1858) 18 N. Y. 86.

Where a superior court of a sister state has a presiding judge, a clerk, and a seal, its records, when duly authenticated, are entitled to be received, and are evidence, not only of the acts of the court, but of its jurisdiction. Ransom v. Wheeler (N. Y. 1861) 12 Abb. Prac. 139.

The record of the court of another state, duly authenticated, and showing the existence of a court having a judge, clerk, and seal, is prima facie evidence of the acts of such court as recited therein, and that the court had jurisdiction of the persons and subject-matter of the proceedings. Pepin v. Lachenmeyer (N. Y. 1871) 3 Alb. Law J. 304.

An exemplified record of the proceedings in Massachusetts court resulting in levy of assessments on insured was evidence of the necessity and validity of the assessments in an action in the courts of New York to enforce an assessment, and common-law proof was not essential to the establishment of a cause of action. Hammond v. Knox (1908) 109 N. Y. S. 367, 125 App. Div. 9.

The copy of the records of a court of Georgia, not having the seal of the court, nor certified by the chief justice or presiding magistrate as required by this section, may be received as prima facie, but not as conclusive, evidence. Baker v. Field (Pa. 1800) 2 Yeates, 532.

Exemplifications of judgments recovered in other states, though slovenly, if believed to be authentic, are entitled to credit, and have the effect of fair records. Stephen v. Coleman (S. C. 1803) 1 Brev. 232.

Under this section, a certificate that a certain person was the administratrix of an estate, when attested and certified by the clerk and judge of the probate court of another state, in which the administration was had, is sufficient evidence of the official character of the administratrix. Abercrombie v. Stillman (1890) 77 Tex. 589, 14 S. W. 196.

A plaintiff suing on a foreign judgment of a court of special jurisdiction prima facie shows the facts conferring jurisdiction on introducing in evidence a duly authenticated transcript of the judgment roll, including the judgment showing that the court was a court having a judge, a clerk, a seal, and records, and that defendant appeared in the action. Christiansen v. Kriesel (Wis. 1907) 113 N. W. 980.

18. —— Availability as basis of action.—A judgment recovered in one state against one of two joint defendants will support an action against him in another state, although the judgment would have been invalid, if rendered in the latter state. Renaud v. Abbott (1886) 6 Sup. Ct. 1194, 1197, 116 U. S. 277, 29 L. Ed. 629.

An action of debt will lie on a judgment of another state, notwithstanding the pendency of an appeal or writ of error. Union Trust Co. v. Rochester & P. R. Co. (C. C. 1886) 29 Fed. 609.

Under Act Pa. April 3, 1903 (P. L. 139), which provides that "two returns of nihil habet shall be equivalent to personal service in writs of scire facias to revive judgments entered in personal actions," and the rule of practice in that state that such writs are a continuation of the original suit, a judgment entered on two such returns in an action in which the court had original jurisdiction, in ordinary circumstances, is entitled to full faith and credit in another state; but under Act Pa. March 26, 1827 (P. L. 129), and Act Pa. June 1, 1887 (P. L. 289), which, as construed by the courts of the state, limit the life of a judgment to five years, during which time only it can be revived by scire facias, a judgment of revival, entered on two such writs issued nine years after the original judgment and returned nihil habet, is void for want of jurisdiction, and will not support an action in another state. Davis v. Davis (C. C. 1908) 164

Fed. 281, judgment reversed (1909) 174 Fed. 786, 98 C. C. A. 494.

A mere memorandum of the clerk of a North Carolina court, stating the amount of damages assessed by the jury, with the words, "then judgment for" the sum so found, added, does not constitute a judgment on which an action of debt can be maintained in Alabama, although the clerk certifies in proper form that it is "a true and perfect transcript and exemplification of the record." Hinson v. Wall (1852) 20 Ala. 298.

To sue on a foreign judgment against a plea of nul tiel record, a certified copy of the judgment is not sufficient, but the pleadings and proceedings on which the judgment is founded, and to which, as matter of record it necessarily refers, must be produced. McCarthy v. Troll (1909) 118 S. W. 416, 90 Ark. 199.

A transcript of a judgment of a sister state, containing no regular placita, contains no sufficient basis on which to found an action. Phelps v. Tilton (1861) 17 Ind. 423.

The record of an action in a state whose jurisprudence is founded on the common law, of which a court judicially takes notice, consists of the writ, declaration, pleas, and judgment; and this, properly authenticated, is sufficient to found an action of debt in a court of a sister state, with the effect of a judgment in the same state. An exemplification of the executions is not necessary. Erb v. Scott (1850) 14 Pa. (2 Harris) 20.

19. —— **Availability as defense.**—A judgment in Missouri against a garnishee is a good defense to the garnishee when sued by the principal defendant in Arkansas, under this section, though it does not appear that the judgment has been paid. St. Louis Southwestern Ry. Co. v. Vanderberg (Ark. 1909) 120 S. W. 993.

20. —— **Impeachment of record or judgment.**—In an action on a judgment rendered in another state on a replevin bond, the transcript of the record in the replevin suit showed a proper judgment, after there had been judgment by default before service of process, which had not been set aside. The transcript showed only one suit, and it appeared that the judgment by default had been treated as a nullity. Held, that defendant could not object that the judgment by default ended the action, and that all that followed in the transcript was a copy of proceedings in another action. Hallum v. Dickinson (1891) 54 Ark. 311, 15 S. W. 775.

In an action of debt on a judgment rendered by the district court for another state against a plaintiff, the fact that no warrant of attorney appears in the exemplification of record is no ground for impeaching the judgment. Rogers v. Burns (1856) 27 Pa. (3 Casey) 525.

21. **"Courts of any state or territory or of any such country."**—A judgment rendered in a court not of record, of another state, which had no clerk, and of which the presiding officer was not ex officio clerk, cannot be authenticated under this section. Sloan v. Wolfsfeld (1900) 35 S. E. 344, 110 Ga. 70.

22. —— **Courts of general jurisdiction.**—Where, in an action on a foreign judgment, it sufficiently appeared from the transcript that the judgment declared on was rendered by a court of record, it would be presumed that such court was a court of general jurisdiction, had jurisdiction of the subject-matter of the action and the parties thereto, and rightfully gave the judgment sued on. Roberts v. Leutzke (Ind. App. 1906) 78 N. E. 635.

The county court of Tennessee is a court of general jurisdiction, within the meaning of this section. Bright v. White (1844) 8 Mo. 421; Same v. Woods, Id. 428.

23. —— **Justices of the peace.**—A judgment of a justice of the peace of another state, when not a court of record, cannot be authenticated, under this section. Graham v. Grigg (Del. 1842) 3 Har. 408; Robinson v. Prescott (1828) 4 N. H. 450; Strecker v. Railson (N. D. 1907) 111 N. W. 612, 8 L. R. A. (N. S.) 1099; King v. Van Gilder (Vt. 1797) 1 D. Chip. 59. But must be otherwise proven. Blackwell v. Glass (1884) 43 Ark. 209; Albright v. Mickey (Ark. 1911) 137 S. W. 568; Lawrence v. Gaultney (S. C. 1839) Cheves, 7. Or according to state statute. Dragoo v. Graham (1861) 17 Ind. 427; Gay v. Lloyd (Iowa, 1847) 1 G. Greene, 78, 46 Am. Dec. 499.

Where justices' courts are courts of record, they come within this section; and such records of a justice of another state, properly authenticated under that act, are admissible in evidence in Connecticut. Bissell v. Edwards (Conn. 1812) 5 Day, 363, 5 Am. Dec. 166. An exemplification of the record of a judgment of a justice of the peace of a sister state certified according to this section, is competent evidence in Kentucky. Scott v. Cleveland (1825) 19 Ky. (3 T. B. Mon.) 62.

24. —— **Federal courts.**—This section does not apply to the judgments and records of the federal courts. South Ottawa v. Perkins (1876) 94 U. S. 260, 271, 24 L. Ed. 154; Mason v. Lawrason (C. C. 1804) Fed. Cas. No. 9,242; Jordan v. McDonnell (Ala. 1907) 44 So. 101; Adams v. Way (1866) 33 Conn. 419; Dean v. Chapin (1871) 22 Mich. 275; Jenkins v. Kinsley (N. Y. 1800) Colem. & C. Cas. 136. Nor does it apply to use of records in federal courts. Bennett v. Bennett

(D. C. 1867) Fed. Cas. No. 1,318; Edwards v. Smith (Tex. Civ. App. 1911) 137 S. W. 1161. But it is the uniform practice to follow the requirements of this section as to the certificate of the clerk and judge in authenticating the records and judicial proceedings of the United States courts, and an authentication which conforms thereto is sufficient. O'Hara v. Mobile & O. R. Co. (1896) 76 Fed. 718, 22 C. C. A. 512 (affirming judgment [C. C. 1895] 75 Fed. 130).

Copies of proceedings in the federal courts for the district of South Dakota are admissible in evidence when attested by the clerk, without the certificate by the federal judge that the attestation is in due form, which is required by Laws S. D. 1911, c. 148, and by analogy by this section. Ganow v. Ashton (S. D. 1913) 143 N. W. 383.

25. —— **Territorial courts.**—The judgments of the courts of the Creek Nation are entitled to the same respect and to the same faith and credit as the judgments of the territorial courts of the United States. Cornells v. Shannon (1894) 63 Fed. 305, 306, 11 C. C. A. 465.

The courts of the United States being domestic tribunals, no distinction can be made as to the manner of proving the proceedings of the courts of the United States in a territory and those of the courts of the same character established within the limits of a state. Womack v. Dearman (Ala. 1838) 7 Port. 513.

A record of proceedings in the judicial district court of the territory of Utah, duly authenticated under this section, is admissible in evidence to show that such proceedings have been had. Friend v. Miller (1893) 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340.

A copy of the record of a judgment of a court in the territory of Louisiana, certified by the clerk, under the seal of the court, together with the certificate of the governor, under the great seal, that he is the clerk, was held to be sufficiently certified. Haggin v. Squires (1811) 5 Ky. (2 Bibb) 334.

Under this section the judgments and records of the courts of the several territories stand on the same footing as those of the courts of a state. Suesenbach v. Wagner (1889) 41 Minn. 108, 42 N. W. 925.

26. **"Any other court."**—This section does not apply to the records of the same court in different places in the same district, which court will take judicial cognizance of its proceedings throughout the district. Bohart v. Hull (1898) 47 S. W. 306, 2 Ind. T. 45.

27. **Validity of statute.**—The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by Const. art. 4, § 1, and by the constitutional provisions authorizing legislation necessary and proper for executing the powers vested by the constitution and declaring the supremacy of the authority of the national government within constitutional limits. Atchison, T. & S. F. R. Co. v. Sowers (1909) 29 Sup. Ct. 397, 400, 213 U. S. 55, 53 L. Ed. 695.

This act is constitutional. Hughes v. Davis (1855) 8 Md. 271.

(B) Authentication in general

28. **Whether this method exclusive.**—The existence of a federal statute providing what authentication shall be necessary to entitle a record or judicial proceeding of one state to admission in evidence in the courts of another state does not preclude the application of a state statute providing for the admission of such record on less stringent terms. Droop v. Ridenour (1897) 11 App. D. C. 224; People v. Miller (1902) 63 N. E. 504, 195 Ill. 621; Tomlin v. Woods (1904) 101 N. W. 135, 125 Iowa, 367; Kingman v. Cowles (1869) 103 Mass. 283; Willock v. Wilson (1901) 59 N. E. 757, 178 Mass. 68; Otto v. Trump (1887) 115 Pa. St. 425, 8 Atl. 786; Ordway v. Conroe (1854) 4 Wis. 45. And a record is admissible which conforms to this section, or the statute of the state in which the record is sought to be used in evidence. Tharpe v. Pearce (1892) 89 Ga. 194, 15 S. E. 46; Sullivan v. Kenney (Iowa, 1910) 126 N. W. 349; In re Ellis' Estate (1893) 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287; Davis v. Davis (1910) 124 N. W. 715, 24 S. D. 474; Tourtelot v. Booker (Tex. Civ. App. 1913) 160 S. W. 293; Ordway v. Conroe (1854) 4 Wis. 45. Or which conforms to or is proved by the common-law mode. Duvall v. Ellis (1850) 13 Mo. 203; Etz v. Wheeler (1886) 23 Mo. App. 449; Campbell v. Home Ins. Co. (1869) 1 S. C. (1 Rich.) 158; Bryant v. Kelton (1846) 1 Tex. 433; St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Tex. Civ. App. 1905) 88 S. W. 512; Wolf v. King (Tex. Civ. App. 1908) 107 S. W. 617.

A court is not prohibited from receiving a record, although not certified according to this section, if proved as a foreign record. Lothrop v. Blake (1846) 3 Pa. St. (3 Barr) 483.

Gen. St. Minn. 1913, § 8423, relative to admission of certified copies, held inapplicable to foreign records and documents, authenticated and certified pursuant to this section. Brown v. Chicago & N. W. Ry. Co. (1915) 152 N. W. 729, 129 Minn. 347.

29. **Necessity of authentication.**—The record of a judgment in the state of Illinois is not admissible in evidence in the circuit court of Missouri unless attested in accordance with this section and duly certified. U. S. v. Biebusch (C. C. 1880) 1 Fed. 213.

This section applies only to the au-

thentication of records of judicial proceedings in the states and territories. American Surety Co. of New York v. Sandberg (D. C. 1915) 225 Fed. 150.

The papers accompanying a requisition for extradition need not be exemplified as prescribed by this section. State v. Currie (Ala. App. 1911) 56 So. 736.

A copy of a judicial record of another state, not authenticated as required by this section or by Code Civ. Proc. Kan. § 371, relating to proceedings in courts of foreign countries, is not admissible in evidence because certified in accordance with Code Civ. Proc. Kan. § 372, which provides for admission in evidence of copies of records required by law to be kept in any public office; such section having reference only to records kept under the authority of the law of the state or of the United States. Ayres v. Wm. Deering & Co. (Kan. 1907) 90 P. 794.

Letters of administration, like the records of all courts in other states, are admissible only when authenticated according to this section. Hope v. Hurt (1881) 59 Miss. 174.

A certificate and copy of his record, given by a probate judge of another state, concerning an administration within his jurisdiction, are inadmissible as evidence in Texas, unless offered as an examined copy produced by a witness, or accredited, as described in this section, by attestation of the clerk under seal of the court, duly certified by the judge, or, in the case of records, by attestation under seal of their keeper, duly certified by one of the officers designated by the statute. Grimes v. Smith (1888) 70 Tex. 217, 8 S. W. 33.

The opinion of the Supreme Court of a sister state, not published as an opinion of the court, is admissible in evidence only as a record and judicial proceeding of the Supreme Court, and must be authenticated as prescribed by this section. Whited v. Johnson (Tex. Civ. App. 1914) 167 S. W. 812.

30. —— Proceedings of federal courts of another state.—Documents offered in evidence in the state courts as copies of orders and proceedings of a federal court in another state are inadmissible in evidence, unless certified in accordance with this section. A. Lehmann & Co. v. Rivers (1903) 35 So. 296, 110 La. 1079.

31. Requisites and sufficiency.—The record of a state court authenticated with the attestation of the clerk and the seal of the court annexed, together with a certificate of the court that the attestation is in due form of law, is sufficiently authenticated to be admissible in evidence. Owings v. Hull (1835) 9 Pet. 607, 627, 9 L. Ed. 246.

A record held duly exemplified. Carpenter v. Strange (1891) 11 Sup. Ct. 960, 964, 141 U. S. 87, 35 L. Ed. 640.

Forms of authenticating the judicial proceedings of one state, as prerequisite to their admission in evidence in other states. Craig v. Brown (C. C. 1816) Fed. Cas. No. 3,328.

A document attested by the clerk of a court with its seal and the certificate of its presiding judge, and called an "exemplified copy," is competent evidence of the judgment described in it under this section, though not sufficient at common law or under the state laws. Taylor v. Carpenter (C. C. 1846) Fed. Cas. No. 13,785.

The record of a judgment in the state of Illinois is not admissible in evidence in the circuit court of Missouri unless attested in accordance with this section and duly certified. U. S. v. Biebusch (C. C. 1880) 1 Fed. 213, 215.

In an action on a judgment of a state court, an exemplification which is a transcript of the "complete record" of the proceedings, made up according to the practice in the courts of the state, is sufficient when it shows that the court had jurisdiction of the subject-matter and the parties, and that the judgment was in fact rendered. Woodbridge & Turner Engineering Co. v. Ritter (C. C. 1895) 70 Fed. 677.

The authentication of the record of a judgment held in substantial conformity to this section. Seymour v. Du Bois (C. C. 1906) 145 Fed. 1003.

Where the proceedings and judgment of a court in a sister state are certified by the clerk and attested by the judge, and the proceedings are in form like those of a court of record, and the declaration such as is usual in such case, it will be intended, without further proof, that the judgment was rendered by a court of record. Hughes v. Harris (1841) 2 Ala. 269.

Where it is not made to appear by the certificate either of the clerk or judge in a sister state that the county in which the proceedings were had is included in the judicial circuit within which the judge presides, the authentication is insufficient to admit the record in evidence. Elliott v. McClelland (1850) 17 Ala. 206.

A certificate of exemplification of a judgment rendered in another state, if it be attested by the clerk under the seal of the court, and the presiding judge of the court certifies that the attestation is in due form of law, will, under this section, sustain an action on the judgment in another state. Thompson v. Manrow (1851) 1 Cal. 428.

A transcript of foreign proceedings with a certificate of the judge alone that the foregoing was a complete transcript of the proceeding of the county court in a certain county, and in a case specified, was insufficient. Henry Inv. Co. v. Semonian (Colo. 1909) 100 P. 425.

A transcript of a record judgment of a Supreme Court of New York, when authenticated substantially in accordance with the acts of Congress em-

bodied in Civ. Code Ga. 1910, § 5824, should be given full faith and credit. Clein v. Diamond (Ga. App. 1916) 87 S. E. 1101.

The record of a judgment in another state is admissible, if attested by the clerk under the seal of the court, and the attestation certified to be in due form by the judge, chief justice, or presiding magistrate. Ducommun v. Hysinger (1852) 14 Ill. (4 Peck) 249.

Where a transcript of a judgment in a court of another state is certified by the clerk thereof, and the presiding judge certifies that the attestation is in due form, it is a substantial compliance with this section. Horner v. Spelman (1875) 78 Ill. 206.

Where a copy of a foreign judgment is not verified by an oath, or such a seal attached as proves itself, and is without proof aliunde of its genuineness, or of the signature or official character and authority of either of the persons certifying thereto, it is inadmissible. Thompson v. Mason (1879) 4 Ill. App. (4 Bradw.) 452.

In a suit on a judgment of the commercial court in Cincinnati, Ohio, the transcript was certified by the clerk of the court of common pleas of Hamilton county, Ohio, and bore the seal of that court. He certified that it was a true copy of a record of the said commercial court, as the same appeared among the records of said court, then in his office, and transferred there according to provisions of the constitution and laws of the state. To this was added the certificate of a judge of said court of common pleas, certifying the official character of the certifying clerk, that his attestation was in due form and by the proper officer. This transcript being offered in evidence, it was held that the certificate of the judge was at least prima facie evidence that the clerk's certificate was in due form of law, and by the proper officer; that it proved the laws of Ohio; that it proved what faith and credit would be given to it in Ohio, and therefore it complied with this section. Gatling v. Robbins (1856) 8 Ind. 184.

Where the record of another case offered in evidence in the state of Kentucky was attested by the clerk of the Louisville law and equity court under his hand and seal of the court, and the judge of the court certified that C., who signed the said certificate, was the clerk of said court, and that the attestation was in due form of law, this was in conformity with this section. Main v. Field (1895) 40 N. E. 1103, 41 N. E. 829, 13 Ind. App. 401.

A transcript of a judgment of the county court of Virginia, before its division by the formation of West Virginia, authenticated by a certificate of the circuit court of West Virginia, showing that the county court of Virginia was abolished or discontinued, and its records and proceedings transferred to the said circuit court of West Virginia, and that he, as the clerk of the court named, was the lawful custodian of the records of the late county court, etc., and further authenticated by the presiding judge of the circuit court, held sufficiently attested. Darrah v. Watson (1872) 36 Iowa, 116.

A certificate of the record of a judgment of another state, showing that it was rendered by a court of record which has a seal and a clerk, sufficiently shows, until the contrary appears, that it is the judgment of a court that had jurisdiction of the parties. Caughran v. Gilman (1890) 81 Iowa, 442, 46 N. W. 1005.

It is not a valid objection to the admissibility of a transcript of a record from a sister state that the clerk's certificate does not state the record to be full or complete, or that the presiding judge does not give himself that title in his certificate, if the record appears to be complete, and shows that he was the presiding judge. Mudd v. Beauchamp (1812) 16 Ky. (Litt. Sel. Cas.) 142.

A copy of a will proved before and recorded in a court of competent jurisdiction in a sister state, and certified by the clerk and presiding officer of that court according to this section, and again proved by persons who compared the copy with the original, detained in the custody of the law of such sister state, may be used in the Kentucky courts as an unrecorded deed, and passes the title of lands devised therein. Bowman v. Bartlet (1820) 10 Ky. (3 A. K. Marsh.) 86.

Records of suits prosecuted in any state in the Union, when authenticated by a certificate of the clerk of the court, with the seal of the court annexed, together with a certificate of the judge thereof that the person certifying is the clerk, and that his certificate is in due form, are admissible. Helm v. Shackleford (1831) 28 Ky. (5 J. J. Marsh.) 390.

To prove a reversal by the supreme court of the United States of a judgment obtained in a circuit court, a printed copy of the record of the action in the supreme court, certified by the clerk of the circuit court, under the seal of his court, to be a true copy of the record and proceedings of the circuit court therein, and a copy of the mandate of the supreme court reversing the judgment and remanding the case for further proceedings, certified in the same way to be a true copy of the original on file in the clerk's office, were offered in evidence, but there was no copy of the judgment of the supreme court among the papers as offered. Held inadmissible, there being no proof that the person signing as clerk of the circuit court was a clerk of that court, and the record not being authenticated as required by this sec-

tion. United States v. Bank of United States (La. 1845) 11 Rob. 418.

To enable them to determine how far the judgment of a court of another state sought to be enforced in Louisiana is conclusive in the state of its rendition, the courts of Louisiana will require that the whole record of the proceedings under which judgment was obtained shall be produced. McLaren v. Kehler (1871) 23 La. Ann. 80, 8 Am. Rep. 592.

Under this section a copy of the record of the court of a sister state is sufficiently authenticated when there is a final authentication under the hand of the clerk. Holyoke v. Holyoke's Estate (1913) 87 A. 40, 110 Me. 469.

In an action brought upon a judgment of the "court of pleas and quarter sessions," of S. county, Tenn., a record certified by the clerk and presiding magistrate of the county court, it appearing that the two names were used indiscriminately, was held to be properly admitted. Strong v. Runnels (1837) 3 Miss. (2 How.) 667.

A transcript of an Indiana record, certified by the clerk of the court to be "a full, true, and complete transcript of all the proceedings had in the above case, as now remains of record and on file in my office," with the certificate of the judge that the clerk's certificate and attestation were "in due form," was held to be properly authenticated under this act. Grover v. Grover (1860) 30 Mo. 400.

Exemplification of foreign judgment. See Omahundro v. Clarkson (1883) 13 Mo. App. 583, memorandum.

A judgment of another state should not be rejected because of a confusion in the record as to the number of the judicial circuit, all else being regular. Taylor v. Heitz (1885) 87 Mo. 660.

A transcript of a judgment rendered in another state, duly authenticated according to this section, and showing that the court which rendered the judgment was a court of record and had a judge, a clerk, and a seal of court, is admissible in an action in this state on the judgment. Western Assur. Co. v. Walden (Mo. 1911) 141 S. W. 595.

If it be assumed that Tennessee was a foreign government in February, 1865, a proper mode of authentication in 1867 of a judgment rendered therein at the former date, so as to entitle it to be received in evidence in the courts of New Hampshire, was the same as though the judgment was rendered in any other state of the United States, since in 1867 Tennessee was again in the Union. Steere v. Tenney (1871) 50 N. H. 461.

A copy of the record of a trial in the court of sittings of New York, though certified only by the clerk of the supreme court of that state, may be given in evidence in this state. Haight v. Morris (1824) 7 N. J. Law (2 Halst.) 289.

Where the certificate of the prothonotary attached to the exemplification of the record of another state is signed by the chief clerk, whose signature is duly attested by the presiding judge of the court, to the effect that the person certifying is the proper officer to make such certificate, it is sufficient, within this section. Sheriff v. Smith (N. Y. 1873) 47 How. Prac. 470.

A copy of a judgment in another state is admissible in evidence, when authenticated by the certificate under seal of the prothonotary of the court in which the judgment was rendered, and the certificate is certified by the presiding judge of the court to be in due form of law, and made by the proper officer, and the certificate of the judge is further authenticated by another certificate of the prothonotary under the seal of the court. Murphy v. Marscheider (1889) 52 Hun, 611, 4 N. Y. Supp. 799.

Under this section a record certified by the clerk of court, the county clerk, and the presiding judge is sufficient, where no specific defect is pleaded, though not attested by the secretary of state under the great seal, as required by Code Civ. Proc. N. Y. § 952. Talamo v. Ermano (City Ct. N. Y. 1899) 62 N. Y. S. 246.

Where, in an action on a judgment recovered in another state, the judgment roll offered in evidence was authenticated as prescribed by this section, it was admissible, though the authentication did not comply with Code Civ. Proc. N. Y. § 952, which relates only to the authentication of copies of records of courts of foreign countries. Skrillow v. Rubonovitz (1908) 113 N. Y. S. 835.

Record of proceedings and decrees of foreign courts, not exemplified, but only certified as correct copies or transcripts by a court commissioner of such court, not under seal, are incompetent. Goss v. Herman (N. D. 1910) 127 N. W. 78.

The papers and proceedings offered to prove the existence of another suit between the same parties in another state, without the seal of the court, and with the certificate of the judge to their authenticity, on a separate piece of paper, are incompetent evidence. McFarlane v. Harrington (S. C. 1804) 2 Bay, 555.

Judicial proceedings, including the judgment, in the "court of pleas and quarter sessions" of North Carolina, certified by the clerk and authenticated by the chairman pro tem. of the court, are admissible in evidence in an action in this state upon the judgment. McKenny v. Gordon (S. C. 1860) 13 Rich. Law, 40.

This section does not in express terms require the clerk to certify that the transcript is a copy; and the phrase "judicial records and proceedings" was intended to embrace the summons, declaration, or petition, and other proceedings in a cause, as well as

the actual proceedings in open court; and hence the certificate of a clerk that a paper is a true and perfect transcript of the petition, note, summons, etc., "as the same remains now on file and of record in my office," with the judge's certificate that his certificate was in due form of law, is a sufficient authentication of the record, the papers enumerated being such as usually constitute a perfect record. Coffee v. Neely (1871) 49 Tenn. (2 Heisk.) 304.

On the inspection of an affidavit offered in evidence, the fact, appearing by the certificate, that the court in which the judge presided before whom the affidavit was made had a clerk and seal, is sufficient evidence that it was a court of record. Moore v. Carson (1854) 12 Tex. 66.

Where a transcript of a foreign judgment purports to be a transcript of a judgment rendered at a term of the law side of the common law and chancery court of the city of Memphis, begun and held at the court house in the city of Memphis, for the Fifth, Thirteenth, and Fourteenth civil districts of the county, etc., and the certificates of the clerk and judge show only that the first is clerk of the law side of the common law and chancery court of the city of Memphis, and the second that the judge is the presiding judge of the common law and chancery court of the city of Memphis, but without specifying any connection with the courts for the Fifth, Thirteenth, and Fourteenth civil districts, etc., the authentication is sufficient. Harper v. Nichol (1854) 13 Tex. 151.

A record of a court of another state, showing the appointment of a receiver, with the certificate of the clerk in due form, whose name is signed by a deputy, with the seal of the court attached, followed by the certificate of the presiding judge that the clerk is the proper custodian of the records, and that the certificate is in due form, with a further certificate of the clerk to the official position of the judge, in due form, with the name of the clerk, signed by his deputy, to which the seal of the court is also attached, is sufficiently authenticated. Steinke v. Graves (1898) 52 P. 386, 16 Utah, 293.

Where a transcript of the record of the proceedings of a court of another state is offered in evidence in this state, and it is not attested according to this act, the certificate of attestation of the clerk must conform to Rev. St. Wis. c. 137, § 71, and state that he has compared the copy with the original, and that it is a correct transcript therefrom. Hackett v. Bonnell (1863) 16 Wis. 471.

Where the record of a foreign judgment sued on was duly attested by the clerk and the seal of the court was annexed thereto, together with a certificate of the judge, as required by this section, it was admissible. Halfhill v. Malick (1911) 129 N. W. 1086, 145 Wis. 200.

32. —— **Judgments of federal courts.**—A judgment of a United States court is admissible, when authenticated, as provided for judgments of state courts. Buford v. Hickman (Super. Ct. Ark. 1834) Fed. Cas. No. 2,114a.

The judgments of the courts of the United States must be construed to be embraced in this section, or they must be esteemed foreign judgments. In either case they must be properly authenticated. Dorsey v. Maury (1848) 18 Miss. (10 Smedes & M.) 298.

The court a qua did not err in rejecting a document offered by defendant to show that the plaintiff was a bankrupt, and therefore not entitled to enforce certain judgments on which his suit was based; the instrument coming from the United States district court of another state, and not being authenticated according to this section. Heard v. Patton (1875) 27 La. Ann. 542.

As to authentication of records and judgments of federal courts without particular reference to this section, see National Acc. Soc. v. Spiro (1899) 94 Fed. 750, 37 C. C. A. 388; Murray v. Marsh (C. C. 1803) Fed. Cas. No. 9,965; Smallwood v. Violet (C. C. 1808) Fed. Cas. No. 12,962; United States v. Wood (C. C. 1818) Fed. Cas. No. 16,757; Catlett v. Pacific Ins. Co. (C. C. 1826) Fed. Cas. No. 2,517; Mewster v. Spalding (C. C. 1853) Fed. Cas. No. 9,513; Springs v. James (C. C. 1909) 172 Fed. 626; Womack v. Dearman (Ala. 1838) 7 Port. 513; Allison v. Robinson (1903) 34 So. 966, 136 Ala. 434; Adams v. Way (1866) 33 Conn. 419; Cain v. Seaboard Air Line Ry. (1910) 67 S. E. 127, 7 Ga. App. 462; Gregory v. Pike (1900) 46 A. 793, 94 Me. 27; Wonderly v. Lafayette County (1899) 51 S. W. 745, 150 Mo. 635, 45 L. R. A. 386, 73 Am. St. Rep. 474; Pepoon v. Jenkins (N. Y. 1800) 2 Johns. Cas. 119; Grant v. Levan (1846) 4 Pa. St. (4 Barr) 393; Williams v. Wilkes (1850) 14 Pa. St. (2 Harris) 228; Hamon v. Foust (Tenn. 1912) 150 S. W. 418.

33. —— **Judgments of justices of the peace.**—A transcript of the record of a justice of the peace, certified by him to the county court, and certified by the prothonotary and the presiding judge of that court, under this section held sufficient. Hade v. Brotherton (C. C. 1829) Fed. Cas. No. 5,892.

A transcript of the record of an action before a justice of the peace in a foreign state, which was certified by the justice under his seal, and which contained a certificate of a clerk of the court of common pleas in such foreign state that the justice was, at the date of the rendition of the judgment and the making of his certificate, an acting justice of the peace, duly commissioned and qualified, and that full faith and

credit should be given to his official acts, and that his signature to the transfer was genuine, is sufficiently certified to be admissible. Ault v. Zehering (1871) 38 Ind. 429.

In an action in New York on a judgment rendered in an action brought in New Jersey "in a court for the trial of small causes," and tried before a justice of the peace of a certain named county, a transcript of the judgment sued on, certified by the clerk of the county named, with a certificate by the justice of the common pleas court, to the effect that the attestation was in due form and that the signature of the county clerk was genuine and the seal of the common pleas court attached, was not a compliance with the statutory requirement so as to render the record admissible. Van Deventer v. Mortimer (1907) 107 N. Y. S. 564, 56 Misc. Rep. 650.

In an action on a judgment of a justice of the peace of a foreign state, a transcript of the judgment, attested by the ordinary certificate of the clerk and the certificate of the judge of a court of common pleas, is inadmissible. Huie v. Devore (1910) 123 N. Y. S. 12, 138 App. Div. 677.

The certificate of a clerk or prothonotary of the official character of a justice of the peace in another state is receivable to authenticate the transcript of a judgment, though such attestation is not within this section. Kuhn v. Miller's Adm'rs (Ohio, 1832) Wright, 127.

A judgment of an Indiana justice of the peace, although not within the act of congress for the authentication of records, is a judicial proceeding, within the first section of article 4 of the constitution of the United States, and is entitled to full faith and credit. Stockwell v. Coleman (1859) 10 Ohio St. 33.

As to proof of proceedings and judgments of justices of the peace, according to state statute or common law, see McGee v. Sheffield (Ala. 1833) 3 Stew. & P. 351; Stevens v. Payne (Conn. 1794) 2 Root, 83; Trader v. McKee (1839) 2 Ill. (1 Scam.) 558; Dragoo v. Graham (1861) 17 Ind. 427; Ault v. Zehering (1871) 38 Ind. 429; Terre Haute & I. R. Co. v. Baker (1890) 122 Ind. 433, 24 N. E. 83; Louisville, N. A. & C. Ry. Co. v. Parish (1893) 6 Ind. App. 89, 33 N. E. 122; Same v. Creamer (1893) 6 Ind. App. 700, 33 N. E. 238; Gay v. Lloyd (Iowa, 1847) 1 G. Greene, 78, 46 Am. Dec. 499; Guesdorf v. Gleason (1860) 10 Iowa, 495; Railroad Bank v. Evans (1871) 32 Iowa, 202; Tomlin v. Woods (1904) 101 N. W. 135, 125 Iowa, 367; Morrison Mfg. Co. v. Rimerman (1905) 104 N. W. 279, 127 Iowa, 719; Case v. Huey (1881) 26 Kan. 553; Upham v. Damon (1866) 94 Mass. (12 Allen) 98; Howard v. Coon (1892) 93 Mich. 442, 53 N. W. 513; Bryan v. Farnsworth (1873) 19 Minn. 239 (Gil. 198); Smith v. Petrie (1897) 73 N. W. 155, 70 Minn. 433; Verhallen v. Laveochia (1901) 30 So. 710, 79 Miss. 370; Winham v. Kline (1898) 77 Mo. App. 36; Gordon Bros. v. Wageman (Neb. 1906) 108 N. W. 1067; Mahurin v. Bickford (1834) 6 N. H. 567; Huie v. Devore (1910) 123 N. Y. S. 12, 138 App. Div. 677; Perry v. Northern Ins. Co. (Pa. 1863) 5 Phila. 188, 20 Leg. Int. 325; Curran v. Rowley (1886) 2 Pa. Co. Ct. R. 539; Beal v. Smith (1855) 14 Tex. 305; King v. Van Gilder (Vt. 1797) 1 D. Chip. 59.

34. —— **Probate proceedings.**—Where the genuineness of a copy of the proceedings of the probate court of a sister state is authenticated by the attestation of its clerk, the certificate of the judge to the official character of the clerk, and the formality of his attestation, and the additional certificate of the clerk in the terms of the law to the official qualification of the judge, its authentication is complete, under this section. Kennedy v. Kennedy's Adm'r (1845) 8 Ala. 391.

To let in the exemplification of the probate of a will under this section, no particular form of certificate is necessary. If the record is attested by the clerk, and his attestation is certified by the presiding judge to be in due form, it is immaterial how the attestation is made. White v. Strother (1847) 11 Ala. 720.

The certificate of the clerk of a court in another state that the transcript was a true copy of the original filed in his office and proven in open court at a certain term, and ordered recorded, is not evidence of the testimony included in the transcript, as it does not show how the will was proved, nor what was the order of the court. Succession of Bowles (La. 1842) 3 Rob. 33.

A certificate by the "judge of the court of ordinary" of a sister state that a copy of a will probated in his court is a true copy, as appears from the record in his office, is not sufficient to render the copy admissible in evidence. Stuart v. Swanzy (1849) 20 Miss. (12 Smedes & M.) 684.

As to authentication of foreign wills in compliance with state statute or common law, see Phebe v. Quillin (1860) 21 Ark. 490; Smith v. Redden (Del. 1851) 5 Har. 321; Dooly v. McCurley (1860) 31 Ga. 593; Shephard v. Carriel (1857) 19 Ill. (9 Peck) 313; Gardner v. Ladue (1868) 47 Ill. 211, 95 Am. Dec. 487; Carmichal v. Elmendorf (1817) 7 Ky. (4 Bibb) 484; McConnell v. Brown (1821) 16 Ky. (Litt. Sel. Cas.) 459; Gray v. Patton (1841) 41 Ky. (2 B. Mon.) 12; Chrisman v. Gregory (1844) 43 Ky. (4 B. Mon.) 474; Succession of Bowles (La. 1842) 3 Rob. 33; Beatty v. Mason (1869) 30 Md. 409; Wilt v. Cutler (1878) 38 Mich. 189; Jordan v. Thomas (1856) 31 Miss. 557; Snedekers v. Allen

(1806) 2 N. J. Law (1 Penning.) 35; Knight v. Wall (1836) 19 N. C. (2 Dev. & B.) 125; Hunter v. Kelly (1885) 92 N. C. 285; In re Kennedy's Will (Pa. 1870) 1 Leg. Gaz. R. 70.

35. —— **Where clerk and judge same person.**—A certificate of the same person as judge and ex officio clerk is a substantial compliance with this section. Catlin v. Underhill (C. C. 1847) Fed. Cas. No. 2,523; Cox v. Jones (1874) 52 Ga. 438; Spencer v. Langdon (1859) 21 Ill. (11 Peck) 192; Roop v. Clark (Iowa, 1854) 4 G. Greene, 294; Brown v. Baxter (Kan. 1908) 94 P. 155 (rehearing denied Id. 574); Pagett v. Curtis (1860) 15 La. Ann. 451; Steele v. Queen (1901) 50 A. 668, 67 N. J. Law, 99; State v. Hinchman (1856) 27 Pa. St. (3 Casey) 479; Sally v. Gunter (S. C. 1860) 13 Rich. Law, 72; Welder v. McComb (1895) 10 Tex. Civ. App. 85, 30 S. W. 822; Keith Bros. & Co. v. Stiles (1896) 92 Wis. 15, 64 N. W. 860. In such case a single certificate made by him, containing the essential statements of both clerk and judge, as required by this section, is sufficient. Jordan v. Thomas (1856) 31 Miss. 557; Wilson v. Phœnix Powder Mfg. Co. (1895) 40 W. Va. 413, 21 S. E. 1035. But the copy of a record of another state is not admissible in evidence without the attestation of the clerk of the court and the certificate of the judge as to the due form of attestation, even though the offices of clerk and judge are held by the same person. Melius v. Houston (1866) 41 Miss. 59. See Rowe v. Barnes (1897) 70 N. W. 197, 101 Iowa, 302, holding that under Code Iowa, § 3713, requiring a copy of a judicial record of another state, to be admissible in evidence, to be authenticated by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law, a copy of a record, simply certified by the judge, with a statement that by the laws of the state he is also clerk of the court, is not sufficiently authenticated.

36. —— **Surplusage.**—If something more than is strictly necessary is included in the attestation and certification of the record of a judgment from another state, it does not vitiate or destroy its validity. Gavit v. Snowhill (1856) 26 N. J. Law (2 Dutch.) 76; Erb v. Scott (1850) 14 Pa. St. (2 Harris) 20.

37. —— **Necessity of complying with statute.**—The authentication of records of the courts of other states must conform to this section. Caperton v. Ballard (1871) 14 Wall. 238, 20 L. Ed. 885; Tarlton v. Briscoe (1817) 8 Ky. (1 A. K. Marsh.) 67; Barbour v. Watts (1820) 9 Ky. (2 A. K. Marsh.) 290; Barlow v. Steel (1877) 65 Mo. 611.

As to authentication in compliance with state statutes, see State v. Adams (Del. 1848) 5 Har. 107; Porter v. Bevill (1849) 2 Fla. 528; Sloan v. Wolfsfeld (1900) 35 S. E. 344, 110 Ga. 70; Thompson v. Mason (1879) 4 Ill. App. (4 Bradw.) 452; Graham v. Troth (1904) 77 P. 92, 69 Kan. 861; Brack v. Morris (1913) 132 P. 1185, 90 Kan. 64; Williams v. Duncan (1891) 92 Ky. 125, 17 S. W. 330; Kingman v. Cowles (1869) 103 Mass. 283; McGregor v. Hampton (1897) 70 Mo. App. 98; Winham v. Kline (1898) 77 Mo. App. 36; Wells Fargo & Co. v. Davis (1887) 105 N. Y. 670, 12 N. E. 42; Harvey v. Cummings (1887) 68 Tex. 599, 5 S. W. 513; Hinchman v. Ballard (1874) 7 W. Va. 152.

(C) Attestation by clerk

38. **Who may or must attest.**—A foreign judgment sued upon was authenticated in accordance with the federal statute, where it appeared that the certifying clerk had custody of the seal and records of the court entering the judgment and that such clerk was the official clerk of the court entering the judgment in question. Joslin v. Fuller (1911) 166 Ill. App. 43.

The proceedings of a foreign court must be certified by one having the seals of the court, and it must be certified that such officer has the official custody of the proceedings. Vandervoort v. Smith (N. Y. 1804) 2 Caines, 154.

39. —— **Attestation by deputy.**—Under this section it is necessary that the attestation of the clerk be made by him personally, and not by deputy. Kansas Pac. R. Co. v. Cutter (1877) 19 Kan. 83; Willock v. Wilson (1901) 59 N. E. 757, 178 Mass. 68; Morris v. Patchin (1862) 24 N. Y. 394, 82 Am. Dec. 311; Lothrop v. Blake (1846) 3 Pa. (3 Barr) 483; Ensign v. Kindred (1894) 163 Pa. 638, 30 Atl. 274, 35 Wkly. Notes Cas. 225; Edwards v. Smith (Tex. Civ. App. 1911) 137 S. W. 1161. Not having charge of the records. Willock v. Wilson (1901) 59 N. E. 757, 178 Mass. 68. But where the record shows that the clerk whose name is signed was the clerk of the court at the time, and the judge certifies to the signature as that of the clerk, the defect is merely formal, and, on appeal, will be disregarded, as immaterial to the merits of the action. Williams v. Williams (1893) 53 Mo. App. 617. See Stedman v. Patchin (N. Y. 1861) 34 Barb. 218, holding that a certificate of a judgment record by a deputy clerk is sufficient, if the presiding judge certifies that it is in due form of law. And Hull v. Webb (1898) 78 Ill. App. 617, holding that under Stover's N. Y. Ann. Code Civ. Proc. (4th Ed.) p. 104, § 200, the attestation of a judgment by a deputy clerk of the Supreme Court is sufficient, when called

in question in a suit on the judgment in a foreign state.

40. —— **Presumption.**—A certificate of a clerk of a court of a sister state, contained on a separate sheet of paper attached to a decree of the court, certifying "the foregoing to be a * * * copy of the final judgment," is presumed to have been lawfully made, and to certify to the copy of the record to which it is attached. Woodworth v. McKee (1905) 102 N. W. 777, 126 Iowa, 714.

It will be presumed, in the absence of evidence as to the powers of the prothonotary of a court of common pleas, that he is the chief clerk of that court, and therefore, authorized to attest copies of its judgments. Trebilcox v. McAlpine (N. Y. 1887) 46 Hun, 469.

41. **Requisites and sufficiency of attestation.**—In an action brought on a decree of another state, a certificate by the clerk of the county in which the decree was taken that "I do hereby certify that the foregoing is a true copy taken from the records of the clerk's office," etc., is insufficient to give authenticity to the record. Allen v. Allen (Ala. 1824) 1 Minor, 249.

A certificate signed by the clerk of the United States district court officially, with the seal of the court affixed, which stated "that the foregoing pages, numbered from 1 to —, both inclusive, contain a full, true, and complete transcript of all the proceedings in the matter of A. B., bankrupt, as the same appears of record and on file in my office," not describing or identifying the papers included in the transcript, held fatally defective, since, on account of the blank, the court could not tell what entries and papers were intended to be certified. Clements v. Taylor (1880) 65 Ala. 363.

The clerk's certificate to a record from another state described plaintiff as Ann C. The record described her as Julia Ann C. Held, that the mistake in the certificate did not vitiate it. Conley v. Chapman (1885) 74 Ga. 709.

Where a foreign judgment on which suit was brought was signed by one as clerk of the court in which it was rendered, and accompanied by a certificate of the judge that the person so signing was at such time the "duly elected, commissioned, qualified, and acting clerk of the court," an objection to its admission in evidence on the ground that the certificate did not show that the clerk was the chief clerk was not well taken. Little Rock Cooperage Co. v. Hodge (1900) 37 S. E. 743, 112 Ga. 521.

The certificate of the clerk of a foreign court in which a judgment was rendered that the transcript of the judgment is a "true and correct copy" is not objectionable because the word "correct" is used instead of the word "complete." Bailey v. Martin (1889) 119 Ind. 103, 21 N. E. 346.

An objection that the clerk's certificate to the transcript of the foreign judgment in suit recites a suit against more than one defendant, whereas the suit, originally brought against defendant and another, was dismissed as to the other before trial, is without merit where the record shows that the plaintiffs and the defendant are identical with the plaintiffs and the defendant in the foreign suit. Gates v. Newman (1897) 46 N. E. 654, 18 Ind. App. 392.

The attestation of the copy of a record must be according to the form used in the state from which the record comes; and if the court itself is extinct, and its records and jurisdiction have been transferred to another, the clerk and presiding judge of the latter may make the requisite attestations. Roop v. Clark (Iowa, 1854) 4 G. Greene, 294.

A clerk's attestation to a transcript of a foreign judgment held to be sufficient, though containing no seal nor stamp; the judge's certificate of authentication declaring the same to be in due form of law. Simons v. Cook (1870) 29 Iowa, 324.

A certificate of the clerk of a court in another state, that among the records and files he finds a certain judgment or confession, and setting out such a judgment, sufficiently shows a judgment properly of record, as against a demurrer to a petition on such judgment. Frisbee v. Seaman (1878) 49 Iowa, 95.

The authentication of the record of a judgment rendered in another state is not impaired by the addition of a superfluous certificate, if it is duly accredited by the other certificates required by law. Young v. Chandler (1852) 52 Ky. (13 B. Mon.) 252.

A chancery record from another state, attested by the clerk and presiding judge in the form required by this section is not open to objection for improper attestation because there is appended an additional clerk's certificate not inconsistent with the proper one, but rather corroborative of it. Such additional certificate could not vitiate the transcript. Weeks v. Downing (1874) 30 Mich. 4.

The certificate of the clerk of a foreign court in which a judgment sued on was recovered that the record is complete must be presumed to be correct, and cannot be impeached by a mere inference that some portion of the transcript, not shown to be a necessary part of the record, is absent. Light v. Reed (1908) 85 N. E. 282, 234 Ill. 626, affirming judgment Reed v. Light (1908) 138 Ill. App. 611.

Where the clerk of a county court in a foreign state certified the exemplification of the record of a judgment, ob-

tained in that court as a true and correct copy of the record, as fully as the same remains on file and of record in his office, such certificate is sufficient to permit the introduction of a copy in evidence in an action on the judgment, where nothing appears to have been omitted therefrom, since the clerk is only rquired to certify to the record as it appears on file in his office. West Feliciana R. Co. v. Thornton (1857) 12 La. Ann. 736, 68 Am. Dec. 778.

Though the certificate of the clerk omitted to state that the presiding justice was duly commissioned and qualified, it was held to be a substantial compliance with the law. Case v. McGee (1855) 8 Md. 9.

A certificate of a clerk of the county court of Hartford county that "A. B. is the presiding judge of the Sixth judicial district, composed of Baltimore and Hartford counties," does not show that the certifying clerk is clerk of the court of which A. B. is the presiding judge. Paca v. Dutton (1836) 4 Mo. 371.

Whether the attestation of a judicial record of the clerk was in due form, so as to be admissible in the courts of another state, must be determined from the certificate of the judge. Adams v. Stenehjem (1915) 146 P. 469, 50 Mont. 232.

Judgment of another state is not admissible in evidence; it alone, and not the whole record, as required by this section, being certified. State v. Misenheimer (1898) 31 S. E. 852, 123 N. C. 758.

The attestation of the transcript of a judgment of a sister state must contain a certificate that "said attestation is in due form," as the law of that state requires. Dodd v. Groll (1898) 8 O. C. D. 334, 19 Ohio Cir. Ct. R. 718.

There is no prescribed form of attestation by the clerk. Schoonmaker v. Lloyd (S. C. 1855) 9 Rich. Law, 173.

To authenticate wills made in other states, and offered as evidence in the courts of that state, it should appear by the clerk's certificate that the transcript offered is a true copy of the will, and of the probate thereof, from the record of the court of which he is clerk. Harris v. Anderson (1849) 28 Tenn. (9 Humph.) 779.

A certificate of the clerk of the court attached to a judgment, reciting that the judgment was "a full, complete, true, and exact copy of the proceedings in the cause of record in the office of said court in favor of * * * [stating the style of the case], and attested by the seal of the court, was sufficient, though the certificate did not have the style of the case at its head. Varn v. Arnold Hat Co. (Tex. Civ. App. 1910) 124 S. W. 693.

The clerk's certificate need not show that he has charge of the records of the court, for this section does not require such fact to be certified to or shown, and it will be presumed. Ritchie v. Carpenter (1891) 2 Wash. St. 512, 28 Pac. 380.

Where a certificate attached to the transcript of a foreign judgment sued on recited that the clerk had carefully compared the foregoing papers with the original complaint, summons, notice, and judgment in the action therein entitled, remaining of record in his office, and that the same was a true and correct copy and transcript of such original papers and the whole thereof, the sheriff's return showing personal service on the defendant being a part of the summons, the certificate was not objectionable for failure to specify that the transcript of the return was correct. Casety v. Jamison (1904) 77 P. 800, 35 Wash. 478.

Where the copy of a record of judicial proceedings in another state is offered in evidence, and not authenticated according to this section, the clerk ought to certify, not only that it is a true copy of the original, but that it has been examined and compared with the original. Ordway v. Conroe (1854) 4 Wis. 45.

42. —— **Seal.**—A copy of a judicial record, having a flourish with the pen on the margin of each page, instead of a seal, held not admissible. Talcott v. Delaware Ins. Co. (C. C. 1810) Fed. Cas. No. 13,734.

Upon the plea of nul tiel record to debt on a judgment of another state, the seal of the court must be annexed to the record itself. The certificate is no part of the record. Turner v. Waddington (C. C. 1811) Fed. Cas. No. 14,263.

The certificate of a probate judge to the copy of a will is not invalid for want of a seal where the judge certifies that the court has no seal. Morgan v. Curtenius (C. C. 1848) Fed. Cas. No. 9,799.

It is not necessary for it to appear, either by the attestation of the clerk or the certificate of the judge, that the seal annexed is the seal of the court. Hull v. Webb (1898) 78 Ill. App. 617.

If the clerk's certificate, attached to the copy of a record of a court of another state, have not the seal of the court or officer granting the letters testamentary, the copy is not admissible as evidence. Allen v. Thaxter (Ind. 1825) 1 Blackf. 399.

A certificate of a clerk of the court of another state, under his private seal, if he certifies that there is no seal of the court, and the presiding judge certifies that the certificate is in due form, is good. Strode v. Churchill (1822) 12 Ky. (2 Litt.) 75.

The clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate, over his official signature and

the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found affixed to the certificate of the keeper thereof. The great seal proves itself. Gunn v. Peakes (1886) 36 Minn. 177, 30 N. W. 466.

If the certificate of a clerk have the seal of his court attached, he will be presumed to be clerk of a court of record. The Thames v. Erskine (1841) 7 Mo. 213.

The seal of the court which is required for the due authentication of the record of a judgment of another state may be affixed by merely making the impression of the seal on the paper. The use of wax or a paper wafer is not essential. Hunt v. Hunt (N. J. Ch. 1887) 9 Atl. 690.

A public seal of a state, affixed to judicial proceedings, is a matter of notoriety, and will be judicially noticed as a part of the law of nations, acknowledged by all. Lincoln v. Battelld (N. Y. 1831) 6 Wend. 475.

Where the clerk of a court in another state certifies that he is the clerk, and that the seal attached is the seal of his office as such clerk, it sufficiently appears that the certificate is under the seal of the court. Clark v. Depew (1855) 25 Pa. (1 Casey) 509, 64 Am. Dec. 717.

The judicial record of a sister state, certified under the seal of office of the clerk of the court, is, though it be not the seal of the court, and so not in compliance with this section, well authenticated, under Code, § 3795, declaring that such a record may be proved by a copy attested by the clerk under his seal of office, etc. Coffee v. Neely (1871) 49 Tenn. (2 Heisk.) 304.

A copy of a record or paper in the clerk's office of any court in the state of Virginia, attested by the officer in whose office the same is, is admissible as evidence in West Virginia, though it has not the seal of the court. Thrasher v. Ballard (1889) 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894.

43. Effect of attestation.—Certificate of clerk is no evidence of character or legal effect of paper, but only as to its being a true copy. Alexander v. Knox (C. C. 1879) Fed. Cas. No. 170.

(D) Certification

44. "Judge, chief justice, or presiding magistrate."—The record of a court in Virginia must be certified by the presiding magistrate. Gardner v. Lindo (C. C. 1802) Fed. Cas. No. 5,231.

A copy of the record of the appointment of a commissioner to take depositions is inadmissible without the certificate of the presiding judge. Tooker v. Thompson (C. C. 1842) Fed. Cas. No. 14,097.

By statute, a record of another state must be authenticated by the judge, chief justice, or presiding magistrate of the court. A record authenticated by "one of the judges," there being no chief justice by law of the state, is admissible in evidence. Huff v. Campbell (Ala. 1828) 1 Stew. 543.

A certificate by an associate judge is not sufficient to authenticate the record of another state. Johnson v. Howe's Adm'rs (Ala. 1829) 2 Stew. 27.

The certificate to the record of a judgment rendered in one state, to be used in another, by the first justice, is not sufficient, unless it appear that the first justice is the chief justice or presiding magistrate. Hudson v. Daily (1848) 13 Ala. 722.

A copy of a record of a court of chancery, with a certificate from the chancellor, is in due form, he being the "judge" of such court. Scott v. Blanchard (La. 1829) 8 Mart. (N. S.) 303.

In the absence of the federal circuit judge and of the federal associate justice, the certificate of the federal district judge to the record of a cause in the circuit court is sufficient to render it admissible as evidence in the state courts. Stephens v. Bernays (1893) 119 Mo. 143, 24 S. W. 46.

The record of a foreign judgment is inadmissible in evidence without the certificate of the judge or magistrate that the attestation of the clerk is in due form, under this act. Folsom v. Blood (1873) 53 N. H. 434.

Where the certificate of the prothonotary is attached with the exemplification of the record of judgment from another state, and is signed by the chief clerk, whose signature is duly attested by the "presiding judge," it is a sufficient compliance with this section. Sheriff v. Smith (N. Y. 1873) 47 How. Prac. 470.

A record of a suit in Ohio certified by a judge of that court, in which it appeared by the record that another member was the chief justice, was not certified as required by this section. Lothrop v. Blake (1846) 3 Pa. (3 Barr) 483.

A record certified by one styling himself "judge of the probate court" of Highland county, in the state of Ohio, is not properly authenticated under this act. Washabaugh v. Entriken (1859) 34 Pa. (10 Casey) 74.

45. Necessity of certification.—A foreign judgment, not certified by the judge as required by this section, is inadmissible in evidence. Northwestern Mut. Life Ins. Co. v. Stevens (1895) 71 Fed. 258, 264, 18 C. C. A. 107; Trigg v. Conway (C. C. 1847) Fed. Cas. No. 14,-172; Holly v. Flournoy (1875) 54 Ala. 99; Spegail v. Perkins (Conn. 1795) 2 Root, 274; Smith v. Brockett (1897) 38 A. 57, 69 Conn. 492; Schwab Clothing Co. v. Cromer (1898) 43 S. W. 951, 1 Ind. T. 661; R. J. McLin & Co. v. Worden (Miss. 1911) 55 So. 358; Duvall v. Ellis (1850) 13 Mo. 203; Wilburn v. Hall (1852) 16 Mo. 426; Westerman v. Sheppard (1897) 71 N. W.

950, 52 Neb. 124; Comstock v. Kerwin (1898) 77 N. W. 387, 57 Neb. 1; Chapman v. Chapman (1905) 104 N. W. 880, 74 Neb. 388; Hutchins v. Gerrish (1872) 52 N. H. 205, 13 Am. Rep. 19; Smith v. Blagge (N. Y. 1800) 1 Johns. Cas. 238; Pratt v. King (1853) 1 Or. 49; Norwood v. Cobb (1857) 20 Tex. 588; Hagan v. Snider (Tex. Civ. App. 1906) 98 S. W. 213; Wolf v. King (Tex. Civ. App. 1908) 107 S. W. 617.

Rev. St. Ill. 1893, c. 51, § 13, which declares that "records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having custody thereof," applies to judgments of another state, and abrogates the necessity of a certificate of the presiding judge that the attestation is in due form. Garden City Sand Co. v. Miller (1895) 157 Ill. 225, 41 N. E. 753.

Where, in an action upon the transcript of a judgment of a justice of the peace of Ohio, there was no certificate of any judge of any court attached, the fact was unimportant: First, because the transcript was not objected to on that ground; second, perhaps, because it was not shown that the court of a justice of the peace is, in Ohio, a court of record. Draggoo v. Graham (1857) 9 Ind. 212.

A state legislature may dispense with some of the requirements provided for by this section, in order to admit in evidence a record of a judgment of another state, and under Code Wash. § 430, providing that such records shall be admissible when duly authenticated by the attestation of the clerk, etc., having charge of the records of the court, with the seal of such court annexed, it is not necessary that the judge shall certify that said attestation is in due form, as required by this section. Ritchie v. Carpenter (1891) 2 Wash. St. 512, 28 Pac. 380.

A copy of a record or paper in the clerk's office of any court in the state of Virginia, attested by the officer in whose office the same is, is admissible as evidence in West Virginia, though it has not the seal of the court or a certificate of a judge as required by this act; Code W. Va. 1887, c. 130, § 5, providing that a copy of any record or paper in the clerk's office of any court of Virginia, attested by the officer in whose office the same is, simply signed by him, shall be received as evidence. Thrasher v. Ballard (1889) 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894.

46. Requisites and sufficiency.—A transcript of a judgment held properly certified in the manner prescribed by this section. Bohlander v. Heikes (1909) 168 Fed. 886, 94 C. C. A. 298.

A certificate of the presiding judge, stating that the person whose name is signed to the attestation of a record is clerk of the court, and that the signature is in his own handwriting, is not sufficient under this section. Craig v. Brown (C. C. 1816) Fed. Cas. No. 3,328.

A certificate of "the chairman and presiding justice of the court of pleas and quarter sessions" of a specified county in North Carolina, appended to a transcript which purports to contain "certain entries upon the minutes of said court concerning the probate" of a will, to the effect that the clerk, "whose name appears to the foregoing certificate, was at the time of signing such certificate, and still is, the true and lawful clerk of said court, duly elected, appointed, and qualified; that his signature is genuine, and his certificate in proper form; and that the above is a true impression of the seal of said court"—is a substantial compliance with the requisitions of this section. Thrasher v. Ingram (1858) 32 Ala. 645.

Where a presiding judge certifies that the attestation of a record made by a deputy clerk in the name of his principal is in due form of law, it is sufficient, without going behind the certificate to inquire whether a deputy has a right so to attest a writ by the laws of his state. Young v. Thayer (Iowa, 1848) 1 G. Greene, 196.

Where one state court is abolished, and its jurisdiction is transferred to another court, the clerk and presiding judge of the latter court are competent to authenticate the records of the former, in the manner prescribed by this section, so as to make them admissible in evidence in the courts of another state; and where such clerk puts his attestation to a transcript of a judgment of the former court in another state, and annexes thereto the seal of the latter court, and the presiding judge of that court annexes thereto his certificate that such attestation is in due form, and that the former court is abolished, and its jurisdiction, records, and proceedings transferred to the latter court, such certificate is prima facie evidence of the correctness and sufficiency of the attestation of such clerk, and makes the record so authenticated admissible in evidence, under Rev. St. c. 94, § 57. Capen v. Emery (1843) 46 Mass. (5 Metc.) 436.

Under the provision requiring the presiding judge to certify that the person making out the record of a foreign judgment was clerk, it is unnecessary for the judge to so certify in his attestation, where it is certified to by the person making it, as clerk. McQueen v. Farrow (1835) 4 Mo. 212.

Sufficiency of certificate. See Omahundro v. Clarkson (1883) 13 Mo. App. 583, memorandum.

A certificate of the judge of a court of a foreign state held not to show that the attestation of record by the clerk was in due form according to the laws and practice of the foreign state.

Adams v. Stenehjem (1915) 146 P. 469, 50 Mont. 232.

A copy of a will proved in a North Carolina court was offered in evidence in Virginia. It was authenticated by a certificate of the clerk of the court, under his seal of office, and by a certificate of the presiding justice that the clerk's "certificate" (not his attestation) was in due form. Held, that it was sufficiently authenticated under this section, and admissible. Gornto v. Bonney (Va. 1836) 7 Leigh, 234.

47. —— **"In due form."**—The form of the certificate attesting the judgment of a court of another state depends on the usage of the state whence the record comes; and, if the judge certifies that it is in due form, this will be sufficient, without setting out the form. Crawford v. Simonton's Ex'rs (Ala. 1838) 7 Port. 110; Regan v. McCormick (Del. 1846) 4 Har. 435.

Under this section the certificate of the presiding judge, stating that the person whose name was signed to the attestation was a clerk of the court, and that the signature was in his own handwriting, but not certifying that the authentication was in due form, did not render the record admissible. Craig v. Brown (C. C. 1816) Fed. Cas. No. 3,328.

The certificate to an exemplified copy of the record of a court, by a judge thereof, "that the attestation of the clerk of the court is in proper form," is sufficient to make such copy admissible evidence in the courts of another state. Brown v. Adair (Ala. 1831) 1 Stew. & P. 49.

In the exemplification of a record of a foreign state, the certificate of the judge that the attesting clerk was clerk at the date of the certificate, and that the attestation was in proper form, is sufficient, although it does not find that the clerk was such at the time of attestation. Merriwether v. Garvin (Ala. 1835) 2 Port. 199, 27 Am. Dec. 650.

The certificate of a judge to the exemplification of a record of another state that the attestation of the clerk "is in due form" is sufficient to admit such exemplification in evidence, notwithstanding the judge may not certify, in so many words, to the official character of the clerk. Linch v. McLemore (1849) 15 Ala. 632.

In authenticating a record, under this section, the judge stated "that full faith and credit are due to his acts as such clerk." Held this did not satisfy the statute, which required the judge to certify "that the attestation of the clerk is in due form." Fitzpatrick v. Williams (1855) 10 La. Ann. 517.

A record of a court of another state bearing a certificate of a judge in the words, "I certify that the certificate of the clerk is in due form of law," is sufficient to render it admissible in evidence. Blair v. Caldwell (1834) 3 Mo. 353.

The mere certificate of a judge of another state that the person who attests a copy of a judgment roll from that state is a clerk, and that the signature is in his handwriting, is not sufficient, but it must state specifically that the attestation of the clause is in due form; and, if it does so state, the judge's certificate is conclusive. Hutchins v. Gerrish (1872) 52 N. H. 205, 13 Am. Rep. 19.

Following and attached to the copy of a foreign judgment attested by the clerk under seal of the court was a copy of an execution with a similar attestation of a later date than that of the record. Following and attached to the last attestation was a certificate of the chief justice that the one who signed as clerk was the clerk of the court, that the seal was the seal of the court, and "that the foregoing attestation is in due form of law." Held, that the copy of the record was not properly exemplified, as required by this section. The word "attestation" could not be taken in the plural. Burnell v. Weld (1879) 76 N. Y. 103.

The certificate of the judge of the court in which a foreign judgment was rendered that the clerk's attestation of the copy of the record of the judgment is in due form is conclusive, and need not state that it was in due form according to the laws of the state where it was offered. Edwards v. Jones (1893) 113 N. C. 453, 18 S. E. 500.

A transcript of the docket on a justice of the peace of a sister state, certified by the justice to be correct, and bearing the certificate of the clerk of the county court, whose signature is attested by the judge of such court, that the justice is in fact such an officer, and that his signature is genuine, is not admissible in proof of the judgment, under this section, since none of the certificates mentioned contained a recital that the attestation was in due form. Snyder v. Wise (1848) 10 Pa. (10 Barr) 157.

48. —— **Certification of judge's authority.**—A federal court will take notice of the organization of a state court to uphold a certificate to a copy of its record. Bennett v. Bennett (D. C. 1867) Fed. Cas. No. 1,318.

Where the judicial certificate to an exemplification of a judgment rendered in the circuit court of Noxubee county, in the state of Mississippi, recites, "I, A. B. D., presiding judge of the Fourth judicial district of the state of Mississippi, which said district includes the county of Noxubee," do certify, etc., it is sufficient to admit the transcript in evidence. Geron v. Felder (1849) 15 Ala. 304.

A certificate to a transcript of a record of a sister state, "I, J. J., one of the chancellors of the state of said state, and in turn presiding chancellor for said district, do," etc., appears to

be good. Taylor v. Kilgore (1858) 33 Ala. 214.

Under this section, the certificate of a judge styling himself "one of the judges" is not a sufficient authentication. It should appear that he was the chief justice or presiding judge. Stewart v. Gray (Super. Ct. Ark. 1830) Fed. Cas. No. 13,428a.

Where a judge, in his attestation of the clerk's certificate to a judgment, is described as judge of the court, it is a sufficient authentication, without saying that he is the judge or sole judge, where there is nothing on the face of the record produced to show that the court is composed of more than one judge or magistrate. Central Bank v. Veasey (1854) 14 Ark. 671.

The certificate attached to a copy of the record of a judgment rendered by the supreme court of New York, attached by the "presiding justice" of that court, is within Code Civ. Proc. Cal. § 1905, providing that a judicial record of a sister state may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form. Bean v. Loryea (1889) 81 Cal. 151, 22 Pac. 513.

The record and judicial proceedings of the county court of B. county, in the state of Virginia, were offered in evidence under this section, and A. certified that he was the presiding magistrate of B. county. Held, that the record was inadmissible, because the magistrate did not certify that he was the presiding magistrate of the court whence the record was taken. Settle v. Alison (1850) 8 Ga. 201, 52 Am. Dec. 393.

The record of a judgment purporting to have been rendered in the Second judicial district of another state held not to be admissible; the certificate of the judge to the exemplification failing affirmatively to show that the county was within that district. Buck v. Grimes (1879) 62 Ga. 605.

The certificate of the judge to judicial record under this section must affirmatively show that he presides in the court from which the record comes, and his omission so to do cannot be supplied by an additional certificate to that effect from the clerk. Taylor v. McKee (1903) 45 S. E. 672, 118 Ga. 874.

Since, under Stover's N. Y. Ann. Code Civ. Proc. (4th Ed.) p. 115a, § 229, a special term or trial term of the Supreme Court must be held by one judge, a certificate on a judgment that the judge who signed it was judge of that court sufficiently shows that he was the sole and presiding judge. Hull v. Webb (1898) 78 Ill. App. 617.

Under Code Iowa, § 2348, a certificate by "a" judge is a sufficient authentication of a record, although this section requires the certificate of a "presiding" judge. Latterett v. Cook (1855) 1 Iowa (1 Clarke) 1, 63 Am. Dec. 428.

It is not necessary that the president or presiding judge certifying to the transcript of a record from a sister state should give himself such title in his certificate, since, if the record shows he was so, it is sufficient. Mudd v. Beauchamp (1812) 16 Ky. (Litt. Sel. Cas.) 142.

A record of another state, attested by the clerk, with the seal of the court annexed, together with the certificate of two judges that it is in due form, wherein one states himself to be the judge "that presided, and one of the judges of the superior courts of law of said state," and the other, "the senior judge of the courts of law of the state," was held not to be sufficiently authenticated to be admissible in evidence. Stephenson v. Bannister (1814) 6 Ky. (3 Bibb) 369.

A judicial record from another state is sufficiently authenticated, when, by a reference to the record itself, taken in connection with the certificate of the judge, there is evidence to show that the person by whom the certificate was given was the judge of the court from which the record was certified. It is not necessary that the judge should repeat in his certificate what his very act implies. Newman v. Goza (1847) 2 La. Ann. 646.

A record of judicial proceedings in another state is sufficiently authenticated, when certified to by a judge before whom, it appears from the record itself, all the proceedings in the case were had, and who states in his certificate that he is one of the judges of the court, and that all the judges of said court are equal in authority and each one is authorized to sign such a certificate. Orman v. Neville (1859) 14 La. Ann. 392.

A certificate by a judge stating that he was "the judge" is a sufficient showing that he was the sole judge of the court to entitle the record to be admitted in evidence. Willock v. Wilson (1901) 59 N. E. 757, 178 Mass. 68.

A statute passed in 1852 makes it the duty of the courts of this state to take judicial cognizance of the laws of the other states; and, by the judiciary system of the state of South Carolina, the associate judges of the state are alternately presiding judges of the court of common pleas. Held, that a certificate to a record, by a judge of that state, stating that he was one of the judges of the state aforesaid, and a presiding judge of the court of common pleas, etc., is a sufficient certificate in law. Bates v. McCully (1854) 27 Miss. (5 Cushm.) 584.

In authenticating records, the certificate of a presiding judge of a court that he himself is the presiding judge

is good evidence of the fact. Hutchison v. Patrick (1831) 3 Mo. 65.

Where the judge's certificate to the transcript of a judgment rendered in another state, on which an action is brought in Missouri, fails to show that he is the judge of the court in which the judgment was rendered, the defect is not cured by the certificate of the clerk that he is such judge, as such a certificate is purely voluntary. Moyer v. Lyon (1890) 38 Mo. App. 635.

A judgment of the circuit court of Garland county, Ark., is sufficiently certified by a judge who recites that he is "judge of the Seventh judicial circuit in the state of Arkansas, of which circuit the county of Garland constitutes a part." Williams v. Williams (1893) 53 Mo. App. 617.

The certificate of the judge, chief justice, or presiding magistrate, is satisfied by a certificate of "A. B., President of the Court," etc. Gavit v. Snowhill (1856) 26 N. J. Law (2 Dutch.) 76.

Where the court is composed of more than one judge, the certificate by the judge of the court certifying that he is one of the judges, with authority to make the certificate, and showing that an assistant judge presided at the trial in which the judgment was obtained, was insufficient, under this section. Rich v. Cohen (1908) 114 N. Y. S 672, 61 Misc. Rep. 148.

Under this section it is not necessary, in suing in one state on a judgment obtained in another state, that the official character of the judge certifying the record should be evidenced by the certificate of the governor under the great seal of the state, nor that the clerk of the court should certify under his hand and seal of office that the certifying judge is duly commissioned and qualified to act. Kinseley v. Rumbough (1887) 96 N. C. 193, 2 S. E. 174.

Unless it appears from the record that the court of another state, a transcript of the judgment of which is offered in evidence, is composed of more than one judge, it is immaterial that his certificate does not show him to be sole or chief or presiding judge; nor does it matter that the certificate is dated anterior to the date of the clerk's attestation, as a clerical error will be presumed. Keyes v. Mooney (1886) 13 Or. 179, 9 Pac. 400.

A certificate which is made by one styling himself therein as "the president judge of the Twelfth judicial district of the state of Ohio, which district includes C. county, in said state," sufficiently shows that he is the presiding magistrate of all the courts composing the district, and hence of the common pleas of C. county, from which court the record otherwise purports to be made. Erb v. Scott (1850) 14 Pa. (2 Harris) 20.

It is no objection to a certificate that it does not appear to be signed by "the judge, chief justice, or presiding magistrate of the court," provided it appear by the record and state laws that the certifying judge is the sole judge of the court. State v. Hinchman (1856) 27 Pa. (3 Casey) 479.

An exemplification of the record of a divorce in the state of New York was certified by the clerk and "J. W. Gilbert, Justice of the Supreme Court," who did not appear to be chief justice, and there appeared to be other judges of the same court. Held not to be properly authenticated. Van Storch v. Griffin (1872) 71 Pa. (21 P. F. Smith) 240.

Where, in an action of debt on a judgment rendered in an inferior court of Georgia, the clerk's certificate of the exemplification, which was offered in evidence, was authenticated by five persons styling themselves presiding justices of the inferior court of the county in Georgia where the judgment was rendered, it was held that this was a compliance with this section, and that the exemplification was properly proved. Arnold v. Frazier (S. C. 1850) 5 Strob. 33.

A transcript of a New York judgment reciting that the cause was tried before Justice A. at a circuit court held in New York, but attested by B., "justice of the supreme court," held not admissible in evidence, as it does not appear to be attested by the judge who tried the case, or the chief justice of the same court. Randall v. Burtis (1882) 57 Tex. 362.

49. —— **Surplusage.**—Where a judicial record comes from a court of another state, and is attested by the clerk of the court, with the seal thereof annexed, all that is further necessary to make the attestation sufficient is that the presiding judge of the court rendering the judgment shall certify that the "attestation is in due form." In such a case, when the presiding judge of a district court of Texas certified to this much, and a great deal more, and said in his certificate, which was dated about five months after the clerk's certificate was dated, that the person who attests the record "is the clerk of said district court," without saying that such person was such clerk at the time of the attestation of the record, held, that such attestation and certificate were sufficient. Haynes v. Cowen (1875) 15 Kan. 637.

50. **Effect of certificate.**—Under this section, the judge's certificate is the only evidence that can be received that the attestation is in the form required by the state from which the record comes. Craig v. Brown (C. C. 1816) Fed. Cas. No. 3,328.

The attestation of a record of court proceedings must be in conformity with the form used in the state, the only

evidence of which is the certificate of the presiding judge of such court. Id.

The certificate of the judge that the clerk's attestation is in due form, is conclusive. Andrews v. Flack (1889) 88 Ala. 294, 6 South. 907.

The certificate of the presiding judge of a court of record in another state that the attestation of the clerk of such court is in due form and by the proper officer is conclusive evidence that the certificate contains all the facts which by the laws of the state it should have certified. Rennick v. Chloe (1841) 7 Mo. 197.

Whether an attestation is in due form or not can only be known by the certificate of the presiding judge, which is conclusive. Schoonmaker v. Lloyd (S. C. 1855) 9 Rich. Law, 173.

The record of an action in another state purported to be a certified copy of the petition, answer, replication, and "journal entry." Attached to the petition was a certificate signed by the clerk of the court stating that he was such clerk, having possession of the records of his office, and that such petition was a true copy of the petition on file. To this was added a certificate that a person named was the judge of the district. Following this was a certificate purporting to be made by the judge, but not signed by him. Practically the same certificates were made by the clerk on the answer, reply, and journal entry. To the journal entry was added a certificate signed by the judge that he was the judge of the district and that such other person was the clerk, and that the signature to the certificate of the clerk was the signature of such person and entitled to full faith and credit. Held, that the certificate signed by the judge was not limited to the certificate of the clerk to the journal entry, but applied to the prior certificates of the clerk upon the petition, answer, and reply. Davis v. Davis (S. D. 1910) 124 N. W. 715.

(E) "Faith and credit"

See, also, notes under Const. art. 4, § 1, post.

51. Basis of rule.—So far as the provision of this section as to the faith and credit given to the records and judicial proceedings relates to the effect to be given to the judicial proceedings of the states, it is founded on Const. art. 4, § 1, which, however, does not extend to the other cases covered by the statute. Embry v. Palmer (1882) 2 Sup. Ct. 25, 30, 107 U. S. 3, 27 L. Ed. 346.

So far as this section relates to the effect to be given to judicial proceedings of the states, it is founded upon Const. art. 4, § 1, but the power to prescribe the effect to be given to judicial proceedings of the courts of the United States is conferred by other provisions, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested in the government of the United States, and which declare the supremacy of the power of the national government within the limits of the Constitution. Metcalf v. Watertown (1894) 14 Sup. Ct. 947, 949, 153 U. S. 671, 38 L. Ed. 861.

This section was enacted pursuant to power conferred by Const. art. 4, § 1, by prescribing the manner in which judicial proceedings shall be proved. Wittemore v. Malcomson (C. C. 1886) 28 Fed. 605.

The several states of the Union are each sovereign and independent, and their relations are those of foreign states in close friendship in regard to all matters not surrendered to the general government; and, but for this section, the judgments of such state would be regarded as foreign judgments in every other. Dorsey v. Maury (1848) 18 Miss. (10 Smedes & M.) 298.

52. What faith and credit required.—This section, relating to judicial records from other states, declares their effect in local courts. Green v. Van Buskirk (1866) 5 Wall. 307, 310, 18 L. Ed. 599.

The authentication is intended as evidence only of the existence of such acts and records, and not to give them any greater validity or effect than that which they had in the state from which they were thus accredited. The statute merely provides a mode of proving public records, leaving them when proved, invested with the same force and effect (and no other) which they have at home. South Ottawa v. Perkins (1876) 94 U. S. 260, 271, 24 L. Ed. 154.

53. —— Same as in state where judgment rendered.—The same faith and credit should be given to a judicial record in all the states of the Union as by law or usage such record possesses in the state where the judgment was rendered. In re Black (N. Y. 1857) 4 Abb. Prac. 162; Railroad Co. v. Mercer (Pa. 1876) 11 Phila. 226.

A judgment, conclusive between the parties in the state in which rendered, is equally conclusive in every other state though the court may not have power to issue execution thereon. Bonfils v. Gillespie (1914) 139 P. 1054, 25 Colo. App. 496; Damon v. Webber (1914) 89 A. 734, 111 Me. 473.

A judgment from another state, properly authenticated, has the same force and effect here as in the state in which it was rendered, but no greater. Tipton v. Mayfield's Curator (1836) 10 La. 189; Briggs v. Spencer (1842) 3 Rob. 265, 38 Am. Dec. 239; Pillet v. Edgar (1843) 4 Rob. 274; Maxwell v. Collier (1843) 6 Rob. 86; Succession of Tilghman (1844) 7 Rob. 387.

This act does not declare that a judgment rendered in one state against the person of a citizen of another who

had not been served with process or voluntarily made defense shall have such faith and credit in every other state as it has in the courts of the state in which rendered. D'Arcy v. Ketchum (1850) 11 How. 165, 175, 13 L. Ed. 648.

A judgment of a state court has the same credit and effect in every other court in the United States which it had in the state where it was rendered, and whatever pleas would be good to a suit thereon, in such state, and none others, can be pleaded in any other court. Hampton v. M'Connel (1818) 3 Wheat. 234, 235, 4 L. Ed. 378.

A final judgment in a state court having jurisdiction of the parties and the subject is admissible as matter of evidence having the same force and effect in the courts of any other state or in a court of the United States. Mutual Life Insurance Co. v. Harris (1877) 97 U. S. 331, 336, 24 L. Ed. 959.

The provision as to giving faith and credit to records and judicial proceedings means such faith and credit as they are entitled to in the courts of state, territory, or country subject to the jurisdiction of the United States from which they are taken. Embry v. Palmer (1883) 2 Sup. Ct. 25, 30, 107 U. S. 3, 27 L. Ed. 346.

A declaration, in an action in a Maryland court on a judgment rendered in Pennsylvania, which alleges that by the law of Pennsylvania a judgment rendered in that state against two defendants was valid and enforceable against one who had been served with process, though void against the other, who had not been so served, states a cause of action, and it was error to sustain a demurrer thereto. Hanley v. Donoghue (1885) 6 S. Ct. 242, 116 U. S. 1, 29 L. Ed. 535.

Although by the common law in force in New Hampshire a joint judgment against two defendants is void as to both, where only one is served with process, yet such a judgment recovered in Louisiana, and valid by the laws of that state, will support an action in New Hampshire against the defendant who was served. Renaud v. Abbott (1886) 6 S. Ct. 1194, 116 U. S. 277, 29 L. Ed. 629.

Refusal of Wisconsin courts to permit action to enforce liability of stockholders in an insolvent Minnesota corporation to be maintained by a receiver thereof who under Laws Minn. 1899, c. 272, became quasi assignee of creditors, and charged with enforcement of stockholders' liability, denies full faith and credit to the laws of Minnesota and the judicial proceedings in that state. Converse v. Hamilton (1912) 32 Sup. Ct. 415, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913D, 1292.

The acceptance by a state court of an affidavit averring the nonresidence of the defendant upon information and belief as legal evidence upon which an order for publication may be based must be deemed sufficient, on collateral attack in the courts of the District of Columbia, to confer jurisdiction over the subject-matter in accordance with local laws, in the absence of any such law excluding the use of such an affidavit for such a purpose. Thompson v. Thompson (1913) 33 Sup. Ct. 129, 226 U. S. 551, 57 L. Ed. 347.

Ruling of Kentucky court that insurance in that state by an Illinois life insurance corporation was not affected by Act Ill. June 22, 1893 (Laws 1893, p. 121) § 9, providing that life insurance companies shall not issue policies on any person in whom the beneficiary has no insurable interest, does not deny the full faith and credit to which such statute is entitled, where there was no decision by the Illinois courts placing any construction on that section. Western Life Indemnity Co. of Illinois v. Rupp (1914) 35 S. Ct. 37, 235 U. S. 261, 59 L. Ed. 220, affirming judgment (1912) 144 S. W. 743, 147 Ky. 489.

Under the law of Kansas, a judgment against a corporation is not conclusive against a stockholder who was not a party to the action, if it was obtained through fraud or collusion, although it can only be impeached for fraud or want of jurisdiction; hence, under the "full faith and credit" requirement, such a judgment rendered by a court of Kansas is required to be given the same effect, but no greater, in an action against a stockholder in a court of another jurisdiction. Ball v. Warrington (1901) 108 Fed. 472, 47 C. C. A. 447.

Where, in a suit in a Municipal Court in New York, a counterclaim was filed in excess of the court's jurisdiction, as authorized by Municipal Court Act N. Y. § 157, and recovery was had thereon, permission to maintain an action in Ohio for the balance amounted only to giving the same faith and credit to the New York judgment as it would have in New York, and was not objectionable as giving extraterritorial force to the New York statute. Canton-Hughes Pump Co. v. Llera (1913) 205 Fed. 209, 123 C. C. A. 397.

In an action on a judgment rendered in New Jersey, if a plea of nil debet would not be sustainable in that state, it is not sustainable in Pennsylvania, in view of the provisions of this section. Armstrong v. Carson (C. C. 1794) Fed. Cas. No. 543.

The provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, gives to a judgment rendered in another state only such credit as it is entitled to in that state; and, if it may there be collaterally attacked for want of jurisdiction in the court rendering it, it may be so attacked in any other state. First Nat.

Bank v. Cunningham (C. C. 1891) 48 Fed. 510.

Under the law of Pennsylvania, which authorizes the entry of a personal judgment without notice on a judgment note, a judgment so entered on a Pennsylvania contract must be accepted by a court in another state as one rendered by a court having jurisdiction. Davis v. Davis (C. C. 1908) 164 Fed. 281, judgment reversed (1909) 174 Fed. 786, 98 C. C. A. 494.

A judgment rendered in a state court is to be given the same force and effect as a bar or an estoppel in a federal court as is given to it in the courts where rendered. Smith v. Mosier (C. C. 1909) 169 Fed. 430.

Full faith and credit can be given to a judgment allowing a claim against a decedent's estate only by ascertaining its effect in the courts of the state where it was rendered. Owsley v. Central Trust Co. of New York (D. C. 1912) 196 Fed. 412.

An adjudication by a court of a state in a proceeding authorized by its statutes that a person is a stockholder of an insolvent corporation and subject to an assessment for the benefit of its creditors under the statute is a judgment to which full faith and credit must be given. Irvine v. Blackburn (D. C. 1912) 198 Fed. 360, judgment affirmed Blackburn v. Irvine (C. C. A. 1913) 205 Fed. 217.

A transcript from another state of what by the laws, practice, and usage of that state is entitled to the faith and credit of a judgment will have the same force and effect in Iowa. Taylor v. Runyan (1859) 9 Iowa, 522.

Whether a judgment dismissing an action on a note in New York on the ground that it was barred by limitations of that state was a determination on the merits of the case, and therefore barred another action on the note in Kentucky, depended on the effect which would be given to such judgment by the courts of New York. Brand v. Brand (1903) 76 S. W. 868, 116 Ky. 785, 25 Ky. Law Rep. 987, 63 L. R. A. 206.

If the judgment of the district court for the city and county of Philadelphia would be regarded by the courts of Pennsylvania as conclusive evidence of the existence of a debt due by the appellants to the appellee, it is so to be considered by the courts of the state of Maryland. Bank of United States v. Merchants' Bank (Md. 1848) 7 Gill, 415.

In an action on a judgment of another state or territory, where the transcript of such judgment is duly authenticated as required by this section, the fact that the transcript shows that the case was tried without a jury, and does not show that a jury trial was waived, does not render the judgment invalid, where it appears that both parties were present at the trial in person or by counsel, and where it is not shown that such judgment could not be enforced in the state in which it was rendered. Stewart v. Maxwell (1873) 1 N. M. 563.

The supreme court of the state of New York has decided that congress having declared the effect of the record, by declaring what faith and credit shall be given to it, it is only necessary to inquire in every case what is the effect of a judgment in the state where it is rendered. Green v. Van Buskirk (N. Y. 1868) 38 How. Prac. 52, reversing Green v. McArthur (1861) 34 Barb. 451.

Where the courts of a foreign state have decided that the judge's signature is not necessary to the validity of a judgment, a duly exemplified copy of a judgment of such state, though not signed by the presiding judge, is entitled to the same credit to which it would be entitled in such state. Waters v. Spencer (1904) 89 N. Y. S. 693, 44 Misc. Rep. 15.

A judgment in Georgia, against an executor as such, to be levied on the goods of the testator, founded on a debt contracted by the executors after the death of the testator, though irregular according to the course of procedure in South Carolina, will, under the constitution and this section, be respected in South Carolina as a valid judgment, so that a sale under it of the goods of the testator will be upheld. Fretwell v. Neal (S. C. 1859) 11 Rich. Eq. 559.

A writ of error not operating as a supersedeas from the supreme appellate court of Texas to a judgment of a district court of that state will be regarded as having the same effect in Virginia as in Texas. Piedmont & A. Life Ins. Co. v. Ray (1881) 75 Va. 821.

54. —— **Same as domestic judgment.** —A judgment recovered in the state of Washington and assigned to plaintiff has not the force and operation of a domestic judgment in Alaska, and cannot be made a lien on defendant's property in that territory without suit brought and judgment recovered thereon. Frye-Bruhn Co. v. Meyer (1903) 121 Fed. 533, 58 C. C. A. 529.

The authoritative character of a domestic judgment is founded, among other reasons, on the constitutional provision which guaranties full faith and credit to the records and judicial proceedings of every state, while the rule as to foreign judgments rests upon considerations of comity; and though they are treated by the courts, in respect to their conclusiveness, as entitled to the same weight as domestic judgments, they do not, to the same extent as a domestic judgment, extinguish the original contract debt. New York, L. E. & W. R. Co. v. McHenry (C. C. 1883) 17 Fed. 414, appeal dismissed McHenry v. New York, L. E. & W. R.

Co. (1888) 9 S. Ct. 800, 131 U. S. 440, 33 L. Ed. 224.

Where a transcript of a judgment of a court of another state is properly certified in accordance with the requirements of this section, and is authenticated in due form, it is entitled to equal faith and credit with a domestic judgment. Bogan v. Hamilton (1890) 90 Ala. 454, 8 South. 186.

Under this section, every state court must give to the judgments and proceedings of the courts of every other state the same faith and credit that are accorded to the judgments and proceedings of other courts of the same state. Whitley v. Spokane & I. Ry. Co. (1913) 132 P. 121, 23 Idaho, 642.

Under this section, the judgment of a foreign court is made, in an action on the same in another court, a debt of record, not examinable on its merits; but it does not carry with it into another state the efficacy of a judgment on property or persons, to be enforced by execution, since to give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit. Lamberton v. Grant (1901) 48 A. 127, 94 Me. 508, 80 Am. St. Rep. 415; McElmoyle v. Cohen (1839) 13 Pet. 312, 324, 10 L. Ed. 177.

54½. —— **Application of rule as between federal and state courts.**—See, also, notes under Const. art. 3, § 1; art. 4, § 1; and art. 6, cl. 2, post. Conclusiveness of judgments, see line 63, this section.

While the courts of the United States are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, and are bound to give to a judgment of a state court only the same faith and credit to which it is entitled in the courts of another state. Pennoyer v. Neff (1877) 95 U. S. 714, 24 L. Ed. 565.

Under this section judgments and decrees of the circuit courts of the United States are entitled to the same sanctity and effect in the courts of each state as their own judgments; nothing more, but nothing less. Metcalf v. Watertown (1894) 14 Sup. Ct. 947, 949, 153 U. S. 671, 38 L. Ed. 861.

A judgment of a circuit court of the United States must be given the same effect in other states that it is entitled to in the state in which it is rendered, and that is the same as if it were a judgment of a state tribunal of equal authority. Hancock Nat. Bank v. Farnum (1900) 20 Sup. Ct. 506, 508, 176 U. S. 640, 44 L. Ed. 619.

In an action in a federal court sitting in another state the same effect will be given to a judgment in a suit in a state court as would be given to it by the courts of the state in which it was rendered. Glencove Granite Co. v. City Trust, Safe Deposit & Surety Co. (1902) 118 Fed. 386, 55 C. C. A. 212, reversing judgment (C. C. 1902) 114 Fed. 978, and certiorari denied City Trust, Safe Deposit & Surety Co. of Philadelphia v. Glencove Granite Co. (1903) 23 S. Ct. 847, 187 U. S. 649, 47 L. Ed. 348.

55. —— **Proceedings to enforce penal statute.**—A state law making the officers of a corporation liable for its debts in case they make a false report and making stockholders of limited liability companies liable for the amount of the stock held by them respectively for all debts contracted by the company before the full amount of capital stock has been paid in is not a penal statute in the international sense, so that a judgment recovered thereunder cannot be enforced in another state, and the decision of a court of another state that the judgment is not enforceable therein is a failure to give such judgment the full faith and credit required by this section. Huntington v. Attrill (1892) 13 Sup. Ct. 224, 234, 146 U. S. 657, 36 L. Ed. 1123.

The full faith and credit clause of the federal Constitution (Const. art. 4, § 1) and this section do not compel a state to enforce in its courts the statute of another state, when such statute is penal or contrary to its policy. Carey v. Schmeltz (1909) 119 S. W. 946, 221 Mo. 132.

56. —— **Presumptions in favor of foreign judgments.**—In an action for breach of a covenant of warranty, an allegation in the complaint that "there was a valid and subsisting mortgage" of a given amount on the land in question, which was subsequently foreclosed in the proper court in Illinois, and the real estate sold under a decree thereof, was a sufficient allegation of the validity of the incumbrance; it being presumed that such court had jurisdiction, and did its duty, in the foreclosure proceedings. Worley v. Hineman (1893) 6 Ind. App. 240, 33 N. E. 260.

In the absence of evidence to the contrary, it will be presumed in favor of the judgments of courts of general jurisdiction in other states that the modes of procedure pursued by them, though different from those established by the laws of Kansas, are authorized by the laws of the states in which they act. Dodge v. Coffin (1875) 15 Kan. 277; Ward v. Baker (1876) 16 Kan. 31.

Judgments in courts of record can be entered only in term time; yet where the duly authenticated record of a court of general jurisdiction of a sister state shows a judgment entered in vacation, it will be presumed, in the absence of any showing to the contrary, that such a judgment was authorized by the laws of that state. Dodge v. Coffin (1875) 15 Kan. 277.

Where a court of another state has acted finally on a case, the legal presumption is that everything has been done according to law, and the judgment

will be evidence between the parties. Jordan v. Black (La. 1842) 1 Rob. 575.

The subsequent proceedings and judgment against a garnishee personally cited in another state will be presumed regular and in accordance with its laws, and the proposition to disregard it because the proceedings, if tested by Louisiana laws, would be irregular, is utterly inadmissible. Kyle v. Van Bibber (1852) 7 La. Ann. 575.

At common law, the original cause of action is extinguished or merged by a judgment, which is conclusive evidence of indebtment between the parties, and final, unless reversed, with respect to the subject-matter adjudicated; and, in the absence of proof of any statutory modification of this principle, it must be assumed that such is the legal effect of the judgments of their courts in the state of Pennsylvania. Bank of United States v. Merchants' Bank (Md. 1848) 7 Gill, 415.

Where a transcript of judgment from a foreign state shows a writ returnable to the clerk's office, the arrest of defendant thereon, and a confession of judgment by him there, followed by an entry of judgment which appears to be the judgment of the court, the whole being certified as a transcript of the record and proceedings of a certain action in a certain court, it will be assumed that the judgment was rendered by the court, and not by the clerk in vacation. Harness v. Green's Adm'r (1854) 19 Mo. 323.

In pleading a judgment of the superior court of Massachusetts, on the same cause of action as that in suit, it is not necessary to allege jurisdiction in the Massachusetts court, since that would be presumed in the absence of a showing to the contrary. Rogers v. Odell (1859) 39 N. H. 452.

In an action on a judgment of a sister state, where an exemplification of record shows a final judgment for an aggregate amount of costs, the taxation will be presumed. Rogers v. Burns (1856) 27 Pa. (3 Casey) 525.

The exemplification of a judgment in another state being in due form, the record and judgment are to be presumed to have been agreeable to the laws and usual course of proceedings in that state. Ben's Guardian v. Coleman (S. C. 1803) 2 Bay, 485.

57. —— **Limitation of actions.**—The statute of limitations can be pleaded to an action on a judgment obtained in the courts of another state. McElmoyle v. Cohen (1839) 13 Pet. 312, 324, 10 L. Ed. 177.

While states may enact limitation laws which accord and limit a reasonable time for the commencement of actions upon judgments of other states, they may not bar all actions upon such judgments within their borders, and thereby render them without judicial force or effect. Keyser v. Lowell (1902) 117 Fed. 400, 54 C. C. A. 574.

Act Colo. April 29, 1895 (Sess. Laws 1895, p. 239, c. 106), as amended by Act April 6, 1899 (Sess. Laws 1899, p. 248, c. 113), prescribing a general limitation of six years for all actions on judgments rendered without the state, and by provisos declaring that, if the judgment be based on a cause of action which accrued more than six years prior to the commencement of the action on such judgment, the action, if against a bona fide resident of the state, shall be barred unless commenced within three months after the rendition of the judgment sued on, is a law of limitation only in so far as it attempts to interpose a bar because of inaction or laches in enforcing a judgment after it is obtained and a right of action thereon accrues, and is unconstitutional and void, as imposing an unreasonable limitation as applied to an action within the proviso on a judgment of another state based on contract, and rendered prior to the passage of the act upon a cause of action which accrued more than six years before. Lamb v. Powder River Live Stock Co. (1904) 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558.

In the courts of other states the judgment of a court of one state is not impeachable except for fraud or want of jurisdiction, is indisputable proof that it rests upon an unanswerable cause of action, is conclusive evidence that the right to its enforcement is wholly unaffected by any laches or lapse of time which preceded its rendition, and gives a right of action for its enforcement, subject to limitation and other laws of the forum which regulate, but do not deny, unreasonably restrict, or oppressively burden, the exercise of that right. Id.

Under Act Pa. April 3, 1903 (P. L. 139), which provides that "two returns of nihil habet shall be equivalent to personal service in writs of scire facias to revive judgments entered in personal actions," and the rule of practice in that state that such writs are a continuation of the original suit, a judgment entered on two such returns in an action in which the court had original jurisdiction, in ordinary circumstances, is entitled to full faith and credit in another state; but under Act Pa. March 26, 1827 (P. L. 129), and Act Pa. June 1, 1887 (P. L. 289), which, as construed by the courts of the state, limit the life of a judgment to five years, during which time only it can be revived by scire facias, a judgment of revival, entered on two such writs issued nine years after the original judgment and returned nihil habet, is void for want of jurisdiction, and will not support an action in another state. Davis v. Davis (C. C. 1908) 164 Fed. 281, judgment reversed (1909) 174 Fed. 786, 98 C. C. A. 494.

58. —— **"Law or usage."**—The effect of a judgment of a state court, when pleaded in a federal court or a court of another state in support of a plea

of res judicata, is to be determined by the "law or usage" of the state in which it was rendered. Union & Planters' Bank of Memphis v. City of Memphis (1901) 111 Fed. 561, 49 C. C. A. 455, decree reversed (1903) 23 Sup. Ct. 604, 189 U. S. 71, 47 L. Ed. 712.

A usage, established by the highest courts of Kentucky, that an appeal to the Court of Appeals operates as a waiver of objections to jurisdiction for insufficient service, must be regarded and enforced in the federal courts. Foster Milburn Co. v. Chinn (1913) 202 Fed. 175, 122 C. C. A. 577, affirming judgment Chinn v. Foster-Milburn Co. (D. C. 1912) 195 Fed. 158.

The full faith and credit clause of this section does not require that any more force shall be given to the judgment of a state court than the law or custom of the state where pronounced gives it or demands. Higgins v. Eaton (C. C. 1911) 188 Fed. 938, decree reversed (C. C. A. 1913) 202 Fed. 75.

A valid judgment of a court in the state of Illinois, the record of which is properly authenticated as provided by this section, is entitled, until otherwise properly impeached, to be given such faith and credit as it had by law or usage in the courts of that state. Vennum v. Holmberg (Colo. 1911) 117 P. 169.

The conclusiveness of the record of a judgment showing an appearance by the defendant will be only such as is given it by general settled rules of law, and not such exceptional effect as is peculiar to the state where it was rendered. Fordyce v. Marks (1872) 5 Ohio Dec. 12.

59. —— **Decree for divorce and alimony.**—A divorce granted in the state which had always been the domicile of the plaintiff and was the only matrimonial domicile, was entitled to full faith and credit in the state in which the defendant resided, though she was not personally served with process within the state where the divorce was rendered, where a letter was mailed to her at her residence as truly stated on oath in the petition advising her of the nature of the suit as required by the law of the state where the suit was brought. Atherton v. Atherton (1901) 21 Sup. Ct. 544, 546, 181 U. S. 155, 45 L. Ed. 794.

A divorce granted on constructive service by the courts of a state in which neither party was domiciled was not entitled to faith and credit in another state. Bell v. Bell (1901) 21 Sup. Ct. 551, 553, 181 U. S. 175, 45 L. Ed. 804.

Where a husband, during the pendency of a suit by the wife in the state of their matrimonial domicile, went to another state without informing any one where he was going or that he intended to change his residence, and after a stay of three months, interrupted by trips elsewhere, commenced a suit for divorce, he had no bona fide domicile for ninety days in such state as required by its laws, and the divorce there granted to him was not entitled to full faith and credit in the state of the matrimonial domicile. Streitwolf v. Streitwolf (1901) 21 Sup. Ct. 553, 555, 181 U. S. 179, 45 L. Ed. 807.

A judgment for alimony based on a decree of a court in another state is properly restricted to the fixed sum already due, excluding provision for future alimony which is subject to the discretion of the court in the other state, which may at any time alter it. Lynde v. Lynde (1901) 21 Sup. Ct. 555, 556, 181 U. S. 183, 45 L. Ed. 810.

Provisions in a decree for alimony for a bond, sequestration, and for a receiver and an injunction, were in the nature of execution, and not of judgment, and could have no extraterritorial operation. Id.

The courts of the state which is the domicile of the husband, and the only matrimonial domicile, have jurisdiction to render a decree of divorce in his favor entitled, under this section, to full faith and credit in the courts of the District of Columbia, although the wife has left the jurisdiction, and can only be served by publication. Thompson v. Thompson (1913) 33 Sup. Ct. 129, 226 U. S. 551, 57 L. Ed. 347.

A decree for alimony and costs will support an action in another state in so far as it is for a sum due at the time of its rendition, and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court. Israel v. Israel (1906) 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168, 8 Ann. Cas. 697, affirming judgment on condition (C. C. 1905) 136 Fed. 1023.

Where plaintiff obtained a judgment for alimony in a state court, so much of the claim as had been reduced to final judgment was entitled to be given full faith and credit in an action to enforce the same in the federal courts. Israel v. Israel (C. C. 1904) 130 Fed. 237.

In a proceeding in a surrogate's court to determine the right to administer on the estate of a decedent, as between two women, each claiming to be the widow, where the record of a divorce proceeding in New Jersey, separating the first wife from the decedent, is introduced in evidence, and recites that summons had been "served," the burden is on the first wife to disprove every lawful mode of service of process, and show affirmatively that there was no lawful service. Black v. Black (N. Y. 1857) 4 Bradf. Sur. 174, 4 Abb. Prac. 162.

60. —— **Federal question.**—Where the question whether a state court has declined by its order to give full faith and credit to a judicial proceeding of a

court of another state is involved, the United States Supreme Court has jurisdiction, and must judge for itself of the true nature and effect of the order. Great Western Tel. Co. v. Purdy (1896) 16 Sup. Ct. 810, 812, 162 U. S. 329, 40 L. Ed. 986.

This section does not preclude the United States supreme court from inquiring, in determining its jurisdiction of an action brought upon a judgment of a state court, whether the cause of action upon which the judgment was rendered was such that this court would have had original jurisdiction of it. State v. Pelican Ins. Co. (1888) 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239.

A contention that a state court denies to a judgment of another state the effect to which it is entitled by this section involves a federal question for the purpose of a writ of error from the supreme court of the United States. Hancock Nat. Bank v. Farnum (1900) 20 Sup. Ct. 506, 507, 176 U. S. 640, 44 L. Ed. 619, reversing judgment (1898) 40 Atl. 341, 20 R. I. 466.

A decision of a state court cannot be reviewed in the Supreme Court of the United States on the ground that by it full faith and credit were denied to an Hawaiian judgment, in violation of Const. art. 4, § 1, as carried out by this section, where the judgment of the trial court was rendered prior to Act April 30, 1900, c. 339, 31 Stat. 142, providing a government for Hawaii, and such contention was not brought to the attention of the highest state court in any form. Mutual Life Ins. Co. v. McGrew (1903) 23 Sup. Ct. 375, 380, 188 U. S. 291, 47 L. Ed. 480, 63 L. R. A. 33.

A decision of a state court that there was probable cause for beginning a trade-mark infringement suit in the federal courts in which a final decree was entered dismissing the bill on the merits after a temporary injunction had been dissolved is not reviewable in the Supreme Court of the United States, where the record does not show that any claim of right under the federal Constitution or laws was made in the state court, on the theory that such court, by its reasoning, implies that it finds probable cause, in its own opinion, that the decree of the federal court was wrong, whereas not to assume it to be correct is to fail to give it the full faith and credit which this section requires. Burt v. Smith (1906) 27 Sup. Ct. 37, 38, 203 U. S. 129, 51 L. Ed. 121.

An issue as to whether due force and effect has been given to a judgment or decree of another state does not involve the construction or application of Const. U. S. art. 4, § 1, but rather involves the interpretation of this section; and hence the circuit court of appeals has jurisdiction. Merritt v. American Steel-Barge Co. (1896) 75 Fed. 813, 21 C. C. A. 525.

61. Scope of inquiry in local court.—Objection that decree of sister state was not approved because record contained only the decree is so lacking in merit as to afford no basis for review by federal Supreme Court. Parker v. McLain (1915) 35 S. Ct. 632, 237 U. S. 469, 59 L. Ed. 1051, dismissing appeals McLain v. Parker (1913) 129 P. 1140, 88 Kan. 717, and Id. (1913) 131 P. 153, 88 Kan. 873.

A judgment of a court of one state can, in an action thereon in another state, be inquired into only in respect to the jurisdiction over the person or subject-matter embraced in the judgment, and in respect to notice to the defendant. Downs v. Allen (C. C. 1885) 22 Fed. 805.

Where an action is brought in the federal courts on a judgment of a state court, the federal court will look to the original cause of action to ascertain whether it is such a judgment as the federal court has jurisdiction to enforce. Israel v. Israel (C. C. 1904) 130 Fed. 237.

The record and pleadings on an appeal to the supreme court of a sister state from the chancellor cannot be looked to in Alabama, for the purpose of showing or correcting a mistake in the appellate decree. Hassell v. Hamilton (1858) 33 Ala. 280.

In a suit upon a judgment rendered in a state, the laws of which, relative to the effect of judgments, correspond with those of the state where it is sought to be enforced, if it appears from the record that the defendant appeared by attorney, it is not admissible, under this section, to dispute the attorney's authority. Warren v. Lusk (1852) 16 Mo. 102.

62. —— Conclusiveness of judgment, in general.—By virtue of this section, judgments of other states are on the same footing as domestic judgments, and conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the court. Marsh v. Atlantic Coast Line R. Co. (N. C. 1909) 65 S. E. 911. But this section does not prevent an inquiry into the jurisdiction of the court in which a judgment is rendered, nor into the right of the state to exercise authority over the parties or the subject-matter, nor whether the judgment is impeachable for fraud. Cole v. Cunningham (1890) 10 Sup. Ct. 269, 270, 133 U. S. 107, 33 L. Ed. 538.

In an action on a judgment obtained by a foreign corporation in another state, defendant may show, in bar of recovery, notwithstanding this section, that the cause of action merged in the judgment arose from a transaction entered into by the corporation in the state of the forum, without having had a permit to do business in that state. St. Louis Expanded Metal Fireproofing

Co. v. Beilharz (Tex. Civ. App. 1905) 88 S. W. 512.

Since supplementary proceedings in the state of New York are not considered special proceedings before a court or officer of limited jurisdiction, but as a new remedy in an action in which the court has general jurisdiction, the production and proof in a New Jersey court of an order by a court of New York appointing a receiver in supplementary proceedings there, and reciting the facts necessary to give the court jurisdiction, furnishes conclusive evidence of the regularity and validity of the order, and prima facie evidence of the jurisdictional facts. Orient Ins. Co. v. Rudolph (1905) 61 A. 26, 69 N. J. Eq. 570.

Where the courts of New York render a decree of strict foreclosure on lands in Illinois, and the parties are before the court, the decree is binding in Illinois, under this section. House v. Lockwood (1886) 1 N. Y. St. Rep. 196.

In debt on a judgment of another state wherein it appeared the judgment defendant had full notice of the suit wherein the judgment was rendered, it was held that the judgment was conclusive, and nil debet was not a good plea. Mills v. Duryee (1813) 7 Cranch, 481, 484, 3 L. Ed. 411.

Refusal to recognize a foreign judgment for wrongful death in an action in which only part of the heirs are represented, as a bar to a like action in the state by an heir not represented in the foreign jurisdiction, held not violative of this section. Whitley v. Spokane & I. Ry. Co. (1913) 132 P. 121, 23 Idaho, 642.

If the transcript of the judgment of a sister state is duly certified under this section, objections which do not go to the question of jurisdiction are unavailing. Joslin v. Fuller (1911) 166 Ill. App. 43.

A judgment obtained in the state court is conclusive by way of estoppel between the same parties or privies and on the same subject-matter where the proceeding is in rem, and an action of debt will not lie against an administrator in one state on a judgment obtained against a different administrator of the same intestate, appointed under authority of another state. Stacy v. Thrasher, use of Sellers (1848) 6 How. 44, 59, 12 L. Ed. 337.

A judgment of another state is record evidence of the demand, and a defendant, when sued on the judgment, may not go behind it and controvert the cause of action on which the judgment is founded. Bank of Alabama v. Dalton (1850) 9 How. 522, 528, 13 L. Ed. 242.

A judgment against a corporation which by the laws of the state in which it is rendered is binding on the stockholders must be given by a court of another state the same conclusive effect against a stockholder who is sued therein; and the only defenses which he can make against it are those which he could make in the courts of the state in which it was rendered. Hancock Nat. Bank v. Farnum (1900) 20 Sup. Ct. 506, 508, 176 U. S. 640, 44 L. Ed. 619.

In ejectment for lands in Mississippi brought by one claiming under deeds from the heirs of a former owner, against one claiming under devisees by the will of that owner, who resided and died in Louisiana, the record of a suit in Louisiana to which the heirs and devisees were parties, and of the judgment rendered therein, was admissible to prove that the will of the former owner was valid in Louisiana; that it devised all his real estate; and that the devises were valid, and the donees capable of taking the same,—such points having been decided by the judgment, and was binding on the parties to the action of ejectment. White v. Keller (1895) 68 Fed. 796, 15 C. C. A. 683.

Plaintiff, a charitable corporation organized under the laws of New York, by which it was given power to take and hold real estate not exceeding $50,000 in value, was made a beneficiary under the residuary clause of the will of a citizen of Kentucky. After the testator's death his heirs brought a suit in the chancery court against the executors to determine their rights under the will, in which plaintiff appeared, and filed a petition of intervention setting up its claim as beneficiary thereunder. The litigation resulted in a decision by the court of appeals of Kentucky which determined as a matter of fact that plaintiff, at the time of the testator's death, held real estate of the value of $50,000, and as matters of law that it was incapable of taking any real estate under the will, and that the residual real estate of the testator relapsed to his heirs. Held that, while the Kentucky court could not adjudicate upon the title to lands situated in another state, its judgment was nevertheless conclusive between the parties and their privies as to each of the questions so determined, and estopped the plaintiff to maintain an action in another state against grantees of the testator's heirs to recover lands there situated, as passing to it under the will. Norton v. House of Mercy of New York (1900) 101 Fed. 382, 41 C. C. A. 396.

Holders of municipal bonds, not parties to a suit in a state court in which bonds of the same issue were declared void, were not bound by the decree. Kinney v. Eastern Trust & Banking Co. (1903) 123 Fed. 297, 59 C. C. A. 586, writ of certiorari denied (1903) 24 S. Ct. 848, 191 U. S. 576, 48 L. Ed. 309.

Defendant corporation purchased the stock of another corporation and issued negotiable certificates of indebtedness in part payment. It also deposited the stock purchased together with stock

of its own, which was to be exchanged therefor, with a trustee which was authorized only to hold and manage the same, and to collect the dividends thereon and apply them in payment of the certificates until they were fully paid, when the stock should be delivered to the parties entitled thereto, and the trust should end. Defendant afterward brought suit in a state court to annul the contract on the ground that it was in restraint of competition and in violation of the laws of the state, making parties thereto the defendants, the selling stockholders, the corporation, the trustee, and certain certificate holders, including plaintiff, who was a purchaser of certain of the certificates. The court decreed the transaction void and directed the stock to be surrendered, but dismissed the suit without prejudice as to plaintiff. Held, that the decree against the trustee concluded plaintiff only to the extent to which it determined his rights or interest in the trust property, and constituted no defense to an action by him against defendant on his certificates. National Salt Co. v. Ingraham (1906) 143 Fed. 805, 74 C. C. A. 479.

Defendant, when sued on a foreign judgment, may show that the attorneys who undertook to enter his appearance in the action in which the judgment was rendered had no authority to do so, unless such question has been determined by a court having jurisdiction of both the parties and subject-matter. Thomas v. Virden (1908) 160 Fed. 418, 87 C. C. A. 370.

Defendant having accepted certain stock in a Minnesota corporation as collateral, and the Minnesota court in dissolution proceedings having rendered judgment for an assessment against him on due notice, he was bound by the judgment, and could not deny his relation as a stockholder in a subsequent action in New York to recover the assessment. Levison v. Hamilton (1913) 204 Fed. 72, 122 C. C. A. 386, affirming judgment Hamilton v. Levison (C. C. 1911) 198 Fed. 444.

A foreign judgment settling the entire controversy between the parties is conclusive. New York, L. E. & W. R. Co. v. McHenry (C. C. 1883) 17 Fed. 414, appeal dismissed McHenry v. New York, L. E. & W. R. Co. (1888) 9 S. Ct. 800, 131 U. S. 440, 33 L. Ed. 224.

In an action on a judgment obtained in another state, it is of no avail to show that there are errors in the record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. Downs v. Allen (C. C. 1885) 22 Fed. 805.

A judgment of a state court having jurisdiction of the parties and subject-matter, affirmed by the highest court of appeal, is not void because based on an improper ground. Converse v. Stewart (C. C. 1911) 192 Fed. 941, judgment affirmed (1912) 197 Fed. 152, 118 C. C. A. 212.

To a bill filed to foreclose a mortgage, defendant interposed an answer, setting up that the contract, to secure the performance of which the mortgage was given, was usurious, and, under the laws of Wisconsin, where the contract was made, was void. After the filing of this bill, and before answering, the mortgagor commenced proceedings in Wisconsin, for the purpose of having the note and mortgage declared void for usury; and a decree was rendered therein accordingly, after the issue was made up in the foreclosure suit, but before the final hearing. Held, that as the mortgagor had no opportunity to plead the former judgment as an estoppel, in the suit for foreclosure, the pleadings being closed before it was rendered, but gave it in evidence under the answer setting up the usury, it was equally as conclusive as if it had been pleaded. Sheldon v. Patterson (1870) 55 Ill. 507.

Under this section, the judgment of a sister state is entitled to full faith and credit in Massachusetts, and in an action on such judgment, the court cannot, as in the case of a judgment of a foreign country, inquire into its merits. Bissell v. Briggs (1813) 9 Mass. 462, 6 Am. Dec. 88; Jacobs v. Hull (1815) 12 Mass. 25; Commonwealth v. Green (1822) 17 Mass. 515.

Where process is served on a corporation subject to suit in the courts of the state in accordance with the laws thereof, a judgment based thereon is binding on it in the courts of other states. Marshall v. R. M. Owen & Co. (1912) 137 N. W. 204, 171 Mich. 232.

A judgment regularly obtained in Connecticut, against defendants of whose persons the court had jurisdiction, is conclusive, and no re-examination of the grounds on which it was rendered can be permitted. Spencer v. Broackway (1824) 1 Ohio (1 Ham.) 259, 13 Am. Dec. 615.

Where a plea setting up a judgment of a sister state in bar of a recovery for the same cause of action avers that the causes of action in the two suits are identical, and the judgment pleaded appears on its face to bear out the allegation, a demurrer to the plea, on the ground that the two causes of action are not identical, will be overruled. Paine v. Schenectady Ins. Co. (1876) 11 R. I. 411.

63. —— **Conclusiveness as between state and federal courts.**—See, also, notes under Const. art. 3, § 1; art. 4, § 1; and art. 6, cl. 2, post. See line 54½, ante, this section.

The statute of Louisiana provides for a trial of the validity of sheriff's sales upon a monition, a proceeding which may be instituted by the purchaser, and further provides that a decree thereupon shall be conclusive against the world as to all matters of form, and as

to the manner of conducting the sale. Held, that a decree in such a case was conclusive in the United States courts, as the rights of the parties, though one of them was a citizen of another state, originated in and depended upon the law of Louisiana, and a decree made conclusive by that law was conclusive on them everywhere. Jeter v. Hewitt (1859) 63 U. S. (22 How.) 352, 16 L. Ed. 345.

Where a city makes no defense in a suit on its bonds in a state court, the question of its liability is not open on error to a judgment of the federal court in a suit on the judgment of the state court. Sacramento v. Fowle (1874) 21 Wall. 119, 123, 22 L. Ed. 592.

Where testator in Mississippi in his will appointed a trustee with power "to dispose of" all or any portion of it that might fall to the devisees, and invest the proceeds for their benefit, the court, in view of the opinion of the supreme court of Mississippi on the precise point, in a case between the same parties, that the trustee had power to make partition, will so hold, though the decision of the supreme court of Mississippi was not announced under such conditions as to make it res judicata. Phelps v. Harris (1879) 101 U. S. 370, 25 L. Ed. 855.

A judgment of a state court sustaining the exemption claimed by a bank, under its charter, from municipal taxation on its capital stock, which, under the local law of the state, is only res judicata in respect to the identical taxes litigated in the suit, can be accorded no greater efficacy in the Federal courts. Union & Planters' Bank of Memphis v. Memphis (1903) 23 Sup. Ct. 604, 606, 189 U. S. 71, 47 L. Ed. 712.

On a petition filed in the federal court in a suit to foreclose a railroad mortgage by a creditor of the defendant to enforce a judgment of a state court establishing his right to a vendor's lien or privilege against certain property of the defendant, the plaintiff cannot relitigate the question of petitioner's status as a vendor, or his right to privilege as such; the judgment of the state court being conclusive upon such questions. State Trust Co. v. De La Vergne Refrigerating Mach. Co. (1900) 105 Fed. 468, 44 C. C. A. 556.

A decree of a state court may be collaterally attacked in the federal courts for want of jurisdiction over the subject-matter or the person, but not for any error which does not affect such jurisdiction. Wood v. City of Mobile (1901) 107 Fed. 846, 47 C. C. A. 9, affirming judgment (C. C. 1900) 99 Fed. 615.

When the final judgment of a state court is offered in evidence in a proceeding in a court of the United States, its validity cannot be questioned for errors which do not affect the jurisdiction of the court which rendered it. U. S. v. Eisenbeis (1901) 112 Fed. 190, 50 C. C. A. 179.

A judgment of a state supreme court in an action for mandamus by the owner of township bonds against the commissioners of the county to compel the levy of a tax to pay matured coupons, which determines such bonds to be illegal on an issue as to their validity, is a bar to an action brought by a subsequent purchaser, who is in privity with the former owner as to such judgment, in a federal court, to recover judgment against the township on coupons from the same bonds subsequently maturing. Gorham v. Broad River Tp. (1902) 118 Fed. 1016, 56 C. C. A. 140, affirming judgment (C. C. 1901) 109 Fed. 772.

Where a state court determined, either as a question of law or fact, that a suit therein to enforce the statutory liability of a stockholder of a corporation of another state could not be maintained under the laws of the latter state, which, as construed by its Supreme Court, gave a right of action only to the creditors as a body against the stockholders as a body, and thereupon dismissed the action on the merits its judgment was conclusive on the parties, and a second action by the same complainant against the same defendant on the identical cause of action cannot be maintained in a federal court. Eau Claire Nat. Bank v. Benson (1904) 128 Fed. 277, 63 C. C. A. 591.

A decision of the state Court of Appeals to the effect that the owner of cutting-stone rights had no property right in a switch over the land is res adjudicata, as to such ownership, in a subsequent suit between the parties. Oman v. Bedford-Bowling Green Stone Co. (1905) 134 Fed. 64, 67 C. C. A. 190, affirming judgment Bedford-Bowling Green Stone Co. v. Oman (C. C. 1904) 134 Fed. 441.

Where, in an action on a contract for the sale and delivery of brick, defendant files an answer and a counterclaim alleging the breach of the contract, and bases on such allegations a counterclaim for damages from the alleged breach of plaintiff, and fails to appear when the case is called for trial, without withdrawing his plea, thereby compelling plaintiff to establish its cause of action by proof, and the court on the evidence finds for plaintiff, the judgment constitutes res judicata against a subsequent action by the defendant in another jurisdiction based on the same state of facts set up in the counterclaim. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co. (1905) 136 Fed. 27, 68 C. C. A. 577, affirming judgment (C. C. 1903) 126 Fed. 552.

The defendant in an action at law in a state court, who was a nonresident of the state and might have removed the cause, went to trial in the state court instead, and, after an adverse verdict and the overruling of his motion for a new trial, appealed to the Supreme Court of the state, which affirmed the judgment. Thereafter he insti-

tuted a suit in equity in the same court to set aside the judgment and enjoin its enforcement, on the ground that it was procured by fraud and perjury. This suit was heard on motion for a preliminary injunction, which was denied. Held, that a federal court was justified in refusing to interfere by injunction to restrain collection of the judgment on practically the same ground that had been passed on by the state court, the application being supported by the same affidavits, with no additional evidence except such as was merely cumulative. Bailey v. Willeford (1905) 136 Fed. 382, 69 C. C. A. 226, affirming judgment (C. C. 1903) 126 Fed. 803, and writ of certiorari denied 26 S. Ct. 746, 199 U. S. 606, 50 L. Ed. 330.

Where, in a suit in a state court to foreclose a mortgage on a stock of goods, the mortgagors alleged false and fraudulent representations of persons who co-operated with the mortgagee in selling the goods as to the quality, quantity, and value thereof, and a decree in favor of the mortgagee on such issue was affirmed by the Supreme Court of the state, a bill was not maintainable by the mortgagors in the federal court to set aside a deficiency judgment recovered by such mortgagee, in the suit in the state court, etc., on the ground that the mortgagors did not discover until several months after the decision in such case that the mortgagee was a party to a conspiracy to commit the fraud alleged as a defense to such suit. Strand v. Griffith (1906) 144 Fed. 828, 75 C. C. A. 558.

A final decree of a state court in a suit brought for the cancellation of a mortgage and foreclosure deed on condition of paying the mortgage debt with interest and costs, even though on demurrer, is a bar to a subsequent suit in a federal court for the same purpose against the same defendants or their privies; the grounds relied upon in the pleading being the same in both actions. Stewart v. Board of Trustees of Park College (1907) 156 Fed. 773, 84 C. C. A. 451, writ of certiorari denied (1908) 28 S. Ct. 760, 209 U. S. 550, 52 L. Ed. 921.

Libelants intervened in a creditor's suit against a corporation in which the receiver had taken possession of the vessels, and claimed enforcement of a maritime and statutory lien for coal. The court ordered the vessels sold, the purchaser to assume liens thereafter established in the suit. Held that, libelants having submitted their claim to the court, an adverse decision thereon was res judicata as to the purchaser, and they could not thereafter maintain a suit in rem in admiralty to enforce their claim. The J. R. Langdon (1908) 163 Fed. 472, 90 C. C. A. 18, affirming judgment (D. C. 1906) 145 Fed. 64.

Where the principal administrator of an estate was sued personally in another state, by an administrator there appointed for the same intestate, as a debtor of the estate, and appeared and defended, a judgment there rendered against him is conclusive as to all defenses he made or could have made therein, and such matters cannot be again litigated in an action against him on the judgment in the state of his residence. Moore v. Kraft (1910) 179 Fed. 685, 103 C. C. A. 231.

A judgment of a state court held conclusive against plaintiff's right of recovery in a second action between the same parties in a federal court. Converse v. Stewart (1912) 197 Fed. 152, 118 C. C. A. 212, affirming judgment (C. C. 1911) 192 Fed. 941.

A judgment in a state court on an agreement between a lessor and the trustee in bankruptcy of the lessee held to finally determine the liability of the trustee under the contract, and to bar the lessee from establishing any claim against the bankrupt's estate. Handlan v. Walker (1912) 200 Fed. 566, 119 C. C. A. 46.

The same matters being complained of in a suit in the state court and a subsequent one in the federal court, that the judgment in the state court depended on the state statutes, and that the complaint in the second suit is founded on the federal statute, which is not within the jurisdiction of the state court, is immaterial as regards the judgment being res judicata. Straus v. American Publishers' Ass'n (1912) 201 Fed. 306, 119 C. C. A. 544.

A final judgment on the merits in the courts of a state is conclusive in the federal courts between the parties or their privies, whether the question determined was one of federal, general, or local law. Sperry & Hutchinson Co. v. Blue (1912) 202 Fed. 82, 120 C. C. A. 354.

Where plaintiff sued his master for injuries in the Massachusetts state courts, alleging a cause of action for breach of the Massachusetts employers' liability act, a judgment for defendant in that action was a bar to a subsequent suit by plaintiff for the same injury in the federal court for breach of defendant's common-law liability to furnish plaintiff a safe place to work. Mazzariello v. Doherty (1913) 204 Fed. 245, 122 C. C. A. 513.

In a suit on a foreign judgment, although the court may look behind the judgment of the court a qua into the question of jurisdiction of the foreign court over the subject-matter or parties, and into the validity of the process, yet this power does not as of course relieve parties from the operation of the principle of res adjudicata. Moch v. Virginia Fire & Marine Ins. Co. (C. C. 1882) 10 Fed. 696.

Judgment creditors of an insolvent insurance company filed a creditors' bill in the federal court against the company and one H., a former officer and director of the company, to set aside a transfer of securities from the company

to H. as constituting an illegal preference, and in such suit a receiver was appointed for the company, to whom it conveyed its property. Two days prior to the commencement of such suit a similar suit was instituted in a state court by a simple contract creditor against substantially the same defendants, over whom the state court obtained priority of jurisdiction. Subsequent to the appointment of the receiver by the federal court, H. filed a cross-bill in the state court, upon which, on final hearing, the court adjudged the validity of the transaction by which the company transferred the securities to him, determined the amount due him from the company, and ordered a sale of the securities to pay the same. Prior to such decree the company had been adjudged a bankrupt, the receiver had been elected assignee, and had joined as a co-complainant in the suit in the federal court, and H. had also filed a similar cross-bill therein. Held, that the decree of the state court was not a bar to the further prosecution of the suit in the federal court; neither the original complainants therein, nor the assignee, nor any representative of the general creditors of the company having been made parties to the cross-bill upon which such decree was based. Hart v. Globe Ins. Co. (C. C. 1882) 113 Fed. 307.

Questions arising between parties to a suit in Oregon which have been considered and decided in a suit between the same parties in California are res adjudicata. The Holladay Case (C. C. 1886) 27 Fed. 830.

The trustee under a mortgage executed by a Kentucky street-railway corporation filed a bill in that state to foreclose. G., who resided in Ohio, and who was manager and a large stockholder, was made party by a "warning order," and an attorney appointed to defend his interests, according to the laws of Kentucky. Pending suit, G. sold out his interest, including certain unpaid and overdue coupons secured by the mortgage, which he warranted to be a first lien, to one who bought with the view, known to G. at the time, of bidding in the property and franchise at the foreclosure sale. The purchaser intervened, and set up the assignment from G., who did not appear, save as a witness in behalf of his assignee. The court ruled that the coupons had been paid, and that their holder was not entitled to come in under the mortgage. Held, in an action in the federal court in Ohio by the purchaser against G. for breach of warranty, that the Kentucky court, being of competent jurisdiction, and the proceeding in rem, its finding as to the coupons was res adjudicata. South Covington & C. S. Ry. Co. v. Gest (C. C. 1888) 34 Fed. 628, appeal dismissed Gest v. South Covington & C. S. Ry. Co. (1889) 9 S. Ct. 798, 131 U. S. 436, 33 L. Ed. 223.

A judgment in personam against a corporation, obtained in a federal court of a sister state, is conclusive on the merits in the courts of every other state when made the basis of an action; and the directors and managers of the corporation are as conclusively bound by the judgment as the corporation itself. Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co. (C. C. 1891) 46 Fed. 584.

An action was brought against a Nebraska corporation in a Colorado state court. The defendant appeared specially, and objected to the jurisdiction of the court on the ground that the service upon it was insufficient. Its objections having been overruled, the defendant, protesting against the jurisdiction, but without appealing, answered to the merits, and filed a counterclaim. Judgment was rendered against it, and a suit afterwards brought on such judgment in the United States circuit court in Nebraska. Held, that the judgment of the Colorado court, even if erroneous, was not void, and in the suit on such judgment it was not open to the defendant to insist that the question of the jurisdiction of the Colorado court should be again litigated. Hubbard v. American Inv. Co. (C. C. 1895) 70 Fed. 808.

A judgment of a state court made the basis of a creditors' suit in a federal court is conclusive against the debtor, and, in the absence of allegations of want of jurisdiction or collusion, is also conclusive on his codefendants. Alkire Grocery Co. v. Richesin (C. C. 1899) 91 Fed. 79, 83.

A judgment of the supreme court of a state cannot be pleaded as an adjudication in bar of a subsequent suit in a federal court, where it has been removed for review to the supreme court of the United States by a writ of error, and is there pending and undetermined. Eastern Building & Loan Ass'n of Syracuse, N. Y., v. Welling (C. C. 1900) 103 Fed. 352.

Plaintiff, a servant in defendant's mill, while following the negligent directions of his foreman, was caught in machinery, and injured. In a former action in a Pennsylvania state court of competent jurisdiction to recover for such injury, the jury found a general verdict for plaintiff, subject to the opinion of the court on the question of law reserved whether, under the undisputed evidence, the relation of such foreman to defendant company was such as to make it responsible for the consequences of his improper order. The court found the question reserved in favor of defendant, and directed judgment for defendant non obstante veredicto. Such judgment was affirmed on appeal to the State Supreme Court. Held, that the question of defendant's liability to plaintiff for the negligence of such foreman was res judicata, and could not be again litigated in another action be-

tween the same parties to recover for the same injury. Casey v. Pennsylvania Asphalt Pav. Co. (C. C. 1901) 109 Fed. 744, judgment affirmed (1902) 114 Fed. 189, 52 C. C. A. 145.

A judgment of a state court sustaining the validity of a municipal ordinance for the widening of a street, rendered on an appeal taken from such ordinance by property owners affected, as permitted by a statute under which the decision of the court on such appeal is final, is conclusive not only on the parties, but also on all other property owners similarly affected, and who might have become parties, and is a bar to a suit subsequently brought in a federal court by one of such property owners, who is a citizen of another state, to have the ordinance declared invalid. McIntosh v. City of Pittsburg (C. C. 1901) 112 Fed. 705.

Where, in an action in a state court to recover on a lien bond, plaintiff, a foreign corporation, was defeated because of its failure to produce the evidence required by statute of its right to do business and sue in such state, the judgment in such action is a bar to a recovery for the same cause of action in a federal court, though the plaintiff there produces evidence that it had the right to do business and sue in such state at the time the former action was tried, which evidence was in its possession at the time of the trial in the state court. Glencove Granite Co. v. City Trust, Safe Deposit & Surety Co. (C. C. 1902) 114 Fed. 978, judgment reversed (1902) 118 Fed. 386, 55 C. C. A. 212, writ of certiorari denied City Trust, Safe Deposit & Surety Co. of Philadelphia v. Glencove Granite Co. (1903) 23 S. Ct. 847, 187 U. S. 649, 47 L. Ed. 348.

A decree canceling a mortgage executed to an Illinois building and loan association by one of its stockholders, obtained in an action brought against the association and its receiver in a Nebraska state court,—notice of the suit being by publication, and neither the association nor the receiver having knowledge thereof, and no permission being given to make the receiver a party,—was not an adjudication, and did not bind a federal court in a subsequent action to foreclose the mortgage, brought by the receiver. Barry v. Friel (C. C. 1902) 114 Fed. 989.

Where a state court has determined that an action against a railroad company to recover a judgment, which shall be a preferred lien on the railroad's property, for injury to the property of the plaintiff, was brought within one year, as required by the statute creating such lien, the federal court will not review such question on a subsequent intervention of the judgment creditor, in proceedings to foreclose a mortgage on the railroad, to establish such judgment as a preferred claim. State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1902) 115 Fed. 367.

A mortgagor brought an action against the mortgagee in a state court of South Carolina to recover the penalty provided for failure of defendant to discharge the mortgage of record, alleging that it had been fully paid. Defendant answered, and, after trial, judgment was rendered for plaintiff, which was affirmed by the supreme court of the state. Held, that a suit by the mortgagee to foreclose the mortgage could not be entertained by a federal court on allegations in the bill that through mistake the mortgage did not express the true contract of the parties, and a prayer for its reformation, since, under the provisions of the Code of South Carolina, such matters might have been pleaded as an equitable defense in the state court, and, if sustained by the proofs, that court could have granted affirmative relief thereon, which would have effectually defeated the plaintiff's recovery, and under the construction placed on such provisions by the supreme court of the state a judgment at law is conclusive upon all matters, legal or equitable, which might have been pleaded in defense, and which if so pleaded would have gone to the merits of plaintiff's case. Eastern Building & Loan Ass'n v. Welling (C. C. 1902) 116 Fed. 100.

A mortgagor brought an action against the mortgagee in a state court of South Carolina to recover the penalty provided by statute for the failure of defendant to discharge the mortgage of record, alleging that it had been fully paid and satisfied. Defendant answered, and after trial a judgment was rendered for plaintiff, which was affirmed by the supreme court of the state. Held, that such judgment was a bar to a subsequent suit by the mortgagee in a federal court to foreclose the mortgage, which involved as the foundation for the granting of the relief demanded a determination by that court that the mortgage was a subsisting obligation, which was the very issue submitted to, and adversely determined by, the state court. Id.

Plaintiff brought suit in the state court to restrain defendant from enforcing a certain city ordinance fixing the maximum rates which plaintiff should charge for water supplied to patrons in defendant city, on the ground that the passage of the ordinance was a violation of plaintiff's contract rights. A demurrer was filed to the bill, which was overruled, and a final decree of injunction rendered. On appeal the judgment was reversed, and the trial court directed to sustain the demurrer and permit further proceedings. On remand of the case the bill was dismissed, and a final decree rendered, from which plaintiff appealed, in order that the Supreme Court might render a final decision, from which a writ of error might be prosecuted to the Supreme Court of the United States. Pending such appeal plaintiff sued in

the federal court to restrain the city from enforcing such ordinance, on the ground that the rates fixed were unreasonable, and operated at a taking of complainant's property without due process of law. Held, that the prior suit, while still pending, was not res judicata or a bar to the second. Tampa Waterworks Co. v. City of Tampa (C. C. 1903) 124 Fed. 932.

On an application for a preliminary injunction a judgment between the parties rendered by a state court although not an estoppel may properly be given consideration as to pertinent matters which were therein determined. Contra Costa Water Co. v. City of Oakland (C. C. 1904) 165 Fed. 518.

A suit in a federal court held not barred by a prior judgment of a state court between the same parties, dismissing a complaint filed by complainant on a general demurrer, on the ground that the bill in the second suit alleged new facts, constituting a different cause of action. John D. Park & Sons Co. v. Bruen (C. C. 1905) 139 Fed. 698.

It is the rule of the federal courts to give a prior decision of a state court, where the parties and the cause of action were the same as in a case before it, the same force and effect as a prior adjudication as would be given it by the courts of the state. Gunning System v. City of Buffalo (C. C. 1907) 157 Fed. 249.

Where proceedings to remove a trustee in the state courts of Massachusetts were instituted at a time when the trust fund was not within the court's jurisdiction, and there was neither service on defendant within the state nor a general appearance by him, the full faith and credit requirement did not prevent a federal court sitting in another state in a suit to compel the original trustee to account from inquiring into the jurisdiction of the Massachusetts court to render judgment of removal. Parker v. Kelley (C. C. 1908) 166 Fed. 968.

The C. Railroad Company operated equipment belonging to the A. Company, for which a mileage rental was paid, the C. Company having complete control of the operation of trains over its tracks and as between it and the A. Company, liable for injuries to persons and property resulting therefrom. Held that, where a passenger injured on such track brought suit in a state court against the C. Company, in which judgment was rendered in its favor, such judgment was res judicata against the passenger's right to sue the A. Company in a federal court for injuries arising out of the same accident. Jenkins v. Atlantic Coast Line R. Co. (C. C. 1910) 179 Fed. 535.

A federal court will not correct errors of a state probate court admitting to probate or rejecting a will of one dying domiciled within the territorial limits of the probate court, and one complaining of the decree of the probate court may only show that it acted without jurisdiction. Higgins v. Eaton (C. C. 1911) 188 Fed. 938, decree reversed (C. C. A. 1913) 202 Fed. 75.

A decision of a state court that it acquired jurisdiction of a foreign corporation on service of process is conclusive; and the question could not be relitigated, when sued on the judgment of the state court in a federal court. Chinn v. Foster-Milburn Co. (D. C. 1912) 195 Fed. 158, judgment affirmed Foster Milburn Co. v. Chinn (C. C. A. 1913) 202 Fed. 175.

Complainant brought injunction in a state court to restrain the enforcement of a city ordinance imposing a license tax on the ground that the ordinance was unconstitutional as denying due process of law, and impairing the obligation of contract, and as against public policy, and the court sustained a demurrer to the complaint, from which complainant appealed, and during the pendency of the appeal brought an action in the federal court for the same relief. Pending the latter action, the former judgment was affirmed, and such affirmance was pleaded by supplemental answer. Held, that the judgment so affirmed was res adjudicata in the federal court. Sperry & Hutchinson Co. v. City of Tacoma, Wash. (D. C. 1912) 199 Fed. 853.

A judgment of nonsuit is not a judgment on the merits, and the entry in a state court of a compulsory nonsuit is not a bar to an action on the same cause of action in the District Court of the United States. Bixler v. Pennsylvania R. Co. (D. C. 1913) 201 Fed. 553.

Power of Michigan state courts, in a suit to set aside a rate order of the Michigan Railroad Commission under Railroad Commission Act Mich. § 26, held essentially judicial in character, so that, where a judgment confirming such order had been affirmed on appeal to the Supreme Court, and a writ of error from the United States Supreme Court had been denied, the judgment was res judicata, and precluded a further review thereof in a suit in the federal courts. Detroit & M. R. Co. v. Michigan Railroad Commission (D. C. 1913) 203 Fed. 864.

Where a railroad company has prosecuted an action to review an order of the Public Service Commission fixing rates under Laws Wash. 1909, c. 93, with the result that the order has been sustained on appeal by the state Supreme Court, the matter is res judicata and a like suit cannot be thereafter maintained in a federal court. Puget Sound Electric Ry. v. Lee (D. C. 1913) 207 Fed. 860.

A judgment in a suit between the same parties and involving the same controversy, in a state court having jurisdiction of the parties and subject-matter, is res judicata of a similar suit in a federal court, though the suit in state court was instituted subsequent

to the action in the federal court. Case v. Mountain Timber Co. (D. C. 1914) 210 Fed. 565.

Under this section held that an order of a federal court in a receivership proceeding appointing a commissioner to hear garnishment suits against employés of a railroad, and providing how such claims could be adjudged, was entitled to be given full faith and credit in state court, and could not be collaterally attacked, and should have been treated by the state court as conclusive against its jurisdiction. Harmon v. Best (Ind. 1910) 91 N. E. 19.

64. —— **Merger.**—The doctrine of merger of a cause of action in a judgment thereon is applied to judgments rendered in courts of a state other than that in the court in which the question arises. Brown v. Fletcher (1910) 182 Fed. 963, 105 C. C. A. 425, writ of certiorari denied Fletcher v. Brown (1911) 31 S. Ct. 715, 220 U. S. 611, 55 L. Ed. 609.

65. —— **Fraud and collusion.**—This section does not prevent an inquiry as to whether a judgment of another state is founded on, or impeachable for, fraud. Eaton v. Hasty (1877) 6 Neb. 419. 29 Am. Rep. 365; Kerr v. Kerr (1869) 41 N. Y. 272; Turley v. Taylor (1873) 65 Tenn. (6 Baxt.) 376.

It having been held by the supreme court of Kansas that a suit by a judgment creditor of a corporation of that state against a stockholder to enforce the statutory liability of the defendant is founded upon the plaintiff's judgment against the corporation, and that the defendant may impeach such judgment for fraud or want of jurisdiction (Ball v. Reese, 50 P. 875, 58 Kan. 614), an allegation by a defendant that the judgment sued on was fraudulent and collusive states a defense to such an action in any state, the faith and credit to be given such judgment in other states being that to which it is entitled in Kansas. Warrington v. Ball (1898) 90 Fed. 464, 33 C. C. A. 609.

To impeach a judgment against a Kansas corporation, rendered in that state, for fraud and collusion, where it is fair and regular on its face, the burden rests on the defendant to prove his allegation by evidence that is clear, precise, and indubitable; and such proof must establish fraud on the part of both plaintiff and defendant in the judgment. A finding against the validity of the judgment is not supported by evidence which leaves the question of fraud as to either of the parties to rest alone on suspicion or surmise; nor can any inference of fraud be drawn from the fact that no defense was made to the action, unless it is clearly shown that a valid defense existed. American Nat. Bank of Denver v. Supplee (1902) 115 Fed. 657, 52 C. C. A. 293.

In an action in one state on a judgment obtained in another state, an alleged collusive arrangement between the plaintiff and the officers of the defendant corporation, whereby no defense was interposed, but a recovery was promoted, is not pleadable. Union Trust Co. v. Rochester & P. R. Co. (C. C. 1886) 29 Fed. 609.

In a suit brought upon a judgment rendered in another state upon the appearance and confession of an attorney under a warrant contained in the note sued on, the defendant may show that the judgment was fraudulent and void by reason of the fact that the warrant of attorney had expired by previous payment of the note. First Nat. Bank v. Cunningham (C. C. 1891) 48 Fed. 510.

In an action on a foreign judgment defendant may show that it was obtained by collusion between plaintiff and one who represented himself to be an agent of defendant for the purpose of being served. Rose v. Northwest Fire & Marine Ins. Co. (C. C. 1895) 67 Fed. 439.

66. —— **Jurisdiction of foreign court.**—This section does not prevent an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered, and the record of such judgment may be contradicted as to the facts necessary to give the court jurisdiction, either as to the subject-matter or the person. Wisconsin v. Pelican Ins. Co. (1888) 8 Sup. Ct. 1370, 1375, 127 U. S. 265, 32 L. Ed. 239; Grover & Baker Sewing Mach. Co. v. Radcliffe (1890) 11 Sup. Ct. 92, 94, 137 U. S. 287, 34 L. Ed. 670; Phœnix Bridge Co. v. Castleberry (1904) 131 Fed. 175, 65 C. C. A. 481; Cooper v. Brazelton (1905) 135 Fed. 476, 68 C. C. A. 188; Davis v. Bessemer City Cotton Mills (1910) 178 Fed. 784, 102 C. C. A. 232; Foster Milburn Co. v. Chinn (1913) 202 Fed. 175, 122 C. C. A. 577 (affirming judgment Chinn v. Foster-Milburn Co. [D. C. 1912] 195 Fed. 158); Graham v. Spencer (C. C. 1882) 14 Fed. 603; Downs v. Allen (C. C. 1885) 22 Fed. 805; Swift v. Meyers (C. C. 1888) 37 Fed. 37; Davis v. Davis (C. C. 1908) 164 Fed. 281 (judgment [1909] 174 Fed. 786, 98 C. C. A. 494); Burt & Brabb Lumber Co. v. Bailey (C. C. 1909) 175 Fed. 131; Frank v. Wolf (Ga. App. 1916) 87 S. E. 697; Flexner v. Farson (1915) 109 N. E. 327, 268 Ill. 435; Marshall v. R. M. Owen & Co. (1912) 137 N. W. 204, 171 Mich. 232; Pennywit v. Foote (1875) 27 Ohio St. 600, 22 Am. Rep. 340 (affirming [1870] 1 Cin. R. 17); Earl v. Earl (Okl. 1915) 149 P. 1179; De Vall v. De Vall (Or. 1910) 109 P. 755; Steel v. Smith (Pa. 1844) 7 Watts & S. 447; McCreery v. Davis (1895) 44 S. C. 195, 22 S. E. 178; Wood v. Augustins (1898) 41 A. 583, 70 Vt. 637.

This provision does not extend to judgments rendered against persons not amenable to the jurisdiction render-

ing the judgments, and when an action is brought in one state on a judgment recovered in another, it is not enough to show it to be valid in the state where it was rendered, but it must appear that defendant was either personally within the jurisdiction of the state or had legal notice of the suit and was subject to the laws of the state, so as to be bound to appear or suffer judgment by default. Lafayette Ins. Co. v. French (1855) 18 How. 404, 406, 15 L. Ed. 451.

Where a court of general jurisdiction in another sovereignty has passed upon the question of its own jurisdiction, when expressly raised and necessarily considered in giving judgment, the parties to the suit are bound in a home court under the principle of res adjudicata. Moch v. Virginia Fire Ins. Co. (C. C. 1882) 10 Fed. 696.

Where there is reason to doubt the existence of jurisdictional facts, the parties may be examined upon the question, and the court may direct the proper pleadings to be filed to raise the issues involved in such question. Gribble v. Pioneer Press Co. (C. C. 1883) 15 Fed. 689.

A judgment debtor, when sued on the judgment of another state, cannot plead want of jurisdiction of his person, where the record of the judgment recites that he appeared and defended the suit by his attorney, since he could not do so in the state where the judgment was rendered. Wilcox v. Kassick (1851) 2 Mich. 165.

Presumption of jurisdiction over the person of a corporation against which a personal judgment was rendered ceases on its appearing that it was not within the limits of the court's jurisdiction at the time of the alleged service. Marshall v. R. M. Owen & Co. (1912) 137 N. W. 204, 171 Mich. 232.

In an action on a foreign judgment, where a certified copy of the record, in evidence, contained no recital or proof that process had been served on defendant, or that he appeared, but did show that when the judgment was rendered he was not a resident of that state, and that he did not appear, it was error not to allow him to prove that he was never served with papers in that action. Smith v. Oliver (Sup. 1909) 120 N. Y. S. 73, 65 Misc. Rep. 487.

The judgment roll of a New York court of general jurisdiction recited that the parties were all personally summoned, and that, after trial and verdict, judgment was entered on the verdict against them for the amount of the verdict and costs. Held, that the record could not be contradicted, in an action on it in another state, by a denial of jurisdiction of the person of a defendant, without denying the effect which by the constitution and this section it is entitled to have. Wetherill v. Stillman (1870) 65 Pa. (15 P. F. Smith) 105.

A replication contradicting the record of a former judgment in another state, by matter in pais, is bad, as want of jurisdiction in the court rendering the judgment can only be shown from the face of the record itself. Lapham v. Briggs (1854) 27 Vt. (1 Williams) 26.

67. —— **Extrinsic evidence.**—A record of a court of general jurisdiction, collaterally introduced as evidence, and showing on its face jurisdiction in that court, cannot be contradicted by parol evidence. Lathrop v. Stewart (C. C. 1855) Fed. Cas. No. 8,112.

Where a foreign judgment against a foreign corporation fails to show that the defendant was doing business in that state, such defect cannot be cured by extrinsic evidence as to that fact. Henning v. Planters' Ins. Co. (C. C. 1886) 28 Fed. 440.

Any statute or rule of court of another state authorizing its courts to proceed without notice, or on publication, must be affirmatively shown, or the proceeding will be held void for want of jurisdiction. Foster v. Glazener (1855) 27 Ala. 391.

A claim for goods sold, on which judgment has been obtained in one state, may be shown by parol to be identical with an account for commissions sued on in another state; the dates and amounts being the same. Whiting v. Burger (1886) 78 Me. 287, 4 Atl. 694.

In a suit on a bond given to indemnify plaintiff for any money he might be compelled to pay to a third person, parol evidence is admissible in plaintiff's behalf to prove that a suit against him in another state by the third person, in which judgment was rendered against him, which he had paid, concerned the liability indemnified against; the pleadings in such suit not showing its real nature. Parker v. Thompson (1826) 20 Mass. (3 Pick.) 429.

Evidence of the laws of a sister state will be admitted as evidence to explain the record of a judgment rendered in such jurisdiction, when introduced as evidence, and its validity will be determined accordingly. Holton v. Gleason (1853) 26 N. H. (6 Fost.) 501.

CITED WITHOUT DEFINITE APPLICATION

Buckner v. Finley (1829) 2 Pet. 586, 592, 7 L. Ed. 528; Booth v. Clark (1854) 17 How. 322, 338, 15 L. Ed. 164; Green v. Van Buskirk (1868) 7 Wall. 139, 145, 19 L. Ed. 109; Crapo v. Kelly (1872) 16 Wall. 610, 613, 619, 21 L. Ed. 430; Glenn v. Garth (1893) 13 Sup. Ct. 350, 352, 147 U. S. 360, 37 L. Ed. 203; Lloyd v. Matthews (1894) 15 Sup. Ct. 70, 72, 155 U. S. 222, 39 L. Ed. 128; Goldey v. Morning News (1895) 15 Sup. Ct. 559, 561, 156 U. S. 518, 39 L. Ed. 517; Hancock Nat.

Bank v. Farnum (1900) 20 Sup. Ct. 506, 508, 176 U. S. 640, 44 L. Ed. 619; Andrews v. Andrews (1903) 23 Sup. Ct. 237, 242, 188 U. S. 14, 47 L. Ed. 366; Anglo-American Provision Co. v. Davis Provision Co. No. 1 (1903) 24 Sup. Ct. 92, 93, 191 U. S. 373, 48 L. Ed. 225; Northern Assur. Co. v. Grand View Bldg. Ass'n (1906) 27 Sup. Ct. 27, 28, 203 U. S. 106, 51 L. Ed. 109; Wetmore v. Karrick (1907) 27 Sup. Ct. 434, 436, 205 U. S. 141, 51 L. Ed. 745; Tilt v. Kelsey (1907) 28 Sup. Ct. 1, 207 U. S. 43, 52 L. Ed. 95; Fauntleroy v. Lum (1908) 28 Sup. Ct. 641, 210 U. S. 230, 52 L. Ed. 1039; Mooney v. Buford & George Mfg. Co. (1896) 72 Fed. 32, 39, 18 C. C. A. 421; National Acc. Soc. v. Spiro (1899) 94 Fed. 750, 751, 37 C. C. A. 388; Israel v. Israel (1906) 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168, 8 Ann. Cas. 697; Brown v. Fletcher (1910) 182 Fed. 963, 105 C. C. A. 425, certiorari denied (1911) 31 Sup. Ct. 715, 220 U. S. 611, 55 L. Ed. 609; U. S. v. Biebusch (C. C. 1880) 1 Fed. 213; Barrett v. Failing (C. C. 1880) 3 Fed. 471, 477, affirmed (1884) 4 Sup. Ct. 598, 111 U. S. 523, 28 L. Ed. 505; Sharon v. Hill (C. C. 1885) 26 Fed. 337, 346; Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335). CONTRA, Costa Water Co. v. Oakland (C. C. 1904) 165 Fed. 518; In re Leary (D. C. 1879) Fed. Cas. No. 8,162; Knapp v. Knapp (D. C. 1893) 59 Fed. 641, 643; Buchanan v. Parker (1845) 27 N. C. 597; In re Peterson's Estate (1912) 134 N. W. 751, 22 N. D. 480; State v. Rosenkrans (R. I. 1910) 75 A. 491; Walker v. State (Tex. Cr. App. 1911) 141 S. W. 243.

§ 1520. (R. S. § 906.) Proofs of records, etc., kept in offices not pertaining to courts.

All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken.

Act March 27, 1804, c. 56, §§ 1, 2, 2 Stat. 298, 299. Act Feb. 21, 1871, c. 62, 16 Stat. 419.

Notes of Decisions

1. Constitutional basis of statute.
2. Whether mode of proof exclusive.
3. "Any country subject."
4. Admissibility in evidence of duly authenticated copies of records and books.
5. —— Conditions precedent.
6. Authentication in general—Necessity.
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15. —— Authentication of certificate.
16. "Faith and credit."
17. —— Same as in the foreign jurisdiction.
18. —— Evidentiary value of duly certified copy of record.

1. Constitutional basis of statute—The power to prescribe, as is done by R. S. §§ 905, 906, ante, § 1519, and this section, what effect shall be given to the judicial proceedings of the courts of the United States, is conferred by Const. art. 4, § 1, and by the constitutional provisions authorizing legislation necessary and proper for executing the powers vested by the Constitution and declaring the supremacy of the author-

ity of the national government within constitutional limits. Atchison, T. & S. F. Ry. Co. v. Sowers (1909) 29 Sup. Ct. 397, 400, 213 U. S. 55, 53 L. Ed. 695.

2. Whether mode of proof exclusive.—The mode of authenticating the laws and records of the different states prescribed by this section does not exclude the common-law methods of proving such documents. Karr v. Jackson (1859) 28 Mo. 316. And it was not error to allow a record in evidence when proved according to common law, but not according to the act. Goodwyn v. Goodwyn (1858) 25 Ga. 203.

The act of 1804 does not exclude every other mode of authentication of state records. A copy, when certified by the officer whose duty it is by law to keep the original on file in his office, is admissible. Logansport Gas Light & Coke Co. v. Knowles (C. C. 1871) Fed. Cas. No. 8,400.

Under Laws N. Y. 1877, c. 311, providing that certificates under the great seal of a foreign state are admissible in evidence in New York, a copy of the charter of an Illinois corporation, certified under the great seal of the state, is sufficient to prove incorporation under the laws of Illinois, without an exemplified copy under this section. United States Vinegar Co. v. Foehrenbach (1893) 74 Hun, 435, 26 N. Y. Supp. 632.

Common-law rules as to proof necessary to admit foreign official, but nonjudicial, records in evidence, held not applicable as between states; that question being covered by Rev. Codes N. D. 1905, §§ 7291–7301, subordinate to Const. art. 4, § 1, pursuant to which Congress has enacted this section. In re Peterson's Estate (1912) 134 N. W. 751, 22 N. D. 480.

The certificate of the increase of the stock of a New Jersey corporation may be admitted in evidence, though the certificate of the Secretary of State does not have on it the great seal of the state, and is not in the form required by this section. Person & Riegel Co. v. Lipps (1907) 67 A. 1081, 219 Pa. 99.

3. "Any country subject."—The use of the words "any country subject to the jurisdiction of the United States" goes to show that the island of Porto Rico is not within the provision of the Constitution relating to taxation. De Pass v. Bidwell (C. C. 1903) 124 Fed. 615.

4. Admissibility in evidence of duly authenticated copies of records and books.—A copy from the records of a deed of personal property, which derives no validity from being recorded, is not competent evidence. Ormsby v. Tingey (C. C. 1816) Fed. Cas. No. 10,580.

A power of attorney acknowledged before the mayor or chief magistrate of a city, and certified under the public or common seal, may be given in evidence. Milligan v. Dickson (C. C. 1817) Fed. Cas. No. 9,603.

A copy of a deed duly recorded is, after 60 years, admissible to establish a grant under which a person claims title to land. Stokes v. Dawes (C. C. 1826) Fed. Cas. No. 13,477.

The record copies of deeds are admissible without proving execution or loss of originals. Bank of United States v. Benning (C. C. 1830) Fed. Cas. No. 908.

The copy of a recorded deed may be received in evidence to show that when recorded it had a seal on it, which had been removed from the original. Gillespie v. Reed (C. C. 1844) Fed. Cas. No. 5,436.

A copy of an official letter of instruction from the state auditor to a county auditor, certified by the latter, is admissible. Raymond v. Longworth (C. C. 1848) Fed. Cas. No. 11,595.

A certified copy of the record of an instrument which is required by law to be recorded is evidence. New York Dry Dock v. Hicks (C. C. 1850) Fed. Cas. No. 10,204.

In a bigamy case, a certified copy of records of defendant's former marriage, certified to in accordance with this section, was admissible in evidence. Witt v. State (Ala. App. 1912) 59 So. 715.

Copies of entries in the books of a state insane asylum, authenticated under this section, offered in evidence in a murder trial by the accused, whose defense is insanity, to show the insanity, treatment and incarceration of certain of his relatives are inadmissible to prove the particular facts stated, unless it be so expressly provided by statute, or be shown that the entries were made in the regular course of official duty, as that which is not evidence in its nature and quality as proof cannot be made evidence by being authenticated. Snell v. U. S. (1900) 16 App. D. C. 501.

The recording of a mortgage in another state does not make a certified copy of it admissible in evidence, or dispense with proof of the execution of the original. Pepper v. James (1910) 67 S. E. 218, 7 Ga. App. 518.

Ordinances of a municipality in a foreign state certified according to this section are admissible in evidence under Burns' Ann. St. Ind. 1908, § 471, providing that all records and exemplifications of books which may be kept in any public office shall be proved or admitted in any court upon the attestation of the keeper of such records of books. New York, C. & St. L. Ry. Co. v. Lind (1913) 102 N. E. 449, 180 Ind. 38.

A certified copy of a plat on file or record in a public office of another state is not admissible in evidence; but the plat must be identified by the cus-

todian thereof, and a copy thereof proved by his oath, before it can be received. Munkres v. McCaskill (1902) 68 P. 42, 64 Kan. 516.

As a deed executed in another state, if properly certified and recorded in the county in this state where the land lies, in due time, will be effectual to pass title of the grantors to the land conveyed, an office copy of such deed may be used as evidence in any suit to recover the land. Harris v. Price (1854) 53 Ky. (14 B. Mon.) 414.

A duly-authenticated copy of a deed recorded in another state must be received here. Norwood v. Green (La. 1826) 5 Mart. (N. S.) 175.

A copy of a record in another state, certified under the seal of the state, of a deed under seal, appended to which is the oath of the subscribing witness that he witnessed the execution of the instrument and saw the maker deliver it, where the effect of such record under the laws of that state is not shown, if objected to, is inadmissible, being but a copy of a copy, and the original being under private signature, and presumed to be in the possession of the party unless otherwise accounted for. Leggo v. New Orleans Canal & Banking Co. (1848) 3 La. Ann. 138.

An act of emancipation of slaves, acknowledged before the circuit court of the city of St. Louis, Mo., may be proven under this section by the production of a copy of the act, which the statute of Missouri made it the duty of the clerk of court to deliver to the slave emancipated, attested by the clerk under the seal of the court before which the acknowledgment was made. Virginia v. Himel (1855) 10 La. Ann. 185.

A copy of a deed of trust, and the assignment thereof, which is kept in a public office of any state, not appertaining to a court, is admissible in evidence in the courts of Louisiana, on being properly attested by the keeper of such records without showing the loss of the original. Graham v. Williams (1869) 21 La. Ann. 594.

Copies of records of deeds and other private writings made in a sister state are admissible in evidence under this section when properly authenticated and certified. Wilcox v. Bergman (1905) 104 N. W. 955, 96 Minn. 219, 5 L. R. A. (N. S.) 938.

A copy of the act of sale of a slave, made before a notary public in Louisiana, the original remaining in his office, is competent evidence. James v. Kirk (1855) 29 Miss. (7 Cushm.) 206.

Where the laws of another state authorize the probate judge to perform the marriage ceremony, and provide for the record of the license, and make a certified copy thereof evidence of the marriage, such copy is admissible in Missouri to show the marriage. State v. Shreve (1897) 137 Mo. 1, 38 S. W. 548.

By the laws of New Jersey, the abstract of a mortgage is all that is required to be recorded, and a certified copy is competent evidence in that state. The courts of Pennsylvania are bound to take official notice of this, and a copy from the record of such abstract, certified under this section, is admissible here. Garrigues v. Harris (1851) 17 Pa. St. 344.

Examined copies of deeds as recorded in another state were admissible to show that the records contained purported copies of the deeds now lost. William M. Rice Institute v. Freeman (Tex. Civ. App. 1912) 145 S. W. 688.

A county court of Ohio county having in 1802 made the order, "Deed from A. to B. was proven in court to be the act and deed of said A., who hath acknowledged the same in the presence of C. and D., justices of the court of common pleas, and ordered to be recorded in perpetuam rei memoriam," the deed was recorded by the clerk, who omitted to record the order, but added to the record the certificate, "A copy from the original, which was proven in court at January term, 1802, by a certificate under the hand and seal of office of X., mayor of the city of Philadelphia, and ordered to be recorded," and also recorded a certificate of C. and D. that the deed had been acknowledged before them in Philadelphia, but no certificate of X. Held, that the clerk's entry called attention to the order of court, which showed that the deed was a recordable instrument, and a copy thereof properly admissible in evidence. Peterson v. Ankrom (1884) 25 W. Va. 56.

5. —— **Conditions precedent.**—To authorize the proof that a deed was registered in another state, by the production of a certified copy, it must appear that by the law of such state such deeds are required to be recorded. And it must appear that it was one authorized by the laws of that state to be made. Longworth v. Close (C. C. 1837) Fed. Cas. No. 8,489; Gillespie v. Reed (C. C. 1844) Fed. Cas. No. 5,-436; Mitchell v. Mitchell (Ala. 1832) 3 Stew. & P. 81; Lee v. Mathews (1846) 10 Ala. 682, 44 Am. Dec. 498; Gamble v. Gamble's Adm'r (1847) 11 Ala. 966; Powell v. Knox (1849) 16 Ala. 364; Dixon v. Thatcher (1853) 14 Ark. 141; McNeill v. Arnold (1856) 17 Ark. 154; De Riesthal v. Walton (1887) 66 Md. 470, 8 Atl. 462; Wilcox v. Bergman (1905) 104 N. W. 955, 96 Minn. 219, 5 L. R. A. (N. S.) 938; Florscheim & Co. v. Fry (1905) 84 S. W. 1023, 109 Mo. App. 487. And that it was properly made. Duff v. Good (1884) 24 W. Va. 682.

6. **Authentication in general—Necessity.**—The indorsement on a deed of gift of personal property that it was acknowledged and recorded, purporting to be made by the clerk of a court of

within his jurisdiction, are inadmissible as evidence in Texas, unless offered as an examined copy produced by a witness, or accredited, by attestation of the clerk under seal of the court, duly certified by the judge, or, in the case of records, by attestation under seal of their keeper, duly certified by one of the officers designated by the statute. Grimes v. Smith (1888) 70 Tex. 217, 8 S. W. 33.

13. —— Requisites and sufficiency.—A copy of an act of incorporation was certified to as follows: "A true copy. Witness the seal of commonwealth of Massachusetts. [Signed] Henry B. Price, Secretary of the Commonwealth" —with the seal affixed. Held properly received in evidence. Pacific Guano Co. v. Mullen (1880) 66 Ala. 582.

The certificate of the Secretary of State of another state, showing defendant's marriage, may be admitted in evidence in a criminal case, when certified only by the Secretary of State, since the statute does not require both the certificate of the presiding justice and the Secretary of State. Reid v. State (Ala. 1910) 53 So. 254.

A certificate by the presiding judge of a county that a copy of a deed to be used in another state was "duly and properly authenticated in due form of law," without adding "by the proper officer," held insufficient to admit of the production of the copy in evidence. Hollister v. Armstrong (Del. 1875) 5 Houst. 46.

The laws of another state required assignments by a bank to be recorded in the county of its domicile, with the recorder of deeds, after approval by the court of common pleas, whose judgments its prothonotaries could sign. An office copy of such an assignment, certified by the recorder, was offered, with the prothonotary's certificate, under seal, of its approval by the court. Appended were certificates from the presiding judge of the recorder's signature and capacity, and from the prothonotary of the judge's. Held, under this section, the copy is admissible. Horn v. Bayard (La. 1845) 11 Rob. 259.

Under this section, the certificate of the clerk of another court as to the official character of the certifying register, followed by certificates of the official character of that clerk, is not a sufficient authentication of a copy of a deed, and is therefore inadmissible as evidence. Kidd v. Manley (1854) 28 Miss. (6 Cushm.) 156.

To render a certified copy of a deed of emancipation, recorded in another state, admissible in evidence, it should appear by the certificate of the clerk certifying the official character of the judge before whom such deed was made that such judge was the presiding judge or justice of the court of which the person certifying is clerk. Paca v. Dutton (1836) 4 Mo. 371.

14. —— Great seal.—The great seal of the state must be annexed to the governor's certificate of a notary's capacity to take acknowledgment. Phillips v. Flint (1831) 3 La. 146.

A certified copy of articles of incorporation held not admissible to prove the corporate existence of the company, either as a certified copy from the office of the county recorder or from the office of the Secretary of the territory, where not under the great seal. Milwaukee Gold Extraction Co. v. Gordon (Mont. 1908) 95 P. 995.

There is no presumption that a seal used by the secretary of a territory in certifying a public record is the great seal of the territory; and hence, where the statute requires the affixing of that seal to a copy of a record to admit it as evidence, the fact that the seal used is such must affirmatively appear. Id.

15. —— Authentication of certificate.—A clerk of a court of record of another state, certified, under the date of August 7, 1855, on the copy of a deed acknowledged July 14, 1821, that the acknowledgment was, when taken, in conformity with the laws of the state, and that the person who took it was then a justice of the peace. Held, that the copy was rightly admitted in evidence. Dunlap v. Daugherty (1858) 20 Ill. (10 Peck) 397.

The certificate must show that it was made by a duly commissioned and qualified presiding judge. Nolan v. Nolan (1898) 54 N. Y. S. 975, 35 App. Div. 339.

16. "Faith and credit."—This act does not authorize the legislature of one state to deny to one having a transitory cause of action originating in that state the right to appeal to the courts of another state. Tennessee Coal, Iron & R. Co. v. George (1912) 75 S. E. 567, 11 Ga. App. 221.

A territory may pass laws regulating recovery for injuries incurred within the territory and may under this section require states, when suits are brought therein to recover for an injury incurred within the territory, to observe the conditions imposed on the cause of action though otherwise controlled by common-law principles. Atchison, T. & S. F. R. Co. v. Sowers (1909) 29 Sup. Ct. 397, 403, 213 U. S. 55, 53 L. Ed. 695, affirming judgment (1907) (Tex. Civ. App.) 99 S. W. 190.

The full faith and credit demanded by this section is given by the Texas courts to the Act N. M. March 11, 1903 (Laws 1903, c. 33), providing that an action for personal injuries received in that territory will not lie unless certain requirements as to the making of an affidavit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restrictions, although the statute also undertakes to

make the suit maintainable only in the district court of the territory. Id.

But such faith and credit under this section, is not given to the New Mexico act where a recovery is permitted in a state court with no showing of a compliance with the preliminaries of notice and demand prescribed by the territorial statute. Id.

17. —— Same as in the foreign jurisdiction.—A certified copy of a deed to lands in Georgia, though authenticated as required by this section, is not admissible in Alabama without proof of the loss or destruction of the original, as under the statutes of Georgia providing that, if a recorded deed be lost, a copy is admissible if the court be satisfied of the loss, it would not be admissible in that state without such proof. Whaun v. Atkinson (1887) 84 Ala. 592, 4 South. 681.

Copies of records of deeds and similar writings made in a foreign state and duly certified will be given such effect only as is given them by the law of the state from which they were taken. Wilcox v. Bergman (1905) 104 N. W. 955, 96 Minn. 219, 5 L. R. A. (N. S.) 938.

An office copy of a deed registered in North Carolina is not admissible as primary evidence in Virginia, unless there is some statute of the former state making them admissible in their courts as such. Petermans v. Laws (Va. 1835) 6 Leigh, 523.

18. —— Evidentiary value of duly certified copy of record.—Exemplification of record of copy of deed not evidence. Barger v. Miller (C. C. 1822) Fed. Cas. No. 979.

The statute does not impart to a state record anything more than "faith and credit." An award or judgment, which may be final against a state, is neither obligatory in law nor conclusive as evidence against the United States. Williams v. U. S. (1887) 22 Ct. Cl. 116.

The statute does not make an award or judgment which may be final against a state either binding in law or conclusive as evidence against the United States. West Virginia v. Same (1910) 45 Ct. Cl. 576.

Where a deed was made in Virginia, which by the laws of such state was required to be recorded, the production of a certified copy from the record thereof was sufficient evidence of the conveyance in a Kentucky court. King v. Mims (1838) 37 Ky. (7 Dana) 267.

A certified copy of a deed, recorded in the office of register of deeds of a county in another state, is competent to prove the date on which the deed was there recorded. Schweigel v. L. A. Shakman Co. (1899) 80 N. W. 871, 78 Minn. 142, affirmed on rehearing (1900) 81 N. W. 529, 78 Minn. 142.

As there is no common-law rule for granting charters to corporations, which are the creatures of law, and authorized by private statutes or general laws, and as courts of Montana do not take judicial notice of the statutory law of Arizona, a certified copy of the record of incorporation of a company in Arizona is not evidence in a Montana court of its lawful incorporation in Arizona, in the absence of proof that the laws of Arizona authorized its incorporation. Milwaukee Gold Extraction Co. v. Gordon (Mont. 1908) 95 P. 995.

This section is binding on the courts of the state, in the absence of a state statute defining the evidentiary value or effect of a copy of a record from another state, at least to the extent of defining the evidentiary value of such a copy. Id.

The copy of a record of a deed from the register's office in another state, duly certified according to this section, is not evidence in New Jersey of title to lands in New Jersey. State v. Engle (1795) 21 N. J. Law (1 Zab.) 347.

The record of an abstract of a mortgage of land in New Jersey, being in conformity to the laws of New Jersey, is competent evidence in Pennsylvania, when authenticated according to the act of congress. Garrigues v. Harris (1851) 17 Pa. St. (5 Harris) 344.

No foreign record is evidence of conveyance of land in this state. Either common-law or statute proof must be made of it. Donaldson v. Phillips (1851) 18 Pa. St. (6 Harris) 170, 55 Am. Dec. 614.

A certified copy of a power of attorney, registered in another state, is not admissible to prove that the person executing it was in a certain place at the time it was executed. Texas Tram & Lumber Co. v. Gwin (Tex. Civ. App. 1899) 52 S. W. 110.

Cited without definite application, Culver v. Uthe (1890) 10 Sup. Ct. 415, 416, 133 U. S. 655, 33 L. Ed. 776; Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335); Hodge v. Palms (1902) 117 Fed. 396, 54 C. C. A. 570.

§ 1521. (R. S. § 907.) Copies of foreign records, etc., relating to land-titles in the United States.

It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the Departments, the Solicitor of

the Treasury, or the Commissioner of the General Land-Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals.

Act Feb. 22, 1849, c. 61, § 1, 9 Stat. 346. Act March 2, 1849, c. 82, 9 Stat. 350.

Notes of Decisions

Documents relating to land titles.—A genealogical table, certified under the seal of foreign office, is not evidence. Banert v. Day (C. C. 1814) Fed. Cas. No. 836.

A translation of the expediente of a Mexican grant of land, unaccompanied by the original or a certified copy of the same, is not admissible in evidence. Bixby v. Bent (1877) 51 Cal. 590.

In the courts, testimonios of public acts done under the former governments are receivable in evidence in all respects as originals. Herndon v. Casiano (1851) 7 Tex. 322.

Authentication of copies.—A copy of a power of attorney executed in Mexico in 1833 was certified by a notary who stated in his certificate that he was in charge of the archives of the notary before whom the act was made, and the notary's certificate and seal was verified by the certificate and seal of the college of notaries in the City of Mexico, and also by the certificate and seal of the governor of the federal district of Mexico, and also by the certificate of the proper secretary of the department of foreign relations of the national government of Mexico, under the seal of said department. Held, that the copy was properly attested. Williams v. Conger (1878) 49 Tex. 582.

§ 1522. (R. S. § 908.) Little & Brown's edition of the Statutes to be evidence.

The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

Act Aug. 8, 1846, c. 100, § 2, 9 Stat. 76.

The edition of the laws, etc., mentioned in this section, included volumes 1–17 of the Statutes at Large, which were published under contracts with the publishers named. Said contracts were terminated by Act June 20, 1874, c. 333, § 1, 18 Stat. 113, and the Secretary of State was charged with the duty of causing to be prepared for printing, publication, etc., the Revised Statutes enacted at that session of Congress, and also pamphlet copies of the statutes of that and each future session, by §§ 2 and 5 of said Act June 20, 1874, c. 333, post, §§ 1523, 1524.

Notes of Decisions

As to judicial notice taken of acts of congress, see § 1523, post.

§ 1523. (Act June 20, 1874, c. 333, § 2.) Revised Statutes as evidence.

The Secretary of State is hereby charged with the duty of causing to be prepared for printing, publication and distribution the revised statutes of the United States enacted at this present session of Congress; * * And when the same shall be completed, the said Secretary shall duly certify the same under the seal of the United States, and when printed and promulgated as herein-

after provided, the printed volumes shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several States and Territories. (18 Stat. 113.)

The portions of this section omitted here related to the preparation of the headnotes, marginal notes, references, and index to the Revised Statutes.

Sections 3 and 4 of the act prescribed the manner of printing, binding, and labeling the two volumes, to be entitled, respectively, "Revised Statutes of the United States," and "Revised Statutes Relating to District of Columbia and Post-Roads—Public Treaties."

Notes of Decisions

Judicial notice of federal laws.—The courts takes judicial notice of the laws and treaties of the United States. Beck v. Johnson (C. C. 1909) 169 Fed. 154; Mobile, J. & K. C. R. Co. v. Bromberg (1904) 37 So. 395, 141 Ala. 258; St. Louis, I. M. & S. Ry. Co. v. Brown (1899) 54 S. W. 865, 67 Ark. 295; Semple v. Hagar (1865) 27 Cal. 163; Schwerdtle v. Placer County (1895) 108 Cal. 589, 41 Pac. 448; Morris v. Davidson (1873) 49 Ga. 361; Dickenson v. Breeden (1863) 30 Ill. (20 Peck) 279; Gooding v. Morgan (1873) 70 Ill. 275; Sullivan v. Algrem (1910) 157 Ill. App. 123; Hamilton v. Shoaff (1884) 99 Ind. 63; Nitche v. Earle (1889) 117 Ind. 270, 19 N. E. 749; State v. Gramelspacher (1891) 26 N. E. 81, 126 Ind. 398; Wabash R. Co. v. Priddy (Ind. 1913) 101 N. E. 724; Caughran v. Gilman (1890) 81 Iowa, 442, 46 N. W. 1005; Hurst v. Dana (1912) 122 P. 1041, 86 Kan. 947; Laidley v. Cummings (1886) 83 Ky. 606; Louisville & N. R. Co. v. Scott (Ky. 1909) 118 S. W. 990; Lemon's Adm'r v. Louisville & N. R. Co. (Ky. 1910) 125 S. W. 701; Louisville & N. R. Co. v. Woodford (1913) 154 S. W. 1083, 153 Ky. 185 (denying rehearing [1913] 153 S. W. 722, 152 Ky. 398); Pollard v. Cook (La. 1843) 4 Rob. 199; Carson v. Smith (1861) 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539; Dole v. Wilson (1871) 16 Minn. 525 (Gil. 472); Davis' Estate v. Watkins (1898) 76 N. W. 575, 56 Neb. 288; Kessel v. Albetis (N. Y. 1870) 56 Barb. 362; Wheelock v. Lee (N. Y. 1873) 15 Abb. Prac. (N. S.) 24; Carlin v. New York, N. H. & H. R. Co. (1911) 130 N. Y. S. 828, 71 Misc. Rep. 521; Anheuser-Busch Brewing Ass'n v. Doss (Okl. 1912) 129 P. 49; In re Kirby (1897) 73 N. W. 95, 10 S. D. 338; In re Yankton-Clay County Drainage Ditch (S. D. 1912) 137 N. W. 608; Ganow v. Ashton (S. D. 1913) 143 N. W. 383; Mims v. Swartz (1873) 37 Tex. 13; Overton v. McCabe & Steen (1904) 79 S. W. 861, 35 Tex. Civ. App. 133; Red River Nat. Bank v. De Berry (Tex. Civ. App. 1907) 105 S. W. 998; Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App. 1908) 106 S. W. 465, judgment affirmed (Sup. 1908) 109 S. W. 112; San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App. 1908) 113 S. W. 574; Edwards v. Smith (Tex. Civ. App. 1911) 137 S. W. 1161; Western Union Telegraph Co. v. White (Tex. Civ. App. 1914) 162 S. W. 905; Sowards v. Meagher (Utah 1910) 108 P. 1112; Bouchard v. Central Vermont Ry. Co. (Vt. 1914) 89 A. 475; Bayly's Adm'r v. Chubb (Va. 1862) 16 Grat. 284; Bird v. Commonwealth (Va. 1871) 21 Grat. 800; Northern Pac. Ry. Co. v. Wadekamper (Wash. 1912) 126 P. 909, 70 Wash. 392; U. S. v. De Coursey (Wis. 1845) 1 Pin. 508; Rowlands v. Chicago & N. W. Ry. Co. (1912) 135 N. W. 156, 149 Wis. 51.

The Court of Appeals of the Indian Territory takes judicial notice of the act of Congress requiring fees to be advanced before a clerk of the District Court may file the transcript on an appeal from commissioner's court and docket the case. Perry v. Morris (Ind. T. 1907) 104 S. W. 571; Cincinnati, N. O. & T. P. Ry. Co. v. Tucker (Ky. 1916) 181 S. W. 940. But not of special acts of congress Denver & R. G. R. Co. v. U. S. (1898) 54 P. 336, 9 N. M. 389.

It is not necessary that the drainage law should recite the public benefits to be effected by a drain, as the court will take judicial notice of the grant to the state by the act of Congress of the lands sought to be drained that the state might "construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, and that the next General Assembly passed an act appointing a board of commissioners to devise plans for the reclaiming of the land. In re Little River Drainage Dist. (Mo. 1911) 139 S. W. 330.

The court will not take judicial cognizance of any conflict between the act of congress of 1875 as to leases of land of the Senecas and prior treaties which were superseded thereby. Ryan v. Knorr (N. Y. 1880) 19 Hun, 540.

Where congress puts in force a code of laws in a territory by reference to such laws, the same not being embraced in the act or by express provision made a part thereof, the courts of the other states and territories from which such code of laws is not taken will take judicial notice of every fact that can be obtained from the act of congress, but will not take judicial notice of the provisions of the laws it puts in force; and, in order that they be availed of, they must be pleaded and proven. Greenville Nat. Bank v. Evans-Snider-Buel Co. (1900) 60 P. 249, 9 Okl. 353.

Or of private acts. State v. Indian Territory Illuminating Oil Co. (Okl. 1912) 123 P. 166.

The court will take judicial notice of an act of Congress organizing a territory, but not of the laws passed by the territory's Legislature, nor of the construction placed by its Supreme Court on the common law. El Paso & S. W. Ry. Co. v. Smith (Tex. Civ. App. 1908) 108 S. W. 988.

The court must take notice of Act May 2, 1890, c. 182, § 31, 26 Stat. 94, which puts in force in Indian Territory statutes of Arkansas, including the one which in general terms adopts the common law, and, since the act adopts for the territory certain chapters of the statutes of Arkansas, the court must take notice of such statutory provisions precisely as if they were provisions of the Act. Missouri, K. & T. Ry. Co. of Texas v. Wise (Tex. Sup. 1908) 109 S. W. 112, affirming judgment (Tex. Civ. App. 1908) 106 S. W. 465.

The testimony of a lawyer of the territory of New Mexico as to the course a case would take under the laws of the territory, and what, in his opinion, was the court of final resort, is not binding on the trial court, when the matter depends on federal statutes. Western Union Telegraph Co. v. White (Tex. Civ. App. 1914) 162 S. W. 905.

§ 1524. (Act June 20, 1874, c. 333, § 5.) Pamphlet copies and bound copies of statutes of each Congress to be published.

He shall, in like manner, cause to be edited, printed, published and distributed pamphlet copies of the statutes of the present and each future session of Congress, to the officers and persons hereinafter provided, and bound copies of the laws of each Congress to the number of two thousand copies to be distributed in the manner now provided by law, and uniform with the said edition of the revised statutes. (18 Stat. p. 113.)

See note to section 2 of this act, ante, § 1523.

Notes of Decisions

Expenses incident to editing statutes.—A person appointed editor at a fixed compensation and expenses necessarily incident cannot employ a lawyer to assist him and recover for it as an expense, but the employment of a typewriter is a proper expense. McCallum v. U. S. (1909) 44 Ct. Cl. 194.

§ 1525. (Act June 20, 1874, c. 333, § 8.) Pamphlet copies and bound copies of statutes of each Congress as evidence.

The said printed copies of the said acts of each session and of the said bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several States therein. (18 Stat. p. 114.)

See note to section 2 of this act, ante, § 1523.

A similar provision was made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, post, § 1526.

Notes of Decisions

As to judicial notice taken of acts of congress, see § 1523, ante.

Printed copies as evidence.—The acts of congress, as published in the pamphlet acts of the session, may be read on a trial without proof of their authenticity, they being presumed to be within the knowledge of the court. White v. St. Guirons (Ala. 1824) Minor 331.

The printed copies of the acts of congress, distributed to the executives of the several states, to be distributed among the people, are proper evidence of the statutes therein contained, without other authentication. Taylor v. Bank of Alexandria (Va. 1834) 5 Leigh, 471.

§ 1526. (Act Jan. 12, 1895, c. 23, § 73.) Pamphlet copies and bound copies of statutes of each Congress as evidence.

The pamphlet copies of the statutes and the bound copies of the Acts of each Congress shall be legal evidence of the laws and treaties therein contained in all the courts of the United States and of the several States therein. (28 Stat. 612.)

This was a provision of § 73 of the Printing and Binding Act of Jan. 12, 1895, c. 23, cited above. It repeated a similar provision of Act June 20, 1874, c. 333, § 8, ante, § 1525.

§ 1527. (Act March 2, 1877, c. 82, § 1.) Preparation and publication of Second Edition of Revised Statutes.

That the President of the United States be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, one person, learned in the law, as a commissioner, for the purpose of preparing and publishing a new edition of the first volume of the Revised Statutes of the United States. (19 Stat. 268.)

This was the first section of an act entitled "An act to provide for the preparation and publication of a new edition of the Revised Statutes of the United States."

Sections 2 and 3 of this act prescribed the duties of the commissioner in preparing the new edition of the Revised Statutes, and the matters to be included therein.

Section 4 of the act, providing for the printing and promulgation of the new edition, and its effect as evidence, is set forth, post, § 1528.

§ 1528. (Act March 2, 1877, c. 82, § 4, as amended, Act March 9, 1878, c. 26.) Revised Statutes, Second Edition, as evidence.

Said new edition shall be completed in manuscript by said commissioner by the first day of January anno Domini eighteen hundred and seventy-eight, and by him presented to the Secretary of State for his examination and approval, who is hereby required to examine and compare the same as amended, with all the amendatory acts, and, within two months after having been submitted to him, and when the same shall be completed, the said Secretary shall duly certify the same under the seal of the Secretary of State, and when printed and promulgated as herein provided the printed volume shall be legal evidence of the laws therein contained, in all the courts of the United States, and of the several States and Territories, but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three. (19 Stat. 269, 20 Stat. 27.)

The amendment of this section by Act March 9, 1878, c. 26, cited above, consisted in striking out, from the section as originally enacted, after the words, "the printed volume shall be legal," the words, "and conclusive;" and after the words, "evidence of the laws," the words, "and treaties;" and by inserting, after the word "Territories," the words, "but shall not preclude reference," etc., to the end of the section as set forth here.

A further provision of this section for the printing and binding of 15,000 copies of the new edition of the Government Printing Office, is omitted here, as temporary merely.

Notes of Decisions

As to judicial notice taken of acts of congress, see § 1523, ante.

§ 1529. (Res. June 7, 1880, No. 44.) Supplement to Revised Statutes as evidence.

That the supplement to the Revised Statutes, embracing the statutes general and permanent in their nature passed after the Revised Statutes with references connecting provisions on the same subject, explanatory notes, citations of judicial decisions, and a general index, prepared by William A. Richardson, be stereotyped at the Government Printing Office; * *

The publication herein authorized shall be taken to be prima facie evidence of the laws therein contained in all the courts of the United States and of the several States and Territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress: Provided, That nothing herein contained shall be construed to change or alter any existing law. (21 Stat. 308.)

This resolution was entitled "Joint resolution to provide for the publication and distribution of a supplement to the Revised Statutes."

The portions of the resolution omitted here provided that the index and

plates of the work should belong to the Government, and further provided for the printing, binding, and distribution of the Supplement.

Subsequent provisions for the continuation of the Supplement, were made by Act April 9, 1890, c. 73, post, §§ 1530, 1531.

§ 1530. (Act April 9, 1890, c. 73, § 1.) Continuation of Supplement to Revised Statutes.

That the publication of the supplement to the Revised Statutes, embracing the statutes general and permanent in their nature, passed after the Revised Statutes, with references connecting provisions on the same subject, explanatory notes, and citations of judicial decisions, be continued and issued in one volume, to include the general laws of the Forty-seventh, Forty-eighth, Forty-ninth, Fiftieth, and Fifty-first Congresses, with a table of alterations and a general index to the whole, to be prepared and edited by the editor of the existing Supplement, authorized by the joint resolution of June Twenty-eighth, eighteen hundred and eighty, numbered forty-four (Supplement to Revised Statutes, page five hundred and eighty-two), to be stereotyped at the Government Printing Office, * * (26 Stat. 50.)

This was the first section of an act entitled "An act to continue the publication of the Supplement to the Revised Statutes."

The closing portion of this section, omitted here, provided for the use of the existing plates, with alterations, and that the work and plates should belong to the Government.

Section 2 of the act provided for the printing, binding, and distribution of the work.

Section 3 of the act, relating to the effect of the Supplement as evidence, is set forth post, § 1531.

§ 1531. (Act April 9, 1890, c. 73, § 3.) Supplement to Revised Statutes as evidence.

The publication herein authorized shall be taken to be prima facie evidence of the laws therein contained, but shall not change nor alter any existing law, nor preclude reference to nor control in case of any discrepancy, the effect of any original act passed by Congress. (26 Stat. 50.)

See note to section 1 of this act, ante, § 1530.

§ 1532. (R. S. § 909.) Burden of proof, when it lies on claimant in seizure cases.

In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: Provided, That probable cause is shown for such prosecution, to be judged of by the court.

Act March 2, 1799, c. 22, §§ 70, 71, 1 Stat. 678.

Provisions similar to those contained in this section are contained in Act Oct. 3, 1913, c. 16, § III T, set forth post, § 5791.

Provisions as to the burden of proof in actions to recover internal revenue taxes, collected under second assessments, to show absence of fraud in list, statement, or return, were made by R. S. § 3225, post, § 5948.

Provisions relating to burden of proof on trial of right to seized distilled spirits were made by R. S. § 3333, post, § 6130.

Notes of Decisions

Operation of statute, in general.—This section held to apply to Revenue Act March 3, 1863. Cliquot's Champagne (1865) 3 Wall. 114, 143, 18 L. Ed. 116; Fennerstein's Champagne (1865) 3 Wall. 145, 147, 18 L. Ed. 121.

Where logs were not seized for a violation of the navigation or revenue or other laws of the United States, providing for the seizure, forfeiture, and condemnation of property, this section did not apply. Handford v. U. S. (1899) 92 Fed. 881, 882, 35 C. C. A. 75.

This section is not adopted by Act 1820, c. 122, § 4. The Abigail (C. C. 1824) Fed. Cas. No. 18.

Burden of proof.—Where the burden of proof is thrown on a claimant in a revenue case by a prima facie case made by the prosecutor, and the claimant fails to explain the difficulties of

the case by the production of papers and other evidence in his possession or under his control, condemnation will follow. The Luminary (1823) 8 Wheat. 407, 410, 5 L. Ed. 647.

The collector of revenue is justified in making any seizure, where he has reasonable ground to suspect that a fraud on the revenue or a violation of the revenue laws is meditated, and, on showing probable cause for the seizure, the burden of proof is on the claimant. Sixty Pipes of Brandy (1825) 10 Wheat. 421, 426, 6 L. Ed. 356.

Where goods imported are fraudulently invoiced and seized by the United States, the burden of proof is on the claimants. Wood v. U. S. (1842) 41 U. S. (16 Pet.) 342, 10 L. Ed. 987.

The throwing of the onus probandi upon the claimants is a matter solely for the consideration of the court, and does not in any way affect the competency of informers as witnesses. Taylor v. U. S. (1845) 3 How. 197, 207, 11 L. Ed. 559.

Whether probable cause is shown so as to cast the burden of proof upon the claimants is a question for the court. Buckley v. U. S. (1846) 4 How. 251, 11 L. Ed. 961; Three Thousand One Hundred and Nine Cases of Champagne (D. C. 1867) Fed. Cas. No. 14,012; U. S. v. Sixteen Cases of Silk Ribbons (D. C. 1870) Fed. Cas. No. 16,301.

The rule prescribed by this section is in force under the Act of 1863, though the latter act is silent on this subject. Cliquot's Champagne (1865) 3 Wall. 114, 18 L. Ed. 116; U. S. v. Sixteen Cases of Silk Ribbons (D. C. 1870) Fed. Cas. No. 16,301. CONTRA, see U. S. v. Baker (D. C. 1871) Fed. Cas. No. 14,500.

Where the United States claims the ownership of logs cut from government land, its remedy is by an action of replevin or trespass. It cannot seize the logs from one having them in his possession, and, by filing a libel against them, cast upon him the burden of proving his ownership. Handford v. U. S. (1899) 92 Fed. 881, 35 C. C. A. 75.

Where the claimant sets up mistake as an excuse for disagreement with the entries, the fact that probable cause of seizure has been made out does not impose upon him the necessity of making out an unusually clear case of mistake. U. S. v. Nine Packages of Linen (C. C. 1818) Fed. Cas. No. 15,884.

A collector who has compelled an importer to pay a higher rate of duty than that imposed by law on such articles as are named in the invoice has the burden of proof to show the authority under which such higher duty was exacted. Wilkinson v. Greely (C. C. 1853) Fed. Cas. No. 17,672.

Where it was proved that the master had a quantity of cigars on board, and none were entered on the manifest, and no account was given of the quantity purchased, the evidence was sufficient to cast the burden of proof on the claimant, under this section, and the failure to produce evidence of what was purchased or put on board was cause for condemnation. The Busy (C. C. 1856) Fed. Cas. No. 2,232.

On a libel for undervaluation, a fraudulent purpose will be implied upon proof of the undervaluation, which complainant must rebut by showing an innocent mistake. U. S. v. Three Hundred and Thirty-Seven Cases of Wine (C. C. 1870) Fed. Cas. No. 16,506.

Where the claimant knew that his method of importation was contrary to law, the burden is upon him to show affirmatively that he did not adopt such method with intent to evade the payment of duties. U. S. v. Nine Trunks (C. C. 1878) Fed. Cas. No. 15,886.

Where there is ample evidence of probable cause, the burden of proof is thrown upon a claimant to show the innocence of the transaction. Boxes of Opium v. U. S. (C. C. 1883) 23 Fed. 367, 392.

Where defendant is found in possession of smuggled goods, it is incumbent on him to explain his possession to the satisfaction of the jury; otherwise, he will be found guilty. U. S. v. Fraser (C. C. 1890) 42 Fed. 140.

Where it appears that the goods were entered at only about one-half of the invoice price of like goods purchased by other importers at the same time, and imported by the same vessel, the claimants have the burden of substantiating the invoice by clear proofs. U. S. v. Sixty-Five Packages of Glass (D. C. 1838) Fed. Cas. No. 16,305a.

Where the invoice price is shown to be far below the market price, the importer has the burden of showing the price actually paid. U. S. v. Eight Cases of Lamps (D. C. 1839) Fed. Cas. No. 15,029.

Where probable cause is shown for the forfeiture of goods, the burden of proof is upon claimants to show their innocence. U. S. v. Twenty-Five Cases of Cloths (D. C. 1840) Fed. Cas. No. 16,563; In re Twelve Hundred and Nine Quarter Casks, etc., of Wine (D. C. 1868) Fed. Cas. No. 14,279; In re Six Cases of Silk Ribbons (D. C. 1869) Fed. Cas. No. 12,914; U. S. v. Sixteen Cases of Silk Ribbons (D. C. 1870) Fed. Cas. No. 16,301; Same v. Six Hundred and Sixty-One Bales of Tobacco (D. C. 1878) Fed. Cas. No. 16,297.

Where, in a suit for the forfeiture of goods under the revenue laws, sufficient evidence has been given for the prosecution, to satisfy the court that there was probable cause for the proceeding, the burden of proof is thrown upon the claimants. U. S. v. Twenty-Five Cases of Cloths (D. C. 1840) Fed. Cas. No. 16,563; The Governor Cushman (D. C. 1865) Fed. Cas. No. 5,646; Three Thousand One Hundred and Nine Cases of Champagne (D. C. 1867) Fed. Cas. No. 14,012; Twelve Hundred and Nine Quarter Casks, etc., of Wine (D. C.

1868) Fed. Cas. No. 14,279; Six Cases of Silk Ribbons (D. C. 1869) Fed. Cas. No. 12,914; U. S. v. Six Hundred and Sixty-One Bales of Tobacco (D. C. 1878) Fed. Cas. No. 16,297.

The claimant of liquors found stored in large quantities in the upper room of a private house has the burden of showing that they were legally imported, and that the original packages had been inspected, marked, and branded as required by law. U. S. v. Five Jugs of Brandy (D. C. 1869) Fed. Cas. No. 15,118.

Burden of proof held not shifted to claimants on production of reports on file in the customhouse showing that a certain lot of goods seized were found on the vessel not entered on the manifest. The Missouri (D. C. 1870) Fed. Cas. No. 9,653.

If an affidavit of damage is in fact false, the jury are authorized to presume an intent to defraud the revenue, and the burden is on the claimant to satisfy them, by a fair preponderance of evidence, that he had no such intent. U. S. v. Six Hundred and Sixty-One Bales of Tobacco (D. C. 1878) Fed. Cas. No. 16,297.

A forfeiture of the cargo of the E. was claimed on the ground that it had been imported into the United States without payment of duties. The information averred that the cargo had been sold to the master of the E. by the master of the V. Held, that it would be presumed, for the purpose of sustaining the information against a demurrer, that the sale took place under such circumstances as to constitute it a legal sale, and that the master of the V. had authority to make the sale. The Cargo ex Lady Essex (D. C. 1889) 39 Fed. 765.

Where an article has been finally placed in a class other than that in which it was originally, and the collector brings suit to recover the excess of duty, he is entitled to a presumption that it is rightfully placed in said other class, and the burden of proof is on the defendant to prove that it rightly belonged to the class in which it had been formerly placed. U. S. v. Midgley (D. C. 1890) 42 Fed. 668.

In a suit to condemn merchandise as forfeited for having been fraudulently imported, where the proofs show probable cause for the seizure, and the claimant makes no offer to explain damaging circumstances, such as that the goods were shipped under a false designation, and show when, where, how, or from whom he acquired the ownership he claims, such withholding of evidence is a circumstance sufficient to complete the case for the government, under this section, casting the burden of proof upon the claimant. U. S. v. Seven Hundred and Forty Tins of Opium (D. C. 1891) 44 Fed. 798; Same v. Ten Hundred and Sixty Tins of Opium (D. C. 1891) 44 Fed. 799.

Where probable cause is shown for the seizure of a vessel and cargo for violation of the revenue laws, the burden of proof to establish the innocence of the property is on the claimant. U. S. v. The Coquitlam (D. C. 1893) 57 Fed. 706, questions certified to and determined The Coquitlam v. U. S. (1896) 16 Sup. Ct. 1117, 163 U. S. 346, 41 L. Ed. 184.

On a suit for forfeiture under section 5785, post, the burden of proof is not on the claimant of the articles seized, unless there was probable cause for seizing them. If at the close of the government's case there is not enough evidence to go to the jury, there is not such probable cause as to put the burden of proof upon the claimant. U. S. v. One Pearl Chain (D. C. 1904) 139 Fed. 510.

Presumptions.—On the trial of a cause where goods had been seized on suspicion of being fraudulently imported, and the government showed sufficient ground for an opinion of the court that probable cause for the prosecution existed, and notice was given for claimant to produce his books and accounts relating to the goods, it was proper to instruct that if he withheld testimony of his accounts and transactions with parties abroad, from where he received the goods the jury could presume that, if produced, they would have operated unfavorably to his cause. Clifton v. U. S. (1846) 4 How. 242, 245, 11 L. Ed. 957.

The presumption of the correctness of the decisions of customs officers must be overcome by a fair preponderance of proof as to the commercial use of the term at the date of the act. Hutton v. Schell (C. C. 1879) Fed. Cas. No. 6,962.

In case of a seizure of cigars alleged to be in boxes other than such as should have contained them according to the revenue laws, the natural and reasonable inference is that the cigars were removed from the factory in the condition in which they were found. Jackson v. U. S. (C. C. 1884) 21 Fed. 35. A defense being that, in case of a seizure of cigars in boxes alleged to be not properly stamped, the presumption of defendant's innocence makes it incumbent on the government's counsel to show that the cigars were not taken out of the original and properly stamped boxes and put into those in which they were when seized, held, that such an act could not have been done without violating some of the several stringent provisions of the internal revenue laws, and subjecting the offender to criminal punishment. The presumptions in favor of innocence, therefore, neutralize each other. Id.

Where goods were entered as "cattle hair," and represented to be such by the claimant, the burden of proof in a suit on information to forfeit them for fraudulently designating them as such is on the government, which must show

that they are in fact something else, and that the claimant so knew, and entered them as hair to defraud the government. U. S. v. One Hundred and Twenty-Nine Bales of Merchandise (D. C. 1891) 46 Fed. 468.

"Probable cause."—A doubt respecting the law furnishes a proper ground for granting to the collector a certificate of probable cause of seizure. U. S. v. Riddle (1809) 5 Cranch, 311, 3 L. Ed. 110; The Friendship (C. C. 1812) Fed. Cas. No. 5,125; U. S. v. The Recorder (C. C. 1849) Fed. Cas. No. 16,130; Same v. Twenty-Six Diamond Rings (D. C. 1855) Fed. Cas. No. 16,572.

"Probable cause," as used in this section, means less than evidence which will justify condemnation. Locke v. U. S. (1813) 7 Cranch, 339, 348, 3 L. Ed. 364. It means reasonable ground of presumption that the charge is or may be well founded. Wood v. U. S. (1842) 16 Pet. 342, 366, 10 L. Ed. 987. And imports circumstances which create suspicion. U. S. v. A Lot of Jewelry (D. C. 1894) 59 Fed. 684, distinguishing Boyd v. U. S. (1886) 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. It exists where there are circumstances sufficient to warrant suspicion, though not sufficient to warrant condemnation. The Thompson (1865) 3 Wall. 155, 162, 18 L. Ed. 55.

Concealment and undervaluation of goods are good grounds for a decision of the court that probable cause of prosecution existed. Taylor v. U. S. (1845) 44 U. S. (3 How.) 197, 11 L. Ed. 559.

A material undervaluation shown will be presumed to have been made with intent to defraud the revenue, in the absence of clear and credible testimony excusing it. Three Hundred and Thirty-Seven Cases of Wine (C. C. 1870) Fed. Cas. No. 16,506; U. S. v. Two Hundred Quarter Boxes of Cigars (D. C. 1858) Fed, Cas. No. 16,587.

Where the seizure is under circumstances warranting suspicion, the collector is entitled to a certificate of probable cause. U. S. v. Three Bales of Cloth (D. C. 1840) Fed. Cas. No. 16,495.

Upon a prosecution for the forfeiture of goods, the law presumes that there was, at the time and place of manufacture of imported goods, an actual market value, and no evidence is admissible to prove the contrary. Six Cases of Silk Ribbons (D. C. 1869) Fed. Cas. No. 12,914.

Evidence that five barrels of opium were seized en route from the point of discharge of the libelant steamer, that the steamer a short time prior thereto had discharged five barrels similar in all respects to those seized, which were consigned by rail over the routes upon which the barrels of opium were seized, and that none of the barrels were entered in the ship's manifest as required by law, constitutes probable cause sufficient to justify the seizure of the ship and to throw the burden of proof on the claimant. U. S. v. The Walla Walla (D. C. 1891) 44 Fed. 796.

Determination of existence.—The judge, and not the jury, is to determine whether there was probable cause for a seizure, so as to throw on the claimant the onus probandi to establish the fairness of the importation. Buckley v. U. S. (1846) 4 How. 251, 260, 11 L. Ed. 961.

Sufficiency of evidence.—Where the burden of proof is thrown on the claimant in a revenue case by a prima facie case on the part of the prosecutor, and the claimant fails to explain the difficulties of the case by the production of papers and other evidence in his possession or under his control, condemnation follows. The Luminary (1823) 21 U. S. (8 Wheat.) 407, 5 L. Ed. 647.

In an action to condemn a vessel for smuggling, the consignee of the goods testified that, in a foreign port, he suggested the enterprise to the shipowner, who neither declined nor accepted, but that, later, witness received word from a third person to send the goods to the port, and subsequently a letter from the shipowner stating that the goods were safely on board. Witness testified that he paid the shipowner for his services, which testimony was corroborated by an unimpeached witness. The shipowner denied receiving the money, but did not positively deny writing the letter, but said it might have referred to his seeing the goods on another ship. Impeaching evidence as to the consignee's veracity was conflicting. The consignee had made a statement before the trial to the owner's attorney that the goods had not been brought in the former's vessel, but this he said was made under the offer of a bribe. Held, that under this section the case was sufficiently made out against the owner. The John Griffin (1872) 82 U. S. (15 Wall.) 29, 21 L. Ed. 80.

A mere preponderance of evidence in a case by information to condemn smuggled goods, in favor of the guilt of the transaction, will justify a decree of forfeiture. Three Thousand Eight Hundred and Eighty Boxes of Opium v. U. S. (C. C. 1883) 23 Fed. 367.

In a suit to condemn merchandise as forfeited, where the proofs show probable cause for the seizure, and the claimant makes no offer to explain damaging circumstances, such as that the goods were shipped under a false designation, and show when, where, how, or from whom he acquired the ownership he claims, such withholding of evidence is a circumstance sufficient to complete the case for the government and cast the burden of proof upon the

claimant. U. S. v. Seven Hundred and Forty Tins of Opium (D. C. 1891) 44 Fed. 798; Same v. Ten Hundred and Sixty Tins of Opium (D. C. 1891) 44 Fed. 799.

Cited without definite application, Lilienthal's Tobacco v. U. S. (1877) 97 U. S. 237, 265, 24 L. Ed. 901; U. S. v. Frerichs (1882) 1 Sup. Ct. 169, 106 U. S. 160, 27 L. Ed. 128.

§ 1533. (R. S. § 910.) Possessory actions for recovery of mining titles.

No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

Act Feb. 27, 1865, c. 64, § 9, 13 Stat. 441.

Provisions relating to witnesses, depositions and subpœnas, connected with investigations in any of the departments, were made by R. S. §§ 183–186, ante, §§ 265–268.

The examination of witnesses in congressional investigations was provided for by R. S. §§ 101–104, ante, §§ 155–159.

Provisions relating to witnesses, evidence, depositions, etc., in causes before the Court of Claims, were made by Jud. Code, §§ 166–171, ante, §§ 1157–1182.

Provisions as to fees and mileage of witnesses were made by R. S. §§ 848–851, ante, §§ 1452–1456.

Provisions relating to the administration of oaths, witnesses, evidence, and depositions in bankruptcy proceedings were made by the Bankruptcy Act of 1898, Act July 1, 1898, c. 541, §§ 20, 21, post, §§ 9604, 9605.

Notes of Decisions

"Mining title."—By "mining title," as employed in this section, is meant the title which the miner obtains by his discovery and location, followed up by a compliance with the statutory regulations to preserve his right of possession. Gillis v. Downey (1898) 85 Fed. 483, 486, 29 C. C. A. 286.

Right of possession.—Where neither party to a suit to recover possession of land held under conflicting mining claims had acquired a perfect right to a conveyance from the United States, and the requirements of the statutes providing for adverse proceedings and suits for the determination of questions respecting conflicting claims had not been complied with, the only issue determinable in such suit was the right of possession. Bevis v. Markland (C. C. 1904) 130 Fed. 226.

Under this section no possessory action between parties in any court of the United States for the recovery of any mining title, or for damages to any such title, can be affected by the paramount title of the United States, but each case must be adjudged by the law of possession. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

Ejectment.—Ejectment will lie for a mining claim, although paramount title be in the United States. Davidson v. Calkins (C. C. 1899) 92 Fed. 230, 232. Possessory title will support ejectment for a mining claim against a trespasser. Aurora Hill Consol. Min. Co. v. 85 Min. Co. (C. C. 1888) 34 Fed. 515.

A locator on public mineral lands has sufficient interest to protect his rights through a possessory action. Producers' Oil Co. v. Hanszen (1913) 61 So. 754, 132 La. 691.

No possessory action between parties in any court of the United States for the recovery of any mining title, or for damages to any such title, can be affected by the paramount title of the United States, but each case must be adjudged by the law of possession. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787. The maxim that the plaintiff must recover on the strength of his own title does not apply in the case of a naked trespasser or intruder, although the party in possession may have a defective location. In such case the latter's possession alone is sufficient to maintain ejectment. Id.

A right of action of a claimant to a mining claim, who is out of possession, against another in possession, concerns possessory rights, the title being in the United States; and his remedy is at law. Davidson v. Calkins (C. C. 1899) 92 Fed. 230.

It is a sufficient possession of a mill site location connected with a mining claim to maintain ejectment therefor that its corners are marked with painted posts, as is the custom in locating such mill sites, and that the claimant had a house and stable thereon, and had constructed tunnels to increase the flow of springs, and built a wagon road to his mines, thus indicating a present and continuous use. Valcalda v. Silver Peak Mines (1898) 86 Fed. 90, 29 C. C. A. 591, affirming Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886.

A person who has purchased a mining claim, which had been properly located and marked out on the ground,

and who is personally, or by agents, upon the claim, working and developing it, and keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim, by virtue of mining laws, but is in the actual possession of the whole claim. Such possession is a possessio pedis, extending to the boundary lines of the claim. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522.

Where a suit in the circuit court to settle the title to a lode mining claim has been dismissed by the clerk by order of an attorney claiming to represent plaintiff, and is subsequently reinstated, but after such dismissal and before reinstatement defendant has renewed his application in the land office and been allowed to enter the claim, and receive a certificate therefor, such certificate cannot have the effect to terminate the suit. McEvoy v. Hyman (C. C. 1885) 25 Fed. 539.

A mining company paid state and county taxes from 1878 to 1888 on certain lands covered by its patent, but in respect to which the patent was void. After 1883 certain occupying claimants paid taxes on their improvements. Held, in an action of ejectment by the mining company against the occupying claimants, that the payment of taxes was immaterial to establish title in either party. Lakin v. Dolly (C. C. 1891) 53 Fed. 333, judgment affirmed Lakin v. Roberts (1893) 54 Fed. 461, 4 C. C. A. 438.

By R. S. § 2322, post, § 4618, the locator of a mining claim is entitled to hold and enjoy the profits of the surface included within the boundary lines of his claim, and, if in possession of the claim in person or by agent, any one who enters upon and takes therefrom mineral or other valuable substances is liable in damages as a trespasser. Fuller v. Harris (D. C. 1887) 29 Fed. 814.

Action to quiet title.—Under section 475, Code Alaska (Act June 6, 1900, c. 786, 31 Stat. 410), providing that any person in possession of real property may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, and this section, one in possession of a mining claim in Alaska under a valid location has such title as will support an action to quiet title against an adverse claimant. Fulkerson v. Chisna Min. & Imp. Co. (1903) 122 Fed. 782, 58 C. C. A. 582.

Cited without definite application, Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Billings v. Aspen Mining & Smelting Co. (1892) 51 Fed. 338, 344, 2 C. C. A. 252 (rehearing denied [1892] 52 Fed. 250, 3 C. C. A. 69); Reed v. Munn (1906) 148 Fed. 737, 80 C. C. A. 215 (certiorari denied [1907] 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353); Jerman v. Stewart, Gwynne & Co. (C. C. 1882) 12 Fed. 271, 273; United States Min. Co. v. Lawson (C. C. 1902) 115 Fed. 1005; O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 109 (affirmed [1905] 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. [N. S.] 919); Price v. McIntosh (1901) 1 Alaska, 286.

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§ 1534. (R. S. § 911.) Sealing and testing of writs.

All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court [or a circuit court] shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of said courts shall be provided at the expense of the United States.

Act May 8, 1792, c. 36, § 1, 1 Stat. 275.

The words of this section enclosed in brackets, "or a circuit court," became inoperative on the abolition of the circuit courts by Jud. Code, § 289, ante, § 1266. Possibly the provisions relating to those courts may be regarded as made applicable to district courts by the transfer of the powers and duties of the circuit courts to the district courts, by Jud. Code, § 291, ante, § 1268.

The powers of the courts to issue writs of ne exeat, scire facias, and all writs not specifically provided for, and to grant temporary restraining orders and writs of injunction, were defined by Jud. Code, §§ 261–266, ante, §§ 1236–1241. The issue of the writ of habeas corpus and proceedings thereon were provided for by R. S. §§ 751–766, ante, §§ 1279–1292.

Notes of Decisions

1. Construction of section with § 1537.
2. Construction and application of section in general.
3. Teste.
4. —— Clerk on vacancy in office of judge.

5. —— Deputy clerk.
6. —— Time for testing.
7. Seal.
8. Body of writ.
9. Amendment.
10. Copies.
11. Specific writs and processes included.

1. Construction of section with § 1537.—This section is unaffected by section 1537, post. Peaslee v. Haberstro (C. C. 1879) Fed. Cas. No. 10,884; Middleton Paper Co. v. Rock River Paper Co. (C. C. 1884) 19 Fed. 252; Brown v. Pond (D. C. 1880) 5 Fed. 31, 37. Nor are its provisions abrogated thereby. Both sections must be so construed as to stand together. Dwight v. Merritt (C. C. 1880) 4 Fed. 614, 615.

2. Construction and application of section in general.—All writs and processes issuing from the courts of the United States shall be signed by the clerk of the court from which they issue, and be under the seal of the court from which they issue. Middleton Paper Co. v. Rock River Paper Co. (C. C. 1884) 19 Fed. 252. A summons must issue from the court, and be sealed with the seal of the court. Dwight v. Merritt (C. C. 1880) 4 Fed. 614.

The process of the court in its narrowest sense means the writ and mandates of the court under the seal thereof, and in this sense it is used in this section and section 1535, post. U. S. v. Murphy (D. C. 1897) 82 Fed. 893, 899.

3. Teste.—All writs and processes issuing from the United States supreme court shall bear teste of the chief justice of the United States. Middleton Paper Co. v. Rock River Paper Co. (C. C. 1884) 19 Fed. 252. This includes writs of error. Wells Fargo & Co. v. McGregor (1871) 13 Wall. 188, 189, 20 L. Ed. 538.

A summons issued out of the district court, and bearing the seal of the district court, but the teste of the chief justice instead of the district judge, as required by this section, is defective in the latter particular. U. S. v. Turner (D. C. 1892) 50 Fed. 734.

4. —— Clerk on vacancy in office of judge.—A District Court does not cease to exist because of a vacancy in the office of judge in such sense that proceedings in bankruptcy may not be instituted therein, but in such case it is the duty of the clerk to receive and file the petition when offered; and it seems that he may also issue a subpœna thereon, tested in his own name, as provided by this section. In re Urban & Suburban Realty Title Co. (D. C. 1904) 132 Fed. 140.

5. —— Deputy clerk.—In U. S. v. Ants (C. C. 1883) 16 Fed. 119, 122, it was held that a paper purporting to be a venire facias, tested in the name of the deputy clerk, was neither a writ nor a process, within the meaning of such words as used in this section.

6. —— Time for testing.—See note to § 1535, post.

7. Seal.—The seal to a statement verifying all the papers sent up may be sufficient, though not in the usual place for a bill of exceptions. U. S. v. Jarvis (C. C. 1847) Fed. Cas. No. 15,469.

8. Body of writ.—A summons issuing out of the United States circuit court, under the seal of the court, and signed by the clerk, as required by this section, is not objectionable because it is wholly in the handwriting of plaintiff's attorney, excepting the signature of the clerk. Jewett v. Garrett (C. C. 1891) 47 Fed. 625, 627.

9. Amendment.—A summons cannot be amended by the subsequent addition of the signature of the clerk and the seal of the court. Dwight v. Merritt (C. C. 1880) 4 Fed. 614, 615. But a summons issued out of the District Court and bearing the seal of the District Court, but tested by the Chief Justice instead of the District Judge, is amendable by virtue of section 1591, post. U. S. v. Turner (D. C. 1892) 50 Fed. 734. The omission of a seal from a writ issuing from a state court is amendable in the federal court after removal of the cause. Wolf v. Cook (C. C. 1889) 40 Fed. 432.

See, also, notes under §§ 1580, 1591.

10. Copies.—It has been for many years a settled practice in the federal court for this district, after writ and process has issued in obedience to this section, for the clerk to prepare the requisite number of copies thereof, attesting the same as true copies of the original writ and process, and to deliver them to the marshal or his deputy for service. The officer makes indorsement to that effect upon the original. Elson v. Town of Waterford (C. C. 1905) 135 Fed. 247. And see Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535, reversed (1893) 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335.

11. Specific writs and processes included.—The following writs, etc., are held to be within this section: A summons in a common-law action in the federal circuit court in New York. Peaslee v. Haberstro (C. C. 1879) Fed. Cas. No. 10,884. A warrant of commitment. Ex parte Sprout (C. C. 1807) Fed. Cas. No. 13,267; Ex parte Bennett (C. C. 1825) Fed. Cas. No. 1,311. A warrant of arrest issued by a United States commissioner. Clough v. U. S. (C. C. 1891) 47 Fed. 791, 795, modified (1893) 55 Fed. 374, 5 C. C. A. 140. A warrant authorizing a marshal to take possession of a vessel. Bowler v. Eldredge (1846) 18 Conn. 1.

The following writs, etc., are held not to be within this section: A notice given under Code Va. 1887, § 3211, authorizing a judgment on a contract to

be obtained on motion after 15 days' notice to defendant. Leas & McVitty v. Merriman (C. C. 1904) 132 Fed. 510. A notice to a garnishee in an action in the United States courts. Wile v. Cohn (C. C. 1894) 63 Fed. 759, judgment affirmed Wile v. Farmers' State Bank of Charter Oak (1895) 70 Fed. 138, 17 C. C. A. 25. But see Middleton Paper Co. v. Rock River Paper Co. (1884) 19 Fed. 252, holding that the summons in a garnishee proceeding is "process" within the meaning of this section, prescribing the manner in which processes shall issue from the federal courts; both the statutes and the decisions of the state courts regarding the garnishee proceeding as the commencement of a new suit against the defendant therein.

Cited without definite application, Todd v. U. S. (1895) 15 Sup. Ct. 889, 890, 158 U. S. 278, 39 L. Ed. 982; Shepard v. Adams (1898) 18 Sup. Ct. 214, 216, 168 U. S. 618, 42 L. Ed. 602; U. S. v. Severens (1896) 71 Fed. 768, 769, 18 C. C. A. 314; Schofield v. Palmer (C. C. 1904) 134 Fed. 753; Nixon v. U. S. (D. C. 1897) 82 Fed. 23, 29.

§ 1535. (R. S. § 912.) Teste of process, day of.

All process issued from the courts of the United States shall bear teste from the day of such issue.

Act June 1, 1872, c. 255, § 4, 17 Stat. 197.

Notes of Decisions

Process defined.—See note to § 1534, ante.

Day of teste.—It is no objection to a writ that it bears test on the day of its issue, as this section requires it. Atherton v. Fowler (1875) 91 U. S. 143, 149, 23 L. Ed. 265.

An alias cap. ad resp. must be tested at the return of the original writ, and made returnable at the next ensuing term. U. S. v. Parker (C. C. 1797) Fed. Cas. No. 15,992.

A fi. fa. issued after the death of defendant, but bearing teste before his death, will not be quashed. Kane v. Love (C. C. 1823) Fed. Cas. No. 7,-608.

Cited without definite application, Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335); Jewett v. Garrett (C. C. 1891) 47 Fed. 625, 627.

§ 1536. (R. S. § 913.) Mesne process and proceedings in equity and admiralty.

The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the [circuit and] district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any [circuit or] district court, not inconsistent with the laws of the United States.

Act Sept. 29, 1789, c. 21, § 2, 1 Stat. 93. Act May 8, 1792, c. 36, § 2, 1 Stat. 276. Act May 19, 1828, c. 68, § 1, 4 Stat. 278. Act Aug. 1, 1842, c. 109, 5 Stat. 499.

The words of this section inclosed in brackets, "circuit and," and "circuit or," became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Procedure in prize causes was prescribed by R. S. §§ 4618–4652, post, §§ 8398–8426.

RULES AND NOTES OF DECISIONS

A. Equity Practice and Procedure.
B. Admiralty Practice and Procedure.

A. Equity Practice and Procedure

I. Equity Rules.
II. Equity Procedure in General.

*I. Equity Rules**

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES PROMULGATED BY THE SUPREME COURT OF THE UNITED STATES NOVEMBER 4, 1912

RULE 1. DISTRICT COURT ALWAYS OPEN FOR CERTAIN PURPOSES —ORDERS AT CHAMBERS.—*The District Courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.*

Any District Judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Notes of Decisions

See § 976.

Proceedings in vacation.—A sale made under a decree in chancery may be confirmed in vacation, especially when each of the parties has brought the other before the chancellor on the subject by a rule nisi. Central Trust Co. v. Sheffield & B. Coal, Iron & Railway Co. (C. C. 1894) 60 Fed. 9.

Proceedings at chambers.—A federal judge has authority at chambers to make an order appointing a receiver in a pending cause, or on a bill and an answer by the defendant joining in the prayer for such appointment. Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

RULE 2. CLERK'S OFFICE ALWAYS OPEN, EXCEPT, ETC.—*The clerk's office shall be open during business hours on all days, except Sundays and legal holidays, and the clerk shall be in attendance for the purpose of receiving and disposing of all motions, rules, orders and other proceedings which are grantable of course.*

RULE 3. BOOKS KEPT BY CLERK AND ENTRIES THEREIN.—*The clerk shall keep a book known as "Equity Docket," in which he shall enter each suit, with a file number corresponding to the folio in the book. All papers and orders filed with the clerk in the suit, all process issued and returns made thereon, and all appearances shall be noted briefly and chronologically in this book on the folio assigned to the suit and shall be marked with its file number.*

The clerk shall also keep a book entitled "Order Book," in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.

He shall also keep an "Equity Journal," in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time.

Separate and suitable indices of the Equity Docket, Order Book and Equity Journal shall be kept by the clerk under the direction of the court.

RULE 4. NOTICE OF ORDERS.—*Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such*

* An index of the equity rules will be found under the heading "Equity Rules" in the general index in Volume 12. See, also, Rule 3 of General Rules of Supreme Court in notes following § 1232, ante.

mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order.

RULE 5. MOTIONS GRANTABLE OF COURSE BY CLERK.—*All motions and applications in the clerk's office for the issuing of mesne process or final process to enforce and execute decrees; for taking bills pro confesso; and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge, shall be deemed motions and applications grantable of course by the clerk; but the same may be suspended, or altered, or rescinded by the judge upon special cause shown.*

Cited without definite application, Columbia Metal Box Co. v. Halper (1915) 220 Fed. 912, 917, 136 C. C. A. 478.

RULE 6. MOTION DAY.—*Each District Court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior Circuit Judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.*

RULE 7. PROCESS, MESNE AND FINAL.—*The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided in these rules or specially ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.*

RULE 8. ENFORCEMENT OF FINAL DECREES.—*Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the District Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of non est inventus, to compel obedience to the decree. If a mandatory order, injunction or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.*

Notes of Decisions

Decrees for payment of money.—A decree awarding money judgment and establishing lien held enforceable by execution after sale of property cover-

ed by lien and application on money judgment of the proceeds of sale. Pease v. Rathbun-Jones Engineering Co. (1916) 228 Fed. 273, 142 C. C. A. 565.

A decree for the payment of money is not invalid because it does not in terms direct the issuance of execution. Richards v. Harrison (D. C. 1914) 218 Fed. 134.

In pursuance of equity rule 8, section 1540, ante, is made applicable to decrees solely for the payment of money. General Electric Co. v. Hurd (C. C. 1909) 171 Fed. 984.

Time for performance.—A decree is final where the issues raised by the pleadings were all submitted, and the court passed upon all the merits of the case, though no time was prescribed within which certain conveyances therein directed were to be executed. Desvergers v. Parsons (1894) 60 Fed. 143, 8 C. C. A. 526.

A decree directing a conveyance, without prescribing the time, reserved execution till the further order of court. Maas v. Lonstorf (1908) 166 Fed. 41, 91 C. C. A. 627.

Lien of judgment.—Where, under the law of a state in force prior to 1872, made applicable to federal judgments and decrees by section 1540, post, and equity rule 8, the lien of a judgment lapsed at the end of 10 years from the entry thereof unless execution was issued in the meantime, and requiring leave of court to issue an execution after five years have elapsed without an execution being issued, the lien of a federal decree, on which no execution had been issued since March 28, 1894, had lapsed. General Electric Co. v. Hurd (C. C. 1909) 171 Fed. 984.

Cited without definite application, Montgomery Light & Water Power Co. v. Montgomery Traction Co. (D. C. 1914) 219 Fed. 963, 979. See, also, Steam Stone-Cutter Co. v. Sears, 9 Fed. 8.

RULE 9. WRIT OF ASSISTANCE.—*When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.*

Cited without definite application, San Francisco (1913) 211 Fed. 202, Pacific Gas & E. Co. v. City, etc., of 204.

RULE 10. DECREE FOR DEFICIENCY IN FORECLOSURES, ETC.—*In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in rule 8 when the decree is solely for the payment of money.*

Notes of Decisions.

Pleading.—This rule does not authorize a deficiency decree, unless the bill shows that the amount is actually due. Ohio Cent. R. Co. v. Central Trust Co. (1890) 10 Sup. Ct. 235, 133 U. S. 83, 33 L. Ed. 561.

Prayer for.—A decree for a deficiency may be rendered without a special prayer therefor, though it is the better practice to insert such a prayer. Seattle, L. S. & E. Ry. Co. v. Union Trust Co. (1897) 79 Fed. 179, 24 C. C. A. 512.

Failure of equities.—There cannot be a personal judgment where the equities on which the bill is based wholly failed. Cumberland Building & Loan Ass'n v. Sparks (C. C. 1900) 106 Fed. 101, decree reversed (1901) 111 Fed. 647, 49 C. C. A. 510.

Exhaustion of funds in payment of costs.—Proceedings to enforce a lien having been properly removed to the federal court, a receiver was appointed, and the property sold. The proceeds were in court for distribution, and a lien creditor, who was made a party, set up his claim by cross bill. Held, that the court might make a decree for a deficiency, though the fund was exhausted in paying the costs and the prior lien. Jarboe v. Templer (C. C. 1889) 38 Fed. 213.

Cited without definite application, Pacific Gas & E. Co. v. City, etc., of San Francisco (D. C. 1913) 211 Fed. 202, 204.

RULE 11. PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.—*Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience*

to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

Notes of Decisions

Injunction.—Complainant railroad company commenced a suit in the federal court against the Railroad Commissioners of a state to enjoin the enforcement of a schedule of rates and fares established by the Commission. A preliminary injunction was granted on the giving of a bond by complainant to the United States in the sum of $200,000, conditioned that if it should be finally determined that the injunction should not have been granted complainant would pay to the parties entitled thereto any excess of rates or fares collected above those enjoined. Later an additional bond was required and given running to the defendants in the suit in the sum of $800,000, similarly conditioned. A permanent injunction was granted, but the decree was reversed by the Supreme Court, with direction to dismiss the bill without prejudice. Held that, under this rule, the court had jurisdiction to retain the cause after dismissal of the bill for the purpose of enforcing the claims of all shippers and passengers under the bonds, and that in aid of such jurisdiction it had power to enjoin individual claimants from maintaining separate suits in the state courts. St. Louis, I. M. & S. Ry. Co. v. Bellamy (D. C. 1914) 211 Fed. 172.

RULE 12. ISSUE OF SUBPŒNA—TIME FOR ANSWER.—*Whenever a bill is filed, and not before, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk's office twenty days from the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, or a joint subpœna against all the defendants.*

Notes of Decisions

Time for issuance.—The clerk is expressly prohibited to issue chancery subpœnas until the bill is filed in his office. Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. 1909) 171 Fed. 778, decree modified (1910) 184 Fed. 199, 107 C. C. A. 93.

Failure to appear.—A decree pro confesso may be taken if defendant fails to appear within the time required. Thomson v. Wooster (1885) 5 Sup. Ct. 788, 114 U. S. 104, 29 L. Ed. 105.

Prayer for process.—No prayer for process is necessary. Pittsburgh Water Heater Co. v. Beler Water Heater Co. (D. C. 1915) 222 Fed. 950.

The omission from the prayer for process of subpœna of the names of some of the defendants named in the introductory part of the bill is a violation of equity rule 23, and is a fatal defect. Goebel v. American Railway Supply Co. (C. C. 1893) 55 Fed. 825.

Cited without definite application, Board of Levee Com'rs v. Tensas Delta Land Co. (1913) 204 Fed. 736, 747, 123 C. C. A. 40.

RULE 13. MANNER OF SERVING SUBPŒNA.—*The service of all subpœnas shall be by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family.*

Notes of Decisions

Ancillary suit.—A subpœna or notice issued on filing a bill to enjoin an action at law is not regarded as original process. Cortes v. Thannhauser (1881) 9 Fed. 226.

Sufficiency of service.—Service on defendant by leaving a copy of the process at his residence, it not appearing that it was left with any person, is not valid. Day v. Phelps (C. C. 1872) Fed. Cas. No. 3,689.

This rule does not require the copy of the subpœna to be left with a person in the dwelling house, but is satisfied by a service at the door, outside the dwelling house. Phœnix Ins. Co. v. Wulf (C. C. 1880) 1 Fed. 775.

Delivering a copy of a subpœna to a person described as "an adult person who is a resident in the place of the abode" of the defendant is not a compliance with this rule. Blythe v. Hinckley (C. C. 1897) 84 Fed. 228.

RULE 14. ALIAS SUBPŒNA.—*Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to other subpœnas against such defendant, until due service is made.*

RULE 15. PROCESS, BY WHOM SERVED.—*The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court or judge for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.*

Notes of Decisions

Nature of process.—An order that defendants appear and plead on or before a certain day, and that a copy of the order be served on defendants, is not "process." Forsyth v. Pierson (C. C. 1882) 9 Fed. 801.

Cited without definite application, U. S. v. Mitchell (D. C. 1915) 223 Fed. 805, 806.

RULE 16. DEFENDANT TO ANSWER—DEFAULT—DECREE PRO CONFESSO.—*It shall be the duty of the defendant, unless the time shall be enlarged, for cause shown, by a judge of the court, to file his answer or other defense to the bill in the clerk's office within the time named in the subpœna as required by rule 12. In default thereof the plaintiff may, at his election, take an order as of course that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte.*

Notes of Decisions

Failing to answer.—See O'Hara v. MacConnell (1876) 93 U. S. 150, 23 L. Ed. 840; Thomson v. Wooster (1885) 5 Sup. Ct. 788, 114 U. S. 104, 29 L. Ed. 105; McGregor v. Vermont Loan & Trust Co. (1900) 104 Fed. 709, 44 C. C. A. 146.

RULE 17. DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—SETTING ASIDE DEFAULT.—*When the bill is taken pro confesso the court may proceed to a final decree at any time after the expiration of thirty days after the entry of the order pro confesso, and such decree shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit. No such motion shall be granted, unless upon the payment of the costs of the plaintiff up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.*

Notes of Decisions

Interlocutory decree.—The court is authorized, on motion and a showing, to vacate an order pro confesso taken against a defendant and enlarge the time for filing an answer. U. S. v. Whitmire (1911) 188 Fed. 422, 110 C. C. A. 222.

A decree entered in a suit for an accounting, following an order that the bill be taken pro confesso, except that it renders such order absolute, is interlocutory only, and may be modified by the court where it directs the account to be stated in a manner not authorized by the allegations of the bill. Webster v. Oliver Ditson Co. (C. C. 1909) 171 Fed. 895.

Final decree.—A decree on a bill to establish complainant's right to a fund which set out the grounds of such right, and alleged its priority, taken pro confesso as to certain defendants, after the expiration of the term became conclusive against the defendants in default as to any claim which might have been set up in answer to the bill, whether or not such claim was correctly recited therein. Third Nat. Bank v. Atlantic City (1904) 130 Fed. 751, 65 C. C. A. 177, reversing decree (C. C. 1903) 126 Fed. 413.

Cited without definite application, Board of Levee Com'rs v. Tensas Delta Land Co. (1913) 204 Fed. 736, 747, 123 C. C. A. 40.

RULE 18. PLEADINGS—TECHNICAL FORMS ABROGATED.—*Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished.*

Cited without definite application, Zenith Carburetor Co. v. Stromberg Motor Devices Co. (D. C. 1913) 205 Fed. 158, 159; Sheeler v. Alexander (D. C. 1913) 211 Fed. 544, 545; Williams v. Pope (D. C. 1914) 215 Fed. 1000, 1002.

RULE 19. AMENDMENTS GENERALLY.—*The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*

Notes of Decisions

Construction of bill.—Under the second clause of this rule, where a bill may be viewed in more than one aspect, the court will adopt the view which best justifies the relief to which complainant is entitled. Medical Society of South Carolina v. Gilbreth (D. C. 1913) 208 Fed. 899.

Cited without definite application, Galesburg & K. Electric Ry. Co. v. Hart (1915) 221 Fed. 7, 14, 136 C. C. A. 533; Marconi Wireless Telegraph Co. v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295, 299; Sheeler v. Alexander (D. C. 1913) 211 Fed. 544, 545.

RULE 20. FURTHER AND PARTICULAR STATEMENT IN PLEADING MAY BE REQUIRED.—*A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just.*

Notes of Decisions

Bill of particulars.—Where defendants believe that they cannot safely proceed to trial without a more complete statement of complainant's alleged grievances, a bill of particulars may be required. Williams v. Pope (D. C. 1914) 215 Fed. 1000.

Cited without definite application, Maxwell Steel Vault Co. v. National Casket Co. (D. C. 1913) 205 Fed. 515, 522; J. H. Day Co. v. Mountain City Mill Co. (D. C. 1915) 225 Fed. 622, 624.

RULE 21. SCANDAL AND IMPERTINENCE.—*The right to except to bills, answers, and other proceedings for scandal or impertinence shall not obtain, but the court may, upon motion or its own initiative, order any redundant, impertinent or scandalous matter stricken out, upon such terms as the court shall think fit.*

Notes of Decisions

Striking out.—See Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14; Williams v. Pope (D. C. 1914) 215 Fed. 1000.

Reinstatement.—In striking impertinent matter from a pleading as authorized by this rule, a District Court exercises its judicial functions on a question of law, and its action cannot be reviewed on application for a writ of mandamus to compel reinstatement of such matter, but only on appeal from the final decree. Lovell-McConnell Mfg. Co. v. Bindrim (1914) 219 Fed. 533, 135 C. C. A. 283.

Cited without definite application, Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C. 1915) 225 Fed. 769, 772.

RULE 22. ACTION AT LAW ERRONEOUSLY BEGUN AS SUIT IN EQUITY—TRANSFER.—*If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.* [See § 1251a, ante.]

Notes of Decisions

Adequate remedy at law.—A bill in equity cannot be dismissed for want of equity or because of the adequacy of the remedy at law. Corsicana Nat.

Bank v. Johnson (1915) 218 Fed. 822, 134 C. C. A. 510; U. S. v. Utah Power & Light Co. (D. C. 1913) 208 Fed. 821, 822; Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C. 1914) 216 Fed. 382; Id. (D. C. 1915) 225 Fed. 769; Collins v. Bradley Co. (D. C. 1915) 227 Fed. 199.

Time for transfer.—This rule cannot be invoked on appeal to the supreme court from a decree of a court of appeals of the District of Columbia, which affirmed a decree of the supreme court of the district dismissing the bill. Curriden v. Middleton (1914) 34 Sup. Ct. 458, 232 U. S. 633, 58 L. Ed. 765. See Destructor Co. v. City of Atlanta (D. C. 1914) 219 Fed. 996.

Proceedings for transfer.—Question of transferring cases held to be determined, without regard to form, when it can be decided in the full light of all information obtainable. Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C. 1915) 225 Fed. 769.

Cited without definite application, U. S. v. Wells (D. C. 1913) 203 Fed. 146, 151; Cubbins v. Mississippi River Commission (D. C. 1913) 204 Fed. 299, 308; Bannse v. Northern Pac. Ry. Co. (D. C. 1913) 205 Fed. 328, 330; Heckscher v. Pennsylvania Steel Co., Id. 377, 379; Cartwright v. Southern Pac. Co. (D. C. 1913) 206 Fed. 234, 235; Sturges v. Portis Mining Co., Id. 534, 539; Wellman v. Bethea (D. C. 1914) 213 Fed. 367, 373; Maurel v. Smith (D. C. 1915) 220 Fed. 195, 202; Triumph Electric Co. v. Thullen (D. C. 1915) 225 Fed. 293, 297.

RULE 23. MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN.—*If in a suit in equity a matter ordinarily determinable at law arises, such matters shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.* [See §§ 1251a, 1251b, ante.]

Notes of Decisions

See notes under rule 22.

Failure of cause of action in equity.—While this rule authorizes the decision of a matter ordinarily determinable at law in a suit in equity when there is jurisdiction to grant equitable relief upon the cause of action in suit, it does not authorize such a determination when jurisdiction of the cause in equity has entirely failed, and section 723, R. S., section 1244, ante, grants to each of the parties the right of the trial of the matter by a jury according to the course of the common law. Linden Inv. Co. v. Honstain Bros. Co. (1915) 221 Fed. 178, 181, 136 C. C. A. 121.

Submission of issues to jury.—This rule does not deprive the court of the rights to refer incidental and subordinate questions of fact to a jury. Vosburg Co. v. Watts (1915) 221 Fed. 402, 137 C. C. A. 272.

Certificate of counsel.—Where the answer raised the question of the court's jurisdiction, its failure to conform to old Equity Rule No. 31, in that it was not certified by counsel or separately verified, was immaterial. Phœnix-Buttes Gold Mining Co. v. Winstead (D. C. 1914) 226 Fed. 855.

Joinder of causes of action.—Causes of action for enforcement of lien, for goods sold, and on account stated, could not be joined for purpose of bringing amount involved within jurisdiction. Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

Cited without definite application, Bureau of National Literature v. Sells (D. C. 1914) 211 Fed. 379, 383; Wellman v. Bethea (D. C. 1914) 213 Fed. 367, 373; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C. 1914) 215 Fed. 377, 380; American Car & Foundry Co. v. Merchants' Despatch Co. (D. C. 1914) 216 Fed. 904, 911; Triumph Electric Co. v. Thullen (D. C. 1915) 225 Fed. 293, 297.

RULE 24. SIGNATURE OF COUNSEL.—*Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.*

Notes of Decisions

Signature.—Counsel retained by solicitor held to have no charging lien, notwithstanding his part in the conduct of the case, and though he signed the bill. Goodwin Film & Camera Co. v. Eastman Kodak Co. (1915) 222 Fed. 249, 138 C. C. A. 71, affirming order (D. C. 1914) 216 Fed. 831.

Signing a bill as "solicitor for com-

plainant" in a court in which there was no distinction between an attorney and a counselor was held a sufficient compliance with old rule 24, requiring all bills to be signed by "counsel." Stinson v. Hildrup (C. C. 1878) Fed. Cas. No. 13,459.

Cited without definite application, Harris v. Marsh (1914) 217 Fed. 555, 558, 133 C. C. A. 407.

RULE 25. BILL OF COMPLAINT—CONTENTS.—*Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:*

First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.

Fourth, if there are persons other than those named as defendants who appear to be proper parties, the bill should state why they are not made parties—as that they are not within the jurisdiction of the court, or cannot be made parties without ousting the jurisdiction.

Fifth, a statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms. If special relief pending the suit be desired the bill should be verified by the oath of the plaintiff, or someone having knowledge of the facts upon which such relief is asked.

Notes of Decisions

Purpose of rule.—The purpose of this rule was to secure brevity and simplicity. Pittsburgh Water Heater Co. v. Beler Water Heater Co. (D. C. 1915) 222 Fed. 950.

Requisites of bill in general.—This rule is not an absolute direction of all that a bill should contain, but is a statement of what shall be sufficient to sustain a bill, though other matters may be embraced therein. Pittsburgh Water Heater Co. v. Beler Water Heater Co. (D. C. 1915) 222 Fed. 950, 953.

Name, citizenship, and residence of parties.—A bill which failed to give the places of residence of the parties to it, as required by old rule 20, held amendable on motion without delay. Harvey v. Richmond & M. Ry. Co. (C. C. 1894) 64 Fed. 19.

An allegation in a bill filed by a corporation that defendants are citizens and residents of the state in which the suit is brought, and nonresidents of another state, "where your orator resides," held a sufficient statement of the places of abode of the parties to satisfy the requirements of old rule 20. Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936.

To properly state the name, citizenship, and residence of a corporation, it is essential to state the name under which it was incorporated, the authority under which it was incorporated, and its place of business. Maxwell Steel Vault Co. v. National Casket Co. (D. C. 1913) 205 Fed. 515, 523.

Bill on behalf of plaintiffs and all others similarly situated held to violate this rule for failure to set out the names, citizenship, and residence of such other parties. State of Maine Lumber Co. v. Kingfield Co. (D. C. 1914) 218 Fed. 902.

See, also, U. S. v. Pratt Coal & Coke Co. (C. C. 1883) 18 Fed. 708.

Statement of ultimate facts.—A bill must allege a plain and concise statement of the facts without unnecessary recital or repetition. Maxwell Steel Vault Co. v. National Casket Co. (D. C. 1913) 205 Fed. 515.

The ultimate facts required to be pleaded are the issuable facts, without proof of which complainant cannot recover. Id.

—— Bill for infringement of patent.—A bill for infringement is not required to set out facts which constitute conditions precedent to grant of patent, set forth in sections 9430, 9431, but it is sufficient if it allege its issuance, the several links in the chain of title which will enable the court to judge of the propriety of parties complainant being so named, and the acts of infringement relied on. Zenith Carbureter Co. v. Stromberg Motor Devices Co. (D. C. 1913) 205 Fed. 158.

This does not abrogate the established rule in infringement cases requiring the bill to allege all facts necessary to show that the patentee was entitled to the patent, and to negative the existence of those facts which would defeat it. Maxwell Steel Vault Co. v. National

Casket Co. (D. C. 1913) 205 Fed. 515, 522.

The bill in a suit for infringement should plead such matters as that prior to the patent the article had not gone into commercial use; that efforts to produce it had been unsuccessful; that on marketing complainant's device an industry of large proportions, as well as an allied industry, grew up, so that defendant may have opportunity to meet the issue, and not be taken by surprise. Acme Steel Goods Co. v. American Metal Fasteners Co. (D. C. 1913) 206 Fed. 478.

Allegations that an inventor, being entitled to a patent under the provisions of the statutes then in force, duly filed an application, and that, all the requirements of the statutes having been complied with, letters patent were duly issued, held sufficiently specific; but an allegation merely that defendant infringed by making and offering for sale the patented article is insufficient. General Bakelite Co. v. Nikolas (D. C. 1913) 207 Fed. 111.

Separate causes of action.—A bill may be properly framed with a double aspect for the reformation of a written contract, or, if that cannot be allowed, for cancellation thereof. Electric Goods Mfg. Co. v. Koltonski (C. C. 1909) 171 Fed. 550.

When more than one cause of action is stated in the same bill, they should be separately stated, but it is good practice in stating a second cause of action to refer to some prior allegation in the first to avoid repetition. Maxwell Steel Vault Co. v. National Casket Co. (D. C. 1913) 205 Fed. 515.

Prayer for relief.—A bill held not fatally defective because the prayers for relief are inconsistent; the term "alternative," as used in the rule meaning mutually exclusive, and a "cause of action," being the combined right of complainant and the obligation, duty, or wrong of the defendant. Boyd v. New York & H. R. Co. (D. C. 1915) 220 Fed. 174.

Laches.—The bar of laches alleged to arise on the face of the bill may be taken advantage of by a motion to dismiss. Alexander v. Fidelity Trust Co. (D. C. 1914) 215 Fed. 791.

Cited without definite application, Wilson v. American Ice Co. (D. C. 1913) 206 Fed. 736, 738; Williams v. Pope (D. C. 1914) 215 Fed. 1000, 1002; Bernheim v. Louisville Property Co. (D. C. 1914) 221 Fed. 273, 278; Luten v. Camp (D. C. 1915) 221 Fed. 424, 426; Nikola Telsa Co. v. Marconi Wireless Tel. Co. (D. C. 1915) 227 Fed. 903, 905.

RULE 26. JOINDER OF CAUSES OF ACTION.—*The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.*

Notes of Decisions

Causes which may be joined.—This rule does not authorize joinder of causes not within the federal jurisdiction with a cause within such jurisdiction. Vose v. Roebuck Weather Strip & Wire Screen Co. (D. C. 1914) 210 Fed. 687.

Causes of action for enforcement of lien, for goods sold, and on account stated, held not such as could be joined for purpose of bringing amount involved within jurisdiction of the United States District Court. Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

Cited without definite application, Marconi Wireless Telegraph Co. v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295, 300; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C. 1914) 215 Fed. 377, 379; Nikola Telsa Co. v. Marconi Wireless Tel. Co. (D. C. 1915) 227 Fed. 903, 905.

RULE 27. STOCKHOLDER'S BILL.—*Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on*

the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.

Notes of Decisions

Verification.—Cause removed from state court. Marder v. Buffalo Bill's Wild West Co. (1904) 132 Fed. 280.

Sufficiency of allegations in general.—See Hyams v. Calumet & Hecla Mining Co. (1915) 221 Fed. 529, 530, 137 C. C. A. 239; Lewarne v. Mexican International Imp. Co. (C. C. 1889) 38 Fed. 629; Elkins v. City of Chicago (C. C. 1902) 119 Fed. 957; Wilson v. American Ice Co. (D. C. 1913) 206 Fed. 736, 743; Russell v. Shippen Bros. Lumber Co. (D. C. 1915) 224 Fed. 254.

Ownership of shares.—The bill must allege that plaintiff was a stockholder. City of Quincy v. Steel (1887) 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624; Hitchings v. Cobalt Cent. Mines Co. (C. C. 1910) 189 Fed. 241.

Collusion.—This rule was intended to exclude cases brought by a stockholder collusively in order to give an apparent jurisdiction to a court which would not have it if the suit were brought by the corporation. Groel v. United Electric Co. of New Jersey (C. C. 1904) 132 Fed. 252; Kelly v. Dolan (D. C. 1914) 218 Fed. 966, 970.

An allegation that the suit is brought in good faith is not an equivalent of the allegation required by this rule, where the only effort appearing to have been made by him to induce the corporation to assert its rights consists of a written demand to the directors, made 16 days before suit brought, and where the facts fairly justify the inference of an attempt by a simulated arrangement to foist on the court jurisdiction in a case not belonging to it. City of Quincy v. Steel (1887) 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624.

Where a bill to enjoin taxation against a corporation showed diverse citizenship and that the amount in controversy exceeded $2,000, the failure of the plaintiff to comply with the rule so as to show a right to maintain the suit did not go to the jurisdiction of the court, although it might be raised as a defense by demurrer. Illinois Cent. R. Co. v. Adams (1901) 21 Sup. Ct. 251, 253, 180 U. S. 28, 45 L. Ed. 410.

When a suit arises upon a constitutional provision which gives a court of the United States jurisdiction, the question whether complainants have complied with the rule by alleging want of collusion is immaterial. Ball v. Rutland R. Co. (C. C. 1899) 93 Fed. 513.

A suit by a stockholder in a waterworks company to restrain a city from putting in force and fixing water rates, on the ground that they are so low as to deprive the stock of any earning ability, thus depriving complainant of the equal protection of the laws, being one in which complainant and the company are united in interest, though the latter is named as defendant, a federal court will not refuse to entertain jurisdiction, as being framed to invoke such jurisdiction, by using the name of the stockholder, where, if the suit was brought in the name of the corporation, jurisdiction would not exist; the case being one of federal cognizance irrespective of citizenship. Kimball v. City of Cedar Rapids (C. C. 1900) 99 Fed. 130.

A nonresident stockholder in a domestic corporation, who brings himself within the rule by showing demand on the corporation to refuse compliance with a state statute, and to contest its validity, and a formal refusal of the corporation by resolution of its board of directors, cannot be charged with being in collusion with the corporation to give a federal court jurisdiction of a suit brought to enjoin the enforcement of the statute, and compliance therewith by the corporation, where among the principal grounds alleged against the validity of the statute is that it is in violation of the constitution of the United States; such allegations raising a federal question, which gives the court jurisdiction of the suit, and to determine all the issues made therein, regardless of the citizenship of the parties, and whether brought by the stockholders or the corporation itself. Simpson v. Union Stockyards Co. (C. C. 1901) 110 Fed. 799.

Allegations which do no more than to show a formal demand on the board of directors to bring the suit, and a formal refusal, with a further general allegation that the suit is not a collusive one to confer jurisdiction, are not a sufficient compliance with equity rule 94. Elkins v. City of Chicago (C. C. 1902) 119 Fed. 957.

A corporation, being a citizen of the same state as defendants, and therefore incapable of suing in the federal courts to restrain defendants from inducing its employés to strike, brought a suit for such relief in the state courts, pending which complainants, who were nonresident stockholders, made a demand on the officers of the corporation to bring suit in the federal courts, knowing that the corporaiton could not do so, and on the corporation's refusal, themselves filed a bill for such relief in the federal court. Held, that such acts did not constitute a compliance with the requirement that such suit shall not be collusive. Kemmerer v. Haggerty (C. C. 1905) 139 Fed. 693.

A stockholders' suit is not subject to the requirements of the rule, where it involves a constitutional question which gives the court jurisdiction, regardless of the citizenship of the parties, and complainant and the corporation and its directors are evidently united in interest. Lindsley v. Natural Carbonic Gas Co. (C. C. 1908) 162 Fed. 954.

A bill brought by a minority stockholder to redress wrongs claimed to have been inflicted upon his corporation is demurrable if it fails to state that the suit is not a collusive one. Smith v. Chase & Baker Piano Mfg. Co. (D. C. 1912) 197 Fed. 466.

Efforts to obtain action.—As to sufficiency of allegations, see Ross v. Quinnesec Iron Mining Co. (C. C. A. 1915) 227 Fed. 337; Elkins v. City of Chicago (C. C. 1902) 119 Fed. 957; Russell v. Shippen Bros. Lumber Co. (D. C. 1915) 224 Fed. 254.

An allegation in a bill to restrain a corporation from complying with a state statute which merely alleges that the corporate officers will comply with it through fear of its penalties is insufficient. Wathen v. Jackson Oil Co. (1915) 35 Sup. Ct. 225, 235 U. S. 635, 59 L. Ed. 395.

In a bill by a minority stockholder against the corporation and another corporation, which controls a majority of the stock of the first, and whose directors are also its directors, this rule does not require an allegation that complainant made efforts to obtain action by the directors, where the relief sought would be detrimental to their interest as directors and stockholders of the controlling corporation. Hyams v. Calumet & Hecla Min. Co. (1915) 221 Fed. 529, 530, 137 C. C. A. 239.

The provision requiring that stockholder, before suing as such, must demand action by directors, will be dispensed with its stockholder's proceedings to intervene on behalf of corporation defendant in bankruptcy, where pleadings showed directors' interests were adverse to corporation's. Ogden v. Gilt-Edge Consol. Mines Co. (1915) 225 Fed. 723, 724, 140 C. C. A. 597.

Where the corporation was a railroad company, indebted to the state for aid under the internal improvement acts of 1852, and was, at the time of the dissolution, in the hands of a receiver appointed by the governor, the receiver was, under those acts, by operation of law, the manager of the company, and the proper person to bring suits in the name of the dissolved corporation, as required by the Tennessee Code, and if the suit be against the receiver himself to call him to account, this rule would not apply, as it would be unreasonable to ask him to sue himself. Lafayette Co. v. Neely (C. C. 1884) 21 Fed. 738.

Where the bill makes proper allegations of demand on the company to bring the suit, and its refusal, the court cannot determine on demurrer that such action was collusive. Mills v. City of Chicago (C. C. 1904) 127 Fed. 731.

This provision applies to a suit commenced in the state court and removed to the federal court. Hitchings v. Cobalt Cent. Mines Co. (C. C. 1910) 189 Fed. 241.

This rule does not require a formal request where the circumstances show that such request would have been futile. Wilson v. American Ice Co. (D. C. 1913) 206 Fed. 736, 744; Dana v. Morgan (D. C. 1914) 219 Fed. 313.

Removal of cause from state court.—This rule has no technical force in cases removed from the state courts; and the question is whether the state court had jurisdiction, and whether the federal court has the same jurisdiction, in succession thereto. Evans v. Union Pac. Ry. Co. (C. C. 1893) 58 Fed. 497.

The provision of this rule as to verification cannot be applied to a bill filed in a state court, and from thence removed to a federal court. Maeder v. Buffalo Bill's Wild West Co. (C. C. 1904) 132 Fed. 280.

Where the suit was commenced in the state court and removed, it immediately became subject to this rule. Hitchings v. Cobalt Cent. Mines Co. (C. C. 1910) 189 Fed. 241.

Cited without definite application. Granite Brick Co. v. Titus (C. C. A. 1915) 226 Fed. 557, 565, 141 C. C. A. 313; Toledo Traction, Light & Power Co. v. Smith (D. C. 1913) 205 Fed. 643, 661; Corey v. Independent Ice Co. (D. C. 1913) 207 Fed. 459, 464; Spring v. Webb (D. C. 1915) 227 Fed. 481, 482.

RULE 28. AMENDMENT OF BILL AS OF COURSE.—*The plaintiff may, as of course, amend his bill before the defendant has responded thereto, but if such amendment be filed after any copy has issued from the clerk's office, the plaintiff at his own cost shall furnish to the solicitor of record of each opposing party a copy of the bill as amended, unless otherwise ordered by the court or judge.*

After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the court or judge.

Notes of Decisions

Amendments under old rules 28, 29.—See Evenson v. Spaulding (1907) 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904 (affirming order Spaulding

v. Evenson [C. C. 1906] 149 Fed. 913); Ross v. Carpenter (C. C. 1855) Fed. Cas. No. 12,072; Lichtenauer v. Cheney (C. C. 1881) 8 Fed. 876; McDonnell v. Eaton (C. C. 1883) 18 Fed. 710; Beavers v. C. A. Richardson & Co. (C. C. 1902) 118 Fed. 820; Chase Electric Const. Co. v. Columbia Const. Co. (C. C. 1905) 136 Fed. 699.

RULE 29. DEFENSES—HOW PRESENTED.—*Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and, if it be denied, answer shall be filed within five days thereafter or a decree pro confesso entered.*

Notes of Decisions

In general.—This rule applies to bankruptcy proceedings. In re Jones (D. C. 1913) 209 Fed. 717, 718; In re Brown (D. C. 1915) 228 Fed. 533.

Whether a bill on its face avers facts constituting a valid cause of action, or whether complainants are barred by laches, can be raised by motion to dismiss or by answer, and when raised by motion the motion may be heard on notice, but when raised by answer it may be disposed of as a matter of pleading or as a trial question. Alexander v. Fidelity Trust Co. (D. C. 1914) 214 Fed. 495.

Where a defense of laches is disposed of as a question of pleading, it must be determined according to the record as it stands, but, when it is raised as a trial question, complainants may obtain leave to amend, whereupon it must be ruled in accordance with the new record. Id.

Motions.—Where, in a suit for infringement of a trade-mark and for unlawful competition, the court sustained pleas to the jurisdiction as to the causes based on trade-mark and unfair competition, but allowed a replication to the plea as to the cause of action for infringement, as was authorized by old equity rule 33, then in force, the court was then authorized to try the issue on the plea and dismiss the bill by this rule. W. S. Tyler Co. v. Ludlow-Saylor Wire Co. (1914) 212 Fed. 156, 129 C. C. A. 12.

An objection that a corporation not joined was an indispensable party to the bill was properly taken by motion to dismiss. Hyams v. Old Dominion Co. (D. C. 1913) 204 Fed. 681, decree modified (1913) 209 Fed. 808, 126 C. C. A. 532.

A motion to dismiss a bill for insufficiency of fact appearing on the face thereof presents a question of law. Wilson v. American Ice Co. (D. C. 1913) 206 Fed. 736.

Under this rule defenses which could previously have been presented by demurrer may be presented by motion to dismiss. General Bakelite Co. v. Nikolas (D. C. 1913) 207 Fed. 111; In re Jones (D. C. 1913) 209 Fed. 717, 718; Destructor Co. v. City of Atlanta (D. C. 1914) 219 Fed. 996, 1001.

The pendency of another action for the same relief cannot be raised by a motion to dismiss the bill, but must be set up in the answer; a motion to dismiss only reaching matters appearing on the face of the bill. Adler Goldman Commission Co. v. Williams (D. C. 1914) 211 Fed. 530.

Where nonjoinder of an indispensable party is alleged in the answer and it is necessary, to show the necessity for joinder, that the record in another case be invoked, a motion to dismiss will not be heard in advance of the trial, but will be taken up before the taking of testimony on the main issue. Bogert v. Southern Pacific Co. (D. C. 1914) 211 Fed. 776.

Where a motion to dismiss is made for defect in pleadings, and a hearing is had in advance of the trial, the motion must be considered on the complaint alone. Id.

The bar of laches when claimed to be presented on the face of the bill may be raised by motion. Alexander v. Fidelity Trust Co. (D. C. 1914) 214 Fed. 495; Id., 215 Fed. 791, 794.

Whether complainant, on an application for a preliminary injunction, is entitled to a permanent injunction, can

be determined on motion. Southwestern Surety Ins. Co. v. Wells (D. C. 1914) 217 Fed. 294.

A motion to dismiss a bill admits, for the purpose of the motion, the truth of everything alleged in the bill that is well pleaded. Destructor Co. v. City of Atlanta (D. C. 1914) 219 Fed. 996; Fordham v. Hicks (D. C. 1915) 224 Fed. 810, 811.

Where on motion defendant after answer claims that the complaint states no cause for equitable relief, he cannot complain that the court considers admissions or allegations explaining, but not contradicting, the allegations of the bill. Boyd v. New York & H. R. Co. (D. C. 1915) 220 Fed. 174.

Under this rule a matter sought to be decided on motion to quash an alternative writ of mandamus would be postponed until hearing on the merits. U. S. v. Postmaster of City of Buffalo (D. C. 1915) 221 Fed. 687.

A bill praying for setting aside of contract with defendant because of indefiniteness and to enjoin defendant from suing thereon held good as against motion to dismiss. Ralston Steel Car Co. v. National Dump Car Co. (D. C. 1915) 222 Fed. 590.

The existence of a remedy at law does not require the dismissal of a bill. Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C. 1915) 225 Fed. 769.

A bill cannot be dismissed on motion, without answer, unless for "misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity," appearing on the face of the bill. Tilden v. Barber (D. C. 1915) 227 Fed. 1010.

Answer.—Where a defense of laches was raised by answer, the question was thereby transferred to the domain of trial questions, but could be raised at the outset of the trial as if it were a question of pleading or by objections to evidence. Alexander v. Fidelity Trust Co. (D. C. 1914) 214 Fed. 495.

One whose answer, under the reformed equity practice, objects generally to the bill, does so not only on what complainant shows, but after having had his own conscience purged. Boyd v. New York & H. R. Co. (D. C. 1915) 220 Fed. 174.

—— **Time for answer.**—On denial of motion to dismiss the provision requiring answer within five days must be observed. Zenith Carbureter Co. v. Stromberg Motor Devices Co. (D. C. 1913) 205 Fed. 158, 159.

Cited without definite application, Board of Levee Com'rs v. Tensas Delta Land Co. (1913) 204 Fed. 736, 747, 123 C. C. A. 40; Williams v. German-American Trust Co. (1915) 219 Fed. 507, 508, 135 C. C. A. 257; Victor Talking Mach. Co. v. Straus (1915) 225 Fed. 535, 536, 140 C. C. A. 519; Maxwell Steel Vault Co. v. National Casket Co., Id. 515, 516; Lecouturier v. Ickelheimer, Id. 683, 685; Puget Sound Electric Ry. v. Lee, Id. 860, 861; Sydney v. Mugford Printing & Engraving Co. (D. C. 1914) 214 Fed. 841, 843; Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C. 1914) 216 Fed. 382, 384; Victor Talking Mach. Co. v. Straus (D. C. 1915) 222 Fed. 524; Continental Trust Co. v. Tallassee Falls Mfg. Co., Id. 694, 703; U. S. v. Kellogg Toasted Corn Flake Co., Id. 725, Ann. Cas. 1916A, 78; Sanitary Street Flushing Mach. Co. v. Studebaker Corp. (D. C. 1915) 226 Fed. 797; Sauer v. Florida Ry. Co. (D. C. 1915) 227 Fed. 718; Marconi Wireless Telegraph Co. v. Simon, Id. 906, 908.

RULE 30. ANSWER—CONTENTS—COUNTER-CLAIM.—*The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic or other person non compos and not under guardianship, but the answer may be amended, by leave of the court or judge, upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense.*

The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable

the court to pronounce a final judgment in the same suit both on the original and cross-claims.

Notes of Decisions

1. Purpose of rule.
2. Cross-bill.
3. Admissions and denials.
4. Set-off and counterclaim.
5. —— Patent infringement cases.
6. —— Intervention.
7. —— Failure to plead.
8. —— Legal demands.
9. —— Against codefendant.
10. —— Effect of dismissal of bill.

1. Purpose of rule.—The purpose of this rule is to secure brevity and simplicity of allegation. Pittsburgh Water Heater Co. v. Beler Water Heater Co. (D. C. 1915) 222 Fed. 950.

2. Cross-bill.—Within the Wyoming statutes providing that materialmen's liens shall cease to exist six months from the filing thereof unless within that time an action shall be commenced and prosecuted without delay to final judgment, where a lienor was brought in as a defendant in a suit to foreclose a trust deed and filed a cross-bill, and the mortgagor's officers testified as to the validity of the lien, the filing of the cross-bill was equivalent to the commencement of a suit, though no process thereon was issued, especially in view of the provision of this rule that such counterclaim shall have the same effect as a cross-suit so as to enable the court to pronounce final judgment in the same suit on the original and the cross claims. Continental & C. T. & S. Bank v. North Platte Val. Irr. Co. (C. C. A. 1915) 219 Fed. 438.

This rule does not authorize a cross-bill in a suit to cancel conveyances of allotted land, which bill prays that individuals claiming an adverse interest be joined as parties and required to litigate their claims. U. S. v. Woods (1915) 223 Fed. 316, 138 C. C. A. 578.

3. Admissions and denials.—The direction to avoid any general denial prohibits "negatives pregnant" and requires the use of specific defenses. General Bakelite Co. v. Nikolas (D. C. 1913) 207 Fed. 111, 113.

The words "specifically admitting or denying or explaining the facts upon which the plaintiff relies" imply a direct denial of any material element or fact on which plaintiff can depend. Id.

The answer should contain a general or specific denial of each material allegation controverted and a statement in ordinary and concise language of any new matter. Coulston v. H. Franke Steel Range Co. (D. C. 1915) 221 Fed. 669.

4. Set-off and counterclaim.—Allegations in an answer, intended to plead a set-off, held insufficient, under this rule. Williams v. Adler-Goldman Commission Co. (C. C. A. 1915) 227 Fed. 374.

The second part of this rule does not enlarge the jurisdiction of the court, and a set-off or counterclaim pleaded thereunder must be one "which might be the subject of an independent suit in equity" against the plaintiff, and such as the court could entertain. Marconi Wireless Telegraph Co. of America v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295.

This rule held not to affect the substantive law providing what could be pleaded as a set-off or counterclaim, as obtained prior to the taking effect of the rules. Sydney v. Mugford Printing & Engraving Co. (D. C. 1914) 214 Fed. 841.

A set-off or counterclaim pleaded in an answer held not affected by a decree dismissing the bill on the merits. Buffalo Specialty Co. v. Vancleef (D. C. 1914) 217 Fed. 91.

5. —— Patent infringement cases.—Under this rule defendant may set up a cause of action for complainant's infringement of another patent. Marconi Wireless Telegraph Co. of America v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295; Salt's Textile Mfg. Co. v. Tingue Mfg. Co. (D. C. 1913) 208 Fed. 156; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C. 1914) 215 Fed. 377; United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (D. C. 1914) 216 Fed. 186. CONTRA, Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C. 1913) 204 Fed. 103; Adamson v. Shaler (D. C. 1913) 208 Fed. 566; Klauder-Weldon Dyeing Machine Co. v. Giles (D. G. 1914) 212 Fed. 452.

Rule construed. Marconi Wireless Telegraph Co. of America v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295.

A complainant, who brings a suit in a district where cognizable under Act Cong. March 3, 1897, subjects himself therein to any counterclaim which the defendant may set up in his answer. United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (D. C. 1914) 216 Fed. 186.

A counterclaim for unfair competition involving the rights of the parties under their patents is available. Id.

Defendant may plead as a counterclaim a claim for damages because of the circulation by plaintiff of false statements respecting his business. Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C. 1913) 208 Fed. 419.

A claim for damages alleged in defendant's answer for unfair competition, consisting of misrepresentations by complainant as to its patent rights

and the scope thereof, held not available. Williams Patent Crusher & Pulverizer Co. v. Kinsey Mfg. Co. (D. C. 1913) 205 Fed. 375.

Defendants held not entitled to plead as a counterclaim damages alleged to have been caused by complainant's unlawful competition and malicious prosecution, based on facts antedating those out of which complainant's cause of action arose, and independent thereof. Electric Boat Co. v. Lake Torpedo Boat Co. (D. C. 1914) 215 Fed. 377.

Defendant will be required to make specific his allegations regarding patents relied on as proving the state of the prior art. Coulston v. H. Franke Steel Range Co. (D. C. 1915) 221 Fed. 669.

6. —— **Intervention.**—This rule does not entitle one not a necessary nor proper party to a suit to intervene to set up a counterclaim which has no bearing on the issues. Atlas Underwear Co. v. Cooper Underwear Co. (D. C. 1913) 210 Fed. 847.

7. —— **Failure to plead.**—Counterclaims authorized must be pleaded, or they will be deemed abandoned. Portland Wood Pipe Co. v. Slick Bros. Const. Co. (D. C. 1915) 222 Fed. 528.

8. —— **Legal demands.**—A legal demand cannot be pleaded as a set-off or counterclaim in an equity suit, but it must be a demand "which might be the subject of an independent suit in equity." Motion Picture Patents Co. v. Eclair Film Co. (D. C. 1913) 208 Fed. 416.

9. —— **Against codefendant.**—Court held to have jurisdiction of counterclaim by one resident defendant against another, and to render affirmative judgment thereon. Portland Wood Pipe Co. v. Slick Bros. Const. Co. (D. C. 1915) 222 Fed. 528.

10. —— **Effect of dismissal of bill.**—A set-off or counterclaim pleaded in an answer held not affected by a decree dismissing the bill on the merits. Buffalo Specialty Co. v. Vancleef (D. C. 1914) 217 Fed. 91.

Cited without definite application, Mississippi Valley Trust Co. v. Washington N. R. Co. (D. C. 1914) 212 Fed. 776, 782; Luten v. Camp (D. C. 1915) 221 Fed. 424, 426; Webb v. Samuels (D. C. 1915) 227 Fed. 948.

RULE 31. REPLY—WHEN REQUIRED—WHEN CAUSE AT ISSUE.—*Unless the answer assert a set-off or counter-claim, no reply shall be required without special order of the court or judge, but the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a set-off or counter-claim, the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply. In default of a reply, a decree pro confesso on the counter-claim may be entered as in default of an answer to the bill.*

Cited without definite application, Adamson v. Shaler (D. C. 1913) 208 Fed. 566, 568; Fidelity Trust Co. v. D. T. McKeithan Lumber Co. (D. C. 1914) 212 Fed. 229, 231; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C. 1914) 215 Fed. 377; Luten v. Camp (D. C. 1915) 221 Fed. 424, 427.

RULE 32. ANSWER TO AMENDED BILL.—*In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as upon an omission to put in an answer.*

RULE 33. TESTING SUFFICIENCY OF DEFENSE.—*Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off or counter-claim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable the court may allow an amendment upon terms, or strike out the matter.*

Cited without definite application, Marconi Wireless Telegraph Co. v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295, 297; Sydney v. Mugford Printing & Engraving Co. (D. C. 1914) 214 Fed. 841, 843.

RULE 34. SUPPLEMENTAL PLEADING.—*Upon application of either party the court or judge, may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof.*

Notes of Decisions

Leave to file supplemental bill.—See Liebing v. Matthews (C. C. A. 1914) 216 Fed. 1; Oregon & Transcontinental Co. v. Northern Pac. R. Co. (C. C. 1887) 32 Fed. 428; Mackintosh v. Flint & P. M. R. Co. (C. C. 1888) 34 Fed. 582; Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co. (C. C. 1896) 72 Fed. 325.

Cited without definite application, Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C. 1913) 204 Fed. 103, 104; Marconi Wireless Telegraph Co. v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295, 301; Sheeler v. Alexander (D. C. 1913) 211 Fed. 544, 545; Kryptok Co. v. Haussman & Co. (D. C. 1914) 216 Fed. 267, 268.

RULE 35. BILLS OF REVIVOR AND SUPPLEMENTAL BILLS—FORM.—*It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.*

RULE 36. OFFICERS BEFORE WHOM PLEADINGS VERIFIED.—*Every pleading which is required to be sworn to by statute, or these rules, may be verified before any justice or judge of any court of the United States, or of any state or territory, or of the District of Columbia, or any clerk of any court of the United States, or of any territory, or of the District of Columbia, or any notary public.*

RULE 37. PARTIES GENERALLY—INTERVENTION.—*Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.*

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

Notes of Decisions

Parties plaintiff.—A corporation, with which the United States makes a contract, under Reclamation Act June 17, 1902, is a proper party plaintiff to sue to enjoin collection of unlawful charges from the shareholders. Magruder v. Belle Fourche Valley Water Users' Ass'n (1914) 219 Fed. 72, 133 C. C. A. 524.

The owner of a copyrighted motion picture film and its lessees held properly joined as plaintiffs in a suit for its infringement. Gaumont Co. v. Hatch (D. C. 1913) 208 Fed. 378.

Licensee of right to produce copyrighted drama on the stage held not proper party to suit for infringement by production of motion picture play. Tully v. Triangle Film Corp. (D. C. 1916) 229 Fed. 297.

Intervention.—This rule does not entitle one not a necessary nor proper party to a suit to intervene to set up a counterclaim which has no bearing on the issues. Atlas Underwear Co. v. Cooper Underwear Co. (D. C. 1914) 210 Fed. 347.

Cited without definite application, Hutchinson v. Philadelphia & G. S. S. Co. (D. C. 1914) 216 Fed. 795, 799; American Ball Bearing Co. v. Adams (D. C. 1915) 222 Fed. 967, 979.

RULE 38. REPRESENTATIVES OF CLASS.—*When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.*

Notes of Decisions

Common interest.—The federal Supreme Court will not revise by mandamus the exercise by a District Court of its discretion when retaining a case for an actual experiment with telephone rates fixed by a municipality after its decree enjoining such ordinance as confiscatory had been reversed without prejudice in refusing to permit a telephone subscriber to intervene as representative of a class; he acting for all other subscribers as to restitution of the sums collected in excess of the rates fixed pending the injunction. In re Engelhard & Sons Co. (1914) 34 S. Ct. 258, 231 U. S. 646, 58 L. Ed. 416.

When allegation of general or common interest to many persons is denied, the court must determine whether it exists, before decreeing against those claimed to be in court by representation. Hill v. Eagle Glass & Mfg. Co. (1915) 219 Fed. 719, 135 C. C. A. 417, appeal granted (C. C. A. 1915) 221 Fed. 1022.

It is unnecessary to have all bondholders present in a suit to foreclose a railroad mortgage. Kerp v. Michigan L. S. R. Co. (C. C. 1873) Fed. Cas. No. 7,727.

In the case of defendants no official or other authority is necessary, and the leaders of an organized strike may be sued as fairly representing the organization, without regard to their official connection with it. American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3 (C. C. 1898) 90 Fed. 598.

Persons, each of whom is injuriously affected by an unconstitutional statute, may join in a suit to enjoin its enforcement. Little v. Tanner (D. C. 1913) 208 Fed. 605.

Alien, suing to enjoin enforcement of law requiring employment of citizens in preference to aliens, held not entitled to sue on behalf of all others similarly situated. Raich v. Truax (D. C. 1915) 219 Fed. 273.

Cited without definite application, Magruder v. Belle Fourche Valley Water Users' Ass'n (1914) 219 Fed. 72, 74, 135 C. C. A. 524; Southern Bell Telephone & Telegraph Co. v. City of Birmingham (D. C. 1914) 211 Fed. 709; Nolen v. Riechman (D. C. 1915) 225 Fed. 812, 814.

RULE 39. ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES.—*In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.*

Notes of Decisions

Indispensable parties.—This rule does not authorize a court of equity to proceed in a case without indispensable parties, the presence of whom was necessary to enable the court to render an adequate decree. Hagan v. Walker (1852) 55 U. S. (14 How.) 29, 14 L. Ed. 312; Fourth Nat. Bank v. Carrollton R. Co. (1870) 78 U. S. (11 Wall.) 624, 20 L. Ed. 82; Gregory v. Stetson (1890) 10 Sup. Ct. 422, 133 U. S. 579, 33 L. Ed. 792 (affirming Same v. Swift [C. C. 1889] 39 Fed. 708); State of California v. Southern Pac. Co. (1895) 15 Sup. Ct. 591, 157 U. S. 229, 39 L. Ed. 683; Collins Mfg. Co. v. Ferguson & Hutter's Trustee (C. C. 1893) 54 Fed. 721; Hyams v. Old Dominion Co. (D. C. 1913) 204 Fed. 681, decree modified (1913) 209 Fed. 808, 126 C. C. A. 532.

A suit to enforce a vendor's lien, brought in a state court against the vendee as sole defendant, was removed by him to the federal court on the ground of diverse citizenship, after he had conveyed the land to a citizen of the same state as the complainants. Held, that such grantee, although a proper party, was not an indispensable party. Fisher v. Shropshire (1893) 13 Sup. Ct. 201, 147 U. S. 133, 37 L. Ed. 109.

Absence from jurisdiction.—The rule authorizing the federal courts to entertain jurisdiction in cases in which some of the defendants are not found within the jurisdiction, and declaring that such absent parties shall not be concluded by the judgment or decree, does not apply when indispensable parties are lacking; and, in respect to necessary parties, the cause may or may not be proceeded in without them, as the court may determine in the exercise of

a sound discretion. California v. Southern Pac. Co. (1895) 15 Sup. Ct. 591, 602, 157 U. S. 229, 39 L. Ed. 683.

Effect of joinder to oust jurisdiction. —A trustee in a street railroad mortgage held entitled to maintain a suit to enjoin a repeal of the company's franchise without joining the mortgagor, where it would defeat the jurisdiction of the court. City of Denver v. Mercantile Trust Co. of New York (1912) 201 Fed. 790, 120 C. C. A. 100, modifying decree Mercantile Trust Co. of New York v. City of Denver (C. C. 1908) 161 Fed. 769.

The administrator of a deceased heir is a proper, but not necessary, party to a suit by the other heirs to construe the will, and need not be joined, where his presence would oust the court's jurisdiction. Thomas v. Anderson (1915) 223 Fed. 41, 138 C. C. A. 405.

A person applying to be made a party plaintiff will be made a party defendant, if he can equally have the benefit of the suit, where making him a party plaintiff would oust the jurisdiction of the court. Brown v. Pacific Mail S. S. Co. (C. C. 1867) Fed. Cas. No. 2,025.

Where the treasurer of a corporation, as the proper custodian of its funds and trustee of an express trust, sues in his own name his predecessor in office in a federal court for an accounting and to recover money of the corporation alleged to have been wrongfully withheld under defendant, the corporation is not an indispensable party, and need not be made a party, where its joinder would oust the jurisdiction of the court. Hunter v. Robbins (C. C. 1902) 117 Fed. 920.

Where a bill maintainable in the federable court only because of diverse citizenship did not show that all the parties on one side of the controversy were entitled by diverse citizenship to sue all the parties on the other side, but could be made sustainable if certain defendants of the same citizenship as some of the complainants were dismissed, and it did not appear that they were necessary parties, they not having entered their appearance, the court was authorized to dismiss the case as to them. A. R. Barnes & Co. v. Berry (C. C. 1907) 156 Fed. 72.

The court in a suit to enjoin defendants from interfering with complainant's diversion of water from a stream for irrigation purposes will in its discretion require complainant, who has commenced a suit in a state court to enjoin interference by others to make all parties interested parties to the suit, though the court will be ousted of jurisdiction thereby. Washington State Sugar Co. v. Sheppard (C. C. 1911) 186 Fed. 233.

Protection of rights of absent parties. —See Anthony v. Campbell (1901) 112 Fed. 212, 50 C. C. A. 195; Coann v. Atlanta Cotton-Factory Co. (C. C. 1882) 14 Fed. 4; Hamilton v. Savannah, F. & W. Ry. Co. (C. C. 1892) 49 Fed. 412; Collins Mfg. Co. v. Ferguson & Hutter's Trustee (C. C. 1893) 54 Fed. 721 (following Fourth Nat. Bank of City of New York v. New Orleans & C. R. Co. [1870] 11 Wall. 624, 20 L. Ed. 82, and Hagan v. Walker [1852] 14 How. 29, 14 L. Ed. 312); American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3 (C. C. 1898) 90 Fed. 598.

Cited without definite application, Bogart v. Southern Pac. Co. (1913) 33 Sup. Ct. 497, 228 U. S. 137, 57 L. Ed. 768 (dismissing appeal Lawrence v. Southern Pac. Co. [C. C. 1910] 180 Fed. 822); St. Louis Independent Packing Co. v. Houston (1914) 215 Fed. 553, 557, 132 C. C. A. 65.

RULE 40. NOMINAL PARTIES.—*Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.*

Cited without definite application, Luten v. Camp (D. C. 1915) 221 Fed. 424, 426; Pittsburgh Water Heater Co. v. Beler Water Heater Co. (D. C. 1915) 222 Fed. 950, 952.

RULE 41. SUIT TO EXECUTE TRUSTS OF WILL—HEIR AS PARTY.—*In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.*

Cited without definite application, Luten v. Camp (D. C. 1915) 221 Fed. 424, 426.

RULE 42. JOINT AND SEVERAL DEMANDS.—*In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.*

Notes of Decisions

Dismissal as to one defendant.—Where a plaintiff might have brought a suit against less than all of the parties jointly and severally liable, in which case the parties joined might have suggested by answer the lack of indispensable parties, they could also have done so after plaintiff's dismissal as against one of the defendants without prejudice by a plea or supplemental answer, and, having failed to so raise the objection, the court was authorized to render a decree against the remaining defendants, saving the rights of those against whom the suit was dismissed. David v. McRae (C. C. 1910) 183 Fed. 812.

Cited without definite application, Luten v. Camp (D. C. 1915) 221 Fed. 424, 426.

RULE 43. DEFECT OF PARTIES—RESISTING OBJECTION.—*Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require.*

Notes of Decisions

See note under rule 42.

Cited without definite application, Luten v. Camp (D. C. 1915) 221 Fed. 424, 426.

RULE 44. DEFECT OF PARTIES—TARDY OBJECTION.—*If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties.*

Notes of Decisions

See note under rule 42.

RULE 45. DEATH OF PARTY—REVIVOR.—*In the event of the death of either party the court may, in a proper case, upon motion, order the suit to be revived by the substitution of the proper parties. If the successors or representatives of the deceased party fail to make such application within a reasonable time, then any other party may, on motion, apply for such relief, and the court, upon any such motion may make the necessary orders for notice to the parties to be substituted and for the filing of such pleadings or amendments as may be necessary.*

Notes of Decisions

Time for revival.—Upon failure to move within a reasonable time after plaintiff's death to revive or continue a stockholder's suit, defendants properly moved to dismiss the bill. Spring v. Webb (D. C. 1915) 227 Fed. 481.

Former rule 56.—The old rule (rule 56) did not authorize compulsory revival at the instance of defendant after the death of the complainant. Brown v. Fletcher (C. C. 1904) 140 Fed. 639. Nor could one entitled to revive proceed therefor by motion. Dillard's Adm'r v. Central Virginia Iron Co. (C. C. 1903) 125 Fed. 157. See, also, Fitzpatrick v. Domingo (C. C. 1882) 14 Fed. 216.

RULE 46. TRIAL—TESTIMONY USUALLY TAKEN IN OPEN COURT—RULINGS ON OBJECTIONS TO EVIDENCE.—*In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules. The court shall pass upon the admissibility of all evidence offered as in actions at law. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it was offered, the objection made, the ruling, and the exception. If the appellate court shall be of opinion that the evidence should have been admitted, it shall not reverse the decree unless it be clearly of opinion that material prejudice will result from an affirmance, in which event it shall direct such further steps as justice may require.*

Notes of Decisions

See notes under rule 47.

Taking testimony orally.—See Mears v. Lockhart (1899) 94 Fed. 274, 36 C. C. A. 239; Hyams v. Federal Coal & Coke Co. (1907) 152 Fed. 970, 82 C. C. A. 324; In re National Equipment Co. (1912) 195 Fed. 488, 115 C. C. A. 398 (writ of certiorari denied National Equipment Co. v. Holt [1912] 32 S. Ct. 835, 225 U. S. 701, 56 L. Ed. 1264); Bischoffscheim v. Baltzer (C. C. 1882) 10 Fed. 1; Magone v. Colorado Smelting & Mining Co. (C. C. 1905) 135 Fed. 846; Encyclopædia Brittannica Co. v. Werner (C. C. 1905) 138 Fed. 461.

Review of questions of fact.—Under the new equity rules, the reviewing court has the right of trying the questions of fact de novo; but the findings below are not to be disturbed, unless it clearly appears that the trial court has either misapprehended the evidence or has gone against the clear weight thereof. American Rotary Valve Co. v. Moorehead (C. C. A. 1915) 226 Fed. 202.

Cited without definite application, Acme Steel Goods Co. v. American Metal Fasteners Co. (D. C. 1913) 206 Fed. 478, 479; Sheeler v. Alexander (D. C. 1913) 211 Fed. 544, 545; Luten v. Camp (D. C. 1915) 221 Fed. 424, 427.

RULE 47. DEPOSITIONS—TO BE TAKEN IN EXCEPTIONAL INSTANCES.—*The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires.*

Notes of Decisions

Effect on statute.—This rule was not intended to vary or be a limitation upon section 1472, ante, which gives the right to take depositions de bene esse in certain cases, in any civil cause. Iowa Washing Mach. Co. v. Montgomery Ward & Co. (D. C. 1915) 227 Fed. 1004.

Reasons for departure from rule.—That the trial will occupy several days does not show such "good and exceptional cause for departing from the general rule" as authorizes appointment of an examiner to take evidence out of court of witnesses residing within the jurisdiction, within this rule and rule 46. North v. Herrick (D. C. 1913) 203 Fed. 591.

Nature of proceeding.—The taking of depositions before an examiner is not a judicial trial nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present at such taking. U. S. v. United Shoe Machinery Co. of New Jersey (D. C. 1912) 198 Fed. 870.

Time for taking.—A witness in an equity case cannot be compelled to

give his deposition before the cause is at issue; hence his refusal to so testify when subpœnaed is not a contempt of the court issuing the subpœna. Flower v. MacGinniss (1901) 112 Fed. 377, 50 C. C. A. 291.

Unless right is waived it is error for the court to hear the cause and enter final decree before the expiration of the time for taking evidence. Jewell v. State Life Ins. Co. of Indianapolis, Ind. (1910) 176 Fed. 64, 99 C. C. A. 372.

Old rule 69, requiring all testimony to be taken within three months after cause is at issue, held to have no application to a reference to take testimony as to damages on an injunction bond. Coosaw Min. Co. v. Farmers' Min. Co. (C. C. 1895) 67 Fed. 31.

Depositions not taken within the time prescribed cannot be read in evidence, when timely objection is made. Western Electric Co. v. Capital Telephone & Telegraph Co. (C. C. 1898) 86 Fed. 769.

Rules as to time for taking will be enforced unless duly extended. Brown v. Worster (C. C. 1902) 113 Fed. 20.

Where a complainant took no action toward the taking of testimony until nearly six years after issue was joined, and no application was made for enlargement of the time, leave to take testimony will not then be granted. Munroe v. Atlanta Mach. Works (C. C. 1909) 170 Fed. 863.

Extension of time. Jackson v. Wolverine Copper Mining Co. (C. C. 1911) 186 Fed. 643.

It is the duty of the court to suppress depositions taken in violation of the requirements as to time. Victor Talking Mach. Co. v. Sonora Phonograph Corporation (D. C. 1915) 221 Fed. 676.

Depositions de bene esse.—Mode of taking. Bischoffscheim v. Baltzer (C. C. 1882) 10 Fed. 1.

This rule was not intended to vary or be a limitation upon section 1472, ante, which gives the right to take depositions de bene esse in certain cases, in any civil cause. Iowa Washing Mach. Co. v. Montgomery Ward & Co. (D. C. 1915) 227 Fed. 1004.

Jurisdiction and authority of examiners.—The court may appoint examiners for the taking of depositions orally, outside as well as inside its territorial jurisdiction. Western Division of Western N. C. R. Co. v. Drew (C. C. 1879) Fed. Cas. No. 17,434.

That the power to appoint special examiners to take testimony outside of the territorial jurisdiction of the court is not free from doubt, and the practice objectionable, see Arnold v. Chesebrough (C. C. 1888) 35 Fed. 16.

When, under the former rule in equity, a court has appointed a special examiner to take testimony in another district, a subpœna duces tecum may issue from the clerk's office of the latter district in the usual way, without a direct order of court, and the court of that district has power to punish a disobedience thereof. Johnson Steel Street-Rail Co. v. North Branch Steel Co. (C. C. 1891) 48 Fed. 191.

An examiner appointed by the court of the district in which the suit is pending to take testimony may lawfully discharge his duty in another district; the court of that district being authorized to issue subpœnas commanding persons residing within the district to appear and testify before such examiner or master. U. S. v. Standard Sanitary Mfg. Co. (C. C. 1911) 187 Fed. 232.

Examination of witness.—Where that part of an answer in equity setting up a particular defense has been stricken out by the court on exception on the ground that it is irrelevant and impertinent, the court of another district in which testimony is being taken before an examiner will, on objections brought before it, exclude testimony offered by defendant in support of such defense. Independent Baking Powder Co. v. Boorman (C. C. 1905) 137 Fed. 995.

Cross-examination. Encyclopædia Britannica Co. v. Werner Co. (C. C. 1905) 138 Fed. 461.

In general, a witness whose testimony is being taken orally before an examiner cannot refuse to answer a question on the ground that the evidence called for is immaterial or irrelevant, although there may be cases where the evidence is so clearly outside the issues that he will be entitled to the protection of the court. New England Phonograph Co. v. National Phonograph Co. (C. C. 1906) 148 Fed. 324.

Stay of proceedings.—It is discretionary with the court to stay the proceedings to allow a party to take a new deposition or to cross-examine a witness already examined by deposition for the opposite party, under section 1472, ante. Van Hook v. Pendleton (C. C. 1848) Fed. Cas. No. 16,852.

Return.—A commission to take testimony duly issued and executed will not be suppressed because, when received by the clerk, the envelope containing the testimony was open at one end, presenting the appearance of having been worn in the mail; the clerk having noted the facts on the package and filed it, since which time it has remained undisturbed in his office. Eiffert v. Craps (C. C. 1890) 44 Fed. 164.

Cited without definite application, Bogart v. Southern Pac. Co. (1913) 33 Sup. Ct. 497, 228 U. S. 137, 57 L. Ed. 768; American Grain Separator Co. v. Twin City Separator Co. (1915) 220 Fed. 150, 154, 136 C. C. A. 104; Goldsmith Silver Co. v. Savage (D. C. 1913) 206 Fed. 1001, 1002.

RULE 48. TESTIMONY OF EXPERT WITNESSES IN PATENT AND TRADE-MARK CASES.—*In a case involving the validity or scope of a patent or trade-mark, the district court may, upon petition, order that the testimony in chief of expert witnesses, whose testimony is directed to matters of opinion, be set forth in affidavits and filed as follows: Those of the plaintiff within forty days after the cause is at issue; those of the defendant within twenty days after plaintiff's time has expired; and rebutting affidavits within fifteen days after the expiration of the time for filing original affidavits. Should the opposite party desire the production of any affiant for cross-examination, the court or judge shall, on motion, direct that said cross-examination and any re-examination take place before the court upon the trial, and unless the affiant is produced and submits to cross-examination in compliance with such direction, his affidavit shall not be used as evidence in the cause.*

Cited without definite application, P. M. Co. v. Ajax Rail Anchor Co. (D. C. 1914) 216 Fed. 634, 636; Todd v. Whitaker (D. C. 1914) 217 Fed. 319, 320.

RULE 49. EVIDENCE TAKEN BEFORE EXAMINERS, ETC.—*All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be taken upon questions and answers reduced to writing, or in the form of narrative, and the witness shall be subject to cross and re-examination.*

Notes of Decisions

See notes under rule 47.

RULE 50. STENOGRAPHER—APPOINTMENT—FEES.—*When deemed necessary by the court or officer taking testimony, a stenographer may be appointed who shall take down testimony in shorthand and, if required, transcribe the same. His fee shall be fixed by the court and taxed ultimately as costs. The expense of taking a deposition, or the cost of a transcript, shall be advanced by the party calling the witness or ordering the transcript.*

Notes of Decisions

Closing testimony.—Where counsel have agreed that the deposition of a witness may be taken down by a typewriter in their presence, at the office of one of them, in the absence of the examiner, but under his constructive direction, if one of the counsel abandons such examination without adequate cause the testimony of the witness will be closed. Ballard v. McCluskey (C. C. 1892) 52 Fed. 677.

RULE 51. EVIDENCE TAKEN BEFORE EXAMINERS, ETC.—*Objections to the evidence, before an examiner or like officer, shall be in short form, stating the grounds of objection relied upon, but no transcript filed by such officer shall include argument or debate. The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions. The court shall have power, and it shall be its duty, to deal with the costs of incompetent and immaterial or irrelevant depositions, or parts of them, as may be just.*

Notes of Decisions

See notes under rule 47.

See, also, In re Allis (1890) 44 Fed. 216.

RULE 52. ATTENDANCE OF WITNESSES BEFORE COMMISSIONER, MASTER OR EXAMINER.—*Witnesses who live within the district, and whose testimony may be taken out of court by these rules, may be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in, the court.*

In case of refusal of witnesses to attend or be sworn or to answer any question put by the commissioner, master or examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notes of Decisions

See notes under rule 47.

Examiner or master appointed in other district.—It is the duty of the court or judge within whose jurisdiction testimony is being taken in a suit pending in another district to compel the production of the evidence, even if the judge deems it incompetent, unless the witness or the evidence is privileged, or it cannot possibly be competent, and it would be an abuse of process to compel its production. Dowagiac Mfg. Co. v. Lochren (1906) 143 Fed. 211, 74 C. C. A. 341, 6 Ann. Cas. 573.

The court in one district has power to issue a subpœna requiring a person living in that district to appear and testify before an examiner, or before a master appointed in another circuit, and who is discharging the duties of his office in the former district, and may also punish the witness for refusing to obey the subpœna. In re Steward (C. C. 1887) 29 Fed. 813.

Where the testimony of a witness is taken by consent on oral interrogatories before an examiner of the court of the district of his residence, for use in an action pending in another court, the former court has power to decide as to the materiality of questions asked, and may compel the witness to answer. In re Allis (C. C. 1890) 44 Fed. 216.

When a court has appointed a special examiner to take testimony in another district, a subpœna duces tecum may issue from the clerk's office of the latter district in the usual way, without a direct order of court, and the court of that district has power to punish a disobedience thereof. Johnson Steel Street Rail Co. v. North Branch Steel Co. (C. C. 1891) 48 Fed. 191.

RULE 53. NOTICE OF TAKING TESTIMONY BEFORE EXAMINER, ETC. —*Notice shall be given by the respective counsel or parties to the opposite counsel or parties of the time and place of examination before an examiner or like officer for such reasonable time as the court or officer may fix by order in each case.*

Cited without definite application, Victor Talking Mach. Co. v. Sonora Phonograph Corp. (D. C. 1915) 221 Fed. 676, 677.

RULE 54. DEPOSITIONS UNDER REV. STAT. §§ 863, 865, 866, 867—CROSS-EXAMINATION.—*After a cause is at issue, depositions may be taken as provided by sections 863, 865, 866 and 867, Revised Statutes. But if in any case no notice has been given the opposite party of the time and place of taking the deposition, he shall, upon application and notice, be entitled to have the witness examined orally before the court,*

or to a cross-examination before an examiner or like officer, or a new deposition taken with notice, as the court or judge under all the circumstances shall order.

Notes of Decisions

See notes under rule 47.

Time for taking.—See Stevens v. Missouri, K. & T. Ry. Co. (C. C. 1900) 104 Fed. 934.

Cross-examination.—See Encyclopædia Britannica Co. v. Werner Co. (C. C. 1905) 138 Fed. 461.

Cited without definite application, North v. Herrick (D. C. 1913) 203 Fed. 591, 592; Victor Talking Mach. Co. v. Sonora Phonograph Corp. (D. C. 1915) 221 Fed. 676, 677.

RULE 55. DEPOSITION DEEMED PUBLISHED WHEN FILED.—*Upon the filing of any deposition or affidavit taken under these rules or any statute, it shall be deemed published, unless otherwise ordered by the court.*

RULE 56. ON EXPIRATION OF TIME FOR DEPOSITIONS, CASE GOES ON TRIAL CALENDAR.—*After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give.*

Notes of Decisions

Application to take further testimony.—Sufficiency of showing. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1914) 217 Fed. 175.

That a cause is not on the trial calendar is not sufficient for refusing to permit a party to take depositions, where it has been kept off by stipulation to await the disposition of preliminary motions and not through the default of either party. Id.

Cited without definite application, Victor Talking Mach. Co. v. Sonora Phonograph Corp. (D. C. 1915) 221 Fed. 676, 677.

RULE 57. CONTINUANCES.—*After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one.*

RULE 58. DISCOVERY—INTERROGATORIES—INSPECTION AND PRODUCTION OF DOCUMENTS—ADMISSION OF EXECUTION OR GENUINENESS.—*The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.*

If any party to the cause is a public or private corporation, any op-

posite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

Copies shall be filed for the use of the interrogated party and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party if there be no record solicitor.

Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served, unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and, if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable.

Notes of Decisions

Scope and extent of discovery.—Matters disclosed in the answer material to plaintiff's case may be made the subject of interrogatories by plaintiff. Blast Furnace Appliances Co. v. Worth Bros. Co. (D. C. 1915) 221 Fed. 430.

This rule allows discovery only of matters that relate to his own case, though he is not deprived of right of discovery because they also pertain to the case of the other party. J. H. Day Co. v. Mountain City Mill Co. (D. C. 1915) 225 Fed. 622.

— **Evidence.**—Under this rule interrogatories may be filed by either party, requiring the other to state material matters relating to the nature of the case and the facts supporting it, but not mere evidence. P. M. Co. v. Ajax Rail Anchor Co. (D. C. 1914) 216 Fed. 634; Luten v. Camp (D. C. 1915) 221 Fed. 424; J. H. Day Co. v. Mountain City Mill Co. (D. C. 1915) 225 Fed. 622.

Waiver of answer under oath.—A waiver of answer under oath does not relieve the defendant from answering the interrogatories of plaintiff. Luten v. Camp (D. C. 1915) 221 Fed. 424.

Former rules.—See Treadwell v. Cleaveland (C. C. 1843) Fed. Cas. No. 14,155; Hatch v. Bancroft-Thompson Co. (C. C. 1895) 67 Fed. 802; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C. 1897) 83 Fed. 26; Federal Manufacturing & Printing Co. v. International Bank Note Co. (C. C. 1902) 119 Fed. 385; Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co. (D. C. 1912) 194 Fed. 172.

Cited without definite application, Keene v. Ætna Life Ins. Co. (D. C. 1914) 213 Fed. 893, 895; Pittsburgh Water Heater Co. v. Beler Water Heater Co. (D. C. 1915) 222 Fed. 950, 952; Webb v. Samuels (D. C. 1915) 227 Fed. 948.

RULE 59. REFERENCE TO MASTER—EXCEPTIONAL, NOT USUAL.—*Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some*

exceptional condition requires it. When such a reference is made, the party at whose instance or for whose benefit it is made shall cause the order of reference to be presented to the master for a hearing within twenty days succeeding the time when the reference was made, unless a longer time be specially granted by the court or judge; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Notes of Decisions

Effect of rules.—See Hatch v. Indianapolis & S. R. Co. (C. C. 1882) 9 Fed. 856.

Matters subject of reference.—Where a bill fails to conform to the standard rules of equity pleading, it is within the general powers of the court, when it becomes necessary for its own protection to do so, on its own motion to send the bill to a master to be purged of everything found not to conform to the rules. Hobbs Mfg. Co. v. Gooding (1910) 176 Fed. 259, 100 C. C. A. 83, reversing decree (C. C. 1909) 166 Fed. 933.

Cited without definite application, Goldsmith Silver Co. v. Savage (D. C. 1914) 211 Fed. 751.

RULE 60. PROCEEDINGS BEFORE MASTER.—*Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.*

RULE 61. MASTER'S REPORT—DOCUMENTS IDENTIFIED BUT NOT SET FORTH.—*In the reports made by the master to the court, no part of any state of facts, account, charge, affidavit, deposition, examination, or answer brought in or used before him shall be stated or recited. But such state of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what state of facts, account, charge, affidavit, deposition, examination, or answer were so brought in or used.*

Notes of Decisions

Statement of facts.—A commissioner's report need not state what facts he considers proved by the evidence. McCormack v. James (D. C. 1886) 36 Fed. 14.

RULE 62. POWERS OF MASTER.—*The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, viva voce, all witnesses produced by the parties before him, or by deposition, according to the acts of Congress, or otherwise, as here provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.*

Notes of Decisions

Bankruptcy cases.—A court of bankruptcy is within this rule. In re Automatic Musical Co. (D. C. 1913) 204 Fed. 334.

Reception of evidence.—The admission and rejection of evidence, according as it may be proper or otherwise, rests entirely within the sound discretion of the master. Wooster v. Gumbirnner (C. C. 1884) 20 Fed. 167.

Examination of parties and witnesses.—See In re Automatic Musical Co. (D. C. 1913) 204 Fed. 334.

Cited without definite application, Beckwith v. Malleable Iron Range Co. (D. C. 1913) 207 Fed. 848, 851.

RULE 63. FORM OF ACCOUNTS BEFORE MASTER.—*All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories, as the master shall direct.*

Notes of Decisions

Purpose of rule.—The purpose of this rule is to limit the trial before the master to disputed items. Beckwith v. Malleable Iron Range Co. (D. C. 1913) 207 Fed. 848.

Patent infringement suits.—Leave granted to complainant in an infringement suit to file a petition for an alternative writ of mandamus to present the question whether, on an accounting before a master, he was entitled to a sworn statement of account. In re Beckwith (1912) 201 Fed. 518, 119 C. C. A. 614.

The Circuit Court of Appeals, having affirmed a judgment for complainant in a suit for patent infringement and remanded the case for an accounting, had jurisdiction to grant a writ of mandamus requiring the trial judge to set aside an order quashing a master's summons requiring defendant to render a sworn statement of account under this rule. In re Beckwith (1913) 203 Fed. 45, 121 C. C. A. 381.

Proper procedure on accounting considered. Beckwith v. Malleable Iron Range Co. (D. C. 1913) 207 Fed. 848.

Names of customers.—Defendant is not in contempt for refusing to include therein the names and addresses of customers. Cushman & Denison Mfg. Co. v. Grammes (D. C. 1915) 225 Fed. 883, 884.

Executor's accounts.—The rule requiring proof of every item of an account before the master in equity has been abrogated, and an executor, setting up a settlement of the estate in a state court and proving it by his depositions, may offer it before the master without leave of court. Pulliam v. Pulliam (C. C. 1879) 10 Fed. 23.

RULE 64. FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER.—*All affidavits, depositions and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.*

Notes of Decisions

Testimony within rule.—Testimony taken by the examiner for the hearing in chief, under a decree against an infringer for an accounting, which was not brought before the master in making up the case on the accounting so that it could be answered or explained on the other side, but was merely referred to in argument, and requests for findings upon the case made, was not within the rule, and an exception to the master's report for failing to find upon the point made by this testimony should be overruled. Bell v. United States Stamping Co. (C. C. 1887) 32 Fed. 549.

RULE 65. CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM.—*The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or viva voce, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.*

RULE 66. RETURN OF MASTER'S REPORT—EXCEPTIONS—HEARING.—*The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the Equity Docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall*

stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise.

Notes of Decisions

Time for exceptions.—Where an application for a discharge in bankruptcy is referred to the master to take testimony and report, exceptions to his report must be filed within 20 days, if at all, after the filing of the report. In re Pierce (D. C. 1914) 210 Fed. 389. See Home Land & Cattle Co. v. McNamara (1901) 111 Fed. 822, 49 C. C. A. 642 (reversing decree McNamara v. Home Land & Cattle Co. [C. C. 1901] 105 Fed. 202, and writ of certiorari denied [1902] 23 Sup. Ct. 843, 187 U. S. 642, 47 L. Ed. 346); Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co. (C. C. 1889) 42 Fed. 372; Gasquet v. Crescent City Brewing Co. (C. C. 1892) 49 Fed. 493; Huntington v. Moore (1871) 1 N. M. 489.

Re-reference.—The report of a master in chancery does not become property in which a party has a vested right, being merely advisory to the chancellor; and it is within the general equity powers of the court, which are not affected by rule 83, to re-refer such a report after it has been filed, or to permit the master to withdraw it for correction or amendment. When such action is taken, the powers of the master, originally derived from the court, are renewed for the purposes for which the re-reference is made or the withdrawal permitted. National Folding Box & Paper Co. v. Dayton Paper Novelty Co. (C. C. 1899) 91 Fed. 822.

Cited without definite application, International Harvester Co. v. Carlson (1914) 217 Fed. 736, 739, 133 C. C. A. 430; Chicago & N. W. Ry. Co. v. Smith (D. C. 1914) 210 Fed. 632, 634; Isaac McLean Sons Co. v. William S. Butler & Co. (D. C. 1914) 227 Fed. 325.

RULE 67. COSTS ON EXCEPTIONS TO MASTER'S REPORT.—*In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled, shall, for every exception overruled, pay five dollars costs to the other party, and for every exception allowed shall be entitled to the same costs.*

Cited without definite application,
In re Amer (D. C. 1915) 228 Fed. 576.

RULE 68. APPOINTMENT AND COMPENSATION OF MASTERS.—*The District Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master pro hac vice in any particular case. The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.*

Notes of Decisions

Compensation.—The provision that the compensation of a master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, "having regard to all the circumstances thereof," contemplates that such compensation shall not be finally determined until the services for which it is allowed have been rendered and all the circumstances are known; and an order made during the pendency of a railroad foreclosure suit, fixing the compensation of a master therein at a certain sum per year until his discharge, and directing that the amount earned at that rate up to a certain date, prior to the date of the order, be paid by one of the parties, does not constitute a contract as to future services binding upon either the court or the parties, but is merely an interlocutory order, subject to revision; and if the services subsequently required of the master are of less value than those previously rendered, and upon which the order was based, the court may, on or after his discharge, reduce the amount to be allowed him therefor. Pleasants v. Southern Ry. Co. (1899) 93 Fed. 93, 35 C. C. A. 226.

The rule cannot be invoked by a par-

ty to enable him to collect of the opposite party disbursements which can be taxed as part of the costs in a final decree. Mallory Mfg. Co. v. Fox (C. C. 1884) 20 Fed. 409. See In re Ward (D. C. 1913) 203 Fed. 769.

RULE 69. PETITION FOR REHEARING.—*Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.*

Notes of Decisions

Time for application.—This rule makes an exception to the general rule that the jurisdiction of a court over its decrees terminates with the close of the term at which they are rendered. Moelle v. Sherwood (1893) 13 Sup. Ct. 426, 148 U. S. 21, 37 L. Ed. 350, affirming decree Sherwood v. Moelle (C. C. 1888) 36 Fed. 478, 1 L. R. A. 797.

A decree fixing the priority of claims against an insolvent corporation, and directing the sale of its property for their payment, is a final decree. Hoffman v. Knox (1892) 50 Fed. 484, 1 C. C. A. 535, reversing Knox v. Columbia Liberty Iron Co. (C. C. 1889) 42 Fed. 378.

Where no appeal lies from the decree to the supreme court, it was within the discretion of the court, to allow a rehearing before the end of the next term, even if the decree was final. Newman v. Moody (C. C. 1884) 19 Fed. 858.

A rehearing asked for after a decree which is not appealable does not come within the rule. Wooster v. Handy (C. C. 1884) 21 Fed. 51.

In a nonappealable case, a rehearing cannot be granted after the lapse of the term succeeding that at which the final decree was entered, although the petition is filed at the same term at which the decree was rendered. Glenn v. Noonan (C. C. 1890) 43 Fed. 403.

The word "admitted" is synonymous with the word "granted," and the effect of the rule is to deprive the court of the power to grant a rehearing in any case after the lapse of the term next succeeding the entry of the final decree. Id.

Where the practice obtains of keeping the term open for business until the statutory time for opening the next term, a petition for rehearing filed before the term at which the decree was rendered has been adjourned sine die is not too late. First Nat. Bank v. Woodrum (C. C. 1898) 86 Fed. 1004.

Where a decree is entered on a master's report, to which exceptions were filed, fixing the amount and priority of claims against an insolvent corporation, and ordering distribution of the funds arising from the sale of his property, a petition for rehearing cannot be entertained after the expiration of the term at which the decree was entered; and it is immaterial that a portion of the fund is still in the court and undistributed at the time the petition was filed. Halsted v. Forest Hill Co. (C. C. 1901) 109 Fed. 820.

This rule does not authorize the filing of a petition for rehearing after the term at which decree was entered since the passage of Act March 3, 1891, §§ 5, 6, establishing the Circuit Courts of Appeals. Byron Jackson Iron Works v. United Iron Works (C. C. 1912) 197 Fed. 44.

A decree of foreclosure was entered, leaving nothing to be done but execute its provisions. At the next term of the court a petition for rehearing was filed, and upon hearing the decree was ordered to be vacated. Held that, as it was a final decree, it was not affected by the order. Sheffey v. Bank of Lewisburg (D. C. 1887) 33 Fed. 315, decree affirmed Bank of Lewisburg v. Sheffey (1891) 11 Sup. Ct. 755, 140 U. S. 445, 35 L. Ed. 493.

Petition.—The procedure for a rehearing after an interlocutory decree in an infringement suit, on the ground of newly discovered evidence, may properly be by petition. Sheeler v. Alexander (D. C. 1913) 211 Fed. 544.

RULE 70. SUITS BY OR AGAINST INCOMPETENTS.—*Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their*

prochein ami; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

Notes of Decisions

Compensation of guardian ad litem.—Where a guardian ad litem is appointed for an insane person to defend an involuntary bankruptcy petition against him, such guardian cannot recover compensation from unsuccessful petitioners, but must look therefor to the estate of his ward. In re Ward (D. C. 1913) 203 Fed. 769.

RULE 71. FORM OF DECREE.—*In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" (Here insert the decree or order.)*

Notes of Decisions

Partition decree.—When, in partition, persons not in possession have established title to a certain interest in the lands by proving heirship to a remote owner, the court may permit the findings as to their pedigree to be recited in the decree, when it deems such a course probably necessary to prevent further question as to the rights of the parties, notwithstanding this rule. McClaskey v. Barr (C. C. 1891) 48 Fed. 130.

RULE 72. CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES.—*Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.*

RULE 73. PRELIMINARY INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS.—*No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.*

Notes of Decisions

Affidavits.—Issuance by District Court of temporary injunction restraining plaintiff from proceeding in state court, made solely upon affidavit of defendant's counsel, no verified bill having been filed, held improper. Cathey v. Norfolk & W. Ry. Co. (1915) 228 Fed. 26, 142 C. C. A. 482.

Notice.—Where, in a suit for specific performance of a contract to assign patents, the bill showed that complainant would be remediless if the patent

in question should be assigned by defendant to innocent third parties, it sufficiently showed complainant's right to a preliminary injunction, without notice, against transfer. Thullen v. Triumph Electric Co. (1914) 212 Fed. 143, 128 C. C. A. 655, affirming decree Triumph Electric Co. v. Thullen (D. C. 1913) 209 Fed. 938.

Cited without definite application, Pack v. Carter (1915) 223 Fed. 638, 640, 139 C. C. A. 184.

RULE 74. INJUNCTION PENDING APPEAL.—*When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.*

RULE 75. RECORD ON APPEAL—REDUCTION AND PREPARATION.—*In case of appeal:*

(a) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a præcipe which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his præcipe also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him.

(b) The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness. The duty of so condensing and stating the evidence shall rest primarily on the appellant, who shall prepare his statement thereof and lodge the same in the clerk's office for the examination of the other parties at or before the time of filing his præcipe under paragraph (a) of this rule. He shall also notify the other parties or their solicitors of such lodgment and shall name a time and place when he will ask the court or judge to approve the statement, the time so named to be at least ten days after such notice. At the expiration of the time named or such further time as the court or judge may allow, the statement, together with any objections made or amendments proposed by any party, shall be presented to the court or the judge, and if the statement be true, complete and properly prepared, it shall be approved by the court or judge, and if it be not true, complete or properly prepared, it shall be made so under the direction of the court or judge and shall then be approved. When approved, it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal.

(c) If any difference arise between the parties concerning directions as to the general contents of the record to be prepared on the appeal, such difference shall be submitted to the court or judge in conformity with the provisions of paragraph (b) of this rule and shall be covered by the directions which the court or judge may give on the subject.

See Rules 12, 14 and 36 of Circuit Court of Appeals, in notes under § 1114, ante.

Notes of Decisions

Statement of evidence.—On an appeal in a proceeding to deport a Chinese person, the evidence should be brought up by a certificate of evidence rather

than by a common-law bill of exceptions. Wong Keow v. U. S. (1914) 215 Fed. 95, 131 C. C. A. 403.

The trial court may approve and direct the filing of the statement of evidence after the term, though no order was entered carrying the matter over until the next term. In re General Equity Rule 75 (1914) 222 Fed. 884, 138 C. C. A. 574.

Perfecting appeal by approval of bond and signing of citation held not to deprive trial court of jurisdiction to settle the evidence. Id.

If counsel follow old practice, disregarding this rule, the clerk, in making return to appeal, should not include the evidence in full. Id.

Where, contrary to this rule, evidence in full is included in record, appeal should not be dismissed, nor evidence stricken; the provision as to costs providing a sufficient remedy. Id.

Perfecting appeal by approval of bond and signing of citation does not deprive trial court of jurisdiction to settle the evidence. Id.

Costs.—Where appellant's solicitors fail to prepare the transcript according to rules 75–77, the appellate court may impose costs on them. Coxe v. Peck-Williamson Heating & Ventilating Co. (1913) 208 Fed. 409, 125 C. C. A. 628, affirming decree In re Selman Heating & Plumbing Co. (D. C. 1913) 204 Fed. 839.

Construction by Circuit Court of Appeals.—PER CURIAM. Motions recently decided and others now pending involving these rules justify a formal statement of our conclusions.

Rule 75 fixes no time within which the statement of evidence must be settled and filed in order to "become a part of the record for the purposes of the appeal." Undoubtedly, the better practice is to complete this step before claiming, or, at least, before perfecting the appeal, and if the term expires before the final statement of evidence is filed, to enter an order carrying this matter into the next term; but where appeals are required within thirty days, or even within ten days, the time may be wholly insufficient to perfect the record in this respect, and the expiration of the term may very commonly be forgotten, particularly as it has never been a matter of importance in equity appeals. It is said that the completing of this statement of evidence corresponds to the settling of a bill of exceptions at law, and the familiar rule is invoked that a purported bill of exceptions which was not settled within the trial term or pursuant to a reservation during the trial term is a nullity and will be stricken from the record. We are not satisfied that the analogy is close enough to justify the incorporation of this harsh rule into the practice pursuant to rule 75, which must have been adopted with due consideration of the existing practice by which appeals were claimed and perfected regardless of the expiration of terms; and we conclude that the trial court has power to approve and direct the filing of the statement of evidence, although the term has expired when the decree was rendered, and although no order was entered carrying the subject-matter over until the next term.

The same general view leads also to the conclusion that the perfecting of an appeal by the approval of a bond and the signing of citation does not deprive the trial court of jurisdiction to settle the evidence. It is true that for general purposes, jurisdiction over the cause is thereby ended, and that the shaping of this statement of evidence involves the decision by the judge of disputed claims; but, upon the whole, the proceeding is rather ministerial, and it sufficiently pertains to the making of the return to the appeal so that we think a statement of evidence so approved and filed cannot, for that reason alone, be stricken from the record.

Instances occur where rule 75 is wholly disregarded, and the return to the appeal includes the evidence in full, in accordance with the old practice, and we are asked to dismiss appeals where the record is so made up, or to strike out the statement of evidence, thereby leading to an affirmance. To send the record back for correction in this respect involves delay and the exercise of uncertain power; while, to dismiss the appeal or to strike all the evidence from the record may cause the loss of substantial rights through the blunder in practice by counsel. This drastic remedy may prove to be necessary in some cases, but we are reluctant to apply it now. The enforcement of both rules rests, primarily, upon the district judges, whose obligation we pointed out in Pittsburgh, etc., R. Co. v. Glinn, 208 Fed. 989, 126 C. C. A. 77; and we have no doubt that they will observe the new practice when approving a statement of evidence or bill of exceptions; but in equity appeals, if counsel overlook the rule and follow the old practice, the matter may not come to the attention of the trial judge. If such cases occur, the clerk who makes return to the appeal should not include the evidence in full, and his due attention will usually prevent informality in this respect. In those instances, however, where the record reaches this court containing the evidence in full, we think general equity rule 76 provides a remedy which, at least during the transition in the general practice, will be sufficient. The reference in rule 76 to "any kindred rule" quite clearly applies to rule 75. It is true that the offending solicitor in this situation is the solicitor for appellant, and that appellant pays, in the first instance, the entire cost of printing, so that if he is unsuccessful in this court, no disposition of the costs of

printing can operate as a penalty, but if he is successful, he can be denied the recovery of such costs; and the further affirmative costs, contemplated by rule 76, might, in a proper case, be imposed upon the offending solicitors. (215 Fed. v, 128 C. C. A. v, pronounced Oct. 14, 1914.)

Cited without definite application, Chesapeake & O. C. & C. Co. v. Black, Sheridan & Wilson (1915) 224 Fed. 924, 925, 140 C. C. A. 402.

RULE 76. RECORD ON APPEAL—REDUCTION AND PREPARATION—COSTS—CORRECTION OF OMISSIONS.—*In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.*

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.

Notes of Decisions

See notes under rule 75.

RULE 77. RECORD ON APPEAL—AGREED STATEMENT.—*When the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence, the parties, with the approval of the District Court or the judge thereof, may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by the appellate court. Such statement, when filed in the office of the clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree from which the appeal is taken, and, together with such decree, shall be copied and certified to the appellate court as the record on appeal.*

Notes of Decisions

See notes under rule 75.

Cited without definite application, Home Bond Co. v. McChesney (1914) 210 Fed. 893, 127 C. C. A. 552; Moore v. Donahoo (1914) 217 Fed. 177, 178, 133 C. C. A. 171.

RULE 78. AFFIRMATION IN LIEU OF OATH.—*Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.*

RULE 79. ADDITIONAL RULES BY DISTRICT COURT.—*With the concurrence of a majority of the Circuit Judges for the circuit, the District Courts may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.*

Notes of Decisions

Authority to make rules.—See Story v. Livingston (1839) 13 Pet. 359, 368, 10 L. Ed. 200; Steam Stone Cutter Co. v. Jones (C. C. 1882) 13 Fed. 567, 577; The Titanic (D. C. 1913) 206 Fed. 500.

Cited without definite application, Marconi Wireless Telegraph Co. v. National Electric Signaling Co. (D. C. 1913) 206 Fed. 295, 302.

RULE 80. COMPUTATION OF TIME—SUNDAYS AND HOLIDAYS.—*When the time prescribed by these rules for doing any act expires on*

a Sunday or legal holiday, such time shall extend to and include the next succeeding day that is not a Sunday or legal holiday.

RULE 81. THESE RULES EFFECTIVE FEBRUARY 1, 1913—OLD RULES ABROGATED.—*These rules shall be in force on and after February 1, 1913, and shall govern all proceedings in cases then pending or thereafter brought, save that where in any then pending cause an order has been made or act done which cannot be changed without doing substantial injustice, the court may give effect to such order or act to the extent necessary to avoid any such injustice.*

All rules theretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect.

Notes of Decisions

Exceptions treated as motion.—Exceptions filed in suit instituted before adoption of rules will be treated as a motion to strike out. Williams Patent Crusher & Pulverizer Co. v. Kinsey Mfg. Co. (D. C. 1913) 205 Fed. 375, 376.

Cited without definite application, Heckscher v. Pennsylvania Steel Co. (D. C. 1913) 205 Fed. 377, 379.

POWER TO MAKE AND EFFECT OF RULES

Power to make rule.—Congressional authority for the equity rules is found in this section. Kelley v. T. L. Smith Co. (1912) 196 Fed. 466, 116 C. C. A. 240; Steam Stone Cutter Co. v. Jones (C. C. 1882) 13 Fed. 567, 577.

Every court of equity possesses the power to mold its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty, to exercise a sound discretion upon this subject, and to enlarge the time whenever it shall appear that the purposes of justice require it. Poultney v. City of La Fayette (1838) 37 U. S. (12 Pet.) 472, 9 L. Ed. 1161.

Under the general power granted by congress to the federal courts in respect of costs, those courts may provide by rule for the taxation as costs of the expense of printing the evidence in equity cases. Tesla Electric Co. v. Scott (C. C. 1900) 101 Fed. 524.

The supreme court acquired no power to change, by its rules, the jurisdiction of the federal courts in respect to nonresidents of the district, by virtue either of the act of 1792 or that of 1842. New England Ins. Co. v. Detroit & C. Steam Nav. Co. (D. C. 1871) Fed. Cas. No. 10,154.

Force and effect of rules.—The equity rules prescribed by the supreme court of the United States were not intended to deprive the courts of the United States of the power to exercise a sound discretion, and to enlarge the time for filing an answer, when justice requires it. Poultney v. City of La Fayette (1838) 37 U. S. (12 Pet.) 472, 9 L. Ed. 1161; Wallace v. Clark (C. C. 1847) Fed. Cas. No. 17,098.

The rules prescribed by the supreme court for government of courts of equity of the United States, under this act, are obligatory on all federal courts. Poultney v. City of La Fayette (1838) 37 U. S. (12 Pet.) 472, 474, 9 L. Ed. 1161; Storey v. Livingston (1839) 13 Pet. 359, 368, 10 L. Ed. 200.

Rules of equity are framed to bring a cause to hearing, and do not apply after a hearing, unless the necessary steps are taken to bring it within their operation, and start the cause anew towards a hearing. Allen v. City of New York (C. C. 1880) 7 Fed. 483.

The rules promulgated by the federal Supreme Court for the guidance of federal courts have the force and effect of law. United States v. Barber Lumber Co. (C. C. 1908) 169 Fed. 184.

See, also, notes under § 1543, post.

II. Equity Procedure in General

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Equity rules, see ante, p. 2497.

Conformity to state practice, see § 1537 and notes.

Equitable remedies in land patent cases, see § 705, and notes thereunder.

See, also, notes under § 991 (3), ante, and Const. art. 3, § 2, cl. 1, as to jurisdiction of cases in admiralty.

(A) In general

1. In general.
2. Constitutionality.
3. Construction.
4. Chancery practice of England.
5. Agreements of parties.
6. Territorial courts.

1. In general.—The equity practice in the federal court is regulated by the laws of congress, and the rules of the supreme court made under the authority thereof. Bein v. Heath (1851) 12 How. 168, 178, 13 L. Ed. 939; Martindale v. Waas (C. C. 1882) 11 Fed. 551; Steam Stone Cutter Co. v. Jones (C. C. 1882) 13 Fed. 567; Gaines v. New Orleans (C. C. 1886) 27 Fed. 411, 412, writ of error dismissed (1887) 7 Sup. Ct. 897, 121 U. S. 284, 30 L. Ed. 961. Their power and rules of decision are the same in all the states. U. S. v. Howland (1819) 4 Wheat. 108, 115, 4 L. Ed. 526.

Equity practice is governed by the rules prescribed by the supreme court, and is the same in all the states. Betts v. Lewis (1856) 19 How. 72, 73, 15 L. Ed. 576; Noonan v. Lee (1862) 2 Black, 499, 509, 17 L. Ed. 278; Watts v. Camors (1885) 6 Sup. Ct. 91, 95, 115 U. S. 353, 29 L. Ed. 406; U. S. ex rel. Mudsill Min. Co. v. Swan (1895) 65 Fed. 647, 651, 13 C. C. A. 77; Bryant Bros. Co. v Robinson (1906) 149 Fed. 321, 328, 79 C. C. A. 259; Johnston v. Roe (C. C. 1880) 1 Fed. 692, 695; Orendorf v. Budlong (C. C. 1882) 12 Fed. 24, 26; Cook v. Cook (C. C. 1888) 34 Fed. 249.

The courts of the United States in Louisiana possess equity powers. The rules of chancery practice in Louisiana mean the rules prescribed by supreme court for the federal courts. Story v. Livingston (1839) 13 Pet. 359, 368, 10 L. Ed. 200.

In the case of Livingston v. Story, which came before this court in 1835 (9 Peters, 655), the court took occasion to examine the various laws of the United States, establishing and organizing the District Court of Louisiana, and to decide whether that court had equity powers; and, if so, what should be the mode of proceeding in the exercise of such powers. The various cases which had been before the court, involving substantially the same question in relation to the states where there were no equity state courts, or laws regulating the practice in equity causes, were referred to; and the uniform decisions of the court have been that there being no equity state courts did not prevent the exercise of equity jurisdiction in the courts of the United States; and it was accordingly decided that the District Court of Louisiana was bound to proceed in equity causes according to the principles, rules, and usages which belong to the courts of equity, as contradistinguished from courts of common law. The Supreme Court has not the power to compel the Circuit Court to proceed according to established rules in chancery cases. All that the court can do is to prevent proceedings otherwise, by reversing them, when brought here on appeal. Gaines v. Relf (1841) 15 Pet. 9, 10 L. Ed. 642.

A court of equity has power to contrive new remedies and issue unprecedented orders to enforce rights secured by federal legislation, provided no illegal burdens are imposed thereby. Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C. 1893) 54 Fed. 746, 19 L. R. A. 395, following Joy v. St. Louis (1891) 11 S. Ct. 243, 138 U. S. 1, 34 L. Ed. 843.

2. Constitutionality.—The delegation of power to the courts is constitutional. Cooke v. Avery (1893) 13 Sup. Ct. 340, 345, 147 U. S. 375, 37 L. Ed. 209.

3. Construction.—The words "forms of mesne process, and modes of proceeding," used in the act of 1828, embrace, not only process, but the whole course of the proceedings in an action. Ely v. Hanks (D. C. 1858) Fed. Cas. No. 4,430.

4. Chancery practice of England.—The federal system of chancery practice follows that of the high court of chancery in England. Vattier v. Hinde (1833) 7 Pet. 252, 274, 8 L. Ed. 675; Bein v. Heath (1851) 12 How. 168, 178, 13 L. Ed. 939; Fuller v. Montague (1893) 59 Fed. 212, 216, 8 C. C. A. 100; Smith v. Burnham (C. C. 1837) Fed. Cas. No. 13,018; Goodyear v. Providence Rubber Co. (C. C. 1864) Fed. Cas. No. 5,583; Nickerson v. Atchison, T. & S. F. R. Co. (C. C. 1880) 30 Fed. 85, 86; Loveridge v. Larned (C. C. 1881) 7 Fed. 294, 298; Richmond v. Atwood (1892) 52 Fed. 10, 25, 2 C. C. A. 596, 17 L. R. A. 615.

When the rules prescribed by the supreme court do not apply, the practice of the circuit and district courts must be regulated by the practice of the high court of chancery of England. Story v. Livingston (1839) 13 Pet. 359, 368, 10 L. Ed. 200.

But this does not apply in determining questions of jurisdiction. Lewis v. Shainwald (C. C. 1881) 48 Fed. 492.

Where relief can be given by the English chancery, similar relief may be given by the courts of the Union. Pennsylvania v. Wheeling & Belmont Bridge Co. (1851) 13 How. 518, 564, 14 L. Ed. 249.

In cases of original jurisdiction, it has been determined that the supreme court will frame its proceedings according to those which had been adopt-

ed in the English courts in similar cases, and that the rules of court in chancery should govern in conducting the case to a final issue; but the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities, or defeat the purposes of justice. California v. Southern Pac. Co. (1895) 15 Sup. Ct. 591, 599, 157 U. S. 229, 39 L. Ed. 683.

Under equity rule 19, adopting the practice of England so far as it is consistent with "our local circumstances and conveniences." a third person can intervene and have a sale set aside, upon offering a sufficient advance in price and paying all the expenses incurred by the previous purchaser. Blackburn v. Selma R. Co. (C. C. 1880) 3 Fed. 689.

Changes since the Revolution in rules and principles in English chancery not followed by federal courts. Baker v. Biddle (C. C. 1831) Fed. Cas. No. 764.

This section having adopted for the circuit and district courts the equity practice as it existed in England at the time of the passage of the judiciary act, the circuit court will not take cognizance of a case in equity in which parties agree upon a statement of facts, and stipulate that the court shall take jurisdiction, try the cause, and render decree without pleadings. Nickerson v. Atchison, T. & S. F. Ry. Co. (C. C. 1880) 30 Fed. 85.

5. Agreements of parties.—State practice cannot be substituted by stipulation. Vitzthum v. Large (D. C. 1908) 162 Fed. 685; Nickerson v. Atchison, T. & S. F. R. Co. (C. C. 1880) 30 Fed. 85, 86.

The court will not take cognizance of a case in equity in which parties agree upon a statement of facts, and stipulate that the court shall take jurisdiction, try the cause, and render decree without pleadings. Notwithstanding the statute of Kansas authorizing such a proceeding in the courts of that state. Nickerson v. Atchison, T. & S. F. R. Co. (C. C. 1880) 30 Fed. 85.

6. Territorial courts.—The practice, pleadings, and forms and modes of proceedings of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves. In case of any difficulties arising out of the state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper. Hornbuckle v. Toombs (1873) 18 Wall. 648, 652, 21 L. Ed. 966.

Under Organic Act Wash. § 9, conferring on territorial courts all the jurisdiction of circuit and district courts of the United States, the rules in equity adopted by the supreme court of the United States are binding on the territorial courts when acting as courts in chancery, in the absence of any local system of practice. Stevens v. Baker (1871) 1 Wash. T. 315.

(B) Abatement and revival

7. In general.
8. Want of jurisdiction.
9. Transfer of interest of complainant.
10. Death of party.
11. Pleading grounds of abatement.
12. Bill of revivor.
13. —— Right to file.
14. —— Time for filing.
15. —— Parties.
16. —— Plea and answer.
17. —— Amendment.

See rules 29, 45, ante, pp. 2508, 2515.

7. In general.—The practice of the federal courts in equity regarding abatement and revival is regulated by the practice of the High Court of Chancery in England in 1843. Childs v. Ferguson (1910) 181 Fed. 795, 104 C. C. A. 305.

Section 1592, post, does not apply to suits in equity. Brown v. Fletcher (C. C. 1904) 140 Fed. 639.

8. Want of jurisdiction.—The declaration alleging such citizenship of parties as gives the court jurisdiction, a plea in abatement, asserting the want of it casts the burden of showing such a residence of the parties as will defeat the jurisdiction on defendant. Gilmer v. City of Grand Rapids (C. C. 1883) 16 Fed. 708.

9. Transfer of interest of complainant.—Where, pending a suit in equity, complainant transferred all his interest in the property in controversy to a corporation, the suit abated as to complainant, and could only be proceeded with by the transferee corporation under equity rule 57, providing that, whenever a suit in equity becomes defective from any event happening after the filing of the bill, leave may be granted to file a supplemental bill, or a bill in the nature of a supplemental bill. Pittsburgh, S. & N. R. Co. v. Fiske (1910) 178 Fed. 66, 101 C. C. A. 560.

10. Death of party.—It was the general rule under the English chancery practice in 1842, as it is now in the federal courts in equity, that the death of a sole defendant, which had the effect to transfer his interest to others, abated the suit, in the absence of revival, and rendered all subsequent proceedings void. Childs v. Ferguson (1910) 181 Fed. 795, 104 C. C. A. 305.

An exception to this rule is that, when the suit has been finally heard and submitted, the subsequent death of defendant wrought no abatement. Id.

A suit in equity does not abate by the death of a co-plaintiff or co-defendant. If one plaintiff and one defendant survive, the suit is open for amendment. Fisher v. Rutherford (C. C. 1830) Fed. Cas. No. 4,823.

Where defendant in a suit in equity has neither been served with process, nor appeared, the suit cannot be revived against his administrator after his death. U. S. v. Fields (C. C. 1859) Fed. Cas. No. 15,089.

Case is not revived on death of party without order to that effect. Atterbury v. Gill (C. C. 1878) Fed. Cas. No. 638.

The failure to revive a suit which has abated by the death of plaintiff is not ground for a motion by defendant to dismiss for want of prosecution, but he may, on proper notice, obtain an order requiring the suit to be revived within a time fixed, or to be dismissed. Dillard's Adm'r v. Central Virginia Iron Co. (C. C. 1903) 125 Fed. 157.

11. Pleading grounds of abatement.—Zimmerman v. So Relle (1897) 80 Fed. 417, 25 C. C. A. 518; Chapin v. Dougherty (1910) 183 Fed. 309, 105 C. C. A. 521; Chicago, B. & Q. R. Co. v. Weil (1911) 183 Fed. 956, 106 C. C. A. 296; Chicago, R. I. & P. Ry. v. Weil (1911) 183 Fed. 956, 106 C. C. A. 296; Ewing v. Blight (C. C. 1855) Fed. Cas. No. 4,589; Tobin v. Walkinshaw (C. C. 1855) Fed. Cas. No. 14,068; Chapman v. School Dist. (C. C. 1865) Fed. Cas. No. 2,607; Hammond v. Hunt (C. C. 1879) Fed. Cas. No. 6,003; U. S. v. Gillespie (C. C. 1881) 6 Fed. 803; Sharon v. Hill (C. C. 1885) 26 Fed. 337; McDonald v. Salem Capital Flour Mills Co. (C. C. 1887) 31 Fed. 577; Pierce v. Flagans (C. C. 1889) 39 Fed. 587; Briggs v. Stroud (C. C. 1893) 58 Fed. 717.

12. Bill of revivor.—See rule 35, ante, p. 2512.

A bill of revivor is not the commencement of a new suit, but a mere continuance of the old one; and it is on ground somewhat analogous that the circuit courts are held to have jurisdiction in cases of cross-bills and injunction bills touching suits and judgments already in those courts. Clarke v. Mathewson (1838) 37 U. S. (12 Pet.) 164, 9 L. Ed. 1041.

When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209.

The only questions upon bill of revivor are as to its form and the competency of the parties. Objections cannot be taken to the original bill. Bettes v. Dana (C. C. 1836) Fed. Cas. No. 1,368.

A bill having become defective by the dissolution of a defendant corporation, it is proper practice for the plaintiff to bring in the statutory assignee by a supplemental bill in the nature of a bill of revivor. Chester v. Life Ass'n of America (C. C. 1880) 4 Fed. 487.

On proceedings to revive a suit in equity, abated by the death of complainant, for the purpose of executing the final decree, no objections can be taken which could have been urged when the original bill was pending, except want of jurisdiction, apparent upon the record. Sharon v. Terry (C. C. 1888) 36 Fed. 337, 1 L. R. A. 572, decree affirmed Terry v. Sharon (1888) 9 Sup. Ct. 705, 131 U. S. 40, 33 L. Ed. 94.

When a suit in equity, which seeks, with other relief, the recovery of real estate, abates in consequence of the death of a complainant, whose interest in the real estate devolves upon other persons, the proper method of reinstating the suit is by a supplemental bill, or bill in the nature of a supplemental bill, and not by a bill of revivor. Currell v. Villars (C. C. 1896) 72 Fed. 330.

Where, pending a bill against a corporation for injunction and accounting for infringement of a patent, the corporation is dissolved by a state court, and its assets placed in the hands of a receiver, the federal court has power to grant a bill of revivor against the receiver. Griswold v. Hilton (C. C. 1898) 87 Fed. 256.

In defense to a bill of revivor to carry into effect a decree in a suit which has abated by the death of the original complainant, the defendants may show that the decree was rendered without jurisdiction over their persons, but the burden rests on them, in such case, to prove that the attorneys who appeared for and assumed to represent them in the case acted without authority. Rutledge v. Waldo (C. C. 1899) 94 Fed. 265.

A bill which is in substance one to revive and carry into effect a former decree, and which contains proper allegations for that purpose, can be entertained by a court of equity, whether properly or not styled a bill of revivor and supplement. Shainwald v. Lewis (D. C. 1895) 69 Fed. 487.

Where a decree has been made reviving a former decree, a second bill for the same purpose properly seeks to revive the first decree of revivor, and so ipso facto the original decree. Id.

13. —— Right to file.—Where the cause of action involved in a suit in equity has passed by assignment or devise from the estate of the deceased complainant to another, the suit cannot be revived, but the assignee or devisee must proceed by original bill. Brown v. Fletcher (C. C. 1904) 140 Fed. 639; Miller v. Wattier (C. C. 1908) 165 Fed. 359. See Barribeau v. Brant (1854) 17 How. 43, 46, 15 L. Ed. 34.

The assignee of the complainant cannot file a bill of revivor. His proper course on the death of the original complainant is to file a supplemental bill. Metal Stamping Co. v. Crandall (C. C. 1880) Fed. Cas. No. 9,493c.

A devisee cannot maintain a bill of

revivor. Slack v. Walcott (C. C. 1825) Fed. Cas. No. 12,932.

14. —— **Time for filing.**—Ordinarily a bill of revivor may be filed at any time before it is barred by the statute of limitations, which, when the suit is abated by the death of the plaintiff, begins to run from his decease, or, according to some authorities, from the time administration is taken out. Where one acquires title with full notice and subject to an incumbrance of a lien, he cannot charge laches on the part of the person bringing suit to enforce the lien if the suit is brought within the time prescribed by the statute. Mason v. Hartford, P. & F. R. Co. (C. C. 1884) 19 Fed. 53.

Where an unconditional order, signed by the judge and duly enrolled, striking the name of a decedent from the cause, was taken, and eight years thereafter application was made for leave to file a bill of revivor, in the absence of any explanation of the order of dismissal, leave to revive will not be granted. Howth v. Owens (C. C. 1887) 30 Fed. 910.

A bill of revivor will be stricken from the record, on motion, after the lapse of 12 years of inaction from the date of the last proceeding. Hubbell v. Lankenau (C. C. 1894) 63 Fed. 881.

After a suit had abated by the death of the complainant, a bill to revive was filed, to which a demurrer was sustained on the ground that the right of action did not vest in the parties filing it, but leave was given to amend by substituting the real parties in interest. The time for amending was extended from time to time, with the consent of defendants, until nearly three years later, and eight years after the death of complainant, when a new bill of revivor was filed by the proper parties. Held, that the fact that a new bill, instead of an amended bill, was filed, was immaterial, and that, although the delay appeared to be without excuse, it was, in effect, by defendant's consent, and did not constitute laches prejudicial to their rights, which they could invoke to defeat the revival. Simmons v. Morris (C. C. 1901) 109 Fed. 707.

The right to revive a suit may be defeated by inexcusable laches resulting in irreparable injury to defendant, where it occurred after the abatement of the original suit; but delay in the commencement of the original suit, not pleaded as a defense thereto, cannot be considered on a bill to revive. Id.

When, within the period of limitation after the rendition of a decree, a bill is filed to revive and continue it, and within the same period from the decree on such bill a second bill for the same purpose is filed, it is not subject to the objection either of laches or the statute of limitations. Shainwald v. Lewis (D. C. 1895) 69 Fed. 487.

15. —— **Parties.**—As a corporation deriving title to railroad property under foreclosure of a mortgage thereon, given before a suit by stockholders of the railroad company to enjoin the collection of taxes on the property, would not be estopped by a decree against plaintiffs in such suit, it is not entitled to the benefit of a decree in favor of plaintiffs, and cannot maintain a bill to revive such suit, even though proceedings to enforce the lien for taxes would have divested the mortgagees of their rights. Keokuk & W. R. Co. v. County Court of Scotland County (1894) 14 Sup. Ct. 605, 152 U. S. 318, 38 L. Ed. 457; Id. (1894) 14 Sup. Ct. 608, 152 U. S. 317, 38 L. Ed. 457, affirming decree (C. C. 1890) 41 Fed. 305.

The administratrix and infant son and sole heir of defendant in the original bill are proper parties to a bill of revivor. Bettes v. Dana (C. C. 1836) Fed. Cas. No. 1,368.

By the will of A., his wife, B., was named as his sole executrix and legatee, but she failed to qualify as executrix, and soon afterwards died. N., as administrator of both B. and A., then brought suit for an accounting of the profits of a partnership in lottery shares between A. and defendants, which suit was abated by the death of N. Held, that A.'s representative should be made a party to a bill to revive by the administrator de bonis non of B., as the property had never vested in B. Newcombe v. Murray (C. C. 1896) 77 Fed. 492.

16. —— **Plea and answer.**—Defenses not made in an answer to the original bill cannot be set up in an answer to a bill of revivor. Fretz v. Stover (1874) 89 U. S. (22 Wall.) 198, 22 L. Ed. 769.

Defendant, who appeared, held not entitled to three months to answer a bill of revivor under Sup. Ct. Rules 6 and 10. Oliver v. Decatur (C. C. 1835) Fed. Cas. No. 10,496.

To a bill of revivor filed by alleged administrators and trustees of the original complainant, a plea was put in setting up that it did not appear by the bill that plaintiffs had ever been appointed administrators by a court of competent jurisdiction. Held, that a replication setting up that, since the filing of the plea and demurrer, plaintiffs had been appointed administrators by a court of competent jurisdiction, could not be sustained. Mason v. Hartford, P. & F. R. Co. (C. C. 1882) 10 Fed. 334.

17. —— **Amendment.**—New matter accruing since the bill was filed cannot be incorporated into the bill of revivor by amendment. Mason v. Hart-

ford, P. & F. R. Co. (C. C. 1882) 10 Fed. 334.

(C) Laches and stale demands

18. Nature and elements.
19. —— Necessity for diligence.
20. Application of doctrine to state or government.
21. Grounds and essentials of bar.
22. —— Computation of time.
23. —— Accrual of cause of action.
24. —— Continuing causes of action
25. —— Knowledge of facts.
26. Lapse of time.
27. —— Effect of delay alone.
28. —— As affecting privies in interest.
29. —— Acquiescence.
30. —— What constitutes unreasonable delay.
31. Prejudice from delay.
32. —— Abandonment or invalidity of claim.
33. —— Prejudice to original parties.
34. —— Prejudice to defendants.
35. —— Change in value of property.
36. —— Loss of evidence or death of witnesses.
37. —— Rights of third persons.
38. Excuses.
39. —— Personal disabilities.
40. —— Pecuniary condition of complainant.
41. —— Absence or nonresidence.
42. —— Fraud, concealment, or other act of adverse party.
43. —— Negotiations and agreements between parties.
44. —— Pendency of legal proceedings.
45. —— Recognition of right by adverse party.
46. —— Possession or control of property.
47. —— Ignorance of facts.
48. —— Negligence of attorney or other representative.
49. Following statute of limitations.
50. —— Loss of legal remedy by limitations.
51. —— Delay short of statutory period.
52. —— Concurrent jurisdiction.
53. —— Commencement of suit.
54. Pleading in anticipation of defense.
55. Pleading as defense.
56. Waiver of objections.

18. Nature and elements.—"Laches" is an unreasonable and inequitable delay in enforcing a demand or right, not depending on mere lapse of time, but on the equity or inequity of permitting enforcement of the demand. Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520; Newberry v. Wilkinson (1912) 199 Fed. 673, 118 C. C. A. 111 (affirming decree Newbery v. Same [C. C. 1911] 190 Fed. 62); Drees v. Waldron (1914) 212 Fed. 93, 128 C. C. A. 609; Parker v. Parker (1915) 222 Fed. 186, 137 C. C. A. 626; Old Colony Trust Co. v. Dubuque Light & Traction Co. (C. C. 1898) 89 Fed. 794; Hansen v. Slick (D. C. 1914) 216 Fed. 164; Mathieson v. Craven (D. C. 1915) 228 Fed. 345.

The institution of a suit does not relieve a person from the charge of laches, and, if he fail in the diligent prosecution of his action, the consequences are the same as though he had never taken it. Northrup v. Browne (1913) 204 Fed. 224, 122 C. C. A. 496; Drees v. Waldron (1914) 212 Fed. 93, 128 C. C. A. 609; Stuart v. Holland (C. C. 1910) 179 Fed. 969.

The objection of laches on the part of the grantors in attacking a sale in attachment proceedings of property covered by a trust deed is not available to the defendants, in a suit to set aside the attachment proceedings and enforce the trust deed, who claim title to the property under the attachment proceedings, where they make their title the basis of an assertion of a right to affirmative relief. Southern Pine Lumber Co. v. Ward (1908) 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420, affirming judgment (1906) 85 Pac. 459. 16 Okl. 131.

The doctrine of laches rests upon equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case. Hanchett v. Blair (C. C. A. 1900) 100 Fed. 817; Northern Pac. Ry. Co. v. Boyd (1910) 177 Fed. 804, 101 C. C. A. 18, affirming decree Boyd v. Northern Pac. Ry. Co. (C. C. 1909) 170 Fed. 779, and (1913) 33 Sup. Ct. 554, 228 U. S. 482, 57 L. Ed. —.

The doctrine of laches is an equitable principle which is never invoked to defeat justice, and does not exist where the analogous action at law is not barred and no unusual conditions invoke its application. Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

In equity, the estoppel of laches takes the place of statutes of limitation. Horton v. Stegmyer (1910) 175 Fed. 756, 99 C. C. A. 332, 20 Ann. Cas. 1134.

Equity, where aid is sought toward the prosecution of a suit in another court, will determine whether the applicant has been guilty of laches barring his right to relief and not leave the determination of such question to the other court. Drees v. Waldron (1914) 212 Fed. 93, 128 C. C. A. 609.

Courts of equity will refuse to interfere in the case of stale demands. Lewis v. Baird (C. C. 1842) Fed. Cas. No. 8,316; Gould v. Gould (C. C. 1844) Fed. Cas. No. 5,637; U. S. v. Flint (C. C. 1876) Fed. Cas. No. 15,-121.

Laches should not be imputed to a party who delays to bring an action to recover land, where the adverse party had full notice of the claim of title of the party suing, unless the delay is, under all the circumstances of the case, unreasonable. Ulman v. Clark (C. C. 1896) 75 Fed. 868.

Where the party against whom a decree has been made fails, without cause, to file his petition to vacate it until three months after its entry and the service of an injunction upon him, and a month after the service of notice of a motion of attachment for contempt for disobedience of the injunction, he is

guilty of such laches as will debar him from relief even though his case be otherwise meritorious. Comly v. Buchanan (C. C. 1897) 81 Fed. 58.

The defense of laches involves a negative course of action. West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833, decree modified (1910) 176 Fed. 833, 100 C. C. A. 303.

The defense of laches is not tested by time alone. A comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of enterprise. General Electric Co. v. Yost Electric Mfg. Co. (D. C. 1913) 208 Fed. 719, appeal dismissed (1914) 213 Fed. 1021, 129 C. C. A. 665.

19. —— Necessity for diligence.—A court of equity will not aid in enforcing stale demands, where the party has been guilty of negligence and has slept upon his rights. Piatt v. Vattier (1835) 34 U. S. (9 Pet.) 405, 9 L. Ed. 173; Godden v. Kimmell (1878) 99 U. S. 201, 25 L. Ed. 431; Hollingsworth v. Fry (1800) 4 U. S. (4 Dall.) 345, 1 L. Ed. 860.

Diligence is an essential condition of equitable relief, and laches and negligence are always discountenanced. Speidell v. Henrici (C. C. 1883) 15 Fed. 753, decree affirmed (1887) 7 Sup. Ct. 610, 120 U. S. 377, 30 L. Ed. 718.

Where the property in litigation is of a speculative and fluctuating value, the parties interested will be held to a greater degree of diligence in asserting rights therein than where it is of permanent and fixed value. Pratt v. California Min. Co. (C. C. 1883) 24 Fed. 869.

20. Application of doctrine to state or government.—Laches cannot be pleaded against the United States. U. S. v. Kirkpatrick (1824) 22 U. S. (9 Wheat.) 720, 6 L. Ed. 199; Dox v. Postmaster General (1828) 26 U. S. (1 Pet.) 318, 7 L. Ed. 160; U. S. v. Insley (1889) 9 Sup. Ct. 485, 130 U. S. 263, 32 L. Ed. 968 (reversing decree U. S. v. McElroy [C. C. 1885] 25 Fed. 804); Same v. Dalles Military Road Co. (1891) 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560; San Pedro & Canon del Agua Co. v. U. S. (1892) 13 Sup. Ct. 94, 146 U. S. 120, 36 L. Ed. 911; U. S. v. City of Alexandria (C. C. 1882) 19 Fed. 609; Same v. Southern Colorado Coal & Town Co. (C. C. 1883) 18 Fed. 273 (decree reversed Colorado Coal & Iron Co. v. U. S. [1887] 8 Sup. Ct. 131, 123 U. S. 307, 31 L. Ed. 182); Same v. Curtner (C. C. 1886) 26 Fed. 296; Same v. Willamette Val. & C. M. Wagon Road Co. (C. C. 1892) 54 Fed. 807. CONTRA, see U. S. v. Beebee (C. C. 1883) 17 Fed. 36, decree affirmed (1888) 8 Sup. Ct. 1083, 127 U. S. 338, 32 L. Ed. 121.

The United States in asserting its rights is not barred by the laches of its officers or agents. Gaussen v. U. S. (1878) 97 U. S. 584, 24 L. Ed. 1009.

Acquiescence by the state of Missouri in the proceedings of the sanitary district of Chicago in devising and carrying out a system of sewerage is no bar to relief against the continuous pouring of sewage and filth into the Mississippi river through a drainage canal constructed by the sanitary district, to the detriment of the state of Missouri and her inhabitants. State of Missouri v. State of Illinois (1901) 21 Sup. Ct. 331, 180 U. S. 208, 45 L. Ed. 497.

The rule of nullum tempus cannot be invoked by the French republic to answer the defense of laches in a suit to enforce an exclusive right to the use of the word "Vichy" in connection with mineral waters as against persons using that word to denote a water not drawn from springs in the commune of France of that name, where it has entered into an 80-year lease of such springs to its co-plaintiff for a fixed annual rental, which lease has still 30 years to run. La Republique Française v. Saratoga Vichy Spring Co. (1903) 24 Sup. Ct. 145, 191 U. S. 427, 48 L. Ed. 247, affirming decree La Republique Française v. Saratoga Vichy Springs Co. (1901) 107 Fed. 459, 46 C. C. A. 418, 65 L. R. A. 830.

Laches founded on mere delay will not bar a state or the nation from maintaining suits to preserve and enforce its just rights. State of Iowa v. Carr (1911) 191 Fed. 257, 112 C. C. A. 477; Same v. John A. Creighton Real Estate & Trust Co. (1911) 191 Fed. 270, 112 C. C. A. 496.

Although time does not run against the United States, and they are not prejudiced by the laches of public officers, yet equity will be unwilling to enforce the doctrine of constructive notice more than 40 years after the passage of a public statute, in a case where stock purchased bona fide, claimed to be affected by the notice, has been held for more than 30 years. U. S. v. City of Alexandria (C. C. 1884) 19 Fed. 614.

The rule that laches cannot be invoked against the United States does not apply where the government is not the real party in interest, but, if successful, the litigation must inure to the benefit of private individuals. La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

21. Grounds and essentials of bar.—Mere laches does not usually bar a party, unless under circumstances which work an equitable estoppel against him. Valvona-Marchiony Co. v. Marchiony (D. C. 1913) 207 Fed. 380.

22. —— Computation of time.—In a suit to have a decree in foreclosure set aside, the time during which an appeal was pending, would not be counted against plaintiff on the question of

laches. Pacific R. R. of Missouri v. Missouri Pac. Ry. Co. (1884) 4 Sup. Ct. 583, 111 U. S. 505, 28 L. Ed. 498, reversing decree (C. C. 1880) 3 Fed. 772.

Time elapsing after the filing of the original bill is not to be considered in determining question of laches, where the amended bill states the same cause of action; and the delay in the proceedings is not chargeable solely to plaintiff. Pendery v. Carleton (1898) 87 Fed. 41, 30 C. C. A. 510.

23. —— **Accrual of cause of action.**—Complainants in a bill to enjoin the execution of defendant's judgment, and to compel the execution of conveyance by him to them, were in no default, prejudicial to their original equities, for failing to discharge, or offering to discharge, their predecessor's bond for purchase money held by defendant, where defendant was in no situation to comply with his part of the contract, by making title, until he had received his patent. Buchannon v. Upshaw (1843) 42 U. S. (1 How.) 56, 11 L. Ed. 46.

Where plaintiff's rights in certain stock as against a railroad company were for the first time fixed by a decree, he could not have been guilty of laches if, after such decree, he sued the railroad company to recover such stock. Illinois G. T. Ry. Co. v. Wade (1891) 11 Sup. Ct. 709, 140 U. S. 65, 70, 35 L. Ed. 342.

The issuance of receipts and certificates of purchase of swamp lands belonging to a county, by the proper officers thereof, makes the county a trustee holding the legal title of the lands for the benefit of the purchaser, and laches cannot be imputed to the latter in respect to delay in obtaining a conveyance, until the county has repudiated the trust by some unequivocal act; but a delay of 22 years after repudiation of the trust constituted laches. Lemoine v. Dunklin County (1892) 51 Fed. 487, 2 C. C. A. 343, affirming (C. C. 1891) 46 Fed. 219.

In providing for actions for relief on the ground of fraud, the California legislature carried into the provision the principle established by courts of equity, that the cause of action shall not be deemed to have accrued until the "discovery of the facts constituting the fraud;" and to ascertain what conditions constitute a discovery, within the meaning of the provisions, the principles established in equity, whence the idea was derived, must be applied. Norris v. Haggin (C. C. 1886) 28 Fed. 275, decree affirmed (1890) 10 S. Ct. 942, 136 U. S. 386, 34 L. Ed. 424.

A bill alleged the purchase of swamp lands from the defendant county 30 years before, the payment of the price in full, and the issue of certificates entitling the holder to a patent from the governor; and further averred the duty of the governor to issue the patent until a short time afterwards, when power to issue patents was conferred on the county courts, and asked that the county be decreed to convey the legal title. Held, that the bill does not disclose such laches as will bar the right to relief. Lemoine v. Dunklin County (C. C. 1889) 38 Fed. 567.

In an action by a railroad company to quiet title to lands granted to it by the United States, no laches can be imputed to the company with respect to time passing between the date of the grant and the time of complete performance of the conditions thereof; for before performance no suit could be maintained. Southern Pac. R. Co. v. Stanley (C. C. 1892) 49 Fed. 263.

24. —— **Continuing causes of action.**—A suit to annul a grant of a right of way to a railroad for failure to comply with a condition to maintain crossings and proper drainage is not barred by laches, as the covenants are continuing. Congregation of the Roman Catholic Church v. Texas & P. Ry. Co. (C. C. 1890) 41 Fed. 564.

25. —— **Knowledge of facts.**—Knowledge of existing facts or ability to acquire information in regard thereto as affecting right to equitable relief, see McQuiddy v. Ware (1873) 87 U. S. (20 Wall.) 14, 22 L. Ed. 311; Taylor v. Holmes (1888) 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179, affirming decree (C. C. 1882) 14 Fed. 498; Kilbourn v. Sunderland (1889) 9 Sup. Ct. 594, 130 U. S. 505, 32 L. Ed. 1005; Ware v. Galveston City Co. (1892) 13 Sup. Ct. 33, 146 U. S. 102, 36 L. Ed. 904; Hardt v. Heidweyer (1894) 14 Sup. Ct. 671, 152 U. S. 547, 38 L. Ed. 548; Penn Mut. Life Ins. Co. v. City of Austin (1898) 18 Sup. Ct. 223, 168 U. S. 685, 42 L. Ed. 626; Eiffert v. Craps (1893) 58 Fed. 470, 7 C. C. A. 319; Swift v. Smith (1897) 79 Fed. 709, 25 C. C. A. 154; Fletcher v. McArthur (1902) 117 Fed. 393, 54 C. C. A. 567; Thornton v. City of Natchez (1904) 129 Fed. 84, 63 C. C. A. 526 (writ of certiorari denied [1905] 25 Sup. Ct. 797, 197 U. S. 620, 49 L. Ed. 909); Weniger v. Success Mining Co. (1915) 227 Fed. 548, 142 C. C. A. 180; Veazie v. Williams (C. C. 1845) Fed. Cas. No. 16,907; Livingston v. Proprietors of Ore Bed (C. C. 1879) Fed. Cas. No. 8,418; Norris v. Haggin (C. C. 1886) 28 Fed. 275 (decree affirmed [1890] 10 Sup. Ct. 942, 136 U. S. 386, 34 L. Ed. 424); Jesup v. Illinois Cent. R. Co. (C. C. 1890) 43 Fed. 483; Galbes v. Girard (C. C. 1891) 46 Fed. 500; Gross v. George W. Scott Mfg. Co. (C. C. 1891) 48 Fed. 35; Fuller v. Montague (C. C. 1892) 53 Fed. 204 (decree affirmed [1893] 59 Fed. 212, 8 C. C. A. 100); Bangs v. Loveridge (C. C. 1894) 60 Fed. 963; Wood v. Perkins (C. C. 1894) 64 Fed. 817; Lasher v. McCreery (C. C. 1895) 66 Fed. 834; Alger v. Anderson (C. C. 1897) 78 Fed. 729; Cutter v. Iowa Water Co. (C. C. 1899) 96 Fed. 777;

Ritchie v. Sayers (C. C. 1900) 100 Fed. 520; Reavis v. Reavis (C. C. 1900) 103 Fed. 813; Kessler v. Ensley Co. (C. C. 1903) 123 Fed. 546.

26. Lapse of time.—A grantee of lands is not required to take any action to assert his title, as against a subsequent grantee from the same grantor, so long as the land remains wild and unoccupied, and is not chargable with laches for failure to do so. Rannels v. Rowe (1906) 145 Fed. 296, 74 C. C. A. 376, writ of certiorari denied Sharpe v. Rannels (1907) 28 Sup. Ct. 257, 207 U. S. 591, 52 L. Ed. 355.

Complainant's claim against one of the sureties on the bond of his deceased guardian to recover the proceeds of his estate held barred by laches. Newberry v. Wilkinson (1912) 199 Fed. 673, 118 C. C. A. 111, affirming decree Newbery v. Same (C. C. 1911) 190 Fed. 62.

Delay in commencing suit to prevent the use of premises by a mining lessee contrary to the terms of the lease held not such laches as to deprive the lessor of the right to relief. Sharum v. Whitehead Coal Mining Co. (1915) 223 Fed. 282, 138 C. C. A. 524.

Delay will not bar a suit in equity before it would be barred at law by limitation, unless the delay has been prejudicial to the defendant. Brissell v. Knapp (C. C. 1907) 155 Fed. 809.

Where there was no basis for an equitable estoppel against plaintiff's right to recover money held for her by defendant Home, she was not barred by laches from maintaining a suit to recover the fund. Bachrach v. Jewish Foster Home (C. C. 1911) 185 Fed. 847.

The existence of laches depends upon particular circumstances, being measurable sometimes by years and sometimes by days. In re Casey (D. C. 1912) 195 Fed. 322.

Where vested interests in real estate are secured by executory contracts, acknowledged, and recorded, the defense of laches in asserting and maturing such interests is not applicable. Such interests may be lost by adverse possession. Nease v. Coal & Coke Ry. Co. (D. C. 1912) 195 Fed. 987.

27. —— Effect of delay alone.—Lapse of time is no defense to a bill to enforce an unexecuted trust to pay debts before adjudged to be unpaid. Bank of United States v. Beverly (1843) 42 U. S. (1 How.) 134, 11 L. Ed. 75.

A lapse of 8 or 10 years after the cestui que trust obtained a knowledge of the breach of trust by the trustee will not bar him of his relief, though he may have been guilty of some negligence. Oliver v. Piatt (1845) 44 U. S. (3 How.) 333, 11 L. Ed. 622.

In 1846 A. and B. agreed, under seal, upon a settlement of long-standing accounts. B. stipulated that he would obtain partition of certain lands wherein he had an undivided interest, and convey in fee the part assigned to him in severalty to A. B. died in 1849. There was no partition until 1866, when it was effected by his devisees—a fact not known to A. until 1872. They made to A. no conveyance of the part of said lands assigned to them in severalty. A. filed his bill in 1876. Held that, upon the case made by the bill, A.'s remedy was not barred by the lapse of time. Gunton v. Carroll (1879) 101 U. S. 426, 25 L. Ed. 985.

In case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law. Speidel v. Henrici (1887) 7 Sup. Ct. 610, 120 U. S. 377, 30 L. Ed. 718, affirming decree Speidell v. Henrici (C. C. 1883) 15 Fed. 753.

A delay of three years after making deeds procured by fraud did not constitute laches, it appearing that, soon after executing the same, the grantors conveyed their interest in the premises to a third person in trust to enable him to take proceedings for the recovery thereof, knowledge of which fact was promptly brought home to the purchaser, and that the delay of the trustee was not caused by the grantors. Billings v. Aspen Mining & Smelting Co. (1892) 51 Fed. 338, 2 C. C. A. 252, rehearing denied (1892) 52 Fed. 250, 3 C. C. A. 69.

Laches will not be imputed to one who went into actual, peaceable possession of land under a patent, merely because he delayed for several years bringing an action to quiet title against one claiming under a subsequent and inferior patent. Thompson v. Dumas (1898) 85 Fed. 517, 29 C. C. A. 312.

Mere delay in enforcing equitable rights is not a defense to a suit except in cases where the statutes of limitation apply, or where the party has slept upon his rights, and acquiesced for such a length of time, that his claim has become stale. Williams v. Boston & A. R. Co. (C. C. 1879) Fed. Cas. No. 17,716.

Mere lapse of time is a defense in equity in cases not within the operation of the statute of limitations. U. S. v. Tichenor (C. C. 1882) 12 Fed. 415.

Equity will not refuse to enforce an obligation merely because of the lapse of time, unless evidence has been lost, or the rights of third parties have become involved, or the personal relations between the parties have been so much altered as to change the essential character of the obligation. U. S. v. City of Alexandria (C. C. 1882) 19 Fed. 609.

Where a valid express trust has been created, and is recognized or treated by both parties to it as subsisting, mere delay upon the part of the cestui que

trust may not defeat his remedy for the enforcement of his rights under the trust; but when a trustee denies the right of the cestui que trust, and his relation to the latter in respect to the trust property becomes adverse, from that time the right of the cestui que trust to relief is subject to the operation of the law of laches. Speidell v. Henrici (C. C. 1883) 15 Fed. 753.

Where tenants in possession purchased the interests of some of their cotenants, and the last conveyance bears date less than 14 years before suit was brought by tenants out of possession to establish their title, the latter will not be barred of their right of recovery on the ground of laches. McClaskey v. Barr (C. C. 1891) 47 Fed. 154, decree reversed Elder v. McClaskey (1895) 70 Fed. 529, 17 C. C. A. 251.

When plaintiff is guilty of gross laches, equity will decline to interfere under a bill for discovery, as under a bill for relief. Fosdick v. Lowell Machine Shop (C. C. 1893) 58 Fed. 817.

Mere lapse of time will not bar a claim against a trust estate, valid and in full life when the trust was created, so long as the estate is unadministered, and the trust subsists. In re McKinney (D. C. 1883) 15 Fed. 912.

Mere lapse of time before bringing suit without change of circumstances will not constitute laches which will bar relief in equity. Central R. Co. of New Jersey v. Jersey City (D. C. 1912) 199 Fed. 237.

28. —— **As affecting privies in interest.**—A testatrix having been guilty of laches in not suing within 10 years during which she was free from defendant's alleged control, the suit could not be maintained by her executors. Halsey v. Cheney (1895) 68 Fed. 763, 15 C. C. A. 656.

One who holds in privity of title with another may not plead laches of the latter in asserting and taking possession of his interest. Nease v. Coal & Coke Ry. Co. (D. C. 1912) 195 Fed. 987.

29. —— **Acquiescence.**—The holders of bridge bills, who had no specific lien upon a bridge, must be considered to have lost their right to impugn a sale of the bridge, made under a consent decree in an equity suit, as fraudulent, after a lapse of 15 years. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209.

A. and B., partners, submitted the settlement of their partnership accounts to the final decision of an arbitrator. In the settlement made in 1831 the amount of certain bonds was divided by the arbitrators. B. accepted the settlement and acquiesced in it until 1850. Held, that a bill in equity by him to recover back half the amount of such bonds, on the ground that A. had never been obliged to pay the same, was barred by lapse of time. Bispham v. Price (1853) 56 U. S. (15 How.) 162, 14 L. Ed. 644.

A court of equity will not grant any relief against the purchaser of lands at a judicial sale, even though not legally made, where there is evidence that the holder of the lands assented to the sale at the time it took place, and relinquished his possession, and where he and his heirs have acquiesced in it for a period of 30 years. Slicer v. Bank of Pittsburg (1853) 57 U. S. (16 How.) 571, 14 L. Ed. 1063.

After a claimant has lain by for 20 years, during which time the defendants have, to his knowledge, been in peaceable possession, he cannot maintain a bill against them. Pindell v. Mullikin (1861) 66 U. S. (1 Black) 585, 17 L. Ed. 162.

A., pursuant to his contract, surrendered to a railroad company coupons attached to some of its bonds, whereof he was a holder, and took in exchange therefor certificates of preferred stock. The road with its franchises was subsequently sold by the trustees of a certain corporation to pay the bonds, whereof those which A. held constituted a part. Eight years after the sale he brought suit to rescind the contract on the ground of fraud, all the particulars of which were as well known to him when the sale was made as at any subsequent time. Held, that his right to relief was barred by his laches. Coddington v. Pensacola & G. R. Co. (1880) 103 U. S. 409, 26 L. Ed. 400.

Where minors interested in a manufacturing establishment, allowed the business to be continued by the surviving partners for several years, and it was then by virtue of a special law, transferred to a corporation created for the purpose, and the beneficiaries, after that, for more than seven years subsequently to coming of age, received dividends on their share of the stock and annual stated accounts, held that, by reason of such acquiescence, they could not maintain a bill in equity for an account of the estate. Hoyt v. Sprague (1880) 103 U. S. 613, 26 L. Ed. 585.

Where the commission to determine the rights of claimants to land in the Hot Springs reservation erroneously found in favor of the tenant, and the landlord expressed himself as satisfied with the justice thereof, and took no steps to assert his rights for several years, and until after the decision in Rector v. Gibbon (1884) 4 Sup. Ct. 605, 111 U. S. 276, 28 L. Ed. 427, he is not entitled to an accounting for the period between the date of the awards and filing of the bills. Goode v. Gaines (1892) 12 Sup. Ct. 839, 145 U. S. 141, 36 L. Ed. 654.

The grant under which a former owner claimed was favorably reported

on by the surveyor general to congress, which in 1851 confirmed it, but no patent issued till 1876. Held, that collateral heirs of such deceased owner, having made no claim to the land until 1880, and apparently acquiesced in the claims of those in possession, though residing in the vicinity, were barred by laches from claiming that the will made by such former proprietor was invalid. Gildersleeve v. New Mexico Min. Co. (1896) 16 Sup. Ct. 663, 161 U. S. 573, 40 L. Ed. 812.

One who had a settlement with his partner, and, for more than three years after he must have known of any fraud in the settlement, continued to enjoy the profits arising from the labor of such partner, cannot invoke the aid of equity to set aside the settlement on the ground of fraud. Baker v. Cummings (1898) 18 Sup. Ct. 367, 169 U. S. 189, 42 L. Ed. 711, reversing (1896) 8 App. D. C. 515.

Under the Arkansas statutes where a meeting of the heirs of the deceased intestate is held, representatives of four-fifths of the interests in the estate being present, and it is agreed that certain persons shall be appointed administrators, one of whom is to reside on and manage the realty, neither those who are present, and consent to the agreement, nor those who are absent, but acquiesce, and make no objection for 12 years, can refuse to be bound thereby. And the heirs, after so long a time, cannot obtain relief in equity on the ground that orders made by the probate court for the renting of the realty and for other purposes, in pursuance of the agreement, are without authority in law, unless it appears that fraud was practiced upon the probate court or upon the heirs. Smith v. Worthington (1893) 53 Fed. 977, 4 C. C. A. 130.

A stockholder seeking to enforce rights of the corporation against its managing officer for diversion of funds arising from an unauthorized "swapping" of checks, who alleges that, being a director, he protested against such acts on first learning thereof, but that they were nevertheless continued for two years, convicts himself of laches, if he fails to aver further that he was ignorant of such continuance. Streight v. Junk (1893) 59 Fed. 321, 8 C. C. A. 137.

In a case of gross laches in prosecuting, or long acquiescence in the assertion of adverse rights, where the statute of limitations does not apply, the court will consider the claim barred. Sullivan v. Portland & K. R. Co. (C. C. 1874) Fed. Cas. No. 13,596.

Where a bill to set aside an alleged fraudulent contract states that the facts concerning the fraud were communicated to the plaintiff nearly three years prior thereto, and it appears that in the meantime, at intervals of every three months, he had accepted payment on a series of notes given under the contract, the delay is fatal to his right to equitable relief. Richardson v. Walton (C. C. 1892) 49 Fed. 888, decree affirmed (1894) 61 Fed. 535, 9 C. C. A. 604.

Where a foreclosure suit had been pending against a corporation for over nine years, and was then before a master upon an application for distribution of the fund and a settlement of the receiver's accounts, held, that a stockholder, who then, for the first time, appeared for the purpose of objecting to the validity of the mortgage, was guilty of laches. Boston Safe-Deposit & Trust Co. v. American Rapid Tel. Co. (C. C. 1895) 67 Fed. 165.

30. —— **What constitutes unreasonable delay.**—See Lansdale v. Smith (1882) 1 Sup. Ct. 350, 106 U. S. 391, 27 L. Ed. 219; Richards v. Mackall (1888) 8 Sup. Ct. 437, 124 U. S. 183, 31 L. Ed. 396; Wetzel v. Minnesota Ry. Transfer Co. (1898) 18 Sup. Ct. 307, 169 U. S. 237, 42 L. Ed. 730 (affirming decree [1894] 65 Fed. 23, 12 C. C. A. 490); Hart v. Buckner (1890) 54 Fed. 925, 5 C. C. A. 1; Hoffman v. Knox (1892) 50 Fed. 484, 1 C. C. A. 535 (reversing decree Knox v. Columbia Liberty Iron Co. [C. C. 1889] 42 Fed. 378); Sagadahoc Land Co. v. Ewing (1895) 65 Fed. 702, 13 C. C. A. 83; Carter v. Couch (1897) 84 Fed. 735, 28 C. C. A. 520; Wheeling Bridge & Terminal Ry. Co. v. Reymann Brewing Co. (1898) 90 Fed. 189, 32 C. C. A. 571; Citizens' Savings & Trust Co. v. Belleville & S. I. R. Co. (1907) 157 Fed. 73, 84 C. C. A. 577; United States Trust Co. of New York v. Chicago Terminal Transfer R. Co. (1911) 188 Fed. 292, 110 C. C. A. 270; Northrup v. Browne (1913) 204 Fed. 224, 122 C. C. A. 496; Waller v. Texas & P. Ry. Co. (1915) 229 Fed. 87, 143 C. C. A. 363; Northern Pac. R. Co. v. Kindred (C. C. 1881) 14 Fed. 77; Glenn v. Dorsheimer (C. C. 1885) 24 Fed. 536 (judgment reversed Same v. Liggett [1890] 10 Sup. Ct. 867, 135 U. S. 533, 34 L. Ed. 262); Young v. Clarendon Tp. (C. C. 1886) 26 Fed. 805 (decree affirmed [1889] 10 Sup. Ct. 107, 132 U. S. 340, 33 L. Ed. 356); St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. (C. C. 1888) 33 Fed. 440 (decree affirmed [1892] 12 Sup. Ct. 953, 145 U. S. 393, 36 L. Ed. 748); Hazard v. Credit Mobilier of America (C. C. 1889) 38 Fed. 195; New Orleans Canal & Banking Co. v. Reynolds (C. C. 1889) 39 Fed. 373 (appeal dismissed [1893] 14 Sup. Ct. 1150, 154 U. S. 511, 38 L. Ed. 1079); Merrill v. Marker (C. C. 1891) 47 Fed. 138; Buckner v. Hart (C. C. 1892) 52 Fed. 835; Reed v. Dingess (C. C. 1893) 56 Fed. 171; Kemp v. Nickerson (C. C. 1895) 66 Fed. 682; Southern Pac. R. Co. v. Groeck (C. C. 1895) 68 Fed. 609; Lant

v. Manley (C. C. 1895) 71 Fed. 7 (decree reversed [1896] 75 Fed. 627, 21 C. C. A. 457); Continental Nat. Bank v. Heilman (C. C. 1897) 81 Fed. 36 (decree affirmed [1898] 86 Fed. 514, 30 C. C. A. 232); Weber v. Gratton (C. C. 1898) 85 Fed. 808; Central R. & Banking Co. v. Farmers' Loan & Trust Co. (C. C. 1901) 112 Fed. 81; Gale v. Southern Building & Loan Ass'n (C. C. 1902) 117 Fed. 732; York Haven Paper Co. v. York Haven Water & Power Co. (C. C. 1911) 194 Fed. 255 (decree reversed [C. C. A. 1912] 201 Fed. 270); Holmes v. Cleveland, C. & C. R. Co. (D. C. 1861) 93 Fed. 100; Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co. (D. C. 1882) 14 Fed. 699.

31. **Prejudice from delay.**—The application of the doctrine of courts of equity, to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time, does not depend upon mere lapse of time, but upon change of situation during neglectful repose, rendering it inequitable to afford relief. O'Brien v. Wheelock (1902) 22 Sup. Ct. 354, 184 U. S. 450, 46 L. Ed. 636, affirming decree (1899) 95 Fed. 883, 37 C. C. A. 309.

To sustain the defense of laches, there may not only have been unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but also some change in the condition or relations of the property or parties occurring during the period of delay which would make it inequitable to permit the claim of the plaintiff to be enforced. London & San Francisco Bank v. Dexter, Horton & Co. (1903) 126 Fed. 593, 61 C. C. A. 515, writ of certiorari denied Dexter, Horton & Co. v. London & San Francisco Bank (1904) 24 Sup. Ct. 856, 194 U. S. 631, 48 L. Ed. 1158.

In cases of fraud it usually takes something besides mere delay to make a chancellor close the door to relief, such as a change of conditions brought about by complainant's apparent acquiescence in the wrong. Citizens' Savings & Trust Co. v. Illinois Cent. R. Co. (1910) 182 Fed. 607, 105 C. C. A. 145, reversing decree (C. C. 1909) 173 Fed. 556.

While the lapse of time is an element which courts of equity consider in sustaining or refusing to sustain the defense of laches, time alone ordinarily is not sufficient to constitute the defense, but, in addition thereto, the situation of the parties must have so changed as to render the prosecution of the suit inequitable. Schwartz v. Loftus (1914) 216 Fed. 320, 132 C. C. A. 464.

Where, during a delay longer than that fixed by the statute of limitations, there is a loss of evidence by the disappearance of an important witness, and great changes take place in the value of the property involved and the rights of an innocent purchaser, such delay amounts to a fatal laches. Weniger v. Success Mining Co. (1915) 227 Fed. 548, 142 C. C. A. 180.

In order that "laches" may bar a suit in equity, it must appear that, beyond the mere lapse of time, it would be inequitable in some matter of substance to permit the claimant to assert his alleged right as against those having enjoyed the same in repose in the meanwhile. Stuart v. Holland (C. C. 1910) 179 Fed. 969.

32. —— **Abandonment or invalidity of claim.**—Equity will not interfere where a set-off claimed by complainant is old and stale, with regard to which he has observed a long silence, and where the correctness of the set-off is a matter of grave doubt. Dade v. Irwin (1844) 43 U. S. (2 How.) 383, 11 L. Ed. 308.

A court of equity will not grant relief to a party who has been guilty of long acquiescence and laches while out of possession, and who can show no actual hindrance or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. Wagner v. Baird (1849) 48 U. S. (7 How.) 234, 12 L. Ed. 681.

In considering the question of laches by a stockholder in bringing a bill to set aside an alleged fraudulent decree foreclosing a railroad mortgage, it is a strong circumstance against complainant that he does not show that his interest would receive any benefit from the granting of the relief asked, for a court of equity will not do a vain thing, nor will it entertain a bill merely to vindicate an abstract principle of justice, or to compel defendants to buy their peace. Foster v. Mansfield, C. & L. M. R. Co. (1892) 13 Sup. Ct. 28, 146 U. S. 88, 36 L. Ed. 899, affirming decree (C. C. 1888) 36 Fed. 627.

When one who claims to be a creditor of a deceased person neglects for more than three years to present his claim, or to bring suit upon the demand, of which the representatives of the decedent are ignorant, and in that time the collateral securities held for the claim depreciate from more than its amount to much less, and the joint maker of the note has become insolvent, the creditor is guilty of inexcusable laches, which bar him from proceeding in equity against the devisees of the decedent. Continental Nat. Bank v. Heilman (1898) 86 Fed. 514, 30 C. C. A. 232, affirming (1897) 81 Fed. 36, and certiorari denied (1898) 19 Sup. Ct. 884, 171 U. S. 690, 43 L. Ed. 1180.

Where plaintiff's claim rests on an unrecorded security trust created nearly 14 years before suit brought, and affects the title to a mining claim, and the evidence showed that plaintiff attached little value to such claim and practically abandoned it though they remained within easy access to the

property, an action to recover the same is barred by laches. Reed v. Munn (1906) 148 Fed. 737, 80 C. C. A. 215, writ of certiorari denied Munn v. Reed (1907) 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353.

33. —— **Prejudice to original parties.** —Where the devisees, living in Tennessee, of a headright certificate to land in Texas, know of the appointment of an ancillary administrator in Texas, and of his sale of the certificate, and take no steps to set it aside or to assert their rights for 13 years, except by taking possession of a part of the land located under the certificate, they are barred by their laches from attacking the sale; the original parties to it being dead, and no party interested in the land when the suit is brought having been implicated in the alleged fraudulent sale by the administrator. Hanner v. Moulton (1891) 11 Sup. Ct. 408, 138 U. S. 486, 34 L. Ed. 1032, affirming (C. C. 1885) 23 Fed. 5.

Thirteen years' delay, after an act authorizing the construction of a levee has been declared unconstitutional, in filing a bill against the owners of lands benefited to enforce contribution for money loaned to make the improvements, held a bar to the suit, where the condition of the parties had greatly changed. O'Brien v. Wheelock (C. C. 1897) 78 Fed. 673.

An application to reform a deed should not be entertained after the lapse of 11 years, where all persons had dealt with the land on the theory that the description was correct. 'U. S. v. Payson (D. C. 1863) Fed. Cas. No. 16,016.

34. —— **Prejudice to defendants.**— Defendant, a land-grant railroad company, having finished its road, laid claim to certain lands. The lands were certified to the state, which between 1867 and 1876 patented the same to defendant. Plaintiff took no steps to claim the land until 1880, when it brought suit in a state court, which suit was dismissed in 1883. Nothing further was done till 1887, when the present suit was begun to recover the same lands. Held, that the claim was barred by laches. Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co. (1893) 55 Fed. 690. 5 C. C. A. 249, following St. Paul, S. & T. F. Ry. Co. v. Sage (1892) 49 Fed. 315, 1 C. C. A. 256.

Where a defendant has suffered no prejudice by delay in bringing an action, and the plaintiff's demand is not barred by the statute of limitations, and the latter also furnishes a satisfactory excuse for not commencing the suit earlier, a demurrer will not lie for laches. Pacific R. R. v. Atlantic & P. R. Co. (C. C. 1884) 20 Fed. 277.

In a suit in equity to have the patent to certain land, issued in the name of defendant, declared to be held in trust for complainants, where the evidence shows that defendant obtained the legal title without notice of complainant's equitable rights, and that, for more than 20 years before bringing suit, complainant, and those under whom he claims, had actual notice of defendant's occupancy and adverse claim under color of title, and that during all that time they stood quietly by, and permitted defendant to put his money, labor, and skill into the land, the court will refuse relief on the ground of laches. Underwood v. Dugan (C. C. 1885) 24 Fed. 74, decree affirmed (1891) 11 Sup. Ct. 618, 139 U. S. 380, 35 L. Ed. 197.

To support the defense of laches, it need not be shown that defendant has been injured by the delay. Jones v. Perkins (C. C. 1896) 76 Fed. 82.

One who, after surrendering his note and mortgage to be canceled, in order that a new mortgage could be made for the purpose of paying off his debt, and who failed for nearly two years to investigate the reason why the money was not paid him, and thereby made it possible for the agent of the money lenders to embezzle the money forwarded to him to be applied to the loan, held guilty of laches, preventing him from recovering the sum from them. Leonard v. Marshall (C. C. 1897) 82 Fed. 396.

35. —— **Change in value of property.** —A patent title under which there has been 14 years' occupation, during which the land has greatly risen in value, is not to be impeached by one who might have attacked it at any time during those 14 years. Harkness v. Underhill (1861) 66 U. S. (1 Black) 316, 17 L. Ed. 208.

Where a person, in violation of the letter and policy of the law, but without actual intent to defraud, buys from a third person inalienable land scrip issued to an Indian, and originally obtained from him by fraud, and locates and procures title thereunder, equity does not require that after the lapse of 28 years, and after the land has increased a thousandfold in value, it shall be surrendered to the Indian's heirs, especially when they have failed to show that they are entirely free from laches. Felix v. Patrick (1892) 12 Sup. Ct. 862, 145 U. S. 317, 36 L. Ed. 719, affirming (C. C. 1888) 36 Fed. 457.

Two parcels of land were conveyed to a corporation by the same deed; one, of 2,000 acres, and the other, to contain about 100 acres, to be surveyed off the western side of a tract lying between a river and the first-named parcel, and to be bounded on the south by it. In 1883 defendant purchased the remainder of the tract from which the 100-acre parcel was taken, without notice of any mistake in the survey, and made large expenditures thereon. In

1885 plaintiff filed a suit to set aside the survey, claiming that the original intention was to connect the 2,000-acre tract with the river by means of the 100-acre tract. Held, that he was guilty of laches, and not entitled to relief. Halstead v. Grinnan (1894) 14 Sup. Ct. 641, 152 U. S. 412, 38 L. Ed. 495.

Waiting more than 10 years before asserting a right to redeem land, and standing silently by while one claiming absolute ownership removes old buildings, and erects an expensive new one, constitute laches. Schlawig v. Purslow (1894) 59 Fed. 848, 8 C. C. A. 315.

One claiming an interest in mining property that is subject to great and sudden fluctuations in value, or the value of which is uncertain, cannot remain silent and inactive, awaiting developments, while those in possession are expending money in its development, and a court of equity will deny him relief, where he has failed to bring suit within a comparatively short period. Curtis v. Lakin (1899) 94 Fed. 251, 36 C. C. A. 222.

A complainant, who claimed an equitable interest in certain coal lands through purchase of the rights of a part owner who had previously consented to their conveyance, but who took no steps to assert such interest for more than three years and until the grantees by large expenditures had greatly increased the value of the lands, was barred by laches from then maintaining suit in equity to recover such interest. Jackson v. Jackson (1909) 175 Fed. 710, 99 C. C. A. 286.

A bill by one claiming under part of the locators of a mining claim, seeking relief against fraud by which the other locators obtained a patent to the entire claim, held demurrable on the ground of laches, having been filed 34 years after the beginning of the fraud, and 28 years after its consummation, where at the commencement of the suit the property was worth $500,000. Socrates Quicksilver Mines v. Carr Realty Co. (1904) 130 Fed. 293, 64 C. C. A. 539.

A suit for misappropriation of property held not barred by laches, where it was brought within the analogous limitation period, though there had been an increase in the value of the property, unaccompanied by any other material changes in the situation. Wilson v. Colorado Mining Co. (1915) 227 Fed. 721, 142 C. C. A. 245.

Where, in a proceeding to obtain a transfer of the legal title to a large quantity of swamp land, alleged to be held by the defendant county in trust for the complainant, it appeared that the entries under which complainant claims were made more than 30 years before and that for more than 20 years the county had openly and persistently denied the trust, and had made sales and conveyances of large quantities of the lands to persons who have made improvements thereon, the complainant will be held guilty of laches, and the bill dismissed. Lemoine v. Dunklin County (C. C. 1891) 46 Fed. 219, decree affirmed (1892) 51 Fed. 487, 2 C. C. A. 343.

Notwithstanding undue advantage had been taken of complainant, seeking to set aside a contract relating to mining lands, she was held not entitled to relief in equity, for laches; the doctrine of laches having a special application to contracts and transactions affecting mineral lands, which are exposed to the utmost fluctuations in value. Kinne v. Webb (C. C. 1892) 49 Fed. 512, decree affirmed (1893) 54 Fed. 34, 4 C. C. A. 170.

A soldier's widow received from the United States a land warrant, which she attempted to assign. The assignee located the warrant, duly obtained a patent, and the warrant was duly filed in Washington. The land increased greatly in value, and improvements were placed thereon, and more than 40 years elapsed from the date of the assignment. Held, that a court of equity would not entertain a suit by the assignor and her descendants to set aside the assignment as invalid, and to recover possession of the property, but would quiet respondents' title against such descendants. Wetzel v. Minnesota Transfer Ry. Co. (C. C. 1893) 56 Fed. 919, following Felix v. Patrick (1892) 12 Sup. Ct. 862, 145 U. S. 317, 36 L. Ed. 719, and decree affirmed (1894) 65 Fed. 23, 12 C. C. A. 490.

In a suit to recover mining stock alleged to have been fraudulently acquired by defendant, and to be still in his possession or under his control, a delay of two years before suit does not constitute laches barring relief, solely because the stock has increased in value, where such increase is not due to any action or expenditure of defendant. Brissell v. Knapp (C. C. 1907) 155 Fed. 809.

36. —— **Loss of evidence or death of witnesses.**—When the lapse of time has been great, the witnesses are dead, and the proofs lost or destroyed, a court of equity will refuse to undertake the task of ascertaining the facts and affording a remedy. Randolph v. Ware (1806) 7 U. S. (3 Cranch) 503, 2 L. Ed. 512; Prevost v. Gratz (1821) 19 U. S. (6 Wheat.) 481, 5 L. Ed. 311 (reversing [C. C. 1816] Fed. Cas. No. 11,406); McKnight v. Taylor (1843) 42 U. S. (1 How.) 161, 11 L. Ed. 86; Clarke v. Boorman (1873) 85 U. S. (18 Wall.) 493, 21 L. Ed 904; Foster v. Mansfield, C. & L. M. R. Co. (1892) 13 Sup. Ct. 28, 146 U. S. 88, 36 L. Ed. 899 (affirmed [C. C. 1888] 36 Fed. 627); Percy v. Cockrill (1893) 53 Fed. 872, 4 C. C. A. 73; Hinchman v. Kelley (1893) 54 Fed. 63, 4 C. C. A. 189 (af-

firming judgment [C. C. 1892] 49 Fed. 492); Sage v. Winona & St. P. R. Co. (1893) 58 Fed. 297, 7 C. C. A. 237 (following St. Paul, S. & T. F. Ry. Co. v. Sage [1892] 1 C. C. A. 256, 49 Fed. 315, and appeal dismissed [1895] 16 Sup. Ct. 1205, 163 U. S. 702, 41 L. Ed. 311); Hiller v. Ladd (1898) 85 Fed. 703, 29 C. C. A. 394 (certiorari denied [1899] 19 Sup. Ct. 885, 173 U. S. 703, 43 L. Ed. 1184); Speidell v. Henrici (C. C. 1883) 15 Fed. 753 (decree affirmed Speidel v. Same [1887] 7 Sup. Ct. 610, 120 U. S. 377, 30 L. Ed. 718); U. S. v. Beebee (C. C. 1883) 17 Fed. 36 (decree affirmed U. S. v. Beebee [1888] 8 Sup. Ct. 1083, 127 U. S. 338, 32 L. Ed. 121); Kenney v. Contner (C. C. 1890) 43 Fed. 705; Dugan v. O'Donnell (C. C. 1895) 68 Fed. 983.

37. —— **Rights of third persons.**—A court of equity will not interfere to relieve a party who has long slept upon his rights, if he has suffered the rights of third persons to accrue through his negligence. Bowman v. Wathen (1843) 42 U. S. (1 How.) 189, 11 L. Ed. 97; U. S. v. Moore (1851) 53 U. S. (12 How.) 209, 13 L. Ed. 958; De Lane v. Moore (1852) 55 U. S. (14 How.) 253, 14 L. Ed. 409; City of New Albany v. Burke (1870) 78 U. S. (11 Wall.) 96, 20 L. Ed. 155; Hall v. Law (1880) 102 U. S. 461, 26 L. Ed. 217; Graham v. Boston, H. & E. R. Co. (1886) 6 Sup. Ct. 1009, 118 U. S. 161, 30 L. Ed. 196 (affirming decree [C. C. 1883] 14 Fed. 753); Jencks v. Quidnick Co. (1890) 10 Sup. Ct. 655, 135 U. S. 457, 34 L. Ed. 200; Underwood v. Dugan (1891) 11 Sup. Ct. 618, 139 U. S. 380, 35 L. Ed. 197 (affirming [C. C. 1885] 24 Fed. 74); Galliher v. Cadwell (1892) 12 Sup. Ct. 873, 145 U. S. 368, 36 L. Ed. 738 (affirming [1888] 18 Pac. 68, 3 Wash. T. 501); Johnston v. Standard Min. Co. (1893) 13 Sup. Ct. 585, 148 U. S. 360, 37 L. Ed. 480 (affirming [C. C. 1889] 39 Fed. 304); Metropolitan Nat. Bank v. St. Louis Dispatch Co. (1893) 13 Sup. Ct. 944, 149 U. S. 436, 37 L. Ed. 799 (affirming decree [C. C. 1888] 36 Fed. 722); Halstead v. Grinnan (1894) 14 Sup. Ct. 641, 152 U. S. 412, 38 L. Ed. 495; Alsop v. Riker (1894) 15 Sup. Ct. 162, 155 U. S. 448, 39 L. Ed. 218 (reversing [C. C. 1886] 27 Fed. 251); Evers v. Watson (1895) 15 Sup. Ct. 430, 156 U. S. 527, 39 L. Ed. 520; Johnson v. Atlantic, G. & W. I. Transit Co. (1895) 15 Sup. Ct. 520, 156 U. S. 618, 39 L. Ed. 556; Abraham v. Ordway (1895) 15 Sup. Ct. 894, 158 U. S. 416, 39 L. Ed. 1036; Willard v. Wood (1896) 17 Sup. Ct. 176, 164 U. S. 502, 41 L. Ed. 531; Merrill v. National Bank of Jacksonville (1899) 19 Sup. Ct. 360, 173 U. S. 131, 43 L. Ed. 640 (affirming decrees Merrill v. First Nat. Bank [1896] 75 Fed. 148, 21 C. C. A. 282, and Same v. National Bank of Jacksonville [1896] 78 Fed. 208, 24 C. C. A. 63); O'Brien v. Wheelock (1902) 22 Sup. Ct. 354, 184 U. S. 450, 46 L. Ed. 636 (affirming decree [1899] 95 Fed. 883, 37 C. C. A. 309); St. Paul, S. & T. F. Ry. Co. v. Sage (1892) 49 Fed. 315, 1 C. C. A. 256 (reversing Sage v. St. Paul, S. & T. F. Ry. Co. [C. C. 1891] 44 Fed. 817, and Hastings & D. Ry. Co. v. Same [C. C. 1887] 32 Fed. 821); Kinne v. Webb (1893) 54 Fed. 34, 4 C. C. A. 170 (affirming decree [C. C. 1892] 49 Fed. 512); Fuller v. Montague (1893) 59 Fed. 212, 8 C. C. A. 100 (affirming [C. C. 1892] 53 Fed. 204); Helfenstein v. Reed (1894) 62 Fed. 214, 10 C. C. A. 327; Church of Christ at Independence, Mo., v. Reorganized Church of Jesus Christ of Latter-Day Saints (1895) 70 Fed. 179, 17 C. C. A. 387 (reversing decree Reorganized Church of Jesus Christ of Latter Day Saints v. Church of Christ [C. C. 1894] 60 Fed. 937, and petition for rehearing denied [1895] 71 Fed. 250, 17 C. C. A. 397); Swift v. Smith (1897) 79 Fed. 709, 25 C. C. A. 154; Curtis v. Lakin (1899) 94 Fed. 251, 36 C. C. A. 222; Curtis v. Lakin (1899) 94 Fed. 251, 36 C. C. A. 222; McNeil v. McNeil (1909) 170 Fed. 289, 95 C. C. A. 485 (affirming decree [C. C. 1897] 78 Fed. 834); Babcock v. Pettibone (C. C. 1874) Fed. Cas. No. 700; Etting v. Marx's Ex'r (C. C. 1880) 4 Fed. 673; Fraker v. Houck (C. C. 1888) 36 Fed. 403; Keely v. Weir (C. C. 1889) 38 Fed. 291; Johnston v. Standard Min. Co. (C. C. 1889) 39 Fed. 304 (decree affirmed [1893] 13 Sup. Ct. 585, 148 U. S. 360, 37 L. Ed. 480); Norton v. Kellogg (C. C. 1890) 41 Fed. 452; De Witt v. Chicago, B. & Q. Ry. Co. (C. C. 1890) 41 Fed. 484; Henry v. Suttle (C. C. 1890) 42 Fed. 91; Van Vleet v. Sledge (C. C. 1891) 45 Fed. 743; Naddo v. Bardon (C. C. 1891) 47 Fed. 782 (decree affirmed [1892] 51 Fed. 493, 2 C. C. A. 335); Nantahala Marble & Talc Co. v. Thomas (C. C. 1896) 76 Fed. 59; The Walter M. Fleming (D. C. 1881) 9 Fed. 474.

38. **Excuses.**—A lapse of 46 years was held a bar to relief in equity, although the creditor, during all that time, supposed the debtor to be insolvent, and not worth pursuing, where it appeared that for a considerable portion of the time he was in a condition to pay, and the creditor might, by reasonable diligence, have discovered it, and recovered the money by a suit at law. Maxwell v. Kennedy (1850) 49 U. S. (8 How.) 210, 12 L. Ed. 1051.

Where defendants foreclosed and got possession of land in 1862, and plaintiff did not file his bill for the recovery of the land until 1884, it was no excuse for the delay that he could not get a lawyer who could put him in possession of the facts. Norris v. Haggin (1890) 10 Sup. Ct. 942, 136 U. S. 386, 34 L. Ed. 424, affirming (C. C. 1886) 28 Fed. 275.

The mere institution of a suit does not, of itself, relieve a person from the

charge of laches, and if he fail to prosecute it with diligence the consequences are the same as if it had never been instituted. Johnston v. Standard Min. Co. (1893) 13 Sup. Ct. 585, 148 U. S. 360, 37 L. Ed. 480, affirming decree (C. C. 1889) 39 Fed. 304.

In an action to recover land, the fact that defendant was complainant's trustee under an express trust will not avoid the effect of laches where the bill itself alleges that more than 10 years before it was filed defendant claimed that complainant had lost all right to the subject of the trust, and refused to account to him. Naddo v. Bardon (1892) 51 Fed. 493, 2 C. C. A. 335, affirming (C. C. 1891) 47 Fed. 782.

Delay of a landowner in bringing suit to annul a tax deed, which is utterly void for failure to comply with the requirements of the statute, and which consequently does not affect his title, is not imputable to him as laches. Cook v. Lasher (1896) 73 Fed. 701, 19 C. C. A. 654.

The delay of plaintiffs in commencing suit against their co-partner for dissolution and an accounting, and to declare a third person purchasing partnership property from him a trustee, is not excused by the fact that the partnership agreement had been misplaced, and was not found until shortly before the suit was commenced. Curtis v. Lakin (1899) 94 Fed. 251, 36 C. C. A. 222.

A court of equity will not refuse to reform a release in aid of an action at law for a personal injury on the ground of laches in commencing the suit, where a reasonable excuse is shown, and it does not appear that the delay will result in the loss of material evidence to the defendant in the action. Wabash Ry. Co. v. Lumley (1899) 96 Fed. 773, 37 C. C. A. 584.

Where the rightful owners of a Louisiana land claim, on learning of an adverse claim thereto by others who had obtained certificates thereon, at once notified such claimants of their intention to assert their rights, they were not chargeable with laches for a delay in bringing suit during the time that both parties were endeavoring to obtain an adjustment of their conflicting claims by the land department. Hodge v. Palms (1902) 117 Fed. 396, 54 C. C. A. 570.

One who has legal title is not guilty of laches, which will prevent him from asserting it in defense to a suit in equity to deprive him of his title, by the fact that he did not institute any suit or take affirmative action to avoid the equities of the complainant. Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co. (1903) 126 Fed. 46, 60 C. C. A. 588.

A suit cannot be maintained in a federal court of equity to recover stock in a mining company under a written contract after a delay of nine years, where the only excuses for the delay are that complainant lived some 300 miles from the office of the company, that during a part of the time the company had ceased working its mine, and that for about four years the contract was lost, it having been recovered more than a year before the suit was brought. Moore v. Nickey (1904) 133 Fed. 289, 66 C. C. A. 667; Hudnutt v. Britannia Min. Co. (1904) 133 Fed. 1020, 66 C. C. A. 679.

The defense of laches is affected by the facts whether rights of innocent persons have intervened, whether witnesses are dead or have disappeared, whether the situation of the parties has changed, and other like considerations. Cunningham v. Pettigrew (1909) 169 Fed. 335, 94 C. C. A. 457.

A bill in equity will be dismissed, where long and gross negligence of plaintiffs in seeking relief is unexplained by sufficient equitable reasons and circumstances. Taylor v. Holmes (C. C. 1882) 14 Fed. 498, decree affirmed (1888) 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179.

A delay of more than five years in bringing suit to redeem pledged property does not constitute laches, where the pledgee has been guilty of breach of trust, and he still holds the pledged property, which has largely increased in value, and complainant had previously brought suit to redeem, which had been decided against him. Gilmer v. Morris (C. C. 1890) 43 Fed. 456.

A delay of 20 years in proceeding to enforce a judgment against land does not render the holder thereof guilty of laches, where there were prior judgments that were liens on the land for more than its value, some of which a purchaser of the land had bought, and was holding against it. Hill v. Gordon (C. C. 1891) 45 Fed. 276, appeal dismissed (1893) 13 Sup. Ct. 1047, 149 U. S. 775, 37 L. Ed. 963.

A bill to cancel a release of all claims on account of injuries alleged that it was given under a mistake caused by the statements of defendant's physician that the injuries were slight, but that five months later, on being told that the right shoulder was permanently injured, plaintiff wrote defendant's surgeon that he would not consider himself bound by the release, and would insist on "his rights," but did not assert a purpose of rescinding till three years later, when he brought suit. Held, that he was guilty of laches. Lumley v. Wabash Ry. Co. (C. C. 1895) 71 Fed. 21, decree reversed (1896) 76 Fed. 66, 22 C. C. A. 60.

Failure of a cestui que trust for 12 years to inquire what disposition had been made of her funds, though informed by the trustee that third parties were endeavoring to defraud him of

them, held to be laches, the trustee having died in the meantime, though her inaction was alleged to be due to his advice not to talk with any one on the subject. McMonagle v. McGlinn (C. C. 1898) 85 Fed. 88.

39. —— **Personal disabilities.**—The mere fact that the cestui que trust of land is an Indian living in the tribal relation, and therefore incapable of suing in the federal courts, while of great force, is not conclusive evidence that a delay of 28 years was not laches, especially where the land in question is located in Nebraska, whose courts are open to an Indian. Felix v. Patrick (1892) 12 Sup. Ct. 862, 145 U. S. 317, 36 L. Ed. 719, affirming (C. C. 1888) 36 Fed. 457.

Lapse of time does not operate against minors, especially where they reside in a different state, and had no knowledge of their rights. Ware v. Brush (C. C. 1839) Fed. Cas. No. 17,171; Copen v. Flesher (C. C. 1861) Fed. Cas. No. 3,211.

A claim is rendered stale after 10 years from removal of involuntary disability of infancy, notwithstanding further disability of coverture. Bedilian v. Seaton (C. C. 1860) Fed. Cas. No. 1,218.

A bill by a married woman against an insurance company held to fail to show any ground for equitable relief; she being all the time capable, by the law of the place where she resided, of making contracts, and of maintaining an action on them. Steines v. Manhattan Life Ins. Co. (C. C. 1888) 34 Fed. 441.

40. —— **Pecuniary condition of complainant.**—Plaintiff's poverty will not excuse delay in the assertion of his rights. Leggett v. Standard Oil Co. (1893) 13 Sup. Ct. 902, 149 U. S. 287, 37 L. Ed. 737 (affirming decree [C. C. 1889] 38 Fed. 842); Naddo v. Bardon (1892) 51 Fed. 493, 2 C. C. A. 335 (affirming [C. C. 1891] 47 Fed. 782); Bower v. Stein (1910) 177 Fed. 673, 101 C. C. A. 299 (affirming decree [C. C. 1908] 165 Fed. 232); De Estrada v. San Felipe Land & Water Co. (C. C. 1891) 46 Fed. 280; Lumley v. Wabash Ry. Co. (C. C. 1895) 71 Fed. 21 (decree reversed [1896] 76 Fed. 66, 22 C. C. A. 60).

41. —— **Absence or nonresidence.**—Where a bill showed that nearly 10 years had elapsed since a conveyance, but alleged that since the sale defendant had been absent from the state "for a period aggregating four years" whether the conveyance be regarded as a deed or mortgage, complainant, in the absence of excuse for the delay must be deemed guilty of laches. De Martin v. Phelan (1892) 51 Fed. 865, 2 C. C. A. 523 affirming (C. C. 1891) 47 Fed. 761, and certiorari denied (1893) 13 Sup. Ct. 1045, 149 U. S. 771, 37 L. Ed. 966.

The mere fact that a nonresident owner of wild lands, who had reason to suppose the taxes thereon were paid, had delayed, for a period beyond that of the statute of limitations, to assert his claims against one who had held the lands under a tax deed, did not constitute laches, there being no change in the condition of the property or parties. Bartlett v. Ambrose (1897) 78 Fed. 839, 24 C. C. A. 397.

It was no excuse for complainant's laches in failing to promptly sue to set aside a foreclosure decree that she was a resident of a distant state. Bower v. Stein (1910) 177 Fed. 673, 101 C. C. A. 299, affirming decree (C. C. 1908) 165 Fed. 232.

A religious body was driven from a state by military force, and for many years its members were not allowed to return. Some 40 years afterwards, land within the state, which was held in trust for this body, was occupied by an adverse claimant, and within 10 years thereafter its representatives filed a bill against such occupants to establish the trust. Held, that the claim was not stale, nor was there any laches on complainant's part. Reorganized Church of Jesus Christ of Latter-Day Saints v. Church of Christ (C. C. 1894) 60 Fed. 937.

At different times between 1890 and 1893 letters were addressed to defendant at the place where she was supposed to reside, but no answers were received, and an attorney employed to locate her was unable to do so; but no other efforts were made to prosecute the claim until suit was instituted in August, 1901. Held, that an application by the plaintiff for leave to file a replication nunc pro tunc after an order dismissing the cause for failure to file the same should be denied on the ground that plaintiff's claim was barred by laches. Potts v. Alexander (C. C. 1902) 118 Fed. 885.

42. —— **Fraud, concealment, or other act of adverse party.**—Where fraud is imputed and proved, length of time ought not to bar relief. Prevost v. Gratz (1821) 19 U. S. (6 Wheat.) 481, 5 L. Ed. 311; Gratz v. Prevost (1821) 19 U. S. (6 Wheat.) 481, 5 L. Ed. 311.

Where fraud was used to enhance the price of land sold at auction, and the sale was made January 1, 1836, but the fraud was not discovered until 1840, and a bill for relief against the sale was filed in 1841, it was held that there was no sufficient objection to relief owing to lapse of time. Veazie v. Williams (1850) 49 U. S. (8 How.) 134, 12 L. Ed. 1018, reversing (C. C. 1845) Fed. Cas. No. 16,907.

A party who, in reliance upon another, places his property and business interests in his hands, is not guilty of laches if, misled by the errors and mis-

statements of the other in regard to the condition of the account between them, so that he is made to believe the balance is against him, he delays bringing suit to recover his rights until he learns the true state of the case. Loring v. Palmer (1886) 6 Sup. Ct. 1073, 118 U. S. 321, 30 L. Ed. 211.

Where, in excuse of a delay of eight years in bringing suit to avoid a release of demands under a contract, on the ground of inadequacy of consideration and fraudulent concealment of facts, it was alleged that complainant was constrained to execute and rest upon the release because it feared that litigation to recover its demands would imperil its receipt of future royalties to become due under the contract (which were in fact actually paid by defendant), held, that this excuse for laches was entitled to less favorable consideration than if complainant's conduct had been that of mere inaction. Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co. (1895) 16 Sup. Ct. 94, 159 U. S. 423, 40 L. Ed. 205, citing Hager v. Thompson (1861) 1 Black, 80, 17 L. Ed. 41; Lane & Bodley Co. v. Locke (1893) 14 Sup. Ct. 78, 150 U. S. 201, 37 L. Ed. 1049.

Where plaintiff performed services under contract with intestate until her death, in 1889, and did not know until her death that she had failed to make a will in his favor as agreed, the fact that the advances by him under the contract were made from 1879 to 1884, and the bill was not filed until 1889, did not show laches on his part. Townsend v. Vanderwerker (1895) 16 Sup. Ct. 258, 160 U. S. 171, 40 L. Ed. 383.

A delay of nine years and four months from the consummation of the fraud, and of four years from the discovery thereof, held not to constitute laches in the case of an ignorant colored woman who had been wheedled out of her real estate by an audacious fraud, committed by one in whom she placed entire confidence, and who assumed to act as her agent. McIntire v. Pryor (1899) 19 Sup. Ct. 352, 173 U. S. 38, 43 L. Ed. 606, affirming decree (1897) 10 App. D. C. 432.

When fraud is clearly proven, the court will look with much more indulgence on any disability under which the defrauded party may labor, as excusing his delay in bringing the suit. Id.

Laches as a defense in case of an active and continuing fraud must amount to assent or acquiescence. Saxlehner v. Eisner & Mendelson Co. (1900) 21 Sup. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree (1899) 91 Fed. 536, 33 C. C. A. 291.

Where a person assumes the management of property under a power of attorney only three days before his principal's title thereto is divested by the expiration of the period of redemption from a sheriff's sale, his failure to discharge the judgment and redeem from prior tax sales is not, in the absence of a showing of means wherewith to accomplish these purposes, such a fraud as will avoid the effect of laches on the principal's suit to recover the property from the agent or his grantees claiming under such sheriff's sale and tax titles. Naddo v. Bardon (1892) 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642, affirming decree (C. C. 1891) 47 Fed. 782.

A victim of a fraudulent sale who has received notice sufficient to put him on his guard cannot evade the duty of speedy and diligent inquiry by merely calling on the chief perpetrator, whose interest it is to conceal the facts, to reiterate or prove his false statements; and such reiteration does not prevent the vendee's delay from operating as a ratification of the contract, or interrupt the running of limitations, when a diligent inquiry at independent sources would have fully disclosed the fraud. Scheftel v. Hays (1893) 58 Fed. 457, 7 C. C. A. 308.

An intervener held not barred of the right to relief against a sale by laches, although the time fixed by the state statute within which an action for relief on the ground of fraud must be brought had expired before he filed his petition of intervention attacking the same; the statute further providing that the cause of action should not be deemed to have accrued until the discovery of the fraud. Anthony v. Campbell (1901) 112 Fed. 212, 50 C. C. A. 195.

Where the party interposing a defense of laches has caused or contributed to the delay, he cannot take advantage of it. Northern Pac. Ry. Co. v. Boyd (1910) 177 Fed. 804, 101 C. C. A. 18, affirming decree Boyd v. Northern Pac. Ry. Co. (C. C. 1909) 170 Fed. 779, and (1913) 33 Sup. Ct. 554, 228 U. S. 482, 57 L. Ed. 931.

The lapse of six years is no bar to a suit to set aside a sale for fraudulent representations brought immediately upon discovering the fraud. Doggett v. Emerson (C. C. 1845) Fed. Cas. No. 3,960.

A court of equity will not relieve against fraud after 20 years from its discovery. Moore v. Greene (C. C. 1854) Fed. Cas. No. 9,763.

A party seeking relief on the ground of mistake must act promptly, especially in the case of speculative property. Kinney v. Consolidated Virginia Min. Co. (C. C. 1877) Fed. Cas. No. 7,827.

To take advantage of the exception provided for in a case of concealed fraud, where otherwise the party would be barred by reason of his laches or the statute of limitations, it must be made to appear that the fraudulent transaction, from which relief is prayed, was one which concealed itself, or at least the allegations and proof must be such as to satisfy the court that the complainant could not have known of

the facts constituting the fraud by the exercise of proper diligence and care. Johnson v. Florida T. & P. R. Co. (C. C. 1883) 18 Fed. 821; Leavenworth County v. Chicago, R. I. & P. Ry. Co. (C. C. 1883) 18 Fed. 209.

A bill on a life insurance policy issued in 1854 held to fail to show grounds for equitable interference, after the lapse of so many years, and the consequent changed condition of the parties. Steines v. Manhattan Life Ins. Co. (C. C. 1888) 34 Fed. 441.

A bill alleged that a conveyance by D. was made in 1857; that D., in his lifetime, and respondents and their grantors since D.'s death, in 1876, concealed certain fraudulent acts from complainants, who were nonresidents, and have never been in the state; and that they did not discover the fraud till 1887, a short time before bringing this suit. Held, that the cause of suit was stale, and that sufficient diligence had not been exercised by complainants to preserve their right of suit. Teall v. Slaven (C. C. 1889) 40 Fed. 774.

The defense of laches, on the ground that complainant, by inquiry, might have learned the facts relied on, and filed his bill earlier, is not available to defendants, who were under obligation to disclose to him such facts without inquiry. Krohn v. Williamson (C. C. 1894) 62 Fed. 869, decree affirmed Williamson v. Krohn (1895) 66 Fed. 655, 13 C. C. A. 668.

Where matters complained of as frauds are evidenced by public records accessible to all, one seeking relief therefrom cannot excuse his delay by alleging ignorance thereof, unless he shows some affirmative act of deception, or some misleading device on the part of the party charged with fraud, intended to exclude suspicion, and to prevent inquiry and the institution of adequate measures of redress. Lant v. Manley (C. C. 1895) 71 Fed. 7, decree reversed (1896) 75 Fed. 627, 21 C. C. A. 457.

Where defendant, being authorized to sell plaintiff's corporate stock, to a certain person at a certain price, sold to him at a still higher price, and then telegraphed plaintiff that he could not make such sale, but could sell to other parties at a less price, and was authorized by plaintiff to sell at such less price, if that was the best he could do, reporting the sale as having been made at such less price, and remitting therefor to plaintiff, he cannot be charged with laches in not discovering such fraud until five years thereafter. Horner v. Perry (C. C. 1901) 112 Fed. 906.

A bill filed in a federal court within the time permitted by the state statute of limitations, and which charges actual, positive fraud on the part of defendant, is not demurrable on the ground of laches, because complainant did not sooner discover the fraud. Balfour v. San Joaquin Valley Bank (C. C. 1906) 156 Fed. 500.

43. —— **Negotiations and agreements between parties.**—Plaintiff's laches in delaying for 12 years to bring suit to set aside a conveyance from his father to another of defendants is not excused by allegations that he had always protested against such defendants' claim of title thereunder, and had negotiated with him in hopes of reaching an amicable adjustment, where there is nothing to show that such defendant acknowledged plaintiff's rights, or did or said anything to encourage such hope. Mackall v. Casilear (1890) 11 Sup. Ct. 178, 137 U. S. 556, 34 L. Ed. 776.

44. —— **Pendency of legal proceedings.**—The pendency of other legal proceedings involving or affecting the subject-matter of the controversy as excuse for laches, see Cressey v. Meyer (1891) 11 Sup. Ct. 387, 138 U. S. 525, 34 L. Ed. 1018; Pepin Tp. v. Sage (1904) 129 Fed. 657, 64 C. C. A. 169; Chapman v. Succession of Wilson (C. C. 1881) 5 Fed. 305; Union Mut. Life Ins. Co. of Maine v. Dice (C. C. 1882) 14 Fed. 523; Fogg v. St. Louis, H. & K. R. Co. (C. C. 1883) 17 Fed. 871; Bickford v. McComb (C. C. 1898) 88 Fed. 428; Lyon v. Town of Tonawanda (C. C. 1899) 98 Fed. 361; Boyd v. Northern Pac. Ry. Co. (C. C. 1909) 170 Fed. 779, decree affirmed Northern Pac. R. Co. v. Boyd (1910) 177 Fed. 804, 101 C. C. A. 18, which is affirmed (1913) 33 Sup. Ct. 554, 228 U. S. 482, 57 L. Ed. 931.

45. —— **Recognition of right by adverse party.**—Where legatees took a specific legacy under a will, and, there being no circumstance to excite suspicion that they were in danger, received the interest regularly on their legacies for five years, it was held that they were not guilty of laches in not having previously compelled the executor to invest their legacies in securities according to the will, although at the time of the testator's death there were assets more than enough to satisfy all the charges upon the estate, and meanwhile, by the bankruptcy of the executor, the assets had become insufficient. Silsby v. Young (1806) 7 U. S. (3 Cranch) 249, 2 L. Ed. 429.

Plaintiff filed his bill 17 years after conveyances were made, and 5 years after his father's death. He alleged that he and his father became reconciled, and the latter reconveyed to him the property; but that defendants, his brothers and sisters, procured a decree adjudging such conveyance void, and plaintiff thought there was no propriety in bringing his suit pending this litigation. Held, that plaintiff was guilty of laches, and his bill should be dismissed. Mackall v. Casilear (1890) 11 Sup. Ct. 178, 137 U. S. 556, 34 L. Ed. 776.

A county acquiesced in a conveyance of certain swamp lands made by its officers, for 20 years or more, without objection, recognizing the grantee as the owner, and collecting taxes from the lands. Held that, though the transaction by which the lands were disposed of may have been voidable, such acquiescence amounted to a ratification, and the county was barred by its laches from asserting title, as against its grantee. American Stave & Cooperage Co. v. Butler County (C. C. 1899) 93 Fed. 301.

46. —— **Possession or control of property.**—Where a party is in possession of land, he may wait until his title and possession are attacked before setting up equitable demands without being chargeable with laches. Buchannon v. Upshaw (1843) 42 U. S. (1 How.) 56, 11 L. Ed. 46; Ruckman v. Cory (1889) 9 Sup. Ct. 316, 129 U. S. 387, 32 L. Ed. 728; Simmons Creek Coal Co. v. Doran (1892) 12 Sup. Ct. 239, 142 U. S. 417, 35 L. Ed. 1063; Massenburg v. Denison (1896) 71 Fed. 618, 18 C. C. A. 280; Seefeld v. Duffer (1910) 179 Fed. 214, 103 C. C. A. 32 (writ of certiorari denied Duffer v. Seefeld [1911] 31 Sup. Ct. 720, 220 U. S. 616, 55 L. Ed. 611); Gunnison Gas & Water Co. v. Whitaker (C. C. 1898) 91 Fed. 191.

Complainants' lands were sold as forfeited for nonentry for taxation in October, 1885, and bill to set aside the proceedings as fraudulent was filed in December, 1889. They had never abandoned their claim to the land, but continued to assert it. It was not shown that defendants had taken possession of, or exercised acts of ownership over, any part of the land. Held, that there was no laches. Sayers v. Burkhardt (1898) 85 Fed. 246, 29 C. C. A. 137, certiorari denied (1899) 19 Sup. Ct. 886, 172 U. S. 649, 43 L. Ed. 1183.

Where no proceedings were brought to perfect the title in vendees during the vendor's lifetime, though he lived nearly 40 years after the transaction, a bill filed nearly 100 years thereafter, when all the parties had been dead for many years, charging such vendor, on information and belief, with fraud in failing to have a duplicate deed recorded, would not be sustained on demurrer as against one in possession of the land for nearly 25 years under tax title, with color of title. Horsford v. Gudger (C. C. 1888) 35 Fed. 388, reversed (1890) 10 Sup. Ct. 1069, 136 U. S. 639, 34 L. Ed. 556.

A delay of nearly 30 years by a claimant of land out of possession, before bringing suit, constitutes such laches as will preclude him from attacking the validity of a decree which adjudged the title to be in the defendant county, and under which it and its grantees have claimed ever since. Bump v. Butler County (C. C. 1899) 93 Fed. 290.

47. —— **Ignorance of facts.**—Defendant conveyed to M. land to which he then had no title, but only an oral agreement by the owners to convey. A deed of the owners to defendant's wife was recorded March 16, 1881, after M.'s death, and while complainants, his widow and heirs, were living in Canada. His widow did not learn until the following summer that defendant disputed their title, and this suit to enforce their rights was instituted in February, 1882. Held no unreasonable delay. Moore v. Crawford (1889) 9 Sup. Ct. 447, 130 U. S. 122, 32 L. Ed. 878, affirming decree Crawford v. Moore (C. C. 1886) 28 Fed. 824.

It appearing from the great weight of evidence that the trustees made no attempt to conceal their intention to buy at a public sale of the trust property, and that the beneficiaries in fact knew that they were the purchasers, the mere fact that the beneficiaries had great confidence in them, and were ignorant of the rule in relation to trustees purchasing at their own sales, would not excuse a delay of 19 years in asserting their claim. Hammond v. Hopkins (1892) 12 Sup. Ct. 418, 143 U. S. 224, 36 L. Ed. 134.

In 1848 a warrant for land was issued to the widow of a soldier in the Mexican War and her minor children, of whom she was guardian. In the same year, without obtaining leave of the orphans' court, she sold and assigned the warrant. The widow's youngest child attained majority in 1863, and in 1892 the surviving children and the heirs of those deceased sued to establish title, relying on the lack of the orphans' court's approval of the sale of the warrant. Held, that though plaintiffs claimed that they were ignorant, until a few years before bringing suit, of the existence of the land warrant, the bill must be dismissed for laches. Wetzel v. Minnesota Ry. Transfer Co. (1898) 18 Sup. Ct. 307, 169 U. S. 237, 42 L. Ed. 730, affirming (1894) 12 C. C. A. 490. 65 Fed. 23.

Where the owner of land sold the same in his lifetime, and on his death the land was sold as part of his succession, the owner's vendee was not barred to assert his claim to the land by the lapse of 20 years from the administrator's sale. Hodge v. Palms (1895) 68 Fed. 61, 15 C. C. A. 220.

Complainant, a stockholder in a corporation, sought to set aside a consolidation between such corporation and another on the ground that the same was fraudulent and void. The bill was filed 13 years after the consolidation. The consolidation was made under authority of a public statute, and the proceedings had were entered of record on the books of the respective corpo-

rations, and the deeds of conveyances executed by them were recorded in the several counties and filed in the office of the secretary of state. Held, that complainant was chargeable with laches, since, where a person has sufficient information to lead him to a fact, he will be deemed conversant with it. Johnson v. Florida T. & P. R. Co. (C. C. 1883) 18 Fed. 821; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co. (C. C. 1883) 18 Fed. 209.

Where a plaintiff obtains title to land, and he and his grantors have exercised unmolested ownership over it, and paid taxes on it for many years, not being advised of any adverse right or title, he cannot be charged with laches in failing to bring an action to remove a cloud upon the title, made many years before, against which there had been an attempted adjudication. Patrick v. Isenhart (C. C. 1884) 20 Fed. 339.

In an action to avoid conveyance, as procured by fraud from plaintiff's ancestor, it was shown that the ancestor died soon after without knowledge of the fraud, and for 18 months before the suit plaintiffs lived in California, and knew nothing of the land, which was located in Colorado, but at once on learning of the fraud proceeded to investigate it, and brought suit in a few days, a little less than three years from the date of the conveyance. Held no such laches as ought to deprive plaintiff of the right to sue. Fellows v. Hyman (C. C. 1888) 33 Fed. 313.

Although complainant knew shortly thereafter that mining property which he had sold to his managing partner for a small price was very valuable, yet, as he did not know that the ore which enhanced its value was discovered before the sale until shortly before bringing suit to set the same aside for fraud, a delay of four years in attacking such sale would not bar complainant from relief. Bowman v. Patrick (C. C. 1888) 36 Fed. 138, decree reversed Patrick v. Bowman (1893) 13 Sup. Ct. 811, 149 U. S. 411, 37 L. Ed. 790.

One who knows that another is selling a proprietary article in a certain territory, in violation of a contract between them, cannot justify his laches on the ground that he has not sufficient knowledge of the details to bring suit, since he could bring suit by stating the facts generally according to his knowledge, and by means of interrogatories have a discovery of the details from the other party. Fowle v. Park (C. C. 1892) 48 Fed. 789.

48. —— **Negligence of attorney or other representative.**—A proceeding in the nature of a bill to collect a legacy will be dismissed for laches, nothing having been done for over nine years after the refusal of the executor to pay it, and the estate having in the meantime been distributed, though the legatee, immediately on refusal of the executor, placed the claim in the hands of an attorney for action. Wilson v. Smith (C. C. 1902) 117 Fed. 707, decree affirmed (1904) 126 Fed. 916, 61 C. C. A. 446.

In order that laches of the trustee may bar suit by the cestui que trust, it is essential that the laches shall have existed during the relationship and while the trustee was legally able to act. Mathieson v. Craven (D. C. 1915) 228 Fed. 345.

49. **Following statute of limitations.**—Federal courts sitting in equity recognize and apply state statutes of limitation, though they may not be bound by them. St. Paul, S. & T. F. Ry. Co. v. Sage (1892) 49 Fed. 315, 1 C. C. A. 256 (reversing Hastings & D. Ry. Co. v. St. Paul, S. & T. F. Ry. Co. [C. C. 1887] 32 Fed. 821, and Sage v. Same [C. C. 1891] 44 Fed. 817); Miles v. Vivian (1897) 79 Fed. 848, 25 C. C. A. 208; Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520; Williams v. Neely (1904) 134 Fed. 1, 67 C. C. A. 171, 60 L. R. A. 232; Redd v. Brun (1907) 157 Fed. 190, 84 C. C. A. 638; Wilson v. Plutus Mining Co. (1909) 174 Fed. 317, 98 C. C. A. 189; Burgess v. Hillman (1912) 200 Fed. 929, 119 C. C. A. 225; Id. (1912) 200 Fed. 932, 119 C. C. A. 228; Robinson v. Hook (C. C. 1826) Fed. Cas. No. 11,956; Hayman v. Keally (C. C. 1828) Fed. Cas. No. 6,265; Lewis v. Marshall (C. C. 1829) Fed. Cas. No. 8,327; Miller v. McIntire (C. C. 1830) Fed. Cas. No. 9,582; Ferson v. Sanger (C. C. 1845) Fed. Cas. No. 4,751; Badger v. Badger (C. C. 1862) Fed. Cas. No. 718; Putnam v. New Albany (C. C. 1869) Fed. Cas. No. 11,481; Amory v. Lawrence (C. C. 1872) Fed. Cas. No. 336; Sullivan v. Portland & K. R. Co. (C. C. 1874) Fed. Cas. No. 13,596; Hall v. Russell (C. C. 1875) Fed. Cas. No. 5,943; Stevens v. Sharp (C. C. 1879) Fed. Cas. No. 13,410; Williams v. Boston & A. R. Co. (C. C. 1879) Fed. Cas. No. 17,716; Etting v. Marx's Ex'r (C. C. 1880) 4 Fed. 673; Fogg v. St. Louis, H. & K. R. Co. (C. C. 1883) 17 Fed. 871; Chemical Nat. Bank v. Kissane (C. C. 1887) 32 Fed. 429; Cockrill v. Butler (C. C. 1897) 78 Fed. 679; Mexican Nat. Coal, Timber & Iron Co. v. Frank (C. C. 1907) 154 Fed. 217; Cleveland Ins. Co. v. Reed (D. C. 1857) Fed. Cas. No. 2,889; Holmes v. Cleveland, C. & C. R. Co. (D. C. 1861) 93 Fed. 100; Updike v. Mace (D. C. 1912) 194 Fed. 1001.

In the consideration of purely equitable rights and titles courts of equity are not governed by the statute of limitations. Michoud v. Girod (1846) 45 U. S. (4 How.) 503, 11 L. Ed. 1076; Stevens v. Grand Central Min. Co. (1904) 133 Fed. 28, 67 C. C. A. 284;

Wilson v. Plutus Mining Co. (1909) 174 Fed. 317, 98 C. C. A. 189; Newberry v. Wilkinson (1912) 199 Fed. 673, 118 C. C. A. 111 (affirming decree Newbery v. Same [C. C. 1911] 190 Fed. 62); Johnston v. Roe (C. C. 1880) 1 Fed. 692, 695; Gest v. Packwood (C. C. 1889) 39 Fed. 525; Cleveland Ins. Co. v. Reed (D. C. 1857) Fed. Cas. No. 2,889.

The rule adopted by courts of equity, making a lapse of 20 years a bar in equity, in analogy to the statute of limitations, will not be applied in the case of boundary lines between states. Rhode Island v. Massachusetts (1841) 40 U. S. (15 Pet.) 233, 10 L. Ed. 721.

Independently of any statute of limitation, courts of equity have inherent powers to refuse relief after undue and unexplained delay, and when injustice would be done by granting the relief asked, and the doctrine applies to suits relating to land. Abraham v. Ordway (1895) 15 Sup. Ct. 894, 158 U. S. 416, 39 L. Ed. 1036.

The maxim that no time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it is applicable to the case of one purchasing an interest in a mine for a trifling consideration, by falsely and fraudulently representing that it is full of water, and cannot be examined, and by this means inducing the vendors, who live at a distance, to delay investigation as to the actual facts. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14.

Where a suit is brought within the time fixed by the analogous statute of limitations, the burden is on defendant to show extraordinary circumstances existing requiring the application of the doctrine of laches, and when a suit is brought after the statutory period, the burden is on plaintiff to show that it would be inequitable to apply it to his case. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14; Boynton v. Haggart (1903) 120 Fed. 81[illegible], 57 C. C. A. 301 (writ of certiorari denied Haggart v. Boynton [1903] 24 Sup. Ct. 845, 191 U. S. 573, 48 L. Ed. 307); Wyman v. Bowman (1904) 127 Fed. 257, 62 C. C. A. 189; Wilson v. Plutus Mining Co. (1909) 174 Fed. 317, 98 C. C. A. 189.

While federal courts sitting as courts of chancery may entertain bills to set aside wills, such courts nevertheless observe the public policy of the state where the property to be recovered is situated and the court sits respecting the time within which such suits shall be brought. Palmer v. Bradley (1907) 154 Fed. 311, 83 C. C. A. 231, affirming judgment (C. C. 1905) 142 Fed. 193, and writ of certiorari denied (1908) 28 Sup. Ct. 759, 209 U. S. 548, 52 L. Ed. 921.

Where complainant sued to subject certain property to his judgment five years after its conveyance, his failure to exercise the diligence in 1896 and 1897 that he used in 1901, when he discovered the conveyance, was laches. Redd v. Brun (1907) 157 Fed. 190, 84 C. C. A. 638.

Where, by ordinary diligence, complainant could have discovered the fraud in time to have sued within the statute of limitations, he was guilty of laches. Id.

Mere increase in the value of property involved is not such an extraordinary circumstance as will authorize equity to depart from the analogous statute of limitations. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley (1908) 164 Fed. 963, 91 C. C. A. 91.

Among the cases which have been held not to be affected by the statutes of arbitrary limitations, or the rule of analogy to them, are (1) those in which the public convenience requires that there shall be a speedy end of strife; (2) those in which some of the principal parties, in transactions sought to be reviewed, are dead and their vouchers lost; (3) those in which the court could not be certain, from lapse of time, that relief, apparently proper, would certainly be just; and (4) those in which the disturbance of purchasers or transactions acquiesced in for a greater or less period of time would prejudice the vested rights of third persons. Etting v. Marx's Ex'r (C. C. 1880) 4 Fed. 673.

A court of equity, however, does not act in analogy to the statute of limitations where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. Id.

In equity, as well as at law, a statute of limitations is a bar when the conflicting titles are adverse in their origin, and one was equitable and the other legal. Fussell v. Hughes (C. C. 1881) 8 Fed. 384, decree affirmed Same v. Gregg (1885) 5 S. Ct. 631, 113 U. S. 550, 28 L. Ed. 993, and Same v. Hughes (1885) 5 Sup. Ct. 639, 113 U. S. 565, 28 L. Ed. 998.

It is a general principle of equity that lapse of time may constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches. U. S. v. Beebee (C. C. 1883) 17 Fed. 36, decree affirmed (1888) 8 Sup. Ct. 1083, 127 U. S. 338, 32 L. Ed. 121.

A suit in equity to set aside an assignment or conveyance of property made to hinder or delay creditors should ordinarily be brought within the same time after the right accrues as an action at law to recover possession of the same property. Hickox v. Elliott (C. C. 1884) 22 Fed. 13.

The rule of limitation in a suit in equity to recover on a note, and enforce the lien of a mortgage therefor, is the same as in an action thereon at law. Allen v. O'Donald (C. C. 1886) 28 Fed.

17, decree affirmed Cross v. Allen (1891) 12 Sup. Ct. 67, 141 U. S. 528, 35 L. Ed. 843.

Where statutes of limitations are not applicable to equity cases in the state courts, and there is not concurrent jurisdiction, and where the specific case is not covered in terms by the statute, then the time prescribed by the statutes of limitations will ordinarily be applied by analogy, in accordance with the provisions most nearly analogous and applicable. Norris v. Haggin (C. C. 1886) 28 Fed. 275, decree affirmed (1889) 10 Sup. Ct. 942, 136 U. S. 386, 34 L. Ed. 424.

Delay in bringing suit for an accounting reduces the time for which an accounting could be had to the time fixed by the state statute of limitations for actions on written contracts. Fowle v. Park (C. C. 1892) 48 Fed. 789.

A contract held a sealed instrument, for the purposes of applying the statute of limitations, by a court of equity. Cook v. Automatic Fire Protection Co. (D. C. 1915) 228 Fed. 192.

Where a bill was filed to enforce payment of money charged on land as a legacy, and no legal remedy existed to enforce the charge, the statute of limitations was inapplicable. Mathieson v. Craven (D. C. 1915) 228 Fed. 345.

50. —— **Loss of legal remedy by limitations.**—Equity will not afford relief where the corresponding legal right has been barred by the statute of limitations. Elmendorf v. Taylor (1825) 23 U. S. (10 Wheat.) 152, 6 L. Ed. 289; Lewis v. Marshall (1831) 30 U. S. (5 Pet.) 470, 8 L. Ed. 195; Miller v. McIntyre (1832) 31 U. S. (6 Pet.) 61, 8 L. Ed. 320; Bank of United States v. Daniel (1838) 37 U. S. (12 Pet.) 32, 9 L. Ed. 989; Stearns v. Page (1849) 48 U. S. (7 How.) 819, 12 L. Ed. 928; Carroll v. Green (1875) 92 U. S. 509, 23 L. Ed. 738; Preston v. Preston (1877) 95 U. S. 200, 24 L. Ed. 494; Meath v. Phillips County (1883) 2 Sup. Ct. 869, 108 U. S. 553, 27 L. Ed. 819; Gaines v. Miller (1884) 4 Sup. Ct. 426, 111 U. S. 395, 28 L. Ed. 466 (affirming decree Gaines v. Hammonds Adm'r [C. C. 1881] 6 Fed. 449); Baker v. Cummings (1898) 18 Sup. Ct. 367, 169 U. S. 189, 42 L. Ed. 711; Kinne v. Webb (1893) 54 Fed. 34, 4 C. C. A. 170 (affirming decree [C. C. 1892] 49 Fed. 512); Scheftel v. Hays (1893) 58 Fed. 457, 7 C. C. A. 308; Nash v. Ingalls (1900) 101 Fed. 645, 41 C. C. A. 545 (affirming decree [C. C. 1897] 79 Fed. 510); Boynton v. Haggart (1903) 120 Fed. 819, 57 C. C. A. 301 (writ of certiorari denied Haggart v. Boynton [1903] 24 Sup. Ct. 845, 191 U. S. 573, 48 L. Ed. 307); Patterson v. Safe Deposit & Trust Co. of Baltimore (1906) 148 Fed. 787, 78 C. C. A. 453; Taylor v. Holmes (C. C. 1882) 14 Fed. 498 (decree affirmed [1888] 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179); Hickox v. Elliott (C. C. 1884) 22 Fed. 13; Chemical Nat. Bank v. Kissane (C. C. 1887) 32 Fed. 429; Felix v. Patrick (C. C. 1888) 36 Fed. 457 (decree affirmed [1892] 12 Sup. Ct. 862, 145 U. S. 317, 36 L. Ed. 719); Jaffrey v. Bear (C. C. 1890) 42 Fed. 569; Rudland v. Mastic (C. C. 1896) 77 Fed. 688; Continental Nat. Bank v. Heilman (C. C. 1897) 81 Fed. 36 (decree affirmed [1898] 86 Fed. 514, 30 C. C. A. 232); Hale v. Coffin (C. C. 1902) 114 Fed. 567 (decree affirmed [1903] 120 Fed. 470, 57 C. C. A. 528).

51. —— **Delay short of statutory period.**—A suit in equity will not ordinarily be held barred by laches within the time allowed by statute for bringing a similar action at law, unless extraordinary circumstances are shown which would render it inequitable to apply such rule. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14; Williamson v. Monroe (C. C. A. 1900) 101 Fed. 322; Ide v. Trorlicht, Duncker & Renard Carpet Co. (1902) 115 Fed. 137, 53 C. C. A. 341; Wyman v. Bowman (1904) 127 Fed. 257, 62 C. C. A. 189; Brown v. Arnold (1904) 131 Fed. 723, 67 C. C. A. 125 (reversing decree [C. C. 1904] 127 Fed. 387); Williams v. Neely (1904) 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley (1908) 164 Fed. 963, 91 C. C. A. 91; Broatch v. Boysen (1910) 175 Fed. 702, 99 C. C. A. 278; Ritchie v. Sayers (C. C. 1900) 100 Fed. 520.

Laches may defeat a suit in equity to enforce rights in a mining location, although the time fixed in Comp. Laws N. M. § 2938, for the prosecution of actions or suits "in law or equity" for any lands, tenements, or hereditaments has not expired. Patterson v. Hewitt (1904) 25 Sup. Ct. 35, 195 U. S. 309, 49 L. Ed. 214, affirming decree (1901) 66 Pac. 552, 11 N. M. 1, 55 L. R. A. 658.

The proviso in Rev. St. Ind. 1894, § 2597 (Rev. St. 1881, § 2442), permitting suits to be brought against heirs, devisees, and distributees of a decedent within two years after final settlement, by any creditor out of the state, does not prevent a federal court from applying the bar of laches resulting from delay within the statutory time. Continental Nat. Bank v. Heilman (1898) 86 Fed. 514, 30 C. C. A. 232, affirming (C. C. 1897) 81 Fed. 56, and certiorari denied (1898) 19 Sup. Ct. 884, 171 U. S. 690, 43 L. Ed. 1180.

Equity follows the law, as to limitations; and, where the life of a judgment is 20 years under the statute, the holder of a judgment against an administrator will not be held guilty of such laches as will authorize a court of equity to set aside a sale of land thereunder, made within such time, where the administration has not been closed, and especially where payments have been made thereon from time to time

by the administrator. Florida Mortg. & Inv. Co. v. Finlayson (1898) 91 Fed. 13, 33 C. C. A. 307, affirming decree Gunnison Gas & Water Co. v. Whitaker (C. C. 1898) 91 Fed. 191, affirming decree (C. C. 1896) 74 Fed. 671.

Delay which will bar relief in equity is not necessarily measured by the statute of limitations, but may be for a much shorter period, depending on the peculiar circumstances in each case, involving a consideration of whether one of the parties or an important witness has died since the trial, and important testimony lost, whether the property involved is largely increased in value, or whether it has been sold to a third person. Bower v. Stein (1910) 177 Fed. 673, 101 C. C. A. 299, affirming decree (C. C. 1908) 165 Fed. 232.

Under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous limitations at law. Westerlund v. Black Bear Mining Co. (1913) 203 Fed. 599, 121 C. C. A. 627.

The equitable doctrine of laches does not necessarily follow the statute of limitations, and a complainant may be denied relief in equity although less than the statutory period of limitations has run against his claim. Pooler v. Hyne (1914) 213 Fed. 154, 129 C. C. A. 506.

Lapse of time may be applied to bar an equity which would not be barred under the statute of limitations. Piatt v. Vattier (C. C. 1831) Fed. Cas. No. 11,117.

Length of time, short of the statute of limitations, is not a bar if fraud exists, or if the delay is accounted for, or if such a course would work injustice. Warner v. Daniels (C. C. 1845) Fed. Cas. No. 17,181.

Poverty may excuse delay, within the period of limitation, so as to relieve plaintiff's claim from the imputation of staleness. Mason v. Crosby (C. C. 1846) Fed. Cas. No. 9,235.

The federal courts sitting in equity will decline relief where complainant has been guilty of laches, though his claim may not be barred by the statute of limitations of the state. Van Vleet v. Sledge (C. C. 1891) 45 Fed. 743.

Equity will not refuse relief because of lapse of time, unless a period equal to that prescribed by the statute of limitations has expired. Jonathan Mills Mfg. Co. v. Whitehurst (C. C. 1894) 60 Fed. 81.

Equity may cut short the limitations of the law, and will adopt its own limitations to meet the special and peculiar exigencies of the case. Newberry v. Wilkinson (1912) 199 Fed. 673, 118 C. C. A. 111, affirming decree Newbery v. Same (C. C. 1911) 190 Fed. 62.

52. —— **Concurrent jurisdiction.**—Courts of equity in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases. Godden v. Kimmell (1878) 99 U. S. 201, 25 L. Ed. 431; Cooper v. Hill (1899) 94 Fed. 582, 36 C. C. A. 402; Rodgers v. Thomas (1911) 193 Fed. 952, 113 C. C. A. 580; Robinson v. Hook (C. C. 1826) Fed. Cas. No. 11,956; Hayman v. Keally (C. C. 1828) Fed. Cas. No. 6,265; Pratt v. Northam (C. C. 1828) Fed. Cas. No. 11,376; Sherwood v. Sutton (C. C. 1828) Fed. Cas. No. 12,782; Ferson v. Sanger (C. C. 1845) Fed. Cas. No. 4,751; Sullivan v. Portland & K. R. Co. (C. C. 1874) Fed. Cas. No. 13,596; Hall v. Russell (C. C. 1875) Fed. Cas. No. 5,943; Etting v. Marx's Ex'r (C. C. 1880) 4 Fed. 673.

In cases of concurrent jurisdiction, equity will sometimes hold the lapse of time a bar to relief, when the prescription is not fully acquired at law. Ferson v. Sanger (C. C. 1845) Fed. Cas. No. 4,751.

53. —— **Commencement of suit.**—To constitute the "commencement of a suit" in equity in a federal court, which will stop the running of the statute of limitations, there must be the filing of a bill and the due issuance of a writ of subpœna, which must come to the hands of the serving officer with intent that it be served, and there must be a bona fide attempt to serve it, followed, if unsuccessful, by reasonable diligence to procure service through further or additional process. U. S. v. American Lumber Co. (C. C. 1897) 80 Fed. 309 (decree affirmed [1898] 85 Fed. 827, 29 C. C. A. 431); Same v. Miller (C. C. 1908) 164 Fed. 444.

A suit in equity is commenced by the filing of the bill with intent to prosecute the same, if there is no unreasonable delay in the issue or service of the subpœna. Armstrong Cork Co. v. Merchants' Refrigerating Co. (1910) 184 Fed. 199, 107 C. C. A. 93, modifying judgment (C. C. 1909) 171 Fed. 778.

Where at the time of the issuance of the subpœna in a suit in equity in a federal court the defendant was absent from the district, and there was a bona fide attempt by the marshal to make the service, and reasonable diligence was used in that behalf and in the issuance and service of the alias subpœna, for the purpose of arresting the running of the statute of limitations the suit was commenced on the date of the filing of the bill. U. S. v. Miller (C. C. 1908) 164 Fed. 444.

On the last day allowed for commencing action to enforce a mechanic's lien, plaintiff filed a petition on the law side of the Circuit Court. It contained no prayer for process, and the summons was returned unexecuted by the marshal by direction of plaintiff's attorneys. Thereafter, on written præcipe, subpœnas in chancery were issued

by the clerk and served, after which a bill, containing no prayer for process, was filed on the law side. Held, that such proceedings were insufficient to constitute commencement of suit to foreclose the lien within the time required. Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. 1909) 171 Fed. 778, decree modified (1910) 184 Fed. 199, 107 C. C. A. 93.

54. **Pleading in anticipation of defense.**—Under the rules of pleading or practice, in equity, it is necessary that the cause or reason which prevented the statutes of limitation or prescription from running in the particular case should be stated in the bill, in order to be permitted to offer evidence thereof. Boyd v. Wyley (C. C. 1883) 18 Fed. 355, decree affirmed (1888) 8 Sup. Ct. 364, 124 U. S. 98, 31 L. Ed. 369.

When suit is brought after the time fixed by the analogous statute of limitations, the burden is on complainant to plead and prove facts taking the case out of the doctrine of laches. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14; Boynton v. Haggart (1903) 120 Fed. 819, 57 C. C. A. 301 (writ of certiorari denied Haggart v. Boynton [1903] 24 Sup. Ct. 845, 191 U. S. 573, 48 L. Ed. 307); Redd v. Brun (1907) 157 Fed. 190, 84 C. C. A. 638; Wilson v. Plutus Mining Co. (1909) 174 Fed. 317, 98 C. C. A. 189; Stearns v. Page (C. C. 1840) Fed. Cas. No. 13,339; Van Bokkelen v. Cook (C. C. 1879) Fed. Cas. No. 16,831.

A court of equity will not relieve against fraud after 20 years from its discovery; and, when the statute is set up in bar, the bill must show when and how the fraud was discovered. Moore v. Greene (C. C. 1854) Fed. Cas. No. 9,763.

55. **Pleading as defense.**—The defense of laches need not be pleaded. Woodmanse & Hewitt Manuf'g Co. v. Williams (C. C. A. 1895) 68 Fed. 489; Moore v. Nickey (1904) 133 Fed. 289, 66 C. C. A. 667; Hudnutt v. Britannia Min. Co. (1904) 133 Fed. 1020, 66 C. C. A. 679; Potts v. Alexander (C. C. 1902) 118 Fed. 885; Calivada Colonization Co. v. Hays (C. C. 1902) 119 Fed. 202; National Cash Register Co. v. Union Computing Mach. Co. (C. C. 1906) 143 Fed. 342.

Staleness of demand may be relied on at hearing, though not presented by pleadings. Sullivan v. Portland & K. R. Co. (1876) 94 U. S. 806, 24 L. Ed. 324; Farmers' & Mechanics' Bank v. Melvin (C. C. 1825) Fed. Cas. No. 4,656; Baker v. Biddle (C. C. 1831) Fed. Cas. No. 764; Fisher v. Boody (C. C. 1852) Fed. Cas. No. 4,814; In re International Mineral Co. (D. C. 1915) 222 Fed. 415.

An answer relying upon the statute of limitations is in time, if filed before the bill is taken for confessed. Hayman v. Keally (C. C. 1828) Fed. Cas. No. 6,265.

Where a plea of the statute of limitations is overruled, it cannot be again put in by the same parties or their privies. Fisher v. Rutherford (C. C. 1830) Fed. Cas. No. 4,823.

The statute of limitations of California must be pleaded in equity suits as in suits at law. Norton v. Meader (C. C. 1866) Fed. Cas. No. 10,351.

Defendant, who sets up the bar of the statute of limitations, is excused from further answer to such parts of the bill as are covered by it. Samples v. Bank (C. C. 1873) Fed. Cas. No. 12,278.

A formal plea of the statute of limitations, or of the special facts, is not necessary in equity to raise the defense of laches, neglect, or acquiescence. Credit Co. v. Arkansas Cent. R. Co. (C. C. 1882) 15 Fed. 46; Johnson v. Florida, T. & P. R. Co. (1883) 18 Fed. 821; Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co. (1883) 18 Fed. 209; Pratt v. California Min. Co. (1883) 24 Fed. 869; Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337.

A plea of the statute of limitations to a bill for partition, which does not negative the fact alleged in the bill that certain of the complainants were under disability when their rights of possession accrued, and have so continued, is bad. McCloskey v. Barr (C. C. 1889) 38 Fed. 165.

Not merely the defense of laches, but the bar of the statute against a suit for an accounting by an administratrix for money which went into the hands of intestate, R., is sufficiently pleaded by an answer alleging that if there had ever been any claim against R. in his lifetime by reason of the alleged transactions, which is denied, said claim is barred by the lapse of time and the neglect of plaintiff to have a settlement of the same in the lifetime of decedent, and defendant therefore pleads that any such claim is barred, as plaintiff allowed the claim to sleep till after the death of deceased; the same strictness of pleading the statute not being required in equity as at law. Huntington Nat. Bank v. Huntington Distilling Co. (C. C. 1907) 152 Fed. 240.

56. **Waiver of objections.**—The objection of stale claim cannot be raised first on oral argument. Green v. Terwilliger (C. C. 1892) 56 Fed. 384, decree modified Richardson v. Green (1894) 61 Fed. 423, 9 C. C. A. 565.

(D) Parties

57. In general.
58. Necessary or indispensable parties.
59. —— Persons legally represented.
60. —— Grounds for omitting or dispensing with parties.

61. —— One or more suing or defending on behalf of all.
62. Proper parties.
63. Complainants.
64. —— Joinder.
65. Defendants.
66. —— Joinder.
67. Making party complainant or defendant.
68. Parties to original suit as parties to ancillary suit.
69. Intervention.
70. Bringing in new parties.
71. Defects and objections.
72. Amendment.

See rules, 37-45, ante, pp. 2512-2515.

57. In general.—The court will not allow a rule respecting parties, adopted for convenience, to operate so as to defeat the ends of justice. Hall v. Sullivan R. Co. (C. C. 1857) Fed. Cas. No. 5,948.

It is not important in equity proceedings, for every purpose, that all the parties to the controversy should be upon opposite sides in the formal pleadings. Campbell v. James (C. C. 1880) 2 Fed. 338.

58. Necessary or indispensable parties.—Indispensable parties are those who have such an interest in the controversy that a final decree between the parties before the court cannot be made without affecting their interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Donovan v. Campion (1898) 85 Fed. 71, 29 C. C. A. 30; O'Neil v. Wolcott Mining Co. (1909) 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200; Camp v. Bonsal (1913) 203 Fed. 913, 122 C. C. A. 207; Silver King Coalition Mines Co. of Nevada v. Silver King Consol. Mining Co. of Utah (1913) 204 Fed. 166, 122 C. C. A. 402; Mathieson v. Craven (C. C. 1908) 164 Fed. 471.

Generally all persons materially interested in the subject of a suit ought to be made parties either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. U. S. v. Howland (1819) 17 U. S. (4 Wheat.) 108, 4 L. Ed. 526; Mallow v. Hinde (1827) 25 U. S. (12 Wheat.) 193, 6 L. Ed. 599; Mandeville v. Riggs (1829) 27 U. S. (2 Pet.) 482, 7 L. Ed. 493 (reversing Riggs v. Swann [C. C. 1827] Fed. Cas. No. 11,831); Caldwell v. Taggart (1830) 29 U. S. (4 Pet.) 190, 7 L. Ed. 828; Riddle v. Mandeville (1837) 9 U. S. (5 Cranch) 322, 3 L. Ed. 114; Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200; Gaines v. Hennen (1860) 65 U. S. (24 How.) 553, 16 L. Ed. 770; Ribon v. Railroad Cos. (1872) 83 U. S. (16 Wall.) 446, 21 L. Ed. 367; Harwood v. Railroad Co. (1872) 84 U. S. (17 Wall.) 78, 21 L. Ed. 558; Williams v. Bankhead (1873) 86 U. S. (19 Wall.) 563, 22 L. Ed. 184; Gregory v. Stetson (1889) 10 Sup. Ct. 422, 133 U. S. 579, 33 L. Ed. 792 (affirming Gregory v. Swift [C. C. 1889] 39 Fed. 708); New Orleans Water Works Co. v. City of New Orleans (1896) 17 Sup. Ct. 161, 164 U. S. 471, 41 L. Ed. 518; Billings v. Aspen Mining & Smelting Co. (1892) 51 Fed. 338, 2 C. C. A. 252; Id., 52 Fed. 250, 3 C. C. A. 69; U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; Consolidated Water Co. v. City of San Diego (1899) 93 Fed. 849, 35 C. C. A. 631; U. S. v. Northern Pac. R. Co. (1905) 134 Fed. 715, 67 C. C. A. 269 (reversing decree [C. C. 1903] 120 Fed. 546); Grand Trunk W. Ry. Co. v. Chicago & E. I. R. Co. (1905) 141 Fed. 785, 73 C. C. A. 43 (writ of certiorari denied [1906] 26 Sup. Ct. 760, 201 U. S. 645, 50 L. Ed. 903); McConnell v. Dennis (1907) 153 Fed. 547, 82 C. C. A. 501; Arkansas Southeastern R. Co. v. Union Sawmill Co. (1907) 154 Fed. 304, 83 C. C. A. 224; O'Neil v. Wolcott Mining Co. (1909) 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200; Brown v. Fletcher (1913) 206 Fed. 461, 124 C. C. A. 367 (modifying decree [D. C. 1912] 203 Fed. 70, and decree reversed [1915] 35 Sup. Ct. 750, 237 U. S. 583, 59 L. Ed. 1128); West v. Randall (C. C. 1820) Fed. Cas. No. 17,424; Garnett v. Macon (C. C. 1825) Fed. Cas. No. 5,245; Ward v. Arredondo, Id. 17,148; Hoxie v. Carr (C. C. 1832) Fed. Cas. No. 6,802; Upham v. Brooks (C. C. 1843) Fed. Cas. No. 16,796; Northern Indiana R. Co. v. Michigan Cent. R. Co. (C. C. 1853) Fed. Cas. No. 10,321; Winter v. Ludlow (C. C. 1859) Fed. Cas. No. 17,891; Bedilian v. Seaton (C. C. 1860) Fed. Cas. No. 1,218; Abbot v. American Hard Rubber Co. (C. C. 1861) Fed. Cas. No. 9; Bunce v. Gallagher (C. C. 1867) Fed. Cas. No. 2,-133; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co. (C. C. 1871) Fed. Cas. No. 2,990; Tyson v. Virginia & T. R. Co. (C. C. 1871) Fed. Cas. No. 14,321; Branch v. Macon & B. R. Co. (C. C. 1875) Fed. Cas. No. 1,808; Stenchfield v. Robinson (C. C. 1880) Fed. Cas. No. 13,359a; Sahlgaard v. Kennedy (C. C. 1882) 13 Fed. 242; Maynard v. Tilden (C. C. 1886) 28 Fed. 688; Howth v. Owens (C. C. 1887) 29 Fed. 722; Smith v. City of Portland (C. C. 1887) 30 Fed. 734; Vinal v. Continental Const. & Imp. Co. (C. C. 1888) 35 Fed. 673 (writ of error dismissed [1889] 10 Sup. Ct. 1075, 136 U. S. 653, 34 L. Ed. 557); Oxley Stave Co. v. Coopers' International Union of North America (C. C. 1896) 72 Fed. 695; Consolidated Water Co. v. Babcock (C. C. 1896) 76 Fed. 243; Ward v. San Diego Land & Town Co. (C. C. 1897) 79 Fed. 665; Consolidated Water Co. v. City of San Diego (C. C. 1897) 84 Fed. 369;

Evans v. Gorman (C. C. 1902) 115 Fed. 399; Brew v. Cochran (C. C. 1905) 141 Fed. 459; Delaware, L. & W. R. Co. v. Jersey City (C. C. 1909) 168 Fed. 128; United States Telephone Co. v. Central Union Telephone Co. (C. C. 1909) 171 Fed. 130 (decree affirmed [C. C. A. 1913] 202 Fed. 66); Beswick v. Dorris (C. C. 1909) 174 Fed. 502; Bland v. Fleeman (D. C. 1887) 29 Fed. 669; U. S. v. Cooper (D. C. 1912) 196 Fed. 584; Sperry & Hutchinson Co. v. Pommer (D. C. 1912) 199 Fed. 309.

No one need be made a party complainant in whom there exists no interest. Kerr v. Watts (1821) 19 U. S. (6 Wheat.) 550, 5 L. Ed. 328.

As to want or insufficiency of interest, see Elmendorf v. Taylor (1825) 23 U. S. (10 Wheat.) 152, 6 L. Ed. 289; Vattier v. Hinde (1833) 32 U. S. (7 Pet.) 252, 8 L. Ed. 675; Boone v. Chiles (1836) 35 U. S. (10 Pet.) 177, 9 L. Ed. 388; Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200; Veazie v. Williams (1850) 49 U. S. (8 How.) 134, 12 L. Ed. 1018 (reversing [C. C. 1845] Fed. Cas. No. 16,907); Prout v. Roby (1872) 82 U. S. (15 Wall.) 471, 472, 21 L. Ed. 58; Doggett v. Railroad Co. (1878) 99 U. S. 72, 25 L. Ed. 301; McGahan v. National Bank of Rondout (1895) 15 Sup. Ct. 347, 156 U. S. 218, 39 L. Ed. 403; McKee v. Lamon (1895) 16 Sup. Ct. 11, 159 U. S. 317, 40 L. Ed. 165; Billings v. Aspen Mining & Smelting Co. (1892) 51 Fed. 338, 2 C. C. A. 252; Id., 52 Fed. 250, 3 C. C. A. 69; Donovan v. Campion (1898) 85 Fed. 71, 29 C. C. A. 30; Dulaney v. Scudder (1899) 94 Fed. 6, 36 C. C. A. 52; McCall v. Harrison (C. C. 1808) Fed. Cas. No. 8,671; MacArthur v. Allen (C. C. 1880) 3 Fed. 313; U. S. v. Gillespie (C. C. 1881) 8 Fed. 140; Phelps v. Elliott (C. C. 1886) 29 Fed. 53 (appeal dismissed [1891] 11 Sup. Ct. 1026, 140 U. S. 694, 35 L. Ed. 745); Western v. Skiles (C. C. 1888) 35 Fed. 674; Bellows v. Sowles (C. C. 1892) 52 Fed. 528; Smith v. Lee (C. C. 1896) 77 Fed. 779; Bickford v. McComb (C. C. 1898) 88 Fed. 428; Davis v. Davis (C. C. 1898) 89 Fed. 532; New York Phonograph Co. v. Jones (C. C. 1903) 123 Fed. 197; Tompkins v. Tompkins, Id. 207; Carter v. Fortney (C. C. 1909) 170 Fed. 463; Fonotipia, Limited, v. Bradley (C. C. 1909) 171 Fed. 951.

One who has parted with all his interest is not a necessary party. Hickox v. Elliott (C. C. 1884) 22 Fed. 13.

The assignor of a chose in action is not in equity a necessary party, where the suit is by the assignee, and the assignment is absolute. Trecothick v. Austin (C. C. 1825) Fed. Cas. No. 14,-164.

The original debtor is not an indispensable party to a suit in equity by his creditor on the promise of the grantee of the debtor to pay the creditor's claim. Silver King Coalition Mines Co. of Nevada v. Silver King Consol. Mining Co. of Utah (1913) 204 Fed. 166, 122 C. C. A. 402.

Where two persons contract with a city to make certain improvements upon the streets, and one of them sells out his right in the contract to the other, the one so selling out is not necessarily a party to a bill brought to enforce a lien upon the lots. Fitch v. Creighton (1860) 65 U. S. (24 How.) 159, 16 L. Ed. 596.

Where the receivers of an insolvent insurance society assigned to complainant absolutely whatever rights the society or its receivers had against defendant depositaries of the society's funds arising out of embezzlements by the society's treasurer, neither the society nor its receivers were necessarily parties to a bill by complainant against such depositaries, though one of the receivers was entitled to one-quarter of whatever complainant collected on the assigned claims. Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co. (C. C. 1900) 143 Fed. 152.

Plaintiffs' firm had originally consisted of S., H., and W. W. sold all his interest to S., evidenced by a bill of sale, and subsequently made a more formal assignment. All of this was done with the knowledge of defendants. In an action by the firm, W. entered appearance, and disclaimed all interest in the proceedings. Held, that he was not a necessary party to the cause. Kilbourn v. Sunderland (1889) 9 Sup. Ct. 594, 130 U. S. 505, 32 L. Ed. 1005.

The state of California is not a necessary party to a bill by the United States to recover the possession of certain public lands listed by mistake to that state under 19 Stat. 267, and by it sold to respondent. U. S. v. Hendy (C. C. 1893) 54 Fed. 447, following Williams v. U. S. (1891) 11 Sup. Ct. 457, 138 U. S. 514, 34 L. Ed. 1026.

Where a trustee transferred the trust property to defendant with the cestui's consent, the original trustee's administrator was not a necessary party to a subsequent suit against defendant to enforce a trust. Sage Land & Improvement Co. v. Ripley (1912) 192 Fed. 785, 114 C. C. A. 339.

59. —— **Persons legally represented.** —Where the interest of one is involved in that of another, and the former possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both parties before the court. Hopkirk v. Page (C. C. 1822) Fed. Cas. No. 6,-697.

It is not necessary to make all bondholders parties to a suit, or to make any of them parties, if their trustees under the mortgages are parties. Campbell v. Railroad Co. (C. C. 1871)

Fed. Cas. No. 2,366; Dows v. Chicago & S. W. Ry. Co. (C. C. 1875) Id. 4,048.

That the trustees of a railroad mortgage filed a cross-bill in a suit to foreclose another mortgage does not make a bondholder under the first mortgage a party to the suit by representation. Mercantile Trust Co. v. Lamoille Val. R. Co. (C. C. 1879) Fed. Cas. No. 9,432.

Where a trustee under a mortgage executed by a cemetery corporation is a party to suit to restrain a sale of cemetery lands, the bondholders need not be made parties, for they are represented by the trustee. Carpenter v. Knollwood Cemetery (D. C. 1912) 198 Fed. 297.

60. —— Grounds for omitting or dispensing with parties.—See § 1032, and notes.

Persons who, if within the jurisdiction of the court, might be regarded as proper and necessary parties to a suit in equity, will not, when beyond the jurisdiction of the court, be regarded as indispensable parties, so that their absence would defeat the jurisdiction, if the rights of the complainant and of the respondents before the court can be determined without them, and they will not be in any manner affected by the decree. Elmendorf v. Taylor (1825) 23 U. S. (10 Wheat.) 152, 6 L. Ed. 289; Mallow v. Hinde (1827) 25 U. S. (12 Wheat.) 193, 6 L. Ed. 599; Vattier v. Hinde (1833) 32 U. S. (7 Pet.) 252, 8 L. Ed. 675; Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200; Union Bank of Louisiana v. Stafford (1851) 53 U. S. (12 How.) 327, 13 L. Ed. 1008; New Orleans Canal & Banking Co. v. Same (1851) 53 U. S. (12 How.) 343, 13 L. Ed. 1015; Hagan v. Walker (1852) 55 U. S. (14 How.) 29, 14 L. Ed. 312; Mississippi & M. R. Co. v. Ward (1862) 67 U. S. (2 Black) 485, 17 L. Ed. 311; Waterman v. Canal-Louisiana Bank & Trust Co. (1909) 30 Sup. Ct. 10, 215 U. S. 33, 54 L. Ed. 80; West v. Randall (C. C. 1820) Fed. Cas. No. 17,424; Gray v. National S. S. Co. (C. C. 1879) Id. 5,726; Hazard v. Durant (C. C. 1884) 19 Fed. 471; Gross v. George W. Scott Mfg. Co. (C. C. 1891) 48 Fed. 35; Union Mill & Mining Co. v. Dangberg (C. C. 1897) 81 Fed. 73; Plume & Atwood Mfg. Co. v. Baldwin (C. C. 1898) 87 Fed. 785; Shingleur v. Jenkins (C. C. 1901) 111 Fed. 452; Edwards v. Mercantile Trust Co. (C. C. 1903) 124 Fed. 381; Slater Trust Co. v. Randolph-Macon Coal Co. (C. C. 1908) 166 Fed. 171.

In the federal courts a suit in equity may proceed without any necessary or proper party, not an indispensable party, if his presence would oust the jurisdiction of the court. Williams v. Crabb (1902) 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425 (writ of certiorari denied Crab v. Williams [1902] 23 Sup. Ct. 845, 187 U. S. 645, 47 L. Ed. 347); Camp v. Bonsal (1913) 203 Fed. 913, 122 C. C. A. 207; Silver King Coalition Mines Co. of Nev. v. Silver King Consol. Mining Co. of Utah (1913) 204 Fed. 166, 122 C. C. A. 402; Joy v. Wirtz (C. C. 1806) Fed. Cas. No. 7,554; Cole Silver Min. Co. v. Virginia & Gold Hill Water Co. (C. C. 1871) Fed. Cas. Nos. 2,989, 2,990; Cleveland Tel. Co. v. Stone (C. C. 1900) 105 Fed. 794; Mackay v. Gabel (C. C. 1902) 117 Fed. 873.

Persons claiming no adverse rights and against whom no relief is sought are not necessary parties. Kerr v. Watts (1821) 19 U. S. (6 Wheat.) 550, 5 L. Ed. 328; Hamilton v. Savannah, F. & W. Ry. Co. (C. C. 1892) 49 Fed. 412 (distinguishing Central R. Co. v. Mills [1885] 5 Sup. Ct. 456, 113 U. S. 256, 28 L. Ed. 1007); Union Mill & Mining Co. v. Dangberg (C. C. 1897) 81 Fed. 73; Ex parte Haggerty (C. C. 1903) 124 Fed. 441.

The general chancery rule that all parties interested must be joined is subject to the exception that if they are too numerous the case is subject to special order; that parties that are not directly affected by the decree are not indispensable, and those not interested in the controversy, but interested in the subject-matter, may be joined or not at complainant's election. Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co. (1913) 208 Fed. 976, 126 C. C. A. 64.

Complainants allowed to dispense with parties on account of their numerousness cannot take advantage of the neglect of defendants, to the prejudice of those not named. Campbell v. Texas & N. O. R. Co. (C. C. 1871) Fed. Cas. No. 2,366.

Where a subsequent mortgagee is made a party to a foreclosure suit, the bill will be dismissed as to him, where it appears that his being made a party hinders and delays the suit. Richards v. Chesapeake & O. R. Co. (C. C. 1876) Fed. Cas. No. 11,771.

The general rule that equity will require all parties in interest to be brought in, to the end that one suit may end the litigation, is one of convenience, and is not to be enforced when it would work injury to the rights of the parties before the court. Smith v. Lee (C. C. 1896) 77 Fed. 779.

When the bill suggests as a reason for not bringing in all interested parties that some of them are unknown to plaintiff, the case may proceed without them, in the absence of any statement of fact in the answer showing the suggestion to be untrue. Alger v. Anderson (C. C. 1897) 78 Fed. 729.

A distinction has been recognized between necessary and indispensable parties, to ascertain whether some of those, who under the established rules of equity pleading and practice were deemed necessary, may not, under such rules, be dispensed with as parties, that equi-

table relief in a given case may not wholly fail. Mathieson v. Craven (C. C. 1908) 164 Fed. 471.

61. —— One or more suing or defending on behalf of all.—It is a well-established rule in equity that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and the others. So a bill may be maintained against a portion of a numerous body of defendants representing a common interest. Smith v. Swormstedt (1853) 57 U. S. (16 How.) 288, 14 L. Ed. 942.

Where a large number of persons are separately, but similarly, interested in a trust fund, a bill for an accounting with respect to such fund and for direction as to its administration may be maintained by a part of such body in behalf of all. Watson v. National Life & Trust Co. (1908) 162 Fed. 7, 88 C. C. A. 380.

In a case where railroad bondholders are numerous, a suit brought by or against some in behalf of all will be binding on all. The parties who are not named may intervene. Campbell v. Railroad Co. (C. C. 1871) Fed. Cas. No. 2,366.

A provision in a deed of trust giving the majority bondholders the option to declare the principal due on default of payment of interest does not prevent a single bondholder from foreclosing for interest. Alexander v. Central R. R. of Iowa (C. C. 1874) Fed. Cas. No. 166.

Bondholders may file a bill, in behalf of themselves and all others who may come in to enforce the trust, without making all bondholders parties. Wilmer v. Atlanta & R. Air Line Ry. Co. (C. C. 1875) Fed. Cas. No. 17,776.

Where the trustees of a railroad mortgage are in such a position that they cannot alone properly represent the bondholders, the latter may sue to foreclose without showing a refusal by the trustees to do so. Mercantile Trust Co. v. La Moille Val. R. Co. (C. C. 1879) Fed. Cas. No. 9,432.

In courts of equity, executors and administrators are considered in almost every respect as trustees, and the proper representatives of all persons interested in the personal estate. The duty is imposed upon them of protecting such estate from all improper demands, and persons interested cannot properly be made parties in a suit against such executors or administrators for an account of the personal estate, although such person may be greatly interested in contesting the demands which have occasioned the suit. Terry v. President and Directors of Bank of Cape Fear (C. C. 1884) 20 Fed. 773.

Trades unions or assemblies cannot be sued as a body, to enjoin them from instituting a boycott. Oxley Stave Co. v. Coopers' International Union of North America (C. C. 1896) 72 Fed. 695.

An executor empowered to sell lands, and make and acknowledge titles, takes the fee-simple title; and, in an action against him to rescind a contract of sale made by the testator, he represents all the beneficiaries, and they are not necessary parties. Alger v. Anderson (C. C. 1897) 78 Fed. 729.

In a suit to restrain an alleged unlawful combination acting as an unincorporated association, it is sufficient that the association, together with a large number of its members, as individuals and officers of the association, are made parties defendant. U. S. v. Coal Dealers' Ass'n (C. C. 1898) 85 Fed. 252.

Where a voluntary association of business concerns engaged in printing, known as the "Typothetæ," executed a contract with the representatives of the International Printing Pressmen and Assistants' Union, also a voluntary association, a suit to enforce such contract might be maintained by a few of the members of the Typothetæ, in behalf of the others, against the executive officers of the union or such members as fairly represented its interests, as provided by equity rule 48. A. R. Barnes & Co. v. Berry (C. C. 1907) 156 Fed. 72.

In a suit for an injunction to restrain certain voluntary labor organizations and officers and members of the same from interfering with the business of complainant, where it is alleged in the bill that the acts complained of were committed pursuant to a conspiracy entered into between the members of such organizations, it is not essential that all of such members be made parties. Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor (C. C. 1907) 156 Fed. 809.

Several property owners may join in a bill on behalf of themselves and all others similarly situated to enjoin the collection of an illegal tax, which affects all of the complainants alike; their interests being common, if not joint. Risley v. City of Utica (C. C. 1909) 173 Fed. 502.

Where complainant sued in equity to compel defendant railroad company to deliver certain of its stock in exchange for stock of another corporation under a reorganization agreement, and alleged that complainant did not know how many others were similarly situated, but averred on information and belief that there were many others similarly situated, and that their stock amounted to at least $500,000, such allegation was not sufficient to justify the court in entertaining the bill as one brought by complainant on behalf of a class. Motley v. Southern Ry. Co. (C. C. 1911) 184 Fed. 956.

Owners of landholders' shares in a cemetery who sue on their own behalf and on behalf of all other owners similarly situated to restrain a sale of cemetery lands must make a shareholders' committee parties as representatives of a class of shareholders whose interests are antagonistic to the interests of complainants. Carpenter v. Knollwood Cemetery (D. C. 1912) 198 Fed. 297.

A suit brought by members of one church association, on behalf of themselves and all other members, against members of another association as representing all its members, to determine rights of the associations, respectively, in property held by a corporation created as a church agency, held a class suit, to which directors of the corporation were not indispensable parties, whose nonjoinder defeated the jurisdiction of a federal court. Helm v. Zarecor (D. C. 1913) 213 Fed. 648.

Alien, suing to enjoin enforcement of law requiring employment of citizens in preference to aliens, held not entitled to sue on behalf of all others similarly situated, within equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix). Raich v. Truax (D. C. 1915) 219 Fed. 273.

62. Proper parties.—Where the surviving partner of an insolvent firm assigned certain lots belonging to the firm for the benefit of its creditors, the heirs of the deceased partner cannot be made parties to a suit involving the title to the lots, on the ground of any relation of trust or confidence subsisting between them and the assignee. Rothwell v. Dewees (1862) 67 U. S. (2 Black) 613, 17 L. Ed. 309.

A proper party, as distinguished from one whose presence is necessary to the determination of the controversy, is one who has an interest in the subject-matter of the litigation, which may be conveniently settled therein. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14.

The pledgee of a chose in action, having an equitable interest therein, is a proper party plaintiff in a bill in equity with reference to such chose in action. Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520.

The B. Co. contracted to transport certain merchandise to a certain point, said merchandise being insured by complainant Co. The merchandise was lost or damaged through the alleged negligence of the B. Co. Complainant, having paid the losses, and being subrogated to the rights of the insured, brought a bill in equity against the B. Co., its president, and the S. Co., which had received all the assets of the B. Co., fraudulently and without consideration, and with notice of complainant's claim. Held, that both the B. Co. and the S. Co. were proper parties. Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C. 1882) 10 Fed. 596, decree affirmed in (1887) 7 Sup. Ct. 550, 120 U. S. 166, 30 L. Ed. 621.

The president of the B. Co. was not a proper party. Id.

The husband is a proper party where the wife is charged as to her separate estate. U. S. v. Pratt Coal & Coke Co. (C. C. 1883) 18 Fed. 708.

In a suit which is, in effect, an application to the court to compel the executor of an executor to pay over to complainant a share of the estate bequeathed to one of the testator's children, to which, complainant claims title by virtue of certain attachment proceedings, the defendant has a right to demand that such child be made a party defendant, and a bill that fails to do so will be held defective for want of proper parties, on demurrer. Drake v. Delliker (C. C. 1885) 24 Fed. 527.

Reorganized lessee railroad company held not a proper party to a bill of intervention by stockholders against the lessor and the reorganized lessee company, praying that the company be required to distribute to them the remainder of the fund received from the reorganized company, as the original lease was abrogated by receivership, and the net earnings thereunder, awarded to the lessor, were not governed by its provisions. Central R. & Banking Co. v. Farmers' Loan & Trust Co. (C. C. 1901) 112 Fed. 81.

Where a bill alleges easements and water rights in complainant under contracts with a water power company and interference and further threatened interference with such rights by the company and its president against which injunctive relief is prayed and also a decree adjusting water rights as between complainant and all the parties, it is not for specific performance, but is in the nature of a bill quia timet; and, where it alleges that complainant's rights under its contracts are prior and superior to those of the mortgagees, persons alleged to claim an interest in the mortgage are the proper parties defendant. Howe & Davidson Co. v. Haugan (C. C. 1904) 140 Fed. 182.

A local board of health in the state of New Jersey is a public agency created under the authority of the state, from which it directly derives its powers, and is wholly independent of municipal control. Hence a town is not a proper party to a suit to enjoin the enforcement of an ordinance passed by a board of health, although the two exercise authority over the same territory in their different spheres. Borden's Condensed Milk Co. v. Baker (C. C. 1909) 168 Fed. 111, decree reversed (1910) 177 Fed. 906, 101 C. C. A. 186.

63. Complainants.—A wife in possession of land constituting her separate estate may maintain a bill in equity to

enjoin the sale of such land under an execution levied by her husband's creditors. Allen v. Hanks (1890) 10 Sup. Ct. 961, 136 U. S. 300, 34 L. Ed. 414.

Persons claiming to have been the equitable owners of a steamboat up to a certain period, and afterwards equitable owners of all the stock of a corporation to which she was conveyed, may maintain in their own names an action against a firm alleged to have had control of the boat, as her agent, during the entire period, for an accounting in respect to her earnings, and her proceeds after her sale, without making the corporation itself a party defendant. Conery v. Sweeney (1896) 81 Fed. 14, 26 C. C. A. 309.

A., owning, alone, certain property, joined with B., who was tenant in common with him of other property, in conveying all of the property to C. Held, that A. could alone sue in equity both B. and C. for neglect in managing the estate, and for an account of proceeds. Jewett v. Cunard (C. C. 1847) Fed. Cas. No. 7,310.

Where an agreement with A. and B. is to reconvey to each separately the different estates conveyed by them, a separate action will lie by either party for his separate proportion. Id.

Court may allow trustee to file bill of foreclosure, after suit by individual bondholder. Alexander v. Central R. R. of Iowa (C. C. 1874) Fed. Cas. No. 166.

A guarantor of bonds expressly subrogated to the rights of mortgagees in respect to payments made by it may foreclose for interest payments which it has made. Dows v. Chicago & S. W. Ry. Co. (C. C. 1875) Fed. Cas. No. 4,-048.

Pending a suit by mortgage trustees to be put in possession on default in payment of the interest, a funding system was adopted, by which payment of the interest was postponed to enable the road to be completed. Held, that a nonassenting bondholder, who had not made a demand upon the trustees to foreclose, could not file an original bill for such purpose. Stern v. Wisconsin Cent. R. Co. (C. C. 1879) Fed. Cas. No. 13,378.

Where state bonds issued in exchange for railroad bonds secured by a statutory mortgage are declared invalid, the holders of the state bonds may in equity enforce such mortgage for their own benefit. Western Division of Western N. C. R. Co. v. Drew (C. C. 1879) Fed. Cas. No. 17,434.

A bill in equity is not demurrable because brought by a cestui que trust in his own name and on his own behalf, where it appears in the bill that the trustees have acquired adverse interests and been made defendants. Webb v. Vermont Cent. R. Co. (C. C. 1881) 9 Fed. 793.

A married woman in New York can maintain an equity action in the United States courts in her own name. Armstrong v. Syracuse Screw Co. (C. C. 1883) 16 Fed. 168.

One who is personally interested in a suit cannot represent an infant therein as his next friend. Jarvis v. Crozier (C. C. 1899) 98 Fed. 753.

Bondholders of coal company, suing to enjoin striking employés and others from illegally interfering with working of company's mine, are not required to apply to the trustee who holds the mortgage to bring such suit, which is outside of the terms of his trust; but, being the principals in interest, they may protect their rights by direct suit in their own names. Carter v. Fortney (C. C. 1909) 170 Fed. 463.

64. —— **Joinder.**—Where one seeking to obtain title to an interest in a mine, by fraudulent representations, induces both the owner and his prospective heirs to join in a deed, such heirs may properly join with the owner in a suit to set aside the deed, though they in fact have no present interest in the property or its income. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14.

Holders of policies in insurance companies transferring assets to other companies held entitled to join in a bill for some form of relief with respect to the assets transferred as a trust fund. Watson v. National Life & Trust Co. (1908) 162 Fed. 7, 88 C. C. A. 380.

Where all the creditors of a debtor join in a release, they must all join in a bill in equity to set it aside. Joy v. Wirtz (C. C. 1806) Fed. Cas. No. 7,-553.

Only those whose interests are in harmony should be joined as plaintiffs. Parsons v. Lyman (C. C. 1860) Fed. Cas. No. 10,779; Bunce v. Gallagher (C. C. 1867) Fed. Cas. No. 2,133.

Persons having distinct claims against same defendant cannot maintain joint suit in equity. Baker v. Portland (C. C. 1879) Fed. Cas. No. 777.

Other persons having assets of an estate cannot be joined with the administrator in an action against the latter, unless there be collusion between such persons and the administrator; and this is true in cases governed by the Public Statutes of Rhode Island. Miner v. Aylesworth (C. C. 1883) 18 Fed. 199.

Where complainants' interests are, in every important sense, several, and there is no unity or community of interest between them as regards the subject-matter of the suit, but they only have a common interest in the law of the case, they cannot join in the suit. Schulenberg-Boeckeler Lumber Co. v. Town of Hayward (C. C. 1884) 20 Fed. 422.

Three creditors of a construction company, each of whom severally loan-

ed money to its president for the purpose of building a railway, under pledges of portions of the profits, may join in a bill for relief when the company sell their stock and assets to a rival railroad. Langdon v. Branch (C. C. 1888) 37 Fed. 449, 2 L. R. A. 120.

Persons who have been separately indicted for the sale of intoxicating liquors in the original packages in which they were imported, and separately enjoined from making such sales, cannot maintain a joint suit for an injunction against such proceedings, though they are, respectively, the agent and subagent of the same importer. Woolstein v. Welch (C. C. 1890) 42 Fed. 566.

The titles of owners under homestead and pre-emption laws which have a common source, and whose validity depends on the same questions of law and fact, may be determined in a single suit in equity in which all the owners join as plaintiffs. Osborne v. Wisconsin Cent. R. Co. (C. C. 1890) 43 Fed. 824.

Complainants who, together and as a single transaction, purchased all of the stock of a coal company, which carried with it the title to coal lands, although they divided the stock between themselves and gave separate notes for their respective shares of the purchase money, may unite in a suit against the vendor to enjoin a transfer of the notes, and compel an abatement therefrom on account of fraudulent representations made by him in regard to the property. Odbert v. Marquet (C. C. 1908) 163 Fed. 892, decree affirmed (1909) 175 Fed. 44, 99 C. C. A. 60.

Two corporations, one of which is the successor in business of the other, may join in a bill to enjoin acts of defendant which will injure both complainants. James B. Sipe & Co. v. Columbia Refining Co. (C. C. 1909) 171 Fed. 295.

Several mine owners in a district suffering from loss of ores by theft of employés, which ores were sold to several individual defendants, held entitled to join in a bill to restrain further purchase of such ores against all the defendants jointly. Goldfield Consol. Mines Co. v. Richardson (C. C. 1911) 194 Fed. 198.

65. **Defendants.**—That an administrator was ordered to account before a master, in a suit by a distributee for his share, does not make parties all who are entitled to distribution, nor authorize a decree in their favor. Hook v. Payne (1871) 81 U. S. (14 Wall.) 252, 20 L. Ed. 887.

In a suit by the United States to recover public lands and to cancel the patent, where no confederacy, nor conspiracy, nor possession, nor title is alleged as to a person, and no case set out for relief against him, or for discovery or accounting, or any other thing, he should not be made a party. U. S. v. Pratt Coal & Coke Co. (C. C. 1883) 18 Fed. 708.

66. —— **Joinder.**—Where the facts pleaded in a bill for an injunction show the defendant to be a trespasser, he cannot be heard to complain that his cotrespassers are not joined as defendants. People's Telephone & Telegraph Co. v. East Tennessee Tel. Co. (1900) 103 Fed. 212, 43 C. C. A. 185.

In a suit by policy holders of insurance company whose assets were successively transferred to other companies for some form of relief with respect to the assets transferred as a trust fund, where the bill contained allegations tending to negative any novation, all the companies could be joined as defendants. Watson v. National Life & Trust Co. (1908) 162 Fed. 7, 88 C. C. A. 380.

In a suit to establish complainant's right to a specific quantity of the water of a stream, several persons who divert water from such stream, and claim the right to divert it as against complainant, and whose acts are such as to make their individual diversion injurious to complainant's rights, may all be united as respondents, though they do not claim the water jointly, nor by any common right. Union Mill & Mining Co. v. Dangberg (C. C. 1897) 81 Fed. 73.

In a suit by a railroad company to enjoin the purchase from passengers of partly used tickets, nontransferable by their terms, and their resale for use in violation of the contract, where different brokers are engaged in dealing in the same class of tickets they may be joined as defendants. Nashville, C. & St. L. Ry. Co. v. McConnell (C. C. 1897) 82 Fed. 65; Delaware, L. & W. R. Co. v. Frank (C. C. 1901) 110 Fed. 689.

A bill seeking to restrain defendants from pasturing sheep on a certain forest reservation, alleging that defendants drove several bands of sheep upon the reservation, held not objectionable for misjoinder of defendants. U. S. v. Dastervignes (C. C. 1902) 118 Fed. 199, order affirmed Dastervignes v. U. S. (1903) 122 Fed. 30, 58 C. C. A. 346.

67. **Making party complainant or defendant.**—In equity it is not essential, as at law, that the parties litigant should be on opposite sides of the case, to have a decree between them. Piatt v. Oliver (C. C. 1842) Fed. Cas. No. 11,116.

When the complainant has joined with him, as co-complainants, other parties who have a similarity, but no community, of interest with him, and whose joinder with him is not necessary, and as between whom and some of the defendants the court cannot take jurisdiction, because of their citizenship, the complainant should be permitted to amend his bill by striking out the names of such parties as complainants, and

making them defendants to the bill, so as to remove the impediment to the jurisdiction. Insurance Co. of North America v. Svendsen (C. C. 1896) 74 Fed. 346.

Where there seems to be no necessity for it, the court will not, at an early stage of the case, by an order require a party complainant, whose interest may lie with the defendants, to become a defendant, but will leave the matter to the final hearing, and will then arrange the parties and administer relief as their respective rights may require. But if such co-complainant should undertake to delay, harass, or impede the orderly progress of the cause, the other complainant will be allowed to renew his motion to make such party a defendant. Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co. (C. C. 1899) 93 Fed. 197.

The fact that proper parties defendant might not be averse to the granting of the relief prayed for would not authorize the court to align them on the side of the plaintiff in the suit, where that would defeat the court's jurisdiction, where plaintiff did not sue in their right, but in its own. Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co. (C. C. 1902) 119 Fed. 942.

Parties in equity have no fixed standing as plaintiff or defendant, but may be realigned for jurisdictional purposes according to interest. Kelly v. Dolan (D. C. 1914) 218 Fed. 966.

68. Parties to original suit as parties to ancillary suit.—The dependence of an ancillary upon an original suit for purposes of jurisdiction does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Parties to the original bill are not thereby made parties to the defendant bill, nor have they any more right to intervene in the dependent cause than if the court, had independent jurisdiction thereof. And the dependent cause is proceeded in without regard to the pleading or course of the principal suit. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1897) 82 Fed. 642.

A receiver appointed in a creditors' suit against an insolvent railroad company is not a proper party to an ancillary suit against the same company to foreclose a mortgage on the property in his hands. Id.

69. Intervention.—In a suit pending in the supreme court of the United States relative to disputed boundary between two states, a motion made by the attorney general on behalf of the United States, before a replication had been filed, for leave to intervene, not technically as a party to the suit, was allowed, and leave given him, without becoming a party to the suit, to file testimony and be heard on the argument, but not to interfere with the pleadings or evidence on behalf of either of the states. Florida v. Georgia (1854) 58 U. S. (17 How.) 478, 15 L. Ed. 181.

A petition to become a party to a suit in equity, where the record does not show the nature of the suit, is irregular and must be dismissed. Ranson v. Davis' Adm'rs (1855) 59 U. S. (18 How.) 295, 15 L. Ed. 388.

Allegations in petition in intervention filed by administratrix of the surety on a forfeited bail bond held to sufficiently show a right to intervene to charge the holder of certain securities with a trust in favor of the government, as against objection that petition does not negative the surety's ignorance of the facts claimed to raise the trust, and that the asserted right of intervention rests upon an implied contract. Leary v. U. S. (1912) 32 Sup. Ct. 599, 224 U. S. 567, 56 L. Ed. 889, reversing decree (1910) 184 Fed. 433, 107 C. C. A. 27.

The right of the administratrix of the surety on a forfeited bail bond, asserting an express trust in the surety's favor in securities held by a third person, to intervene in a suit by the United States to charge the holder of the securities with a trust, is not barred by laches because not filed until the evidence had been taken and the suit was ready for final hearing. Id.

In a suit by a national bank president, against whom an indictment is pending for violating the banking laws, brought against the receiver of the bank to obtain possession of alleged private papers, the United States district attorney cannot, on his petition, be made a party defendant for the purpose of claiming the papers to lay them before the grand jury. The proper course was for him to obtain a subpœna duces tecum from the court in which the investigation was pending, and then to make summary application to the court which had impounded the papers. Potter v. Beal (1892) 50 Fed. 860, 2 C. C. A. 60.

In a suit to cancel a deed procured by fraud from heirs of aliens conveying their interest in a mining claim of which he was a colocator, it was error to refuse a petition by the representative of his deceased daughter to become a party complainant, since the decree should be in such shape as to settle the rights of all parties claiming under such alien. Billings v. Aspen Mining & Smelting Co. (1892) 51 Fed. 338, 2 C. C. A. 252, rehearing denied (1892) 52 Fed. 250, 3 C. C. A. 69.

The parties to an original bill are bound to take notice of an intervening petition filed in the suit. McLeod v. City of New Albany (1895) 66 Fed. 378, 13 C. C. A. 525.

While a petition of intervention need not be as formal as a bill of complaint, yet it should exhibit all the material facts relied on, embodying, by recital or reference, so much of the record in

the original suit as is essential; and proceedings taken therein, after the filing of the petition, which would fortify the right of the intervener, should be incorporated in the petition by amendment, and, if this is not done, such proceedings cannot be noticed on a demurrer to the petition. Empire Distilling Co. v. McNulta (1897) 77 Fed. 700, 23 C. C. A. 415, decree affirmed Dennehy v. McNulta (1898) 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609.

Where, on the filing of a bill by one coexecutor against another, complainant filed a petition to remove his coexecutor, which was met by an answer and a cross-petition for the same relief, with reference to complainant, whereupon the probate court removed both and appointed an administrator with the will annexed, the latter was entitled to intervene and maintain the bill alone for the benefit of the estate. Monmouth Inv. Co. v. Means (1906) 151 Fed. 159, 80 C. C. A. 527.

Applications for leave to intervene are of two kinds: In one the applicant has other means of redress open to him, and it is within the court's discretion to refuse to incumber the main case with collateral inquiries; in the other, the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending cause, and in such case the right to intervene is absolute, and the rejection of the petition is a final adjudication, and therefore appealable. United States Trust Co. of New York v. Chicago Terminal Transfer R. Co. (1911) 188 Fed. 292, 110 C. C. A. 270.

Until an order denying a petition to intervene in a pending cause is set aside either by the court which entered the order, or by an appellate court, petitioners are not entitled to a hearing on a second petition based on the same grounds. United States Trust Co. of New York v. Chicago Terminal Transfer R. Co. (1911) 188 Fed. 292, 110 C. C. A. 270.

Under provisions of an order after decree of foreclosure against a terminal railroad company, permitting a lessee company to redeem from the decree and be subrogated to the rights of the complainant therein, held, that the stockholders of the terminal company were not entitled to intervene in the foreclosure suit for the purpose of attacking the decree as well as the lease on the ground that the latter was fraudulent and brought about the default and foreclosure, but that they were limited to a proceeding in some proper forum to hold the lessee liable in damages. Id.

Where a person's property rights have been injured by a fraud, and the person elects to repudiate the transaction and recover his property, and such recovery cannot be had except by intervention in a pending suit, his right to intervene is not destroyed by the fact that he had an election of remedies between recovery of damages for the fraud and repudiation of the transaction. Id.

Where a suit was brought for the benefit of all stockholders of an insolvent corporation, including petitioners, it was not an abuse of discretion to deny application for leave to intervene. Farmers' & Merchants' Bank of Phœnix, Ariz., v. Arizona Mut. Savings & Loan Ass'n (C. C. A. 1915) 220 Fed. 1, affirming decree Clark v. Arizona Mut. Sav. Loan Ass'n (D. C. 1914) 217 Fed. 640.

The grant of leave to intervene in a proceeding in equity is ordinarily discretionary. Western Union Telegraph Co. v. United States & Mexican Trust Co. (1915) 221 Fed. 545, 137 C. C. A. 113.

The right of intervention does not necessarily follow from the absence of other remedy; but an intervener should have some interest in or claim to the demand in suit, or some connection with, interest in, or lien upon, the subject-matter of the litigation. Glass v. Woodman (1915) 223 Fed. 621, 139 C. C. A. 167.

A person who becomes interested in the subject matter pending litigation may come in and protect his interests, if application is made within reasonable time. The Jennie Lind (C. C. 1856) Fed. Cas. No. 7,287; Scott v. Mansfield, C. & L. M. R. Co. (C. C. 1877) Fed. Cas. No. 12,541. But see Drake v. Goodridge (C. C. 1868) Fed. Cas. No. 4,062; Anderson v. Jacksonville, P. & M. R. Co. (C. C. 1873) Fed. Cas. No. 358.

Where trustees under a mortgage, of whom it is alleged in the bill for a foreclosure that they had refused to realize on the security, apply to come in, and have been admitted as complainants in the bill, they must control the proceedings. Richards v. Chesapeake & O. R. Co. (C. C. 1876) Fed. Cas. No. 11,771.

The fact that the trustees in a railroad mortgage have approved a reorganization plan recommended by one set of bondholders, rather than that approved by another set, is no ground for admitting a committee of the latter as parties to the foreclosure suit. Skiddy v. Atlantic, M. & O. R. Co. (C. C. 1879) Fed. Cas. No. 12,922.

Third persons may be permitted to intervene for their rights in equity cases, if those rights are to be affected, and if at the hearing the court would be compelled to notice their absence, and order the case to stand over until they were brought in, or their rights were protected. Carter v. City of New Orleans (C. C. 1884) 19 Fed. 659.

In order to become a party to an action by simply proving the claim before the master, the person's rights must have existed at the commencement of the suit and been represented by the original plaintiff. He cannot be con-

sidered as thus represented, if, at the time of the filing of the bill, he was a debtor, and his rights inconsistent with and adverse to the rights of the plaintiff. Terry v. Bank of Cape Fear (C. C. 1884) 20 Fed. 777.

Where a judgment creditor of a corporation files his bill in the circuit court to subject the equitable interest of defendant in its mortgaged property to the payment of his debt, the owner of the company's property, stock, and franchises will not be permitted to become a party defendant on his petition alleging that he has already commenced an equity suit in the state court against plaintiff to determine the amount of the debt and to set aside certain transactions between them, where the chancery suit in the state court is in no way affected by the suit in the federal court, and the property is not paying expenses, and the intervention of petitioner would merely delay the suit. Coffin v. Chattanooga Water & Power Co. (C. C. 1891) 44 Fed. 533.

A petition to be admitted as defendants in a suit should be accompanied by the proposed answer, but, not being so accompanied, the petition may be allowed to stand as the answer, all impertinent matters being stricken therefrom. Toler v. East Tennessee, V. & G. Ry. Co. (C. C. 1894) 67 Fed. 168.

Where intervening petitions are filed without leave in a railway mortgage foreclosure suit three years after they might have been tendered, and where the delay has the appearance of laches, it is in the discretion of the court to determine how much of such petitions may be regarded as making proper issues for the bondholders to meet. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1897) 82 Fed. 642.

An intervener in an equity suit by leave of court becomes and remains a party for all purposes of the suit, the same as though originally made one. Rice v. Durham Water Co. (C. C. 1899) 91 Fed. 433.

Petition by owner of brickyard in suit by receiver of a railroad to enjoin the tearing up by another railroad company of a spur track connecting the brickyard with the main line of his road held sufficient. Receiver of Central R. & Banking Co. of Georgia v. Macon D. & S. R. Co. (C. C. 1902) 115 Fed. 926.

An intervention pro inter esse suo must be construed as pleading in connection with the averments of the original bill. Id.

Where by the judgment of a probate court it is determined that an estate is fully settled, and the administratrix is discharged, creditors whose claims were allowed, but not paid, because the estate was insolvent, cannot intervene in an action thereafter brought by the administratrix in her own right to recover property formerly belonging to the deceased, and claimed as her individual property, for the purpose of having such property adjudged to belong to the estate, and to have it appropriated to the payment of their claims. Clarke v. Eureka County Bank (C. C. 1902) 116 Fed. 534.

One among a number of interveners in a suit, who was admitted as a party without conditions, and has been in the case for 17 months, without taking any part in the proceedings or offering any evidence, is not entitled, on a petition filed after the testimony has been closed, to be given full charge of the suit, as complainant, on an allegation of collusion between the original parties, of which none of the other interveners complains, and of which he offers no proof, except certain testimony in the record, taken in a previous stage of the litigation, on other issues. Edwards v. Bay State Gas Co. of Delaware (C. C. 1902) 120 Fed. 585.

Where a suit is brought on behalf of complainant and all others similarly situated, a person will not be given leave to intervene by separate counsel to assert a claim in all respects similar to that of complainant, unless it is proposed to dispose of the cause otherwise than in the usual way at final hearing, so that such intervention may be necessary to protect the petitioner's right. Bowker v. Haight & Freese Co. (C. C. 1905) 140 Fed. 794.

Where a petitioner for leave to intervene alleges rights in the subject-matter of the suit which make him a proper party, and his intervention will not prejudice the rights of other parties, but rather tend to facilitate the final determination of the rights of all of the parties, his petition will be granted, and the court will not undertake on such preliminary application to decide questions of right which may be doubtful. Brinckerhoff v. Holland Trust Co. (C. C. 1906) 146 Fed. 203.

Where receivers have been appointed for a system of street railroads, consisting of a combination of various lines, in a suit against the lessee, from which fact it is to be apprehended that rentals will not be paid promptly and that a lessor will also be placed in a position of at least temporary insolvency, it is proper that such lessor should be permitted to intervene as a party defendant and surrender its own property and interest to the receivership. Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1907) 157 Fed. 440, petitions dismissed In re Reisenberg (1908) 28 Sup. Ct. 219, 208 U. S. 90. 52 L. Ed. 403.

In a suit by a stockholder against the corporation and another to set aside a transaction between the defendants by which the corporation disposed of property, on the ground of fraud and the gross negligence of its president and directors, such president, although not made a party, may properly be permitted to intervene and file a cross-bill

meeting and controverting the allegations of the bill. Brinckerhoff v. Holland Trust Co. (C. C. 1908) 159 Fed. 191.

A court of equity, until its final and conclusive decree, has power to afford redress to every litigant who, because of the wrong he has sustained, is entitled to participate in a fund unlawfully wrung from him by the defendants, of which the court has jurisdiction, not only to avoid a multiplicity of suits and because he has no adequate remedy at law, but because he is a proper party to the suit; he being entitled, without regard to the amount of his claim or the locality of his residence, to intervene by petition in his own behalf. Tift v. Southern Ry. Co. (C. C. 1908) 159 Fed. 555.

Shippers, other than complainants, who had paid excessive freight charges held entitled to intervene and share in a fund which the railroads were bound to pay into court for the settlement of such claims. Id.

70. Bringing in new parties.—Where, in a suit to obtain a conveyance of land to which defendant has a legal title, but to which plaintiffs claim an equitable title, claiming under a conveyance made in pursuance of a decree of a court of competent jurisdiction, it appears that the service of process was insufficient as to some of the defendants in the suit in which such decree for a conveyance was made, plaintiff should be given leave to make such defendants not served in the former suit new parties to the present suit. Hunt v. Wickliffe (1829) 27 U. S. (2 Pet.) 201, 7 L. Ed. 397.

Where plaintiffs in a bill claim under a decree of a court of competent jurisdiction, the bill should not be dismissed for want of proper parties, but leave should be given to them to make new parties. Id.

Where an assignment of a chose in action is not absolute, or its extent or validity are in dispute, or remaining rights or liabilities of the assignor may be affected by the decree in a bill in equity with reference to such chose in action, the assignor is a necessary party to such suit. His nonjoinder, however, may be cured by amendment. Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520.

A proceeding to bring into court a person who becomes a necessary party in consequence of an act performed by himself, after the commencement of the suit, though supplemental as to the former parties, is original as to the new party, and, though the former suit was commenced before the passage of Act May 4, 1858, it may, if afterwards instituted, be, within the meaning of the law, a suit brought after its enactment. Winter v. Ludlow (C. C. 1859) Fed. Cas. No. 17,891.

Purchasers pendente lite are bound by the decree, though not brought in as parties to the bill. Pullan v. Cincinnati & C. Air Line R. Co. (C. C. 1865) Fed. Cas. No. 11,461.

A complainant cannot be compelled to add new parties to his bill if he chooses to take the responsibility of their not being made parties. Searles v. Jacksonville, P. & M. R. Co. (C. C. 1873) Fed. Cas. No. 12,586.

Leave to amend a bill for adding new parties defendant after replication was filed will be denied where plaintiff could have made the amendment before replication. Clifford v. Coleman (C. C. 1875) Fed. Cas. No. 2,894.

Plaintiff, suing to enjoin infringement of a trade-mark belonging to a firm of which he alleged that he was the sole member, allowed to amend to bring in another, whom the proof showed was also a member. Frese v. Bachof (C. C. 1878) Fed. Cas. No. 5,110.

In a suit to foreclose a mortgage on the property of a railroad company composed of several consolidated companies, the fact that some of the stock of one of the constituent companies had never been converted into stock of the consolidated company held no ground for making such constituent company a party defendant. Skiddy v. Atlantic, M. & O. R. Co. (C. C. 1879) Fed. Cas. No. 12,922.

Assignees of defendants restrained from using a trade-mark, who use the mark, but do not base their claim to use it on any rights supposed to be derived from the original defendants, cannot be brought into the original suit by supplemental bill. Dadirrian v. Gullian (C. C. 1897) 80 Fed. 986.

A court has jurisdiction to allow an amendment of a bill to bring in a necessary party complainant. Kaiser v. General Phonograph Supply Co. (C. C. 1909) 171 Fed. 432.

Complainant held not entitled to object to adding a party defendant on the ground that it would complicate the issues, necessitate delay and entail on it additional expense, where it had been in its power to bring the entire controversy into court in one suit. Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. 1909) 187 Fed. 474.

Where a bill was filed against defendant B. to restrain him from interfering with complainant's wires located in the streets of the city for the purpose of moving a house along the streets, and by supplemental bill other house movers, who were moving another house under a separate permit, obtained from the city over the same route but in the rear of the houses being moved by B., were sought to be joined as parties, but there was no proof that they were in any way connected with B. in moving the first house

nor he with them in moving the second, or that such additional defendants had any claim or interest in the subject-matter of the original suit, the supplemental bill would be dismissed. Edison Electric Light & Power Co. of St. Paul v. Blomquist (C. C. 1911) 185 Fed. 615.

71. **Defects and objections.**—See rules 43, 44, ante, p. 2515.

Objection by plea, answer, or demurrer, see Greenleaf v. Queen (1828) 26 U. S. (1 Pet.) 138, 7 L. Ed. 85; Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200; Carey v. Brown (1875) 92 U. S. 171, 23 L. Ed. 469; Sheffield & B. Coal, Iron & Railway Co. v. Newman (1896) 77 Fed. 787, 23 C. C. A. 459 (certiorari denied Neely v. Newman [1897] 18 Sup. Ct. 944, 168 U. S. 708, 42 L. Ed. 1211); Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520; Bunce v. Gallagher (C. C. 1867) Fed. Cas. No. 2,133; U. S. v. Gillespie (C. C. 1881) 6 Fed. 803; Patrick v. Isenhart (C. C. 1884) 20 Fed. 339; Snelling v. Richard (C. C. 1909) 166 Fed. 635.

Objections as to parties may be raised for the first time at the hearing. Coiron v. Millaudon (1856) 60 U. S. (19 How.) 113, 15 L. Ed. 575. CONTRA, Bowman v. Wathen (D. C. 1841) Fed. Cas. No. 1,740.

But the objection ought not to prevail, except in a very strong case, and where the court perceives that a necessary and indispensable party is wanting. Mechanics' Bank of Alexandria v. Seton (1828) 26 U. S. (1 Pet.) 299, 7 L. Ed. 152; Wallace v. Holmes (C. C. 1871) Fed. Cas. No. 17,100; Adams v. Howard (C. C. 1884) 22 Fed. 656.

The objection of misjoinder of complainants cannot be made for the first time at the hearing. Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200.

Objection for the first time at the argument on final hearing of an infringement suit that there was a defect of parties held too late. California Electrical Works v. Finck (C. C. 1891) 47 Fed. 583.

The mere joinder or nonjoinder of formal parties will not oust the court of its jurisdiction but it will rather proceed without them, and decide upon the merits of the case between the parties who have the real interests before it, whenever it can be done without prejudice to the rights of others. Wormley v. Wormley (1823) 21 U. S. (8 Wheat.) 421, 5 L. Ed. 651, affirming Wormeley v. Wormeley (C. C. 1817) Fed. Cas. No. 18,047.

A defendant cannot, after consenting to a decree against him for an injunction and an account, object to the misjoinder of one of plaintiffs. Livingston v. Woodworth (1853) 56 U. S. (15 How.) 546, 14 L. Ed. 809.

An objection as to parties will not be considered on appeal. McBurney v. Carson (1878) 99 U. S. 567, 25 L. Ed. 378. CONTRA, see Coiron v. Millaudon (1856) 60 U. S. (19 How.) 113, 15 L. Ed. 575.

Where it appears by the bill that certain nonresidents are indispensable parties, and they are not made such, the bill should be dismissed without prejudice. Goodman v. Niblack (1880) 102 U. S. 556, 26 L. Ed. 229.

A plaintiff, by filing a replication to a petition in intervention, and proceeding to a hearing, waives the right to object to the sufficiency of the petition, or to the absence of an order granting leave to intervene. Perry v. Godbe (C. C. 1897) 82 Fed. 141.

An objection that there is a defect of parties defendant and a misjoinder of parties plaintiff should not be raised on a motion for preliminary injunction. Snelling v. Richard (C. C. 1909) 166 Fed. 635.

72. **Amendment.**—Where, on the hearing of a cause in equity, even on appeal, it appears that plaintiff is entitled to relief, but that it cannot be given for want of proper parties, the cause may be ordered to stand over, giving liberty to plaintiff to amend by adding the proper parties. Lewis v. Darling (1853) 57 U. S. (16 How.) 1, 14 L. Ed. 819.

The joinder of a party who has no interest in the suit is curable by amendment. Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520.

Where an English executor filed a bill in his individual capacity as the legal owner, to foreclose a mortgage owned by his testator, and which matured after his death, it was within the power of the court to permit the filing of an amended bill bv complainant, in his representative capacity as executor, setting up the same cause of action. Leahy v. Haworth (1905) 141 Fed. 850, 73 C. C. A. 84, 4 L. R. A. (N. S.) 657.

Where a bill by a corporation and individual complainants was demurrable for multifariousness for misjoinder of causes of action, the individuals having a right to sue in equity and asking for leave to amend should be permitted to amend their bill, omitting therefrom the corporation as a party complainant and its cause of action. Backus v. Brooks (1912) 195 Fed. 452, 115 C. C. A. 354, modifying decree (C. C. 1911) 189 Fed. 922.

The court may permit an amendment to a bill by omitting a nonresident named thereon as defendant, but not served, without prejudice to a motion for injunction. Cole Silver Min. Co. v. Virginia & Gold Hill Water Co. (C. C. 1871) Fed. Cas. No. 2,989.

Where plaintiff sued several members of an association individually, he cannot amend his bill by alleging that they were severally president, secretary,

and directors of the association, since it is unnecessary in suing them individually, and improper if intended to convert the suit into one against the whole association. Tyler v. Galloway (C. C. 1882) 13 Fed. 477.

A bill to which a demurrer has been sustained on the ground of a misjoinder of complainants may be amended by dismissing as to the party without interest. Victor Talking Mach. Co. v. American Graphophone Co. (C. C. 1902) 118 Fed. 50.

The court may permit the correction by amendment of a clerical error in the name of a corporation complainant, in the caption and body of the bill, after the case has been tried on an answer to the merits and a decision handed down, where no prejudice can result to defendant; no plea in abatement having been filed. Mellwood Distilling Co. v. Harper (C. C. 1909) 167 Fed. 389.

(E) Process and appearance

73. Against state.
74. Nature and necessity.
75. Form and requisites.
76. Service.
77. —— Time of service.
78. —— Publication.
79. —— Substituted service.
80. Return.
81. Defects, objections, and amendment.
82. Appearance.

See rules 7–14, ante, pp. 2498-2501.

73. Against state.—See Grayson v. Virginia (1796) 3 Dall. 320, 1 L. Ed. 619; Huger v. South Carolina (1797) 3 Dall. 339, 1 L. Ed. 627; New York v. Connecticut (1799) 4 U. S. (4 Dall.) 1, 1 L. Ed. 715; New Jersey v. New York (1831) 5 Pet. 284, 289, 8 L. Ed. 127.

74. Nature and necessity.—Where a subpœna in a suit in equity out of the supreme court of the United States is served on defendant within 60 days, and he does not appear at the return day, the complainant will be at liberty to proceed ex parte. Grayson v. Virginia, 3 U. S. (3 Dall. 1796) 320, 1 L. Ed. 619.

Where a state, sued in equity, did not appear, and a subpœna had not been served 60 days before the return day, an alias subpœna should be awarded. New York v. Connecticut, 4 U. S. (4 Dall. 1799) 1, 1 L. Ed. 715; New Jersey v. New York (1830) 28 U. S. (3 Pet.) 461, 7 L. Ed. 741.

The proceedings on executions and other process in the courts of the United States in suits at common law are to be the same in each state, respectively, as were used in the supreme court of the state in September, 1789, subject to such alterations and additions as the courts of the United States may make, or as the supreme court of the United States shall prescribe by rule. Wayman v. Southard (1825) 10 Wheat. 1, 26, 6 L. Ed. 253.

This act modifies and alters the power of the courts as to the kind of process which may be issued by them, and the forms of writs and executions and modes of process in the circuit and district courts in suits at common law must be the same in each state, respectively, as are now used or allowed in the supreme court of the state. Bank of U. S. v. Halstead (1825) 10 Wheat. 51, 57, 6 L. Ed. 264.

The federal courts may so alter the form of the process of execution used in the supreme courts of the states in 1789 as to subject to execution lands and other property not thus subject by the state laws in force at that time, and a statute enacted by a state in 1821 which prohibits the sale of property taken under execution for less than three-fourths of its appraised value without the consent of the owner does not apply to a venditioni exponas issued out of the circuit court for the district of the state. Id.

As respects parties who have already been served, a new subpœna is not required upon filing a supplemental bill in chancery. A rule upon them to answer the supplemental bill is sufficient. Shaw v. Bill (1877) 95 U. S. 10, 24 L. Ed. 333.

No process is required to bring in as defendant to a cross-bill an infant complainant in the original bill, under the Illinois statutes relating to cross-bills (1 Starr & C. Ann. St. pp. 407, 408, §§ 30–35). Kingsbury v. Buckner (1890) 10 Sup. Ct. 638, 134 U. S. 650, 33 L. Ed. 1047.

Proceedings seeking to enjoin the defendant from prosecuting any suits touching certain matters except a certain equity cause are ancillary in their nature; but the bill, being technically an original one, requires process and service as other original bills of an ancillary nature. Gregory v. Pike (1897) 79 Fed. 520, 25 C. C. A. 48.

The form of original writs as fixed by this section remains, though there is a subsequent change in a state statute. In re Kinney (1913) 202 Fed. 137, 120 C. C. A. 315.

A person residing out of the jurisdiction of the court, though named as defendant in a bill, is, substantially, not a party to the action, till service of process or appearance. Cole Silver Min. Co. v. Virginia & Gold Hill Water Co. (C. C. 1871) Fed. Cas. No. 2,989.

Mere filing of a bill and giving notice thereof does not confer jurisdiction, but service of process is necessary. Wheeler v. Walton & Whann Co. (C. C. 1895) 65 Fed. 720.

In an equity suit, where execution for costs has been issued against the plaintiff without avail, and it is sought to enforce payment from patents owned by him, this should be done by petition in the original suit; and if, instead thereof, an original bill is filed, it may be treated as a dependent or an-

cillary proceeding, so that no subpœna is necessary, and a mere notice of the filing of the bill and of an intended motion for injunction is sufficient. Maitland v. Gibson (C. C. 1897) 79 Fed. 136.

The practice of indorsing the process in suits for penalties given by statute to any person suing therefor was adopted as a part of the "forms of writs" and "modes of process" to be used in the federal courts, so that, independently of R. S. 914, post, § 1537, process so indorsed was the proper process to be used in such case. Brown v. Pond (D. C. 1880) 5 Fed. 31, 37.

While resident and nonresident stockholders are necessary parties to a suit to enforce double statutory liability to creditors imposed by Rev. St. Ohio 1880, §§ 3258, 3260, no valid decree in personam can be rendered against nonresident stockholders not served with process within the state, or voluntarily appearing. Irvine v. Elliott (D. C. 1913) 203 Fed. 82.

75. Form and requisites.—A decree, rendered on default, against Elizabeth Meyer, on service by publication of a summons directed to Sarah E. Meyers, is void as against her. Meyer v. Kuhn (1895) 65 Fed. 705, 13 C. C. A. 298.

76. Service.—On a bill by one state against another, the subpœna must be served on the governor and attorney general of the defendant state; and a service on the governor alone, there being no appearance entered for the defendants, will not entitle the court to proceed. New Jersey v. New York (1830) 28 U. S. (3 Pet.) 461, 7 L. Ed. 741.

The trust deed was given to secure W., C., and H., who was the nonresident defendant. C. and H. were directors of the corporation. The bill was filed August 1, 1883, making the corporation, the trustee, and the cestuis que trustent parties. After the defendants served had answered, upon the application of complainant, a receiver was appointed to take charge of the property. November 28, 1883, W. filed a cross bill, alleging that his debt and that of C. were valid, and that the trust deed had been executed without C.'s co-operation, but that H. had used his position as director to secure his debt, and asked that the deed be held invalid as to H., but valid as to the others. He also alleged that the property was depreciating in value, and ought to be sold. An order was entered requiring the defendants to appear and plead, which directed that if H. was served with a copy of the order by a certain time, and failed to appear, the cross bill would be taken as confessed. The order was served on H. in time, but he failed to appear. On December 22d, on the application of the receiver, the property was ordered sold, and sale was made to W., and in time confirmed. On March 3, 1884, H. was ordered to appear and plead to the original bill, or judgment would be taken for confessed. The order was duly served, and upon his failure to appear judgment was taken for confessed, and on final hearing it was decreed that H. was not entitled to any lien by reason of said trust deed. Held, that the act of 1875 was complied with. Mellen v. Moline Malleable Iron Works (1889) 9 Sup. Ct. 781, 131 U. S. 352, 33 L. Ed. 178.

In a suit in personam merely, a court of one state can obtain no jurisdiction of parties residing in another by delivery of process to them in the latter. Dull v. Blackman (1898) 18 S. Ct. 333, 169 U. S. 243, 42 L. Ed. 733, affirming decree Blackman v. Wright (1896) 65 N. W. 843, 96 Iowa, 541.

Under that act, and under the previous law and practice of the circuit courts in equity, a subpœna issued in such a case, out of the circuit court for either of two districts of a state, may be served in the other district of the same state. Winter v. Ludlow (C. C. 1859) Fed. Cas. No. 17,891.

The general doctrine of courts of equity in relation to parties out of the jurisdiction. Gray v. Larrimore (C. C. 1865) Fed. Cas. No. 5,721.

Service of subpœna upon persons whose names are alleged in the bill to be unknown, and who are designated therein by fictitious names, is void. Kentucky Silver Min. Co. v. Day (C. C. 1873) Fed. Cas. No. 7,719.

In the case of corporations created by different states operating a continuous line of road, a decree of foreclosure made in one jurisdiction on service on the corporation residing therein and the appearance of the other will bind the latter. Wilmer v. Atlanta & R. Air Line Ry. Co. (C. C. 1875) Fed. Cas. No. 17,776.

In a railroad foreclosure suit, service of process of a state court, outside the state, on a bondholder, as defendant to a cross bill, is ineffectual. Mercantile Trust Co. v. Lamoille Val. R. Co. (C. C. 1879) Fed. Cas. No. 9,432.

The only one of the persons to whom the estate had been distributed, found within the district, was a lunatic, to whose committee one-fourth of the estate had been paid. She had been returned summoned by service on her committee, and he had appeared and fully answered, and on her behalf, with the assistance of able counsel, had resisted the claims of the complainants. After taking testimony in Ireland and several of the United States, for over two years, the case came on for final hearing. The lunatic had been for about 30 years in an insane asylum in the district, and had been found non compos by a jury, and so adjudged by a competent state court, which appointed her committee. Held, that service of the subpœna on the lunatic by service on the committee was sufficient, and that the answer of the committee should be

taken and treated as the answer of the lunatic. Sullivan v. Andoe (C. C. 1881) 6 Fed. 641.

The prayers of the bill being for an account of lumber, etc., taken from demised premises, for damages for defendant's breaches of covenant, for the appointment of a receiver of demised premises, lumber, etc., the suit was not one under Act March 3, 1875, c. 137, § 8, 18 Stat. 470, which authorizes service on nonresident defendants, wherever found, in suits "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought." Ellis v. Reynolds (C. C. 1888) 35 Fed. 394.

A husband and wife removed from their community land, on which they had given a mortgage, to another state, where they separated. The wife remained out of the state, but the husband returned to the land. There was a decree foreclosing the mortgage on a return showing that service of the summons was made on the husband personally, and on the wife by delivering a copy to the husband "at her usual place of abode." Held, that the decree was binding on the wife. Johnson v. Richmond Beach Imp. Co. (C. C. 1894) 63 Fed. 493.

A subpœna on a bill in equity by the assignee is not properly served when left at a dwelling house which the parties have not occupied for over two years. Hyslop v. Hoppock (D. C. 1872) Fed. Cas. No. 6,988.

When the respondent is a married woman, having no place of business or of customary resort other than her home, which there is no reason to suppose she has left, an omission to seek her there, or at her usual or last-known place of residence, must be held a failure of any proper endeavor to make personal service. Provost v. Pidgeon (D. C. 1881) 9 Fed. 409.

77. —— **Time of service.**—A subpœna in equity must be served 60 days before its return. New York v. Connecticut (1799) 4 Dall. 1, 6, 1 L. Ed. 715.

In a suit between states, the service of process on the governor and attorney general 60 days before the return day is sufficient. New Jersey v. New York (1831) 5 Pet. 284, 289, 8 L. Ed. 127.

78. —— **Publication.**—Under the statute of Kentucky authorizing their courts in chancery to make decrees against absent defendants on publication of an order to appear and answer, for two months successively, the publication for eight weeks is not a compliance with the law, but it should be continued for two calendar months. Hunt v. Wickliffe (1829) 27 U. S. (2 Pet.) 201, 7 L. Ed. 397.

A personal judgment in a foreclosure suit against nonresident defendants brought in by constructive service who do not appear, while void, does not invalidate that part of the judgment which forecloses the mortgage, and directs a sale of the property. Audas v. Highland Land & Building Co. of Dayton, Ky. (1913) 205 Fed. 862, 125 C. C. A. 62.

Service of notice by publication is a purely statutory right, and is of such a nature that all of the provisions of the statute must be strictly complied with, and courts will not indulge in presumptions to supply apparent defects or failures to meet the requirements of the statute. Hartley v. Boynton (C. C. 1883) 17 Fed. 873.

A statute authorizing service by publication in a foreclosure suit, where personal service cannot be had, is not unconstitutional, and a decree rendered upon such service binds the property within the jurisdiction of the court. Palmer v. McCormick (C. C. 1886) 28 Fed. 541.

In a suit to establish a trust in real estate, service may be had on a nonresident by publication, though the bill also prays for an accounting and for other relief. Porter Land & Water Co. v. Baskin (C. C. 1890) 43 Fed. 323.

Service by publication cannot be had when the suit is for the purpose of setting aside alleged fraudulent transfers of life insurance policies issued by a foreign company, and which are not within the district, although such company, in compliance with the state statute, has deposited bonds with the comptroller general of the state, especially when the company acknowledges its liability on the policies, and offers to pay the amount thereof into court. Evans v. Charles Scribner's Sons (C. C. 1893) 58 Fed. 303.

79. —— **Substituted service.**—A suit brought by the trustee under a mortgage to foreclose the same for the benefit of the bondholders secured thereby is a suit for the settlement of a trust; and where the bondholders intervene by a petition in the nature of a cross bill, alleging misconduct on the part of the trustee whereby the value of their security is diminished, the matters thus arising are so connected with the subject-matter of the original suit as to entitle the bondholders to substituted service on the trustee's attorneys, the trustee itself being a nonresident. Gasquet v. Fidelity Trust & Safety Vault Co. (1893) 57 Fed. 80, 6 C. C. A. 253, reversing Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C. 1893) 53 Fed. 850.

While, in proceedings of an ancillary character, service of process may be made under some circumstances on the attorney of record or on some other agent of defendant in the proceedings, such service is void in the absence of any allegation appearing of record, or order of court, supporting the substitu-

tion. Gregory v. Pike (1897) 79 Fed. 520, 25 C. C. A. 48.

Service in ancillary proceedings on the attorney of record in the original cause is sufficiently supported by an order permitting such substituted service, on bill alleging that defendant is not an inhabitant of the district, and cannot be served with process and summons therein, and that he has an attorney appearing for him in the case to which the suit is ancillary, and asking that service be made on such attorney. Pike v. Gregory (1899) 94 Fed. 373, 36 C. C. A. 299.

The service of a subpœna in equity on the attorney of a nonresident plaintiff, in a judgment at law, will be deemed good where the subject in controversy is the same as that in the suit in which the judgment was rendered. Hitner v. Suckley (C. C. 1810) Fed. Cas. No. 6,-543.

In cases of injunctions to stay proceedings at law and in cross suits in equity, the court will direct service of the subpœna to be made on the attorney at law, or upon the adverse solicitor in the cross suit. Eckert v. Bauert (C. C. 1823) Fed. Cas. No. 4,266; Ely v. Elliott (C. C. 1882) Id. 4,429a; Lowenstein v. Glidewell (C. C. 1878) Id. 8,-575; Read v. Consequa (C. C. 1821) Id. 11,606; Sawyer v. Gill (C. C. 1847) Id. 12,399; Ward v. Seabring (C. C. 1824) Id. 17,160; Same v. Seabry (C. C. 1823) Id. 17,161.

It is sufficient service of the subpœna, in a suit to enjoin ejectment, to serve it on the attorney of the plaintiff in the ejectment. Doe v. Johnston (C. C. 1840) Fed. Cas. No. 3,958.

Service of subpœna in an equity suit brought by defendant in an action at law against the nonresident plaintiff therein, to restrain its further prosecution, may be made upon the attorney for such nonresident party. Segee v. Thomas (C. C. 1853) Fed. Cas. No. 12,-633.

In case of a bill in equity to stay proceeding at law or a cross bill, an order for the service of a subpœna upon the attorney for the absent plaintiff will not be made when the judgment in the action at law has been enforced. Kamm v. Stark (C. C. 1871) Fed. Cas. No. 7,604.

The service in an action to set aside a decree of foreclosure and sale of subpœnas on solicitors and attorneys of persons before the court in the foreclosure suit is of no validity, until an application to the court has first been made, setting forth the circumstances which render such service proper, and an order obtained from the court directing that service be made, and that such service, when made, should answer as a substitute for actual service on the parties so represented by the attorneys or solicitors. Pacific R. Co. v. Missouri Pac. Ry. Co. (C. C. 1880) 3 Fed. 772, decree reversed (1884) 4 Sup. Ct. 583, 111 U. S. 505, 28 L. Ed. 498.

A bill brought by a defendant to enjoin the suit at law is only ancillary to such suit; but the court may, in its discretion, order personal service of the subpœna on the plaintiff, if he can be found, in addition to substituted service on his attorney. The Cortes Co. v. Thannhauser (C. C. 1881) 9 Fed. 226.

In a bill filed on the equity side of the federal court to enjoin a suit at law, substituted service on the attorney of the opposing party is sufficient to give the court jurisdiction. Id.

The court may, in an order for substituted service, fix any day certain for the appearance of the nonresident defendant, and is not limited to the usual rule days in equity. Forsyth v. Pierson (C. C. 1882) 9 Fed. 801.

Where attorneys have instituted a suit at law for nonresidents of the state where the suit is instituted, and a temporary injunction against such proceeding at law is allowed, a subpœna may be served upon such attorneys, and their clients will be bound thereby, although the attorneys have not been retained, except as to the proceeding at law. Crellin v. Ely (C. C. 1882) 13 Fed. 420.

In a suit to enjoin the prosecution of an action at law, if the defendant cannot be found in the district process may be served upon his attorneys in the legal action. Bartlett v. His Imperial Majesty, the Sultan of Turkey (C. C. 1884) 19 Fed. 346.

Where an action at law cannot be maintained on an insurance policy, unless it is reformed, and the action is continued to enable plaintiff to procure such reformation, a bill filed for that purpose is auxiliary to the action at law, and a subpœna to defendant in the equity suit is properly served on its attorneys in the law action. Abraham v. North German Fire Ins. Co. (C. C. 1889) 37 Fed. 731, 3 L. R. A. 188.

A suit by the trustee under a mortgage to foreclose the same for the benefit of the bondholders secured thereby is a suit for the settlement of a trust, and where the bondholders intervene by a petition in the nature of a cross bill, alleging misconduct on the part of the trustee whereby the value of their security is diminished, the matters thus arising are so connected with the subject-matter of the original suit as to entitle the boundholders to substituted service on the trustee's attorneys, the trustee itself being a nonresident. Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C. 1893) 53 Fed. 850; reversed in Gasquet v. Fidelity Trust & Safety Vault Co. (1893) 57 Fed. 80, 6 C. C. A. 253.

A bill to set aside a judgment at law, merely in order to raise an objection to jurisdiction, without alleging any defense on the merits, does not show such

a meritorious case as to justify an order for substituted service of the subpœna. Muhlenburg County v. Citizens' Nat. Bank (C. C. 1894) 65 Fed. 537.

Substituted service of a subpœna on a bill in equity should not be ordered unless the bill shows merits. Id.

A suit which seeks to require the defendant to perfect his title to certain land, furnish the plaintiff an abstract thereof, convey the land to the plaintiff, and pay him damages, under a contract for the sale of the land, is not one in which the decree can be executed by the court, under Rev. St. Mo. 1889, §§ 2225–2227, without requiring any personal act by the defendant, and accordingly is not so far a suit in rem as to authorize substituted service on a nonresident defendant. Adams v. Heckscher (C. C. 1897) 80 Fed. 742.

Jurisdiction cannot be acquired in equity by a substituted service, although defendants, who are not inhabitants of the district, remain continually absent therefrom to avoid service of process. Hyslop v. Hoppock (D. C. 1872) Fed. Cas. No. 6,989.

A party to a suit, which, as to him, is an original proceeding, cannot be brought before the court in a jurisdiction foreign to his residence, by substituted service of process on a law firm retained by him to represent him only in case it should be necessary for him to appear voluntarily. Shainwald v. Davids (D. C. 1895) 69 Fed. 701.

An attorney cannot accept service of a subpœna in an equity suit for a defendant. U. S. v. Cooper (D. C. 1912) 196 Fed. 584.

80. Return.—Above the return on a writ of subpœna in a foreclosure suit was written a designation of H. as "special bailiff to execute the within subpœna" on two defendants named, signed by C., "U. S. Marshal," and the return of service on said defendants was signed "C., U. S. Marshal. H., Special Bailiff." The defendant first named afterwards filed a bill to set aside the deed of land sold under the decree of foreclosure in such suit, setting forth the designation and return, and alleging that there was no sufficient service on him, and that he never appeared or answered therein. Held that, as it was not inconsistent with the designation or return that H. was a general deputy, or that the service was made by the marshal and H., either jointly or severally in the order named, which would make the service on the first-named defendant service by the marshal, and nothing to the contrary was averred in the bill, and as the presumption was in favor of the validity of the foreclosure proceedings, as those of a court of superior jurisdiction, a demurrer to the bill should be sustained. Martin v. Gray (1891) 12 Sup. Ct. 186, 142 U. S. 236, 35 L. Ed. 997.

The return, where the service is by leaving a copy of the subpœna at the dwelling house or usual place of abode of the defendant, must show that the copy was handed to a member of or resident in the family of defendant. Von Roy v. Blackman (C. C. 1877) Fed. Cas. No. 16,997.

A return reciting that the subpœna had been handed to a person at defendant's domicile, who resided there, the defendant being absent, is not a sufficient return of service. Id.

In the circuit court for the district of Indiana the return of the marshal to a subpœna in chancery is conclusive as against collateral attack by a resident of the state. Joseph v. New Albany Steam Forge & Rolling Mill Co. (C. C. 1892) 53 Fed. 180.

The return of an officer of service of a summons is not conclusive, as between strangers to the litigation. Rigney v. DeGraw (C. C. 1900) 100 Fed. 213.

A subpœna on a bill in equity in the district court by an assignee in bankruptcy is properly made returnable on the first Tuesday of the month, where there is a new term on that day. Hyslop v. Hoppock (D. C. 1872) Fed. Cas. No. 6,988.

81. Defects, objections, and amendments.—An original writ has performed its function when it has brought the defendant into court. If afterwards lost, the court may, in its discretion, upon ascertaining the defect, supply the deficiency. York & C. R. Co. v. Myers (1855) 59 U. S. (18 How.) 246, 15 L. Ed. 380.

Where a cause is set down for hearing on the plea that defendant has not been served with process within the state, docket entries showing a prior appearance by a solicitor cannot be considered. Harrison v. Rowan (C. C. 1818) Fed. Cas. No. 6,140.

A defendant who appears and puts in an answer waives all objections to the regularity of the service of the subpœna. Goodyear v. Chaffee (C. C. 1855) Fed. Cas. No. 5,564; Segee v. Thomas (C. C. 1853) Id. 12,633.

A service of a subpœna in equity by a person other than the marshal unless specially appointed by the court will be set aside on motion. Deacon v. Sewing Mach. Co. (C. C. 1882) Fed. Cas. No. 3,694a.

Service of a subpœna outside the judicial district is unauthorized and ineffective as compulsory process; but since the party may voluntarily appear, and the court thereby acquire the right to proceed with the case, it is not a question of jurisdiction, unless it happen that the plaintiff and defendant are citizens of the same state, or are otherwise wholly disqualified to sue each other in the federal courts, in which event it does, in those courts, become a matter pertaining to their jurisdiction, to which objection may be taken in any appropriate and convenient way; the mode being quite immaterial. Ro-

maine v. Union Ins. Co. (C. C. 1886) 28 Fed. 625.

Where the court would have jurisdiction to decide the controversy as to a nonresident defendant who cannot be compelled to litigate, if he should voluntarily appear, a service of the subpœna upon him must be set aside on his motion but the subpœna itself will not be set aside. Mason v. New York Steam-Power Co. (C. C. 1898) 87 Fed. 241.

An objection to service of subpœna on a foreign corporation by serving on a stenographer who was not the corporation's agent, while otherwise sustainable, will not be allowed, where not raised by plea to the jurisdiction. Chadeloid Chemical Co. v. Chicago Wood Finishing Co. (C. C. 1910) 180 Fed. 770.

82. **Appearance.**—Where an order was made in a suit by one state against another, giving defendant leave to appear on the second day of the term and answer the bill, a demurrer filed by the attorney general for defendant, being admitted as containing an appearance by it, amounts to a compliance with such order. New Jersey v. New York (1832) 31 U. S. (6 Pet.) 323, 8 L. Ed. 414.

The sole office of the writ of subpœna is to bring a defendant into court, in order that the court may acquire jurisdiction of his person; and, when a defendant has appeared generally in a cause, and subsequently, upon the filing of an amended bill containing a new cause of action, stipulates by his solicitor to file an answer to the merits of such amended bill, no subpœna thereon is required. Seattle, L. S. & E. Ry. Co. v. Union Trust Co. (1897) 79 Fed. 179, 24 C. C. A. 512.

A suit was brought to quiet title in a former foreclosure suit. An administrator ad prosequendum of the estate of the deceased mortgagor was appointed, and service was made upon him. An appearance was entered for the administrator by the orator's solicitors, and afterwards a decree pro confesso was taken and an order for proofs made. Held, that the appearance by the orator's solicitors was no objection to the validity of the decree, since they were the court's own officers. Roberts v. Brooks (C. C. 1896) 71 Fed. 914.

The filing of a demurrer in a suit in equity in a federal court, which in addition to challenging the jurisdiction of the court, presents other grounds which go to the merits, constitutes a general appearance, and, where the case is one of which the court can take jurisdiction, waives not only want of service, but all special privileges of the defendants in respect to the particular court in which the action is brought. Nelson v. Husted (C. C. 1910) 182 Fed. 921.

(F) Bill

83. Nature and office.
84. Form and requisites in general.
85. Address or direction.
86. Introduction or statement as to parties.
87. Title or caption.
88. Premises or statement of cause of action.
89. Averment of jurisdiction.
90. Prayer for relief.
91. Prayer for process.
92. Form and sufficiency of allegations.
93. Directness and positiveness or argumentativeness.
94. Certainty.
95. Consistency, ambiguity, or repugnancy.
96. Double aspect.
97. Joinder of causes of action.
98. —— Legal and equitable.
99. Multifariousness.
100. —— Misjoinder of causes of action.
101. —— Misjoinder of complainants.
102. —— Misjoinder of defendants.
103. Impertinence and scandal.
104. Exhibits.
105. Construction and operation.

See rules 24–27, ante, pp. 2503–2505.

83. **Nature and office.**—Where a decree was obtained for the sale of property, a bill filed 15 years thereafter, referring to the proceedings in the original suit, and making them a part of the bill, and praying that the original bill, with all its amendments, answers, decree, and evidence may be reinstated and revived to the extent of the several interests of the parties to the bill, is not a bill of revivor, but an original bill, having for its objects the prayers specifically set forth. Kennedy v. Bank of State of Georgia (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209.

Where a petition for leave to file a bill of review has been refused, a bill afterwards filed, praying the court to set aside the decree on the ground of fraud, is an original bill. Wickliffe v. Eve (1854) 58 U. S. (17 How.) 468, 15 L. Ed. 163.

After a decree disposing of the issues in a cause, the filing of a new bill by other parties, and involving other issues, although connected with the subject-matter of the original litigation, is the beginning of a new litigation, although styled a "supplemental bill," and permitted to be entitled in the original cause. In such case the complainant in the original bill is entitled to notice, and will not be bound without it. Great Western Tel. Co. v. Purdy (1896) 16 Sup. Ct. 810, 162 U. S. 329, 40 L. Ed. 986, affirming (1891) 50 N. W. 45, 83 Iowa, 430, and following Smith v. Woolfolk (1885) 5 Sup. Ct. 1177, 115 U. S. 143, 29 L. Ed. 357.

An original bill is a proper mode of seeking redress against a decree obtained by fraud or covin. Sahlgard v. Kennedy (C. C. 1880) 2 Fed. 295.

Where one claiming the exclusive right under a contract to use the name of another in the sale of patent medicines files a bill against him to enjoin a violation thereof, whereupon the latter files an alleged cross bill to enjoin complainant from making a use of the name not authorized by the contract, this latter bill is not a true cross bill,

but an original bill. Chattanooga Medicine Co. v. Thedford (C. C. 1893) 58 Fed. 347, decree reversed (1894) 66 Fed. 544, 14 C. C. A. 101.

A cross bill in a state court to foreclose a mortgage was dismissed, but, on appeal, the state supreme court reversed the decree, entered a decree of foreclosure, and appointed its own clerk to make the sale. Thereupon the mortgagors filed in the state court, whose decree was reversed, a bill to enjoin the clerk from making the sale, alleging fraud in the foreclosure decree. Held, that this was not an original bill in the nature of a bill of review nor was the suit in any sense a mere continuance of the former suit, but, on the contrary, was an independent original suit. Carver v. Jarvis-Conklin Mortgage Trust Co. (C. C. 1896) 73 Fed. 9.

84. Form and requisites in general.—The formal parts of a bill may be dispensed with, excepting the stating part and the prayer for relief. Comstock v. Herron (C. C. 1891) 45 Fed. 660.

85. Address or direction.—A bill addressed to the "circuit court," etc., "in chancery sitting," held sufficient. Sterrick v. Pugsley (C. C. 1874) Fed. Cas. No. 13,379.

86. Introduction or statement as to parties.—A bill must contain sufficient matter of fact per se to maintain the case, and the proofs must support the allegations, and a bill for the construction of a will of personalty must allege the domicile of testator, since the law of the place of the testator's domicile governs in the interpretation of the will, unless it is manifest that testator had the laws of some other country in view. Harrison v. Nixon (1835) 9 Pet. 483, 503, 9 L. Ed. 201.

A bill is defective which does not give full names of all parties to whom it refers. Barth v. Makeever (C. C. 1868) Fed. Cas. No. 1,069.

Persons cannot be made parties by designating them by a fictitious name in the introductory part of the bill and in the prayer for process. Kentucky Silver Min. Co. v. Day (C. C. 1873) Fed. Cas. No. 7,719.

In a bill for an accounting by an administrator for assets converted by him, and unadministered, an allegation that complainants "comprise all the heirs and next of kin" of deceased, though stating a legal conclusion, is a sufficient averment of complainants' title, where the decree of distribution in the probate proceedings, reciting the pedigree and relationship of each of the complainants, is set out in the bill. Hubbard v. Urton (C. C. 1895) 67 Fed. 419.

In answer to rules in contempt proceedings for the violation of a restraining order in the district court for the Southern district of West Virginia, defendants in the rules, who were residents of West Virginia, and not named in the bill, stated that they were advised that they were parties to the original bill. The bill stated that it was brought against the defendants named, "their confederates, associates," etc., whose citizenship and residence were unknown. Held, that such defendants in the rules were not parties to the bill, since the allegation must be treated as referring to defendants who could be made parties, and so could not refer to any resident of West Virginia, and no defendant can be made defendant to a bill save by name. Ex parte Richards (C. C. 1902) 117 Fed. 658.

A bill in equity in a federal court need allege the citizenship of the parties only where jurisdiction depends on diverse citizenship. Wright v. Skinner (D. C. 1905) 136 Fed. 694.

87. Title or caption.—Where a bill is entitled in a cause before it is filed, the entitling may be rejected as surplusage. Sterrick v. Pugsley (C. C. 1874) Fed. Cas. No. 13,379.

88. Premises or statement of cause of action.—The material facts on which complainant relies for relief must be so alleged in his bill as to put them in issue, or the relief cannot be granted, though the facts be proved. Harding v. Handy (1826) 24 U. S. (11 Wheat.) 103, 6 L. Ed. 429.

A bill in equity to relieve from forfeiture for nonpayment of rent should allege a tender of the rent admitted to be due. Sheets v. Selden (1868) 74 U. S. (7 Wall.) 416, 19 L. Ed. 166.

The allegations of a bill in equity for the removal of a trustee of a trust created by will, showed the creation of a trust estate, the appointment of a trustee, the designation of a cestui que trust, and specific directions to the trustee in respect to his duties. Held, that a demurrer, on the ground that the bill did not sufficiently set forth the nature of the trust, was properly overruled. The court could not assume that any of the provisions of the will relating to the subject-matter of the trust were omitted from the bill. Cavender v. Cavender (1884) 5 Sup. Ct. 955, 114 U. S. 464, 29 L. Ed. 212.

A bill for a rescission, which will seriously affect the interest of others, must contain clear and positive allegations showing the equitable right of the complainants to the relief asked. Post v. Beacon Vacuum Pump & Electrical Co. (1898) 84 Fed. 371, 28 C. C. A. 431, petition for rehearing denied (1898) 89 Fed. 1, 32 C. C. A. 151.

Where a subscription certificate for railway bonds on its face entitles the subscriber merely to bonds of some one of several railways, whenever such bonds may be issued, but the subscriber's bill of complaint alleges that a supplementary agreement was made by which he was to receive bonds of one specified company, and that all the

bonds of that company have been otherwise disposed of, the bill states a case for relief, and is good on demurrer. Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520.

Allegations of a bill to cancel deeds for fraud held sufficient to show that complainant was not chargeable with laches, which would cause limitation to begin to run before discovery of the fraud. Board of Levee Com'rs of Tensas Basin Levee Dist v. Tensas Delta Land Co. (1913) 204 Fed. 736, 123 C. C. A. 40.

Complainant is not required to set out all the minute facts of his case; the general statement of a precise fact is usually sufficient. Dunham v. Eaton & H. R. Co. (C. C. 1861) Fed. Cas. No. 4,150.

A bill is equity to recover lands, claiming only an equitable title thereto, which does not set up any facts tending to show that defendants were in any way affected by their equity, cannot be maintained. Young v. Porter (C. C. 1878) Fed. Cas. No. 18,171.

A bill is not demurrable when a foundation has been laid for some of the discovery and relief asked. Buerk v. Imhaeuser (C. C. 1881) 8 Fed. 457.

Courts will refuse to decree relief unless a substantial groundwork of the case in which relief is sought is distinctly alleged in the complaint. Pelham v. Edelmeyer (C. C. 1883) 15 Fed. 262.

On demurrer to a bill by a trustee under a mortgage for attorneys' fees and costs, which were allowed in the foreclosure suit, the question whether or not the adjudication as to the attorneys' fees was an allowance only against the mortgaged property, or whether it was a personal liability against the trustee, will not be considered where that case is not a part of the bill. Central Trust Co. v. Louisville Trust Co. (C. C. 1898) 87 Fed. 23, decree affirmed (1900) 100 Fed. 545, 40 C. C. A. 530.

A bill is not subject to a general demurrer if it contains any matter, properly pleaded, which constitutes grounds for equitable relief requiring an answer or plea. Edwards v. Bay State Gas Co. of Delaware (C. C. 1898) 91 Fed. 946.

A bill by one corporation against another held to state a cause of action for equitable relief, where it prayed for an accounting and alleged fraud by the president of defendant, who was also general manager of complainant, which fraud was known to defendant and by which it benefited, but which was concealed from complainant through the dual relationship of defendant's president to the parties. Candelaria Min. Co. v. Juarez Co. (C. C. 1907) 157 Fed. 315.

A bill in equity must allege with particularity every material ultimate fact necessary for the complainant to prove to establish his right to the relief prayed. Wilson v. American Ice Co. (D. C. 1913) 206 Fed. 736.

89. Averment of jurisdiction.—A bill for equitable relief must show, by facts pleaded, that the interposition of a court of equity is necessary or proper; that complainant has no adequate remedy at law. Parker v. Winnipiseogee Lake Cotton & Woolen Mfg. Co. (1862) 67 U. S. (2 Black) 545, 17 L. Ed. 333; Safe-Deposit & Trust Co. of Baltimore v. City of Anniston (C. C. 1899) 96 Fed. 661; Bernier v. Griscom-Spencer Co. (C. C. 1908) 161 Fed. 438.

A bill in equity, by an heir seeking to establish his right to a bequest, is defective where it does not contain an averment of the domicile of testator at the time of making the will, or at his death, or at any intermediate period, as the will is supposed to speak the sense of the testator according to the laws of the country where he is domiciled. Harrison v. Nixon (1835) 34 U. S. (9 Pet.) 483, 9 L. Ed. 201.

A mortgagee cannot be decreed equitable relief on a bill in which he asserts legal rights only. Koehler v. Black River Falls Iron Co. (1862) 67 U. S. (2 Black) 715, 17 L. Ed. 339.

In a bill for relief against an alleged illegal tax, allegations that such tax would involve complainant in a multiplicity of suits as to the title of lots laid out to be sold, prevent the sale of such lots, and cloud complainant's title to all his real estate, are sufficient to give jurisdiction to a court of equity. Union Pac. Ry. Co. v. Ryan (1885) 5 Sup. Ct. 601, 113 U. S. 516, 28 L. Ed. 1098.

Under the code provisions abolishing forms of actions, and providing that the complaint shall state the facts constituting the cause of action in ordinary and concise language, both legal and equitable relief may be granted in the same action; and it is not necessary, in order to obtain equitable relief, to allege that plaintiff has no adequate remedy at law. Ely v. New Mexico & A. R. Co. (1889) 9 Sup. Ct. 293, 129 U. S. 291, 32 L. Ed. 688.

A sufficient showing of equitable jurisdiction is made by a bill filed by the Cherokee Nation to restrain any further action by the secretary of the interior upon applications for leases of its tribal lands for mining purposes, which contains general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title, and a claim that irreparable injury will be caused, and wrong and oppression result, and that there will be a deprivation of property rights. Cherokee Nation v. Hitchcock (1902) 23 Sup. Ct. 115, 187 U. S. 294, 47 L. Ed. 183.

Equity jurisdiction cannot be invoked by mere charges of fraud, conspiracy, prayers for injunction, and the cancellation of deeds as a cloud on title. Marthinson v. King (1906) 150 Fed. 48, 82 C. C. A. 360.

A bill against a corporation, which asks for the cancellation of releases alleged to have been fraudulently obtained by defendant, and further asks that defendant be wound up on the ground of insolvency, and also on the ground that its business is illegal, states a case cognizable in equity, so that the bill cannot be dismissed on the ground that complainant has an adequate remedy at law, because, when a bill states one cause of action cognizable in equity it is not subject to a motion to dismiss, even though it states other grounds of suit not so cognizable. Haight & Freese Co. v. Weiss (1907) 156 Fed. 328, 84 C. C. A. 224, writ of certiorari denied 28 Sup. Ct. 260, 207 U. S. 594, 52 L. Ed. 356.

In order that the court may have jurisdiction in equity, the complainants not being entitled to an injunction, some other ground for equitable relief must be disclosed in the bill besides a naked account for profits and damages. Spring v. Domestic Sewing-Mach. Co. (C. C. 1882) 13 Fed. 446.

A bill for discovery and accounting which shows no right to an accounting is insufficient on demurrer. Everson v. Equitable Life Assur. Co. (C. C. 1895) 68 Fed. 258, decree affirmed (1896) 71 Fed. 570, 18 C. C. A. 251.

One claiming title to a patent by assignment from an administrator of the former owner, appointed by the surrogate's court of the city and county of New York, which is a court of limited and inferior jurisdiction, must allege the facts upon which its jurisdiction to make the appointment was founded; and if the bill does not show whether the deceased died intestate, whether, at the time of his death, he was a resident of the city and county of New York, or whether he had any property there to be administered on, it is subject to demurrer. Otto v. Regina Music-Box Co. (C. C. 1898) 87 Fed. 510.

To induce a court of equity to take jurisdiction of a suit on the ground that a multiplicity of suits is threatened, and irreparable injury thereby about to be sustained, the facts must be so pleaded that the court can reasonably infer that such allegations are true. Corbus v. Alaska Treadwell Gold-Min. Co. (D. C. 1899) 99 Fed. 334.

90. Prayer for relief.—A bill by a widow against an heir, charging him with fraudulently procuring from her a quitclaim deed to the land of her deceased husband, and alleging that said heir had mortgaged the property to his codefendant, who had full knowledge of the fraud, and that the latter had purchased part of the property at foreclosure sale, and that the residue was sold to an innocent purchaser, is not demurrable because, besides asking general relief, it prays specifically to be allowed to redeem the whole property from the mortgage, as under the facts and prayer for general relief complainant could have relief as to her dower interest. Jones v. Van Doren (1889) 9 Sup. Ct. 685, 130 U. S. 684, 32 L. Ed. 1077, reversing decree (C. C. 1883) 18 Fed. 619.

A bill in equity alleged that defendant T., as president of defendant corporation, to induce complainant to purchase stock therein, sent her a letter upon which she had a right to rely, and did rely, and which contained fraudulent statements which induced complainant to purchase stock; that the purchase price thereof went into the company's treasury, was expended by it, and was justly due to complainant from the company and T.; and that the company was insolvent; and prayed an accounting of the company's assets, their application to the debts due complainant and others, and the appointment of a receiver; and required answers to interrogatories as to the debts and assets of the company. Held, that the bill stated a case for equitable relief, and a decree stating that defendant T. represented to plaintiff that the company was in a flourishing condition, when in fact it was insolvent, supported the allegations as to fraud, and relief against T. was properly granted under the prayer for general relief. Tyler v. Savage (1892) 12 Sup. Ct. 340, 143 U. S. 79, 36 L. Ed. 82.

A prayer for discovery in a bill may be disregarded where the bill propounds no interrogatories, and answer under oath is expressly waived. Excelsior Wooden Pipe Co. v. City of Seattle (1902) 117 Fed. 140, 55 C. C. A. 156.

Where a complainant is uncertain whether upon a certain state of facts he is entitled to avoid a contract or transfer for fraud or breach of trust and to recover back his property, or to enforce a lien upon it for its value, he may pray for each in the alternative, and a court of equity will grant him the relief to which it deems him entitled. Jones v. Missouri-Edison Electric Co. (1906) 144 Fed. 765, 75 C. C. C. A. 631, reversing decree (C. C. 1905) 135 Fed. 153.

A prayer for general relief is a prayer for any relief the court can give, except by injunction, upon the facts averred in the bill. Chicago, St. L. & N. O. R. Co. v. Macomb (C. C. 1880) 2 Fed. 18.

Complainants cannot, by the frame of their prayer for relief, preclude the court from treating their bill as one to stay an action at law, in which they

can fully avail themselves of the facts as a defense. Drexel v. Berney (C. C. 1883) 16 Fed. 522.

In a suit to recover property procured by fraud, the prayer of the bill may be in the alternative that complainant recover the specific property or its value. Hubbard v. Urton (C. C. 1895) 67 Fed. 419.

91. Prayer for process.—A bill may be dismissed by the court on its own motion where the prayer for subpœna does not contain the names of defendants as required by the rules. City of Carlsbad v. Tibbetts (C. C. 1892) 51 Fed. 852.

Though the failure of a bill, filed to restrain interference with interstate commerce, to pray for process renders it demurrable, it does not affect the jurisdiction of the court, nor render void the injunction issued thereon. United States v. Agler (C. C. 1894) 62 Fed. 824.

A bill is not demurrable because it contains no prayer for process where the defendants who are required to answer are named both in the caption and body of the bill. Jennes v. Landes (C. C. 1897) 84 Fed. 73.

See Equity Rule 12, ante, p. 2500.

92. Form and sufficiency of allegations.—Title or interest of complainants, see McClanahan v. Davis (1850) 49 U. S. (8 How.) 170, 12 L. Ed. 1033; Bent v. Hall (1902) 119 Fed. 342, 56 C. C. A. 246; Bayerque v. Cohen (C. C. 1856) Fed. Cas. No. 1,134; Baltimore & O. R. Co. v. Adams Exp. Co. (C. C. 1884) 22 Fed. 404; Otto v. Regina Music Box Co. (C. C. 1898) 87 Fed. 510; Bishop v. York (C. C. 1902) 118 Fed. 352; Bishop v. York (C. C. 1903) 124 Fed. 959.

A general allegation of fraud and duress or mistake is not sufficient. Moore v. Greene (1856) 60 U. S. (19 How.) 69, 15 L. Ed. 533 (affirming [1854] Fed. Cas. No. 9,763); Noonan v. Lee (1862) 67 U. S. (2 Black) 499, 17 L. Ed. 278; Voorhees v. Bonesteel (1872) 83 U. S. (16 Wall.) 16, 21 L. Ed. 268; Stearns v. Page (C. C. 1840) Fed. Cas. No. 13,339; Magniac v. Thomson (C. C. 1852) Id. 8,957; Sullivan v. Sullivan (C. C. 1856) Id. 13,598; Linn v. Green (C. C. 1883) 17 Fed. 407; Lafayette Co. v. Neely (C. C. 1884) 21 Fed. 738; Rice v. Wilson (D. C. 1915) 225 Fed. 159.

The effect of laches is not avoided by a general averment that the plaintiff was ignorant of the facts until a short time before the bill was filed. A general allegation of ignorance at one time and knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. Badger v. Badger (1864) 69 U. S. (2 Wall.) 87, 17 L. Ed. 836 (affirming [1862] Fed. Cas. No. 718); Harwood v. Cincinnati & C. Air Line R. Co. (1872) 84 U. S. (17 Wall.) 78, 21 L. Ed. 558; Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520; Credit Co. v. Arkansas Cent. R. Co. (C. C. 1882) 15 Fed. 46; Cutter v. Iowa Water Co. (C. C. 1904) 128 Fed. 505 (judgment reversed [1905] 140 Fed. 986, 72 C. C. A. 680).

A bill in equity, brought by the proprietor of a city lot, averring that plaintiff's rights are illegally, wrongfully, and injuriously affected by the acts of defendants, on its face entitles plaintiff to relief. Griffing v. Gibb (1862) 67 U. S. (2 Black) 519, 17 L. Ed. 353.

Where a bill shows no equity in complainant, or contains no averment that complainant was injured by certain state statutes, the supreme court will not consider a question the object of which is merely to determine the constitutionality of the statutes, but will dismiss it without prejudice. Williams v. Haygood (1878) 98 U. S. 72, 25 L. Ed. 51.

Praying that a bill in another cause may be made a part of the present bill is the same as repeating all its statements. Mason v. Jones (C. C. 1848) Fed. Cas. No. 9,240.

A bill by legal owners alleging that defendants have forcibly taken possession under a false and fictitious claim of title, whose nature is not set out, is bad for want of equity on its face. Speigle v. Meredith (C. C. 1868) Fed. Cas. No. 13,227.

It is necessary that the cause or reason which prevented the statutes of limitation or prescription from running in the particular case should be stated in the bill, in order to be permitted to offer evidence thereof. Boyd v. Wyley (C. C. 1883) 18 Fed. 355.

It is sometimes necessary and proper in equity pleadings to make deductions from the facts stated that are more or less conclusions of law. Allen v. O'Donald (C. C. 1885) 23 Fed. 573, decree affirmed Cross v. Allen (1891) 12 Sup. Ct. 67, 141 U. S. 528, 35 L. Ed. 843.

A bill to have a constructive trust imposed upon a grantee is not demurrable because allegations in the charging part, as to fraudulent representations, are made upon information and belief only. Leavenworth v. Pepper (C. C. 1887) 32 Fed. 718.

A bill by a telegraph company seeking to restrain the operation of electric light wires which have been placed so close to complainant's wires as to interfere with and injuriously affect the working of the latter need not state the distance at which an electric current on one wire will affect another, this being matter of evidence. Western Union Tel. Co. v. Los Angeles Electric Co. (C. C. 1896) 76 Fed. 178.

Where a bill contains sufficient allegations of fact to constitute a cause of action, it is not subject to demurrer because it contains further allegations, stating conclusions of law, which are insufficient. Berwind v. Canadian Pac. Ry. Co. (C. C. 1899) 98 Fed. 158.

Vague averments on information and belief and deductions of the pleader cannot properly be accepted in an equity pleading as a substitute for facts which are within the pleader's knowledge, and which would enable the court to arrive at an intelligent conclusion. Jahn v. Champagne Lumber Co. (C. C. 1908) 157 Fed. 407, decree affirmed Champagne Lumber Co. v. Jahn (1909) 168 Fed. 510, 93 C. C. A. 532.

While a bill in equity must advise defendant of the facts on which complainant relies, it need not state a cause of action at law, a bill which asks relief not itself inconsistent, and justified by the narrative part of the bill, being ordinarily sufficient; and complainant is not limited to any given theory of law if he does not depart from the bill itself. Colgate v. James T. White & Co. (C. C. 1910) 180 Fed. 882.

93. Directness and positiveness or argumentativeness.—A bill charging notice of the fraud against one of defendants, "that the defendant then and there, well knowing all and singular the premises," etc., is bad. Wood v. Mann (C. C. 1833) Fed. Cas. No. 17,-951.

An allegation of an essential fact in a bill in equity, by way of recital, but in such form that the existence of the fact appears by necessary implication, is good as against a general demurrer. Investor Pub. Co. of Massachusetts v. Dobinson (C. C. 1896) 72 Fed. 603.

Relief in equity cannot be granted on facts merely suggested in the prayer and not charged with reasonable distinctness, under the rule that pleadings must be taken most strongly against the pleader. Electric Goods Mfg. Co. v. Koltonski (C. C. 1909) 171 Fed. 550.

94 Certainty.—Allegations, in a bill to rescind a contract for fraud, of frauds that cannot be specified because of their concealment by defendants, are sufficiently certain, and not demurrable. Northern Pac. R. Co. v. Kindred (C. C. 1881) 14 Fed. 77.

When there is a want of certainty in the allegation to show that plaintiffs are entitled to the relief demanded, the bill will be dismissed. Taylor v. Holmes (C. C. 1882) 14 Fed. 498, decree affirmed (1888) 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179.

To allege that a sale is simulated, and, if not simulated, is fraudulent, meaning thereby that it is a sham sale, and, if not a sham, then a real sale, but fraudulent, may be consistent, but it is not certain; and certainty is a requisite in equity pleading, as well as consistency. Socola v. Grant (C. C. 1883) 15 Fed. 487.

Where a bill by a receiver against the directors of a national bank for losses caused by their mismanagement does not state the dates of the losses, nor the dates of the acts or omissions contributing to those losses, with sufficient certainty to inform each of the defendants with which and how many of the losses it is sought to charge him, it is demurrable. Price v. Coleman (C. C. 1884) 21 Fed. 357.

A bill is demurrable which is so defectively drawn that it is impossible for the court to determine the questions attempted to be presented for decision. Savage v. Worsham (C. C. 1892) 104 Fed. 18.

Where a bill to set aside a lease alleged that it was executed and delivered by the president and secretary of a corporation without authority, and that it contained a clause of forfeiture, which the lessees had failed to comply with, and the lessor had declared the lease forfeited, giving due notice thereof to the lessees, it is not demurrable for uncertainty. Davis v. Berry (C. C. 1901) 106 Fed. 761.

A bill, based on a written contract, reciting that it was entered into to carry out a prior written agreement between the same parties, with modifications, and that it confirmed the prior agreement, except where there was a conflict, held demurrable for uncertainty, for not setting out the first contract. Ulrich v. Freedman (D. C. 1912) 196 Fed. 113.

A bill filed by a trustee to compel a restoration of trust property alleged to have been illegally transferred held not sufficiently definite and certain in its averments to disclose complainant's right to equitable relief. Id.

95. Consistency, ambiguity, or repugnancy.—In a bill by the holder of notes secured by deed of trust to set aside a release thereof as negligently and fraudulently made, an attempt to charge the trustee personally because of his negligence in executing the release is inconsistent with the purpose of the bill, and must be disregarded. Williams v. Jackson (1883) 2 Sup. Ct. 814, 107 U. S. 478. 27 L. Ed. 529.

Positive allegations of fraud warranting the relief sought are not destroyed by allegations, contained in a part of the bill which seeks to excuse delay, that the information obtained by complainants was derived from general rumors. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14; Curran v. Campion (1898) 85 Fed. 67, 29 C. C. A. 26.

A quantity of cotton was seized during the war by the United States treasury agents and confiscated. Subsequently the owner brought proceedings

in the court of claims, and recovered the value of the property. After his death a claim was made by a third party to a portion of the cotton seized, and he brought action against the executor of decedent to recover the value thereof. Held that, where the material allegations of the bill were proved, an allegation that the executor received the cotton as executor of the testator, and held it as such when it was seized when in fact he received it as surviving partner of testator, is a mere matter of inducement, and the bill ought not, therefore, to fall when the material allegations were proven. McCay v. Lamar (C. C. 1882) 12 Fed. 367.

96. **Double aspect.**—A bill may be originally framed with a double aspect, so as to be of that character, if the alternative case stated is the foundation for the same relief. Shackleton v. Baggaley (1909) 170 Fed. 57, 95 C. C. A. 505; Jackson v. Jackson (1909) 175 Fed. 710, 99 C. C. A. 286; U. S. v. Debell (1915) 227 Fed. 760, 142 C. C. A. 284; Bradley v. Converse (C. C. 1876) Fed. Cas. No. 1,775; McGraw v. Woods (C. C. 1899) 96 Fed. 56; Electric Goods Mfg. Co. v. Koltonski (C. C. 1909) 171 Fed. 550.

While the pleader, where he is uncertain as to what specific relief he is entitled, may so frame his bill as to entitle him to an alternative prayer for relief, yet he may not be so entitled where the bill clearly discloses the fact that he seeks relief based upon the recognition of the validity of a transaction which he seeks to specifically enforce, and at the same time pray for the annulment of such transaction as fraudulent. Cella v. Brown (1906) 144 Fed. 742, 75 C. C. A. 608, affirming decree Cella, Adler & Tilles v. Same (C. C. 1905) 136 Fed. 439, and writ of certiorari denied Cella v. Same (1906) 26 Sup. Ct. 766, 202 U. S. 620, 50 L. Ed. 1174.

A bill which looks towards double relief, but which is not sustainable as a bill with a double aspect, cannot be dismissed on that ground when respondents fail to make the objection; but it is nevertheless the duty of the court to see that the litigation is put in proper form to be disposed of understand ingly, and, where respondents have apparently accepted the bill in one aspect, the court will treat it in that light, as they are entitled to make such election. American Box Mach. Co. v. Crosman (1894) 61 Fed. 888, 10 C. C. A. 146, affirming decree (C. C. 1892) 57 Fed. 1021.

Where a bill sets out a contract relating to certain patents, and asks specific performance thereof against several parties, but also contains expressions looking to relief as in a suit for infringement, it cannot be sustained as a bill with a double aspect, because the determination of who are proper parties must be made from different standpoints in the two kinds of bills. Id.

97. **Joinder of causes of action.**—A cause of action for unfair competition and one for infringement of trade-mark may properly be joined. G. Heileman Brewing Co. v. Independent Brewing Co. (1911) 191 Fed. 489, 112 C. C. A. 133; Samson Cordage Works v. Puritan Cordage Mills (1914) 211 Fed. 603, 128 C. C. A. 203, reversing order (D. C. 1912) 197 Fed. 205, and affirming decree 194 Fed. 573; Jewish Colonization Ass'n v. Solomon & Germanski (C. C. 1903) 125 Fed. 994.

Plaintiffs united severally in a suit claiming the return of money paid by them on distinct notes given to defendants. Held, that the parties could not join the claims in the same bill. Yeaton v. Lennox (1834) 33 U. S. (8 Pet.) 123, 8 L. Ed. 889.

Several causes of action may be joined in a single bill, but not when the effect would be to embarrass the defendant, or introduce unnecessary confusion. Horman Patent Mfg. Co. v. Brooklyn City R. Co. (C. C. 1879) Fed. Cas. No. 6,703.

When the matter charged and the relief sought all grow out of one general transaction, the fraudulent obtaining of a patent from the United States, accounting for rents and profits and waste are incidental. U. S. v. Pratt Coal & Coke Co. (C. C. 1883) 18 Fed. 708.

In cases of trespass on a mining claim it is not necessary to bring separate actions for injunction and an accounting, but both may be had in the same suit. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540.

Where a bill was brought against a trustee for alleged breach of trust, for an accounting, and to restrain a transfer of the trust property, an action against members of an executive committee, appointed to manage such trust property for an association of beneficiaries, charging conspiracy with the trustee to effect the alleged transfer, was not germane to the cause alleged in the bill, and could not be joined therewith. Moody v. Flagg (C. C. 1903) 125 Fed. 819.

98. **—— Legal and equitable.**—Legal and equitable causes of action cannot be joined. Hurt v. Hollingsworth (1879) 100 U. S. 100, 25 L. Ed. 569; Schurmeier v. Connecticut Mut. Life Ins. Co. (1909) 171 Fed. 1, 96 C. C. A. 107 (certiorari dismissed [1911] 31 Sup. Ct. 470, 219 U. S. 586, 55 L. Ed. 347); Berkey v. Cornell (C. C. 1898) 90 Fed. 711. But see § 1251b, ante.

99. **Multifariousness.**—No general rule can be laid down as to what constitutes multifariousness in a bill in equity. The court must exercise a sound discretion in determining, from the circumstances of each case, whether a bill is liable to that objection. Gaines v. Chew (1844) 43 U. S. (2 How.) 619, 11 L. Ed. 402; Oliver v. Piatt (1845) 44 U. S. (3 How.) 333, 11 L. Ed. 622;

McLean v. Lafayette Bank (C. C. 1844) Fed. Cas. No. 8,886; Singer Mfg. Co. v. Springfield Foundry Co. (C. C. 1888) 34 Fed. 393; Bracken v. Rosenthal (C. C. 1907) 151 Fed. 136.

The fact that a paragraph of the bill set out a verbal agreement by defendant's intestate to convey to plaintiff an interest in land, while the prayer was for the payment of a certain amount of money, did not render the bill multifarious, the discrepancy being explained by the fact that, owing to the making of a trust deed of the property by the intestate, a decree for an interest in the land in accordance with the latter's contract would fail to satisfy plaintiff's claim, and that his lien was claimed to extend to the whole property to satisfy the intestate's promise to convey a half of its unincumbered value. Townsend v. Vanderwerker (1895) 16 Sup. Ct. 258, 160 U. S. 171, 40 L. Ed. 383.

Multifariousness is the union of causes of action which, or of parties whose claims, it is impracticable or inconvenient to adjudicate in a single suit. Westinghouse Air-Brake Co. v. Kansas City Southern Ry. Co. (1905) 137 Fed. 26, 71 C. C. A. 1, reversing decrees State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1904) 128 Fed. 129, and 129 Fed. 455.

A bill cannot be sustained in equity which is multifarious and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters. West v. Randall (C. C. 1820) Fed. Cas. No. 17,424.

A bill for accounting between partners is not multifarious because it relates to the trnsactions of two separate firms, of which the parties were the only members. Lewis v. Loper (C. C. 1891) 47 Fed. 259.

A bill examined, and held not only multifarious, but without equity. Inman v. New York Interurban Water Co. (C. C. 1904) 131 Fed. 997.

The rules governing the determination of the question of multifariousness stated. Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co. (C. C. 1911) 193 Fed. 69.

100. —— Misjoinder of causes of action.—There is no fatal misjoinder of causes of action in any bill which presents a common point of litigation, the decision of which will affect the whole subject-matter, and settle the rights of all the parties. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14. See, also, Fitch v. Creighton (1860) 65 U. S. (24 How.) 159, 16 L. Ed. 596; Grant v. Phœnix Mut. Life Ins. Co. (1886) 7 Sup. Ct. 841, 121 U. S. 105, 30 L. Ed. 905; U. S. v. Beebe (1901) 21 Sup. Ct. 371, 180 U. S. 343, 45 L. Ed. 563; Bitterman v. Louisville & N. R. Co. (1907) 28 Sup. Ct. 91, 207 U. S. 205, 52 L. Ed. 171, 12 Ann. Cas. 693 (affirming decree Louisville & N. R. Co. v. Bitterman [1906] 144 Fed. 34, 75 C. C. A. 192); Curran v. Campion (1898) 85 Fed. 67, 29 C. C. A. 26; Barcus v. Gates (1898) 89 Fed. 783, 32 C. C. A. 337; Williams v. Crabb (1902) 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425 (writ of certiorari denied Crabb v. Williams [1902] 23 Sup. Ct. 845, 187 U. S. 645, 47 L. Ed. 347); George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40 (decrees affirmed Wyman v. Same [1906] 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same [1906] 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Wallace [1906] 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743); Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (1905) 137 Fed. 26, 71 C. C. A. 1 (reversing decrees State Trust Co. v. Kansas City, P. & G. R. Co. [C. C. 1904] 128 Fed. 129, and 129 Fed. 455); Jones v. Missouri-Edison Electric Co. (1906) 144 Fed. 765, 75 C. C. A. 631 (reversing decree [C. C. 1905] 135 Fed. 153); Rogers v. Penobscot Min. Co. (1907) 154 Fed. 606, 83 C. C. A. 380; Ætna Ins. Co. v. Albany & S. R. Co. (1909) 170 Fed. 1019, 95 C. C. A. 393 (affirming decree [C. C. 1907] 156 Fed. 132, and writ of certiorari denied Delaware & H. Co. v. Albany & S. R. Co. [1909] 30 Sup. Ct. 401, 215 U. S. 601, 54 L. Ed. 344); Equitable Life Assur. Soc. v. Patterson (C. C. 1880) 1 Fed. 126; Beatty v. Hinckley (C. C. 1880) 1 Fed. 385; Sheldon v. Keokuk Northern Line Packet Co. (C. C. 1881) 8 Fed. 769; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C. 1882) 10 Fed. 596 (decree affirmed [1887] 7 Sup. Ct. 550, 120 U. S. 166, 30 L. Ed. 621); Rosenstein v. Burns (C. C. 1882) 41 Fed. 841 (decree affirmed Burns v. Rosenstein [1890] 10 Sup. Ct. 817, 135 U. S. 449, 34 L. Ed. 193); Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308; Pacific R. R. v. Atlantic & P. R. Co. (C. C. 1884) 20 Fed. 277; Gordon v. St. Paul Harvester Works (C. C. 1885) 23 Fed. 147; Norris v. Haggin (C. C. 1886) 28 Fed. 275 (decree affirmed [1889] 10 Sup. Ct. 942, 136 U. S. 386, 34 L. Ed. 424); Mills v. Hurd (C. C. 1887) 32 Fed. 127; Chaffin v. Hull (C. C. 1889) 39 Fed. 887; Pullman v. Stebbins (C. C. 1892) 51 Fed. 10; Patton v. Glatz (C. C. 1892) 56 Fed. 367; Amberg File & Index Co. v. Shea, Smith & Co. (C. C. 1896) 78 Fed. 479 (decree affirmed [1897] 82 Fed. 314, 27 C. C. A. 246); Harper v. Holman (C. C. 1897) 84 Fed. 222; Weir v. Bay State Gas Co. of Delaware (C. C. 1898) 91 Fed. 940; Cutter v. Iowa Water Co. (C. C. 1899) 96 Fed. 777; Bidwell v. Huff (C. C. 1900) 103 Fed. 362; Burlington Sav. Bank v. City of Clinton, Iowa (C. C. 1901) 106 Fed. 269; Davis v. Berry (C. C. 1901) 106 Fed. 761; Rincon Water & Power Co. v. Anaheim Union Water Co. (C. C. 1902) 115 Fed. 543; Ingersoll v. Coram (C. C. 1903) 127

Fed. 418; U. S. v. Clark (C. C. 1904) 129 Fed. 241; United Cigarette Mach. Co. v. Wright (C. C. 1904) 132 Fed. 195; Howe & Davidson Co. v. Haugan (C. C. 1904) 140 Fed. 182; Brown v. Pegram (C. C. 1906) 149 Fed. 515; Olmsted v. City of Superior (C. C. 1907) 155 Fed. 172; Bernier v. Griscom-Spencer Co. (C. C. 1908) 161 Fed. 438; James B. Sipe & Co. v. Columbia Refining Co. (C. C. 1909) 171 Fed. 295; Risley v. City of Utica (C. C. 1909) 173 Fed. 502; James v. City Investing Co. (C. C. 1911) 188 Fed. 513.

A bill is multifarious when it joins separate and independent matters, so distinct from each other that they are not the proper subjects of attack in one suit. Walker v. Powers (1881) 104 U. S. 245, 26 L. Ed. 729; Merriman v. Chicago & E. I. R. Co. (1894) 64 Fed. 535, 12 C. C. A. 275 (petition for rehearing denied [1895] 66 Fed. 663, 14 C. C. A. 36); Security Savings & Loan Ass'n v. Buchanan (1895) 66 Fed. 799, 14 C. C. A. 97; Ziegler v. Lake St. El. R. Co. (1896) 76 Fed. 662, 22 C. C. A. 465 (affirming decree [C. C. 1895] 69 Fed. 176); Copen v. Flesher (C. C. 1861) Fed. Cas. No. 3,211; Haines v. Carpenter (C. C. 1872) Fed. Cas. No. 5,905; Markey v. Mutual Ben. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 9,091; McDonnell v. Eaton (C. C. 1883) 18 Fed. 710; Chapin v. Sears (C. C. 1883) 18 Fed. 814; Price v. Coleman (C. C. 1884) 21 Fed. 357; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. (C. C. 1888) 33 Fed. 440 (decree affirmed [1892] 12 Sup. Ct. 953, 145 U. S. 393, 36 L. Ed. 748); Von Auw v. Chicago Toy & Fancy Goods Co. (C. C. 1895) 70 Fed. 939 (overruling [C. C. 1895] 69 Fed. 448); First Nat. Bank v. Peavey (C. C. 1896) 75 Fed. 154; Church v. Citizens' St. R. Co. (C. C. 1897) 78 Fed. 526; Leslie v. Leslie (C. C. 1897) 84 Fed. 70; Central Nat. Bank v. Fitzgerald (C. C. 1899) 94 Fed. 16; Metcalf v. American School-Furniture Co. (C. C. 1901) 108 Fed. 909; Inman v. New York Interurban Water Co. (C. C. 1904) 131 Fed. 997; Schell v. Alston Mfg. Co. (C. C. 1906) 149 Fed. 439; Howard v. Luce (C. C. 1909) 171 Fed. 584; U. S. v. Allen (C. C. 1909) 171 Fed. 907 (decrees reversed [1910] 179 Fed. 13, 103 C. C. A. 1, judgment affirmed upon conditions Deming Inv. Co. v. U. S. [1912] 32 Sup. Ct. 549, 224 U. S. 471, 56 L. Ed. 847, and Goat v. Same [1912] 32 Sup. Ct. 544, 224 U. S. 458, 56 L. Ed. 841, and Mullen v. Same [1912] 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, and Heckman v. Same [1912] 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820); Twenty-Third St. Ry. Co. v. Metropolitan St. Ry. Co. (C. C. 1910) 177 Fed. 477; Field v. Camp (C. C. 1911) 193 Fed. 160, decree modified (C. C. A. 1913) 201 Fed. 682.

A bill is not multifarious because it alleges two alternative grounds upon which complainants may be entitled to an estate; nor because some of the defendants may not be interested in all the questions that may arise in the suit. Kilgour v. New Orleans Gas Light Co. (C. C. 1875) Fed. Cas. No. 7,764; Halsey v. Goddard (C. C. 1898) 86 Fed. 25; Ritchie v. Sayers (C. C. 1900) 100 Fed. 520; De Hierapolis v. Lawrence (C. C. 1902) 115 Fed. 761; Jahn v. Champagne Lumber Co. (C. C. 1906) 147 Fed. 631; Peale v. Marian Coal Co. (C. C. 1909) 172 Fed. 639.

But a bill is multifarious which contains prayers in the alternative which are antagonistic. In such case the bill is one of alternative cases, and not a case for alternative relief. Emmons v. National Mut. Building & Loan Ass'n (1905) 135 Fed. 689, 68 C. C. A. 327; Wilkinson v. Dobbie (C. C. 1874) Fed. Cas. No. 17,670; Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. (C. C. 1890) 43 Fed. 545; Cutter v. Iowa Water Co. (C. C. 1899) 96 Fed. 777; State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1904) 128 Fed. 129 (decree reversed Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [1905] 137 Fed. 26, 71 C. C. A. 1).

A bill will not be dismissed as multifarious because the complainant, in addition to praying for the relief appropriate to the only cause of action supported by the facts pleaded in the bill, has also asked for other relief to which he is not entitled. De Neufville v. New York & N. Ry. Co. (1897) 81 Fed. 10, 26 C. C. A. 306.

Where a bill states a good cause of action, but couples with it another cause of action which renders it multifarious, it is error to dismiss the bill on the merits, but complainants should be given the right to replead, or on their failure the dismissal should be without prejudice. Price v. Union Land Co. (1911) 187 Fed. 886, 110 C. C. A. 20.

A bill alleging infringement of several different patents by one machine of defendants is not multifarious. Meerse v. Allen (C. C. 1859) Fed. Cas. No. 9,393a.

A bill is not multifarious when the joinder therein of two distinct matters prevents a needless multiplicity of suits, and neither inconveniences the defendants nor causes them additional expense. Stafford Nat. Bank v. Sprague (C. C. 1881) 8 Fed. 377; Western Land & Emigration Co. v. Guinault (C. C. 1889) 37 Fed. 523; London Guarantee & Accident Co. v. Bell Telephone Co. of Buffalo (C. C. 1909) 171 Fed. 278. But see Haines v. Carpenter (C. C. 1872) Fed. Cas. No. 5,905.

Whether or not a bill is demurrable on the ground of multifariousness or misjoinder of causes of action will depend on the special circumstances, and what the due administration of justice demands, in each case. Sheldon v. Keokuk Northern Line Packet Co. (C. C. 1881) 8 Fed. 769.

A bill for the perpetuation of testi-

mony is multifarious if it also asks for relief. Ætna Life Ins. Co. v. Smith (C. C. 1896) 73 Fed. 318.

The objection of multifariousness is one which addresses itself to the sound discretion of the court, and should not be sustained where the relief prayed is of the same kind with respect to the several matters complained of and is based on substantially similar considerations, and no hardship or injustice is likely to result to the defendant from the joinder of such matters. California Fig-Syrup Co. v. Clinton E. Worden & Co. (C. C. 1898) 86 Fed. 212; Dennison Mfg. Co. v. Thomas Mfg. Co. (C. C. 1899) 94 Fed. 651; Howard v. National Telephone Co. (C. C. 1910) 182 Fed. 215.

A creditors' bill in a federal court, against judgment debtors and another who is alleged to be indebted to them on a legal demand, is multifarious, as against the latter, where it prays, not only for a discovery and for a decree adjudging a claim made by him that his indebtedness was to another than the judgment debtors to be fraudulent, but also for a personal judgment against him, as uniting equitable and legal demands, and because the latter is a demand over which the court is without jurisdiction in equity. Hudson v. Wood (C. C. 1903) 119 Fed. 764.

Bill against directors of insolvent national bank, in which many alleged wrongful transactions, extending over several years, were set forth, held not multifarious. Williams v. Brady (D. C. 1915) 221 Fed. 118.

101. —— Misjoinder of complainants. —Equity will, in a single suit, take cognizance of a controversy involving individual claims of different parties against the same party, when all arise from the same cause, involve similar facts, and are governed by the same legal rules. Shields v. Thomas (1855) 59 U. S. (18 How.) 253, 15 L. Ed. 368; Virginia-Carolina Chemical Co. v. Home Ins. Co. (1902) 113 Fed. 1, 51 C. C. A. 21; Boyd v. Schneider (1904) 131 Fed. 223, 65 C. C. A. 209; Watson v. National Life & Trust Co. (1908) 162 Fed. 7, 88 C. C. A. 380; Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C. 1890) 44 Fed. 151, 11 L. R. A. 623 (decree modified [1893] 56 Fed. 378, 5 C. C. A. 524); Allen v. Fairbanks (C. C. 1891) 45 Fed. 445; Liverpool & L. & G. Ins. Co. v. Clunie (C. C. 1898) 88 Fed. 160; Home Ins. Co. of New York v. Virginia-Carolina Chemical Co. (C. C. 1901) 109 Fed. 681; Kilgore v. Norman (C. C. 1902) 119 Fed. 1006; South Penn Oil Co. v. Calf Creek Oil & Gas Co. (C. C. 1905) 140 Fed. 507; Snelling v. Richard (C. C. 1909) 166 Fed. 635.

A bill is multifarious where the relief for which the two complainants pray in regard to a portion of the property sought to be reached thereby involves distinct questions, requiring different evidence, and leading to different decrees. Walker v. Powers (1881) 104 U. S. 245, 26 L. Ed. 729.

A bill is subject to demurrer for multifariousness if one of the two complainants has no standing in court. Id.

Two alternative claims, each belonging to many persons, one of whom has no interest in one claim, and others of whom have no interest in the other claim, cannot be joined in one bill in equity. Stebbins v. Town of St. Anne (1886) 6 Sup. Ct. 418, 116 U. S. 386, 29 L. Ed. 667.

A right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation, and stockholders suing in such right cannot join therewith a cause of action for fraud and deceit practiced on them when they purchased their stock which is personal. Price v. Union Land Co. (1911) 187 Fed. 886, 110 C. C. A. 20.

A bill in equity which states a cause of action in behalf of individual complainants based on the fraudulent conduct of majority stockholders toward the minority, and which asserts the right of stockholders to follow corporate property conveyed in fraud, and which states a cause of action in favor of a corporation, as complainant, for breach of contract by defendant corporation and individual defendants for the purchase of articles is multifarious for misjoinder of causes of action. Backus v. Brooks (1912) 195 Fed. 452, 115 C. C. A. 354, modifying decree (C. C. 1911) 189 Fed. 922.

A bill to establish a constructive or resulting trust in favor of a corporation and a bill by interveners to establish a trust in the same property in favor of another are necessarily adverse to each other and cannot be maintained in the same suit. Hill v. Wilson (1914) 210 Fed. 200, 127 C. C. A. 260.

A bill by numerous stockholders to recover damages on the ground of fraudulent acts of defendant held multifarious. Watson v. Huntington (C. C. A. 1914) 215 Fed. 472, 131 C. C. A. 520.

A bill is multifarious which mingles independent claims of plaintiff with those which he has as administrator. Carter v. Treadwell (C. C. 1843) Fed. Cas. No. 2,480.

The fact that a complainant in his bill sets up two causes of action, one as trustee and one in his individual right, does not render the bill subject to demurrer, on the ground that it is multifarious, by a defendant between whom and complainant, in either capacity, the issue made is precisely the same. Metropolitan Trust Co. of New York v. Columbus, S. & H. R. Co. (C. C. 1899) 93 Fed. 689.

Possible lack of title or interest in the subject-matter of a suit, so far as

one of the complainants is concerned, which could not injuriously affect the defense, cannot be determined on demurrer to the bill on the ground of multifariousness of parties. Havens v. Burns (C. C. 1911) 188 Fed. 441.

A bill setting up a cause of action by a corporation complainant against a corporation defendant for breach of a contract, and an entirely separate and distinct claim by individual complainants against defendant corporation and other defendants for the delivery of stock in defendant corporation, held demurrable for multifariousness. Backus v. Brooks (C. C. 1911) 189 Fed. 922, decree modified (1912) 195 Fed. 452, 115 C. C. A. 354.

In equity, misjoinder of plaintiff having no interest, and entitled to no relief, held to render complaint multifarious and devoid of equity, and to require a dismissal. Tully v. Triangle Film Corp. (D. C. 1916) 229 Fed. 297.

102. —— Misjoinder of defendants.— Community or want of community of interest in subject-matter of suit, see Gaines v. Chew (1844) 43 U. S. (2 How.) 619, 11 L. Ed. 402; Nelson v. Hill (1847) 46 U. S. (5 How.) 127, 12 L. Ed. 81; Dial v. Reynolds (1877) 96 U. S. 340, 24 L. Ed. 644; Heckman v. U. S. (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820 (affirming judgment upon conditions U. S. v. Allen [1910] 179 Fed. 13, 103 C. C. A. 1); Mullen v. Same (1912) 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834 (affirming judgment upon conditions U. S. v. Allen [1910] 179 Fed. 13, 103 C. C. A. 1); Hayden v. Thompson (1895) 71 Fed. 60, 17 C. C. A. 592 (reversing decree [C. C. 1895] 67 Fed. 273); Dastervignes v. U. S. (1903) 122 Fed. 30, 58 C. C. A. 346 (affirming order U. S. v. Dastervignes [C. C. 1902] 118 Fed. 199); Louisville & N. R. Co. v. Smith (1904) 128 Fed. 1, 63 C. C. A. 1; Jones v. Missouri-Edison Electric Co. (1906) 144 Fed. 765, 75 C. C. A. 631 (reversing decree [C. C. 1905] 135 Fed. 153); U. S. v. Allen (1910) 179 Fed. 13, 103 C. C. A. 1 (reversing decree [C. C. 1909] 171 Fed. 907, and judgment affirmed upon conditions Deming Inv. Co. v. U. S. [1912] 32 Sup. Ct. 549, 224 U. S. 471, 56 L. Ed. 847, and Goat v. Same [1912] 32 Sup. Ct. 544, 224 U. S. 458, 56 L. Ed. 841, and Mullen v. Same [1912] 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, and Heckman v. Same [1912] 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820); Same v. Curtner (C. C. 1886) 26 Fed. 296; Chase v. Cannon (C. C. 1891) 47 Fed. 674; First Nat. Bank v. Moore (C. C. 1892) 48 Fed. 799; Holton v. Wallace (C. C. 1895) 66 Fed. 409 (decree affirmed [1896] 77 Fed. 61, 23 C. C. A. 71); Hayden v. Thompson (C. C. 1895) 67 Fed. 273 (decree reversed [1895] 71 Fed. 60, 17 C. C. A. 592); U. S. v. Flournoy Live Stock & Real-Estate Co. (C. C. 1895) 69 Fed. 886; Carmichael v. City of Texarkana, Ark. (C. C. 1899) 94 Fed. 561; Animarium Co. v. Neiman (C. C. 1899) 98 Fed. 14; Pacific Live Stock Co. v. Hanley (C. C. 1899) 98 Fed. 327; O'Brien v. Champlain Construction Co. (C. C. 1901) 107 Fed. 338; Moody v. Flagg (C. C. 1903) 125 Fed. 819; Illinois Cent. R. Co. v. Caffrey (C. C. 1904) 128 Fed. 770; Allen v. Luke (C. C. 1906) 141 Fed. 694; Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co. (C. C. 1906) 143 Fed. 152; Pennsylvania Co. v. Bay (C. C. 1906) 150 Fed. 770; Ryan v. Martin (C. C. 1908) 165 Fed. 765; Hobbs Mfg. Co. v. Gooding (C. C. 1909) 166 Fed. 933 (order reversed [1910] 176 Fed. 259, 100 C. C. A. 83); Hultberg v. Anderson (C. C. 1909) 170 Fed. 657; U. S. v. Rea-Read Mill & Elevator Co. (C. C. 1909) 171 Fed. 501; Rumbarger v. Yokum (C. C. 1909) 174 Fed. 55; Pulver v. Leonard (C. C. 1909) 176 Fed. 586; Horner-Gaylord Co. v. Miller & Bennett (D. C. 1906) 147 Fed. 295; U. S. v. Curry (D. C. 1912) 201 Fed. 371.

Character of relief sought against different defendants, see Herndon v. Chicago, R. I. & P. Ry. Co. (1910) 30 Sup. Ct. 633, 218 U. S. 135, 54 L. Ed. 970; Swanger v. Atchison, T. & S. F. Ry. Co. (1910) 30 S. Ct. 639, 218 U. S. 159, 54 L. Ed. 978 (affirming decree Chicago, R. I. & P. Ry. Co. v. Swanger [C. C. 1908] 157 Fed. 783); Watson v. United States Sugar Refinery (1895) 68 Fed. 769, 15 C. C. A. 662; Campbell v. Clark (1900) 101 Fed. 972, 42 C. C. A. 123; New Hampshire Sav. Bank v. Richey (1903) 121 Fed. 956, 58 C. C. A. 294; Carroll v. Chesapeake & O. Coal Agency Co. (1903) 124 Fed. 305, 61 C. C. A. 49; McMullen Lumber Co. v. Strother (1905) 136 Fed. 295, 69 C. C. A. 433; Miller v. Weston (1912) 199 Fed. 104, 119 C. C. A. 358; Irons v. Manufacturers' Nat. Bank (C. C. 1883) 17 Fed. 308; Ulman v. Iaeger (C. C. 1895) 67 Fed. 980; Ryan v. Seaboard & R. R. Co. (C. C. 1898) 89 Fed. 397; Farson v. City of Sioux City (C. C. 1901) 106 Fed. 278; Thornton N. Motley Co. v. Detroit Steel & Spring Co. (C. C. 1904) 130 Fed. 396; Perkins v. Northern Pac. Ry. Co. (C. C. 1907) 155 Fed. 445; Groom v. Wittmann (C. C. 1908) 164 Fed. 523.

A joinder of two causes of action against the same party for the same relief, one against him as an individual and one against him as an officer, does not make a bill multifarious. Rogers v. Penobscot Min. Co. (1907) 154 Fed. 606, 83 C. C. A. 380.

A bill by a judgment creditor against the debtor and others to set aside various conveyances by which it is alleged the debtor fraudulently transferred his property to different corporations organized for the purpose and of which

he owned the stock, the purpose being to cover it up and place it beyond the reach of execution through which transfers the other defendants have acquired or claim some interest in different portions of the property, has but a single object, which is to reach and subject the property, is based on a series of transactions forming one course of dealing, and is not demurrable for multifariousness, although the interests of the other parties defendant are separate and distinct. Fowler v. Palmer (1908) 160 Fed. 1, 87 C. C. A. 157.

Where all matters alleged in a bill are relevant to one defendant, he cannot object to it, as multifarious, because it is not relevant to the other defendants. Atwill v. Ferrett (C. C. 1846) Fed. Cas. No. 640.

A bill is not multifarious because it joins defendants holding distinct tracts of land, under distinct conveyances, if the main ground of defense is common to all. Gaines v. Mausseaux (C. C. 1871) Fed. Cas. No. 5,176; Central Pac. R. Co. v. Dyer (C. C. 1871) Fed. Cas. No. 2,552.

A bill by railroad company to restrain the collection of taxes in various counties through which the railroad runs held not multifarious. Union Pac. R. Co. v. McShane (C. C. 1874) Fed. Cas. No. 14,382.

A bill by the Northern Pacific Railroad Company to enjoin the payment of taxes for 1889 upon lands granted to it by Act July 2, 1864, is not multifarious because brought against the tax collectors of 12 different counties for the lands within their respective jurisdictions, since the questions of law and fact involved are common to all the defendants, and the relief prayed is the same. Northern Pac. R. Co. v. Walker (C. C. 1880) 47 Fed. 681, decree reversed (1893) 13 Sup. Ct. 650, 148 U. S. 391, 37 L. Ed. 494.

A bill filed by an execution creditor in aid of his execution against the debtor and others who have fraudulently combined with him to conceal his property, held not multifarious, though it do not aver a conspiracy. Prevost v. Gorrell (C. C. 1879) Fed. Cas. No. 11,-405.

Where the purpose of the bill and the alleged foundation for relief are not so distinct in their nature as to make their joinder in one bill objectionable, but are intimately related as parts of a fraudulent scheme, and the bill so connects the defendants as to make them proper joint defendants, the bill is not multifarious. Duff v. First Nat. Bank (C. C. 1882) 13 Fed. 65.

Participation in conspiracy or other tort or series of torts, see Johnson v. Powers (C. C. 1882) 13 Fed. 315; Woodruff v. North Bloomfield Gravel Min. Co. (C. C. 1883) 16 Fed. 25; U. S. v. Guglard (C. C. 1897) 79 Fed. 21; New England Phonograph Co. v. Edison (C. C. 1901) 110 Fed. 26; Field v. Western Life Indemnity Co. (C. C. 1909) 166 Fed. 607, decree affirmed Moulton v. Field (1910) 179 Fed. 673, 103 C. C. A. 77, writ of certiorari denied Gray v. Same (1911) 31 Sup. Ct. 470, 219 U. S. 586, 55 L. Ed. 347.

103. Impertinence and scandal.—Scandal in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners or anything unbecoming the dignity of the court to hear. Impertinence consists of any allegation that is irrelevant to the material issues made or tendered. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14.

In a bill filed against an insurance association by members to secure its dissolution on the ground of insolvency and the illegality of a reincorporation, specific allegations of mismanagement and fraud on the part of certain officers who are not parties, and as to whom no relief is asked, are impertinent, and on exceptions will be stricken out. Polk v. Mutual Reserve Fund Life Ass'n (C. C. 1904) 128 Fed. 524.

If an allegation in a bill, when proved, could exercise any proper influence on the decision of the cause, it cannot, in general, be said to be impertinent. South & N. A. R. Co. v. Railroad Commission of Alabama (C. C. 1909) 171 Fed. 225.

In suits to determine the constitutionality of statutes fixing railroad rates, alleged to be confiscatory, in which there are a large number of questions of fact and law to be considered, and which properly have a bearing on the issues, a wide latitude is allowed in pleading, and allegations of facts which may be material will not be held bad for impertinence because they are evidential in character and not issuable. Id.

In a bill to enjoin the enforcement of railroad rates established by a state, allegations of the motive of the officers or legislators of the state in prescribing and enacting the statute complained of are impertinent; but allegations that power conferred by such statute on a railroad commission to alter the rates fixed thereby in its discretion with respect to individual carriers is being so used as to discriminate against complainants, and to favor other carriers as a reward for dismissing suits brought to test the validity of the law, are pertinent as tending to show that the statute, in operation, denies to complainants the equal protection of the laws. Id.

Where, in such a suit, a supplemental bill was filed, praying for an injunction to restrain the county solicitors and sheriffs of the state and clerks of the courts from instituting criminal prosecutions and civil suits against officers of complainants for violations of the statute, pending a determination of its validity, and from issuing and serving process in such suits, allegations showing threats by the Governor of the

state to cause such suits to be instituted in every case of violation, notwithstanding the issuance of an injunction suspending the enforcement of the law, are pertinent. Id.

104. Exhibits.—Where, on appeal to the supreme court, it appeared from the record that complainant relied on and set out certain contracts in his bill, which were replied to by the answer, which contracts should have been made exhibits, it not appearing that they could not have been, the decree was reversed for this cause, and the case remanded for further proceedings, with directions that complainant produce the contracts, or account for them, and with leave to make the proper amendments of the bill and answer. Levy v. Arredondo (1838) 37 U. S. (12 Pet.) 218, 9 L. Ed. 1062.

Complainants alleged that they were employed to provide materials and labor to construct a smelter, the reasonable value of the work performed and materials furnished, but referred to a notice of a mechanic's lien and a written contract under which the work was done, which were attached to the bill as exhibits, which contract contained an express waiver of a right to a lien. Held, that the written contract controlled the allegations of the bill, and hence the cause of suit stated was not a quantum meruit but an express contract. Shackleton v. Baggaley (1909) 170 Fed. 57, 95 C. C. A. 505.

The writings mentioned in a bill, or copies of them, need not be filed as exhibits with the bill. Putnam v. New Albany (C. C. 1869) Fed. Cas. No. 11,481.

The rule that where resort is had to a court of equity, instead of a court of law, upon the ground that the writings upon which the action is founded have been lost, destroyed, or suppressed, and affidavit that such instruments are not in the custody or power of the complainant, and that he knows not where they are, unless in the hands of the defendant, must be annexed to the bill, does not apply to a case where the defendants are severally called upon by the bill to answer whether they executed a bond or instrument in writing or print by which they received and became the owners of shares of stock of a corporation, and whether they received certificates of such shares or not. Holmes v. Sherwood (C. C. 1881) 16 Fed. 725.

The broad allegation of a bill that a trustee has been by decree of court substituted for the original trustee, who resigned, cannot be qualified on demurrer by reference to the decree itself, detached from the record of the proceeding, and found with the bill in this case, not even if it can be treated as an exhibit to the bill, where the bill promises to produce the record in evidence at the hearing. Partee v. Thomas (C. C. 1882) 11 Fed. 769.

A bill which does not set forth a copy of an instrument vital to complainant's claim, or aver its terms, is demurrable. Marshall v. Turnbull (C. C. 1888) 34 Fed. 827.

Where the same paper is set out at two or more places in a pleading, such repetitions will be expunged, and the complainant given leave to amend by striking out all but one copy, and referring to the page in which it first appears. Nevada Nickel Syndicate v. National Nickel Co. (C. C. 1898) 86 Fed. 486.

Where a bill claims relief based on written agreements which are not free from ambiguity, it is proper to set them out in full in the bill, together with the construction placed upon them by the plaintiff. Einstein v. Schnebly (C. C. 1898) 89 Fed. 540.

Where a bill makes general allegations, in support of which exhibits are attached, the allegations must be taken as qualified and limited by the exhibits. Willard v. Davis (C. C. 1903) 122 Fed. 363.

A bill incorporating in hæc verba a printed contract in full, even down to the printed names of the signatures and the attestation thereof, held objectionable. Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo. (C. C. 1907) 154 Fed. 238.

105. Construction and operation.—Where complainant in a bill in equity alleged "that he became interested in a ship and cargo at and from Gibraltar," it was held conclusive on him that he had no interest in the ship until she arrived at that port. Mathewson v. Clarke (1848) 47 U. S. (6 How.) 122, 12 L. Ed. 370.

Complainants are not precluded, by an allegation in the bill, which defendants deny the truth of, and which is unproved, from recovering upon other substantive and sufficient allegations which are established. Cowen v. Adams (1897) 80 Fed. 448, 25 C. C. A. 547, denying rehearing (1897) 78 Fed. 536, 24 C. C. A. 198; decree affirmed Adams v. Cowan (1899) 19 Sup. Ct. 873, 174 U. S. 800, 43 L. Ed. 1188, decree reversed (1900) 20 Sup. Ct. 668, 177 U. S. 471, 44 L. Ed. 851.

Where a bill sets forth a case within the jurisdiction of the court, the jurisdiction cannot be ousted by the anticipation and denial in the bill of possible defenses which may not be made. Atherton Mach. Co. v. Atwood-Morrison Co. (1900) 102 Fed. 949, 43 C. C. A. 72.

Complainant is bound at the argument by the allegation of a particular fact in the pleading. Prevost v. Gratz (C. C. 1818) Fed. Cas. No. 11,407.

In a bill for infringement of letters patent, alleged to have been issued in 1879, and assigned to the complainant in 1880, an averment of an infringement of the latter's rights "since the date of said patent" means after the date

of the patent, and not ever since that time, and the bill is not subject to demurrer for laches of complainant in asserting his rights. Brush Electric Co. v. Ball Electric Light Co. (C. C. 1890) 43 Fed. 899.

A bill framed for partition and accounting as between tenants in common cannot be maintained as a bill for adjustment of a partnership estate, it appearing that the land is part of an unadministered partnership estate, defendant being the surviving partner, and plaintiffs, heirs of the deceased partner. Holton v. Guinn (C. C. 1895) 65 Fed. 450.

On demurrer to a bill to avoid a street railway monopoly, the court could not adopt the reasoning of the bill and its deductions from the facts in order to find the existence of a conspiracy or monopoly. Continental Securities Co. v. Interborough Rapid Transit Co. (C. C. 1908) 165 Fed. 945.

Whether a bill states a cause of action depends on the legal effect of its allegations. U. S. v. Conklin (C. C. 1909) 169 Fed. 177, decree affirmed (1910) 177 Fed. 55, 100 C. C. A. 473.

A bill in equity should be construed to mean what it fairly conveys by a fairly exact use of English speech. Ware-Kramer Tobacco Co. v. American Tobacco Co. (C. C. 1910) 180 Fed. 160.

Whether a bill states a cause of action for relief in equity is not to be determined merely from general allegations of equity cognizance or from conclusions of law and fact but from the alleged facts themselves, which, if true, make out a case of equity jurisdiction. Kansas City Southern Ry. Co. v. Quigley (C. C. 1910) 181 Fed. 190.

(G) Pleas

106. Practice on pleas.—Pleas were abolished by rule 29, ante, p. 2508.

Matter in abatement must be set up by plea. Milligan v. Milledge (1805) 7 U. S. (3 Cranch) 220, 2 L. Ed. 417; Chappedelaine v. Dechenaux (1808) 8 U. S. (4 Cranch) 306, 2 L. Ed. 629; Wilcox v. Hunt (1839) 13 Pet. 378, 379, 10 L. Ed. 209; Rhode Island v. Massachusetts (1840) 39 U. S. (14 Pet.) 210, 10 L. Ed. 423; Lansdale v. Smith (1882) 1 Sup. Ct. 350, 106 U. S. 391, 27 L. Ed. 219; Farley v. Kittson (1887) 7 Sup. Ct. 534, 120 U. S. 303, 30 L. Ed. 684 (reversing decree Same v. St. Paul, M. & M. Ry. Co. [C. C. 1882] 14 Fed. 114); Grant v. Phœnix Mut. Life Ins. Co. (1887) 7 Sup. Ct. 841, 121 U. S. 105, 30 L. Ed. 905; Beals v. Illinois, M. & T. R. Co. (1890) 10 Sup. Ct. 314, 133 U. S. 290, 33 L. Ed. 608, affirming decree (C. C. 1886) 27 Fed. 721; Pearce v. Rice (1891) 12 Sup. Ct. 130, 142 U. S. 28, 35 L. Ed. 925; U. S. v. California & O. Land Co. (1893) 13 Sup. Ct. 458, 148 U. S. 31, 37 L. Ed. 354 (affirming decree [1892] 49 Fed. 496, 1 C. C. A. 330); Same v. Dalles Military Road Co. (1893) 13 Sup. Ct. 465, 148 U. S. 49, 37 L. Ed. 362 (affirming decree [1892] 51 Fed. 629, 2 C. C. A. 419); Horn v. Detroit Dry-Dock Co. (1893) 14 S. Ct. 214, 150 U. S. 610, 37 L. Ed. 1199; Building & Loan Ass'n of Dakota v. Price (1898) 18 S. Ct. 251, 169 U. S. 45, 42 L. Ed. 655; Hudson v. Randolph (1894) 66 Fed. 216, 13 C. C. A. 402; Elgin Wind Power & Pump Co. v. Nichols (1895) 65 Fed. 215, 12 C. C. A. 578; Zimmerman v. So Relle (1897) 80 Fed. 417, 25 C. C. A. 518; MacVeagh v. Denver City Waterworks Co. (1897) 85 Fed. 74, 29 C. C. A. 33; Daniels v. Benedict (1899) 97 Fed. 367, 38 C. C. A. 592; Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co. (1901) 109 Fed. 504, 47 C. C. A. 200; Westervelt v. Library Bureau (1902) 118 Fed. 824, 55 C. C. A. 436; General Electric Co. v. New England Electric Mfg. Co. (1904) 128 Fed. 738, 63 C. C. A. 448 (reversing decree [C. C. 1903] 123 Fed. 310); Eagle Oil Co. of New York v. Vacuum Oil Co. (1908) 162 Fed. 671, 89 C. C. A. 463 (affirming decree Vacuum Oil Co. v. Eagle Oil Co. of New York [C. C. 1907] 154 Fed. 867, and writ of certiorari denied [1909] 29 Sup. Ct. 696, 214 U. S. 515, 53 L. Ed. 1063); Chapin v. Dougherty (1910) 183 Fed. 309, 105 C. C. A. 521; Chicago, B. & Q. R. Co. v. Weil (1911) 183 Fed. 956, 106 C. C. A. 296; Chicago, R. I. & P. Ry. Co. v. Same (1911) 183 Fed. 962, 106 C. C. A. 302; Gallagher v. Roberts (C. C. 1806) Fed. Cas. No. 5,194; Peirce v. West (C. C. 1816) Fed. Cas. No. 10,909; Ferguson v. O'Harra (C. C. 1818) Fed. Cas. No. 4,740; Hughes v. Blake (C. C. 1818) Fed. Cas. No. 6,845; Sims v. Lyle (C. C. 1822) Fed. Cas. No. 12,891; Kirkpatrick v. White (C. C. 1826) Fed. Cas. No. 7,850; Taylor v. Luther (C. C. 1835) Fed. Cas. No. 13,-796; Piatt v. Oliver (C. C. 1837) Fed. Cas. No. 11,114; Stearns v. Page (C. C. 1840) Fed. Cas. No. 13,339; Hough v. Richardson (C. C. 1845) Fed. Cas. No. 6,722; Kittredge v. Claremont Bank (C. C. 1845) Fed. Cas. No. 7,858; Childs v. Lenig (C. C. 1849) Fed. Cas. No. 2,680; Ewing v. Blight (C. C. 1855) Fed. Cas. No. 4,589; Tobin v. Walkinshaw (C. C. 1855) Fed. Cas. No. 14,068; Mellus v. Thompson (C. C. 1858) Fed. Cas. No. 9,405; Chapman v. School Dist. (C. C. 1865) Fed. Cas. No. 2,-607; Beard v. Bowler (C. C. 1866) Fed. Cas. No. 1,180; Lamb v. Starr (C. C. 1868) Fed. Cas. No. 8,021; Gaines v. Mausseaux (C. C. 1871) Fed. Cas. No. 5,176; Noyes v. Willard (C. C. 1871) Fed. Cas. No. 10,374; Wheeler v. McCormick (C. C. 1871) Fed. Cas. No. 17,498; Pond v. Vermont Val. R. Co. (C. C. 1874) Fed. Cas. No. 11,265; Reissner v. Anness (C. C. 1877) Fed. Cas. No. 11,686; Brooks v. Vermont Cent. R. Co. (C. C. 1878) Fed. Cas. No. 1,964; Williams v. Empire Transp. Co. (C. C. 1878) Fed. Cas. No. 17,720; Hammond v. Hunt (C. C. 1879) Fed. Cas. No. 6,003; Emma Silver-Min. Co.

v. Emma Silver-Min. Co. of N. Y. (C. C. 1880) 1 Fed. 39; Id. (C. C. 1880) 7 Fed. 401; U. S. v. Gillespie (C. C. 1881) 6 Fed. 803; Wooster v. Blake (C. C. 1881) 7 Fed. 816 (decree affirmed Clark v. Beecher Mfg. Co. [1885] 5 Sup. Ct. 1190, 115 U. S. 79, 29 L. Ed. 352); Lilienthal v. Washburn (C. C. 1881) 8 Fed. 707; Dwight v. Central Vermont R. Co. (C. C. 1881) 9 Fed. 785; Crescent City Live Stock Landing & Slaughter-House Co. v. Butchers' Union Live-Stock Landing & Slaughter-House Co. (C. C. 1882) 12 Fed. 225; St. Louis S. & R. Co. v. Green (C. C. 1882) 13 Fed. 208; Dinsmore v. Central R. Co. (C. C. 1883) 19 Fed. 153; Giant-Powder Co. v. Safety Nitro-Powder Co. (C. C. 1884) 19 Fed. 509; Pentlarge v. Pentlarge (C. C. 1884) 22 Fed. 412; Gordon v. St. Paul Harvester Works (C. C. 1885) 23 Fed. 147; Goldsmith v. Gilliland (C. C. 1885) 24 Fed. 154; Hazard v. Durant (C. C. 1885) 25 Fed. 26 (appeal dismissed Hazard v. Ames [1889] 10 Sup. Ct. 1068, 136 U. S. 638, 34 L. Ed. 551); Sharon v. Hill (C. C. 1885) 26 Fed. 337; Dudgeon v. Watson (C. C. 1885) 23 Fed. 161; Phelps v. Elliott (C. C. 1886) 26 Fed. 881; Armengaud v. Coudert (C. C. 1886) 27 Fed. 247; Garrett v. New York Transit & Terminal Co. (C. C. 1886) 29 Fed. 129; McDonald v. Salem Capital Flour-Mills Co. (C. C. 1887) 31 Fed. 577; Campbell v. City of New York (C. C. 1888) 33 Fed. 795; Burrell v. Hackley (C. C. 1888) 35 Fed. 833; Same v. Pratt, Id. 834; McCloskey v. Barr (C. C. 1889) 38 Fed. 165; Pierce v. Feagans (C. C. 1889) 39 Fed. 587; Hilton v. Guyott (C. C. 1890) 42 Fed. 249 (decree reversed [1895] 16 Sup. Ct. 139, 159 U. S. 113, 40 L. Ed. 95); Kellner v. Mutual Life Ins. Co. (C. C. 1890) 43 Fed. 623; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C. 1892) 50 Fed. 151; Briggs v. Stroud (C. C. 1893) 58 Fed. 717; Marshall v. Otto (C. C. 1893) 59 Fed. 249; Rejall v. Greenhood (C. C. 1893) 60 Fed. 784; Rhino v. Emery (C. C. 1897) 79 Fed. 483; Huntington v. Laidley (C. C. 1897) 79 Fed. 865; National Hollow-Brake Co. v. Interchangeable Brake-Beam Co. (C. C. 1897) 83 Fed. 26; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1898) 84 Fed. 379; Chisholm v. Johnson (C. C. 1898) 84 Fed. 384; Earll v. Metropolitan St. Ry. Co. (C. C. 1898) 87 Fed. 528; Knox Rock-Blasting Co. v. Rairdon Stone Co. (C. C. 1898) 87 Fed. 969; Hostetter Co. v. E. G. Lyons Co. (C. C. 1900) 99 Fed. 734; Gilbert v. Murphy (C. C. 1900) 100 Fed. 161; Jones v. Hillis (C. C. 1900) 100 Fed. 355; Fayerweather v. Trustees of Hamilton College (C. C. 1900) 103 Fed. 546; Dobson v. Peck Bros. & Co. (C. C. 1900) 103 Fed. 904; Soderberg v. Armstrong (C. C. 1902) 116 Fed. 709; Calivada Colonization Co. v. Hays (C. C. 1902) 119 Fed. 202; Vacuum Oil Co. v. Eagle Oil Co. (C. C. 1903) 122 Fed. 105; Metcalf v. American School Furniture Co. (C. C. 1903) 122 Fed. 115; United Cigarette Mach. Co. v. Wright (C. C. 1904) 132 Fed. 195; John D. Park & Sons Co. v. Bruen (C. C. 1904) 133 Fed. 807; General Electric Co. v. Bullock Electric Mfg. Co. (C. C. 1905) 138 Fed. 412; Computing Scale Co. v. Moore (C. C. 1905) 139 Fed. 197; Schnauffer v. Aste (C. C. 1906) 148 Fed. 867; Jahn v. Champagne Lumber Co. (C. C. 1907) 152 Fed. 669; Warren Featherbone Co. v. De Camp (C. C. 1907) 154 Fed. 198; Underwood Typewriter Co. v. Fox Typewriter Co. (C. C. 1908) 158 Fed. 476; Underwood Typewriter Co. v. Manning (C. C. 1908) 165 Fed. 451; Stephens v. Smartt (C. C. 1909) 172 Fed. 466; Moredock v. Moredock (C. C. 1910) 179 Fed. 163; Sims v. United Wireless Telegraph Co. (C. C. 1910) 179 Fed. 540; W. A. Gaines & Co. v. Rock Spring Distilling Co. (C. C. 1910) 179 Fed. 544; Blackburn v. Stannard (D. C. 1842) Fed. Cas. No. 1,468; West Portland Homestead Ass'n v. Lownsdale (D. C. 1883) 17 Fed. 205.

(H) Answer

107. Nature and office.
108. Necessity.
109. Time for filing.
110. Form and requisites.
111. —— Joint or several.
112 —— Joinder of defenses.
113. Plea standing as answer.
114. Scope and extent.
115. Sufficiency of defenses.
116. Denials and admissions.
117. —— Denial of knowledge of part.
118. Responsiveness.
119. Impertinence and scandal.
120. Compelling answer.

See rules 29-36, ante, pp. 2508-2512.

107. Nature and office.—Whether the objection of misjoinder or multifariousness can or cannot properly be taken by way of answer, the court sua sponte may give effect to it whenever that course is deemed conducive to the due and convenient administration of justice. Chisholm v. Johnson (C. C. 1901) 106 Fed. 191.

108. Necessity.—A defendant in equity will not be relieved from answering on the ground that his answer may tend to incriminate him, but he must answer or take the consequences of his default. Webb v. Samuels (D. C. 1915) 227 Fed. 948.

109. Time for filing.—An answer setting up the statute of limitations is in time, if filed before the bill is taken for confessed. Hayman v. Keally (C. C. 1828) Fed. Cas. No. 6,265.

It is of right, and not of favor, that defendant may file his answer before the decree nisi is made absolute. Mason v. Jones (C. C. 1847) Fed. Cas. No. 9,239.

An irregular motion by defendant for a decree does not invalidate a subse-

quent answer and a decree on the bill and such answer. Perkins v. Hendryx (C. C. 1887) 31 Fed. 522.

It is proper under equity rules for defendant to enter appearance and file his answer before the rule day at which the writ was returnable. Heyman v. Uhlman (C. C. 1888) 34 Fed. 686.

In a suit against a city, its board of education, and its several successors, where the board last organized failed to answer, and no decree pro confesso was taken against it, and the cause proceeded without objection to a final hearing and decree upon the pleadings, held, that such board could not take advantage of the omission to enter the decree pro confesso and file its answer. Allen v. City of New York (C. C. 1880) 7 Fed. 483.

A foreclosure suit having been instituted against a railroad company upon a mortgage given to secure its bonds, the company appeared and consented to the appointment of a receiver, and assented to all steps thereafter taken in the case without filing any answer for about a year and a half. Held, that if the defendant had a meritorious defense, an answer stating it, under oath, might be submitted, provided it was shown to the satisfaction of the court by explanatory affidavits that there was a good excuse for the delay. Central Trust Co. v. Texas & St. L. Ry. Co. (C. C. 1885) 23 Fed. 846.

For time to plead under a West Virginia statute, see Wilson v. Winchester & P. R. Co. (C. C. 1897) 82 Fed. 15; and under a New Jersey statute, see Ricard v. Inhabitants of New Providence Tp. (C. C. 1881) 5 Fed. 433.

110. Form and requisites.—It is no ground of exception to an answer that it is not properly entitled. Osgood v. A. S. Aloe Instrument Co. (C. C. 1895) 69 Fed. 291.

An answer to a bill in equity must be an answer in full to all the charges in the bill. Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co. (D. C. 1912) 194 Fed. 172.

111. —— Joint or several.—A joint answer is sufficient if all the parties swear to it. Davis v. Davidson (C. C. 1846) Fed. Cas. No. 3,631.

Answer in name of three defendants, but signed and sworn to by two only, will be stricken from files, but with leave to amend. Bailey Washing Mach. Co. v. Young (C. C. 1874) Fed. Cas. No. 751.

The court will treat as genuine a paper purporting to be an answer, and found among the papers of the suit, although there is no indorsement of the filing thereof by the clerk, especially where the testimony of one of the members of the firm, whose signature is attached to the answer, shows he wrote the answer, and he thinks it was filed. Boyd v. Wyley (C. C. 1883) 18 Fed. 355, decree affirmed (1888) 8 Sup. Ct. 364, 124 U. S. 98, 31 L. Ed. 369.

Where, in the case of a joint tort, separate answers are put in, each respondent must rely for his defense upon his own answer and the proofs. Gardner v. Bibbins (D. C. 1833) Fed. Cas. No. 5,222.

112. —— Joinder of defenses.—More than one defense may be presented in an answer in equity, but each should be separately and clearly alleged without condition or qualification. Graham v. Mason (C. C. 1869) Fed. Cas. No. 5,671.

Where a defendant sets up by his answer under oath two inconsistent defenses, the result will be to deprive him of the benefit of either, and this rule applies to an answer under oath read as an affidavit of merits, on a motion to set aside a decree rendered by default; and the decree will not be set aside where the affidavit sets up two flatly inconsistent defenses, as, for example, where one defense relied on is a tax title in the defendant to the lands, and the other is that the lands are and always have been the property of the United States. Ozark Land Co. v. Leonard (C. C. 1885) 24 Fed. 660.

A defendant in a suit in equity may plead as a defense all facts which he has a right to prove, and which, if proved, can have any effect on the judgment of the court; and it is no valid objection to an answer that it contains allegations setting up the defense in different aspects, as that one paragraph contains a denial which is qualified in another, or that different provisions of a statute of limitations are set up as defenses in different paragraphs. Von Schroder v. Brittan (C. C. 1899) 98 Fed. 169.

An answer to a bill in equity may plead a former judgment in bar in connection with matters of defense to the merits. Mound City Co. v. Castleman (C. C. 1909) 171 Fed. 520.

113. Plea standing as answer.—Where the answer is broader than the plea, and sets up other defenses, the plea will be considered merely as a part of the answer. Lewis v. Baird (C. C. 1842) Fed. Cas. No. 8,316.

A bill to ascertain the surrender value of a policy of insurance upon the life of complainant alleged that the principles and methods of the apportionment made by defendant of its surplus funds failed to award to complainant's policy the amount equitably due to it. Held, that a plea alleging that complainant agreed to ratify any plans adopted by the company for the equitable distribution of its surplus and profits was not an answer, for if the methods adopted resulted in an inequitable division, as alleged, it was not the method complainant agreed to rat-

ify. Kellner v. Mutual Life Ins. Co. (C. C. 1890) 43 Fed. 623.

114. Scope and extent.—If an exception is taken to an answer because certain allegations in the bill are neither answered, admitted, nor denied, and it appears that such allegations are immaterial, the exception will be overruled. Hardeman v. Harris (1849) 48 U. S. (7 How.) 726, 12 L. Ed. 889.

A defendant who sets up the bar of the statute of limitations is excused from further answer to such parts of the bill as are covered by it. Samples v. City Bank (C. C. 1873) Fed. Cas. No. 12,278.

An answer which fairly meets all allegations of the bill required for sufficiency as a pleading, need not admit or deny every detail of evidence alleged in the bill, so as to save the complainant the necessity of proof. Field v. Hastings & Bradley Co. (C. C. 1895) 65 Fed. 279.

115. Sufficiency of defenses.—Where defendant claims protection as a purchaser of land without notice of a prior equity, he must state the deed of purchase, the date, parties, and contents, briefly, and that the vendor was seised in fee and in possession; the consideration must be stated, with a distinct averment that it was bona fide, and truly paid, independently of the recital in the deed; notice must be denied down to the time of paying the money and the delivery of the deed; and, if notice is specially charged, the denial must be of all circumstances referred to from which notice can be inferred, and the answer or plea must show how the grantor acquired title. Boone v. Chiles (1836) 35 U. S. (10 Pet.) 177, 9 L. Ed. 388.

In pleading the statute of limitations, it is not necessary that there shall be any express reference to the statute. Harpending v. Reformed Protestant Dutch Church (1842) 41 U. S. (16 Pet.) 455, 10 L. Ed. 1029.

Defendant may set up a bar in his answer to excuse him from answering further; and if the bar set up is a sufficient defense to the whole relief sought, it is immaterial whether the defendant answer the allegations of the bill or not; but if it is insufficient for any reason, complainant may except, and set the cause down on bill and answer only, or may file a replication, and proceed to proofs. In the former case, the answer is taken as true, and the bar therein as proved; and, though insufficient as a defense, complainant cannot have a decree, unless the answer admits the allegations of the bill on which the prayer for relief is founded. Gaines v. Agnelly (C. C. 1872) Fed. Cas. No. 5,173.

To a bill for an accounting for the surplus of securities pledged for advances thereafter to be made, averments in the answer of facts, such as the prior state of the parties' accounts, are needless, since these facts may be proved under any other averment. Armstrong v. Chemical Nat. Bank (C. C. 1889) 37 Fed. 466.

The doctrine that exceptions to the answer for insufficiency are confined to cases where complainants are compelled to rely on defendants to prove their case, and are not properly taken where all the matters concerning which complainants ask discovery are of record, does not apply to bills for relief. McClaskey v. Barr (C. C. 1889) 40 Fed. 559.

Defendant may join in his answer all matters of defense in bar or to the merits of the bill. Holton v. Guinn (C. C. 1895) 65 Fed. 450.

The rules of equity pleading do not require the defenses of payment or setoff to be set forth in an answer according to any particular form, but it is sufficient for the pleader to set forth the facts in a concise and intelligible manner. Bausman v. Denny (C. C. 1896) 73 Fed. 69, judgment affirmed Same v. Kinnear (1897) 79 Fed. 172, 24 C. C. A. 473.

It is permissible to set forth matters of law as well as matters of fact constituting a defense. Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1896) 76 Fed. 15.

Allegations that the plaintiff in a bill for an accounting respecting his employment by defendants as agent to sell machinery on commission violated his contract of agency, by neglecting the business, to the damage of defendants, sets out a purely legal demand, not pleadable in an answer to the bill. Whittemore v. Patten (C. C. 1897) 84 Fed. 51.

An answer which specifically traversed the allegations of the bill, and also contained a general denial, held sufficient to put in issue all the material allegations of the bill, although as to one of such allegations it was not technically responsive. Robinson v. American Car & Foundry Co. (C. C. 1904) 132 Fed. 165, decree affirmed (1905) 135 Fed. 693, 68 C. C. A. 331, writ of certiorari denied (1906) 27 Sup. Ct. 777, 203 U. S. 590, 51 L. Ed. 330.

An answer to a bill is not defective because it alleges matter of record which would be judicially noticed, as a predicate for defendant's contention that by the course of pleading and action taken thereon complainant acquiesced therein. Mound City Co. v. Castleman (C. C. 1909) 171 Fed. 520.

Any relief to which complainant would be entitled on the statement of the position of one of several defendants raising an issue of law by answer, would not be stayed by allegations of his codefendant's lack of knowledge. Boyd v. New York & H. R. Co. (D. C. 1915) 220 Fed. 174.

116. Denials and admissions.—A mere denial of facts is proper for an answer, but not for a plea. Milligan v. Milledge (1805) 7 U. S. (3 Cranch) 220, 2 L. Ed. 417.

A denial by defendant that his testator gave authority to an agent to draw a bill of exchange is not such an answer to an averment of such authority in the bill as will deprive the complainant of his remedy, unless defendant go further and deny the subsequent assent of his testator to the drawing of such bill, for a subsequent assent is equivalent to an original authority. Clark v. Van Riemsdyck (1815) 13 U. S. (9 Cranch) 153, 3 L. Ed. 688.

Where a bill is brought to enforce an equitable title to land against a subsequent purchaser, defendants must deny in explicit terms that they had notice of the prior equity before their purchase, and an allegation that they had no notice of any valid claim, and that they did not recollect hearing anything of the claim of complainants before the conveyance, is insufficient. Caldwell v. Carrington (1835) 34 U. S. (9 Pet.) 86, 9 L. Ed. 60.

No admissions in an answer to a bill in chancery can lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill. Jackson v. Ashton (1837) 36 U. S. (11 Pet.) 229, 9 L. Ed. 698.

A denial in an answer in equity that defendant "delivered" an alleged deed goes for nothing if the answer admits facts and circumstances which constitute delivery. Adams v. Adams (1874) 88 U. S. (21 Wall.) 185, 22 L. Ed. 504.

Every material averment in the bill not denied is admitted. Surget v. Byers (C. C. 1845) Fed. Cas. No. 13,629.

Where defendant's oath has been waived, admissions contained in answers are evidence against him. Uhlmann v. Arnholt & Schaeffer Brewing Co. (C. C. 1890) 41 Fed. 369.

A literal denial in the answer of a material allegation in the bill is not to be deemed an admission, although on exception it might have been held insufficient. United States v. Ferguson (C. C. 1892) 54 Fed. 28.

In equity pleadings, denials or admissions should be specific and direct, and it is not enough to allege that every allegation of the bill, not expressly admitted, is denied. Holton v. Guinn (C. C. 1895) 65 Fed. 450.

It is not ground of exception to an answer that it alleges that defendant "doth not admit" the allegations of the bill on certain topics "to be true," and does not specifically answer whether any one allegation is true or false, nor that it does not explicitly admit or deny that there was a contract as alleged in the bill. Schultz v. Phenix Ins. Co. of Brooklyn (C. C. 1896) 77 Fed. 375, decree reversed Phenix Ins. Co. v. Schultz (1897) 80 Fed. 337, 25 C. C. A. 453.

An answer is not subject to exception because it fails to answer an averment of the bill that a true and correct copy of a plat referred to therein is attached and made an exhibit, there being no rule of pleading requiring the attaching of such exhibits. Peters v. Tonopahi Min. Co. (C. C. 1903) 120 Fed. 587.

In a suit in equity, submitted on bill and answer, the complainant's title to real estate will be deemed to be admitted by an answer in which the defendant pleads an adverse claim of title, deraigned from a void judicial decree in a proceeding against the complainant to foreclose a lien for taxes, notwithstanding a denial of the complainant's title in the same answer. Klenk v. Byrne (C. C. 1906) 143 Fed. 1008.

An averment in a bill that land which is the subject of the suit was at the time of its commencement unoccupied is not denied by an affirmative allegation in the answer that defendants "are now in the quiet and peaceable possession" of the same. Klenk v. Byrne (C. C. 1906) 143 Fed. 1008.

Where an answer under oath is false in material particulars, as to which respondent could have made no mistake, it may be wholly disregarded. Scammon v. Hobson (D. C. 1872) Fed. Cas. No. 12,434.

117. —— Denial of knowledge of fact.—Where fraud is asserted as a ground of relief, as against third persons, a mere denial of all fraud in themselves and all knowedge of fraud in their grantor, is insufficient, without a denial of a knowledge of the facts from which fraud is inferred. Wormeley v. Wormeley (C. C. 1817) Fed. Cas. No. 18,047.

A denial according to defendant's "recollection and belief," in an answer to a direct charge of a thing done by defendant, will be treated as a mere evasion. Taylor v. Luther (C. C. 1835) Fed. Cas. No. 13,796.

A statement in an answer that defendant has no knowledge that the fact is as stated is insufficient, either as an admission or denial; and an answer that defendant "had no knowledge, information, and belief that the charge was not true," is insufficient to an interrogatory "as to his knowledge, remembrance, information, and belief." Brooks v. Byam (C. C. 1840) Fed. Cas. No. 1,947.

When the bill requires answer as to information and belief, and one of the respondents is a corporation, its officers are bound to make full inquiries on the matter before answering. Kittredge v. Claremont Bank (C. C. 1846) Fed. Cas. No. 7,859.

Where fraud is charged to have been committed by an agent, denial by the principal on belief and on information from the agent is not sufficient. Mason

v. Jones (C. C. 1848) Fed. Cas. No. 3,246.

Where respondent has no personal knowledge of matter alleged in the bill, a denial upon information and belief is sufficient to put complainant to his proof. Robinson v. Mandell (C. C. 1868) Fed. Cas. No. 11,959.

Want of knowledge of allegations as to which defendant's knowledge, if any, must be direct and personal, must be directly stated. A denial upon information and belief does not raise an issue. Burpee v. First Nat. Bank (C. C. 1873) Fed. Cas. No. 2,185.

A corporation is not excepted from such rule. Id.

Defendant may answer an allegation in a bill that he has no knowledge, information, or belief concerning the same, and the effect is to leave the matter to be proven by plaintiff. In re Holladay (C. C. 1886) 27 Fed. 830.

An affirmative defense cannot be set up by a denial of allegations not contained in the bill. Osgood v. A. S. Aloe Instrument Co. (C. C. 1895) 69 Fed. 291.

An answer merely denying an allegation of the bill on information and belief is sufficient to put the allegation in issue, and place the burden of proof on the complainant, but not to require the testimony of two witnesses, or of one and corroborating circumstances, to establish it. Earle v. Art Library Pub. Co. (C. C. 1899) 95 Fed. 544.

In a suit in equity, a charge in an answer, which is denominated a "cross-bill," may be accepted as a statement of respondents' case, notwithstanding the misnomer calling the answer a cross-bill. Hoge v. Eaton (C. C. 1905) 135 Fed. 411, decree reversed Eaton v. Hoge (1905) 141 Fed. 64, 72 C. C. A. 74, 5 Ann. Cas. 487.

An answer that defendants did not know and could not set forth as to their belief or otherwise whether, etc., was insufficient, since, though it denied knowledge, it did not deny information. Victor G. Bloede Co. of Baltimore City v. Carter (C. C. 1906) 148 Fed. 127.

118. Responsiveness.—Where a bill charges defendant with notice of a particular fact, an answer must be given without a special interrogatory; but defendant is not bound to answer an interrogatory not warranted by some matter contained in a former part of the bill. Mechanics' Bank v. Lynn (1828) 26 U. S. (1 Pet.) 376, 7 L. Ed. 185.

A cross-bill alleged that a certain corporation did not execute an act of pledge to the defendant in the cross-bill, that no one was authorized by the corporation to execute such pledge, and that defendant illegally obtained possession of the property claimed to be pledged. The answer to the cross-bill alleged that the pledge was executed in good faith for the purposes of the corporation which received and used the proceeds thereof. Held, that the answer was responsive to the bill. Prentiss Tool & Supply Co. v. Godchaux (1895) 66 Fed. 234, 13 C. C. A. 420.

An answer to a bill alleging a compromise, which goes into the history of the dispute compromise, is not responsive. Sargent v. Larned (C. C. 1855) Fed. Cas. No. 12,364.

Where a bill to set aside a conveyance calls for answers under oath as to the date of the contract relied upon, an answer that it was not executed until a day much later than its date is responsive. Walker v. Derby (C. C. 1870) Fed. Cas. No. 17,068.

An answer is not subject to exception because it contains a substantive defense not responsive to a bill in equity. Adams v. Bridgewater Iron Co. (C. C. 1881) 6 Fed. 179.

Where a bill against the executors and trustees under a will charges them with having delayed, neglected, and refused to invest a certain sum as directed by the will, and to pay the income to complainant, the averments in the answer that defendants' conduct was known to and approved by complainant, and that she had never, until shortly before the suit, requested the investments to be made, are responsive to the bill. Comstock v. Herron (C. C. 1891) 45 Fed. 660, decree reversed (1893) 55 Fed. 803, 5 C. C. A. 266.

A bill by railroad companies to enjoin the assessment of taxes on complainants' property alleged that the United States Supreme Court had decided that the railroads in question were exempt from a property and franchise tax, and that the legislation of the state of Georgia, which sought to impose a tax thereon was unconstitutional, null and void, but that respondent was seeking to collect taxes on the same property in the hands of complainants as lessees. Held, that an answer admitting such decree, but alleging that it involved no consideration of the lease of the railroad to complainants, or of complainants' liability to pay taxes, and denying that the litigation respecting the taxes due by the railroad company had any relation to the question of what taxes, if any, complainants were required to pay, was not objectionable as nonresponsive. Louisville & N. R. Co. v. Wright (C. C. 1910) 190 Fed. 252.

119. Impertinence and scandal.—The mother and guardian of a minor, upon his death, was appointed co-administrator with plaintiff of his estate. On her death it passed into the hands of her husband, who mingled it with his own property. Plaintiff, as surviving administrator, having sued him to recover possession of the estate, he filed an answer and a cross bill, alleging that plaintiff, as one of the administrators of the minor's father, had wasted and misappropriated moneys which should have come to the minor, in excess of the amount of the minor's estate in de-

fendant's hands, and in the cross bill prayed an accounting as to the father's estate, and that a decree of the probate court finally discharging the administrators of the father's estate should be set aside, together with various other forms of relief, which would have required an investigation extending over many years. Held, that these allegations of the answer were impertinent. Harrison v. Perea (1897) 18 Sup. Ct. 129, 168 U. S. 311, 42 L. Ed. 478, affirming (1895) 41 P. 529, 7 N. M. 666.

Where an answer impeached the bona fides and validity of a codicil to a will already approved and allowed by the proper probate court, held, that the allegations should be expunged as impertinent. Langdon v. Goddard (C. C. 1843) Fed. Cas. No. 8,061.

Allegations in the answer of an attempted settlement, the nature and terms of which were not given, and which was not acceded to by plaintiffs, ordered expunged as irrelevant. Id.

If an amendatory answer repeat what was said in the original answer without varying the defense, it may be considered as impertinent, and will be referred to a master, etc. Gier v. Gregg (C. C. 1847) Fed. Cas. No. 5,406.

Matter in an answer which is responsive to the bill cannot be excepted to as impertinent, although it in fact is so. Lownsdale v. Portland (D. C. 1861) Fed. Cas. No. 8,578; Chapman v. School Dist. (C. C. 1865) Fed. Cas. No. 2,607; Mound City Co. v. Castleman (C. C. 1909) 171 Fed. 520.

The answer of the defendant contained, inter alia, the following language: "Further answering, these defendants admit, on information and belief, that a decree was rendered in the suit of the above-named complainants against S. J. Force et al., at the date as alleged in said bill; but these defendants, on like information and belief, deny that said decree was rendered after full consideration, but on the contrary, aver, on such information and belief, that the said decree was made, and said finding had, without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein,—the court, as these defendants are advised and believe, without taking time to consider, deciding said cause and granting said decree even before counsel had completed the argument and presentation of the same." Held, upon exception, that such language was neither impertinent nor scandalous. Miller v. Buchanan (C. C. 1880) 5 Fed. 366.

Averments referring to facts entitling defendant to affirmative relief are only proper for a cross bill, and may be expunged from an answer. Armstrong v. Chemical Nat. Bank (C. C. 1889) 37 Fed. 466.

Passages in a defendant's answer to a bill in equity, which, without alleging any facts which do not appear in the bill, or denying any allegations of the bill, consist merely of argument as to the effect of facts, already apparent in the bill, as amounting or not amounting to notice or to laches, and as to the legal rights of the defendant under state statutes, are impertinent. Florida Mortg. & Inv. Co. v. Finlayson (C. C. 1896) 74 Fed. 671.

An allegation in an answer that plaintiff brought the suit in a state distant from that of defendants' residence for the purpose of harassing them, and involving them in large expense, is impertinent. Whittemore v. Patten (C. C. 1897) 84 Fed. 51.

Parts of an answer, though immaterial as a defense, and scandalous in nature, will not on that account be suppressed, when intended to meet charges of bad faith made in the bill. Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1898) 84 Fed. 379.

Where a bill alleges that complainant had secured options on property, which he transferred to defendants under a contract for the enforcement of which the bill was filed, an averment in the answer, which admitted the contract, that complainant had expended but little time or money in procuring such options, is impertinent, the subsequent contract having precluded any inquiry into such question. Barrett v. Twin City Power Co. (C. C. 1901) 111 Fed. 45.

Averments in an answer to a bill filed for the purpose of obtaining a strict and literal enforcement of a contract, including a forfeiture, stating facts tending to show that the contract was a hard one for defendants, and that they had endeavored in good faith to carry it out, and had substantially complied with its terms, although stating no legal defense, are proper as considerations addressed to the discretion of the court for the purpose of avoiding a harsh and literal enforcement of the contract, and are not subject to exception for impertinence. Id.

Impertinence in a pleading in equity consists in the introduction of any matter into the pleading which is not properly before the court for decision at the particular stage of the suit. Blanton v. Chalmers (C. C. 1908) 158 Fed. 907.

Where a complainant charged defendants, parties to a prior suit in the state court for partition of the property in controversy, and their attorneys, in general terms with fraud in the allotment of parcels of land, to the prejudice of complainant's rights, but did not set out the conduct constituting the fraud, complainant could not object that allegations in the answer, intended to show the good faith and regularity of the proceedings leading to the partition decree, etc., were impertinent. Mound City Co. v. Castleman (C. C. 1909) 171 Fed. 520.

The allegation of matter in a bill which the court would judicially notice

is insufficient to sustain an objection for impertinency. Id.

Complainant railroad companies suing to restrain the collection of taxes as lessees, charged that their lessor had never parted with its right, title and estate in the property, or sought to do so; had never sought to be absolved from its obligations to the public as a common carrier of freight and passengers, or as a railroad company, but that on the contrary was subject to suit for injuries to goods and passengers, irrespective of the fact that in most cases the lessees indemnified the lessor against such judgments. Held, that averments in the answer alleging that such liability existed by operation of law had no bearing on the complainants' liability to pay taxes, and denying that the lessor company had not parted with an estate in the property, claiming that under the law of Georgia a leasehold for a long term was an estate in realty different from a mere tenancy under a landlord, in that the exclusive and absolute right of possession and control of the term was in the lessee, with a mere estate in reversion in the lessor, etc., was not objectionable as impertinent, though it exceeded what was necessary in response to complainants' averments. Louisville & N. R. Co. v. Wright (C. C. 1911) 190 Fed. 252.

120. Compelling answer.—On motion for a rule answer in chancery, held, that such rule need not be laid, but attachment might go of course after fourth day of next term. Anonymous (C. C. 1803) Fed. Cas. No. 442.

Where the defendant on a bill for injunction is merely nominal, the court will, on the application of the party really interested, direct the answer of the nominal party to be taken under a commission, and notice of such application is not necessary. Wilkins v. Jordan (C. C. 1813) Fed. Cas. No. 17,665.

An attachment for not answering the bill must not be made returnable to the clerk at the rules, but to the court. Dowson v. Packard (C. C. 1826) Fed. Cas. No. 4,049.

Where bill sets up facts taking an oral agreement averred out of the statute of frauds, defendant will be required to respond by answer to such facts. Bailey v. Wright (C. C. 1868) Fed. Cas. No. 749.

Although a corporation cannot be compelled to answer to a bill in equity under oath, it can be required to answer, and must answer fully. Gamewell Fire-Alarm Tel. Co. v. City of New York (C. C. 1887) 31 Fed. 312.

(I) Cross-Bill

121. Nature and office.
122. —— Relation to subject-matter of original bill in general.
123. —— Subject-matter of cross-bill.
124. Necessity of cross-bill.
125. Right to file cross-bill.
126. Leave or direction of court to file cross-bill.
127. Jurisdiction of subject-matter.
128. Time for filing cross-bill.
129. Form and requisites of cross-bill.
130. Sufficiency of cross-bill.
131. Parties.
132. Process.

121. Nature and office.—A cross-bill may be filed by defendant against plaintiff, or against other defendants, or against both, touching matters in question in the original bill, and is brought either to obtain a discovery of facts in aid of the defense, or to obtain full and complete relief to all parties, as to the matters charged in the original bill. Ayres v. Carver (1854) 58 U. S. (17 How.) 591, 15 L. Ed. 179.

A cross-bill filed by the parties in whose favor the decree was made in the original suit was properly dismissed as useless. Minnesota Co. v. St. Paul Co. (1867) 73 U. S. (6 Wall.) 742, 18 L. Ed. 856.

Where a cross-bill is filed by a party claiming an interest in the subject of litigation, on petition of defendant and against the objection of complainant, an appellate court may treat such cross-bill as a summary petition, filed by the party himself pro interesse suo, and affirm a decree entered in his favor. Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33.

The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties and a complete determination of all controversies which arise out of the matters charged in the original bill. Springfield Milling Co. v. Barnard & Leas Mfg. Co. (1897) 81 Fed. 261, 26 C. C. A. 389.

A cross-bill seeking affirmative relief is in the nature of an original bill. Jackson v. Simmons (1900) 98 Fed. 768, 39 C. C. A. 514.

Where a cross-bill seeks affirmative relief with respect to matters germane to the original suit, and the controversy takes such shape that a complete and final determination of the whole case as to all the parties to the original suit may be had upon the lines of a cross-bill, then it seems a final decree may be entered on the cross-bill. Blythe v. Hinckley (C. C. 1897) 84 Fed. 228.

A cross-bill is but an auxiliary to the original suit, and depends thereon. It is brought in the court in which the original suit is pending, and must be preferred by a defendant to the original bill in the same suit, or against other defendants, or both. It must state the parties to the original bill, the object, prayer, or proceedings thereon, as also the facts and rights of the exhibiting party, the ground on which he resists complainant's claim, and should pray

that the cross-cause and the original cause be heard at the same time, and one decree made adjudicating all rights of the parties. U. S. v. Reese (C. C. 1909) 166 Fed. 347.

A "cross-bill" is one brought by a defendant in a suit against the complainant in the same suit, or against the other defendants in the same suit, or against both, touching the matters in question in the original bill. Lovell v. Latham & Co. (D. C. 1914) 211 Fed. 374, order modified Knauth, Nachod & Kuhne v. Latham & Co. (C. C. A. 1915) 219 Fed. 721.

122. —— Relation to subject-matter of original bill in general.—A cross-bill must be confined to the subject of litigation in the original suit. It cannot set up other and distinct matters. Ayres v. Carver (1854) 58 U. S. (17 How.) 591, 15 L. Ed. 179; Randolph v. Robinson (C. C. 1879) Fed. Cas. No. 11,561; Lautz v. Gordon (1886) 28 Fed. 264; Johnson Railroad Signal Co. v. Union Switch & Signal Co. (C. C. 1886) 43 Fed. 331; Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co. (C. C. 1891) 46 Fed. 851; Goff v. Kelly (C. C. 1896) 74 Fed. 327; Thruston v. Big Stone Gap Imp. Co. (C. C. 1898) 86 Fed. 484; Lovell v. Latham & Co. (C. C. 1911) 186 Fed. 602; Lovell v. Latham & Co. (D. C. 1914) 211 Fed. 374, order modified Knauth, Nachod & Kuhne v. Latham & Co. (1915) 219 Fed. 721, 135 C. C. A. 419.

A "cross-bill," being an auxiliary bill simply, must be a bill touching matters in question in the original bill. If its purpose be different from that of the original bill, it is not a cross-bill, although the matters presented in it have a connection with the same general subject. Cross v. De Valle (1863) 68 U. S. (1 Wall.) 5, 17 L. Ed. 515.

The issues raised by a cross-bill must be so closely connected with the cause of action in the original suit that the cross suit is a mere auxiliary or dependency upon the original suit, but, subject to this qualification, new facts and new issues may properly be presented by a cross-bill. Springfield Milling Co. v. Barnard & Leas Mfg. Co. (1897) 81 Fed. 261, 26 C. C. A. 389.

Matters germane to and connected with the subject-matter of a suit may be introduced by cross-bill, although new, and not mentioned in the original bill. Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co. (C. C. 1874) Fed. Cas. No. 13,643.

A cross-bill will not be sustained when the relief sought is not founded upon the allegations of the original bill, and when the facts are merely such as to authorize a recovery of damages for which there is an adequate remedy at law. Lautz v. Gordon (C. C. 1886) 28 Fed. 264.

A cross-bill is auxiliary to the original suit and a dependency upon it, and it cannot introduce new controversies between the defendants to the original bill, the decision of which is in no way necessary to a complete determination of the controversy between complainant and the defendants over the subject-matter of the original bill. If it does, it is not a cross-bill, but an original bill, and should be dismissed. Gilmore v. Bort (C. C. 1905) 134 Fed. 658.

A cross-bill cannot be made an original bill in the same cause, unless the subject-matter is germane to the original bill. American Car & Foundry Co. v. Merchants' Despatch Transp. Co. (D. C. 1914) 216 Fed. 904.

123. —— Subject-matter of cross-bill.—As against an original bill claiming an equitable title to land, two complainants in a cross-bill set up title to the lands in dispute, claiming the same to be paramount to that of their codefendants, and sought to obtain a decree to that effect, to have the possession delivered to them, and the same matter was set up in their answer to the original bill against the equitable title claimed by complainant. Held, that complainant had nothing to do with the dispute between defendants, and that it could not properly be considered a cross-bill. Ayres v. Carver (1854) 58 U. S. (17 How.) 591, 15 L. Ed. 179.

Where, on a bill for infringement of a patent the court sustains the patent and decrees damages, a bill which sets up judgment in another suit against one of the complainants, and asks that defendants in the principal suit set forth what share of the damages they claim, respectively, so that the defendant in that suit may set off his judgment with respect to the one against whom it is entered, cannot be regarded as a cross bill. Rubber Co. v. Goodyear (1869) 76 U. S. (9 Wall.) 807, 19 L. Ed. 587.

Where a bill is filed to restrain an execution sale under a judgment, defendant may file a cross-bill to have the judgment decreed a valid equitable lien on complainant's property, and to have the property sold to satisfy it. Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank (1890) 10 Sup. Ct. 550, 134 U. S. 276, 33 L. Ed. 900, affirming decree Chicago & P. R. Co. v. Same (C. C. 1886) 26 Fed. 820.

A bill alleged ownership by complainant of realty conveyed by a certain deed to his father, and standing in the latter's name at his death; prayed that an alleged will of the latter be declared invalid, that title to the property be confirmed in complainant, and that defendants be enjoined from interfering therewith. A cross-bill alleged, inter alia, that the deed mentioned was a trust deed for defendants' benefit, and prayed that the trust be declared, and defendants' ownership of the property established. Held, that the subject-matter of the cross-bill was germane to that of

the original bill. Kingsbury v. Buckner (1890) 10 Sup. Ct. 638, 134 U. S. 650, 33 L. Ed. 1047.

In a suit to restrain the enforcement of a report of appraisers, determining the amount of loss under an insurance policy, a cross-bill may properly be filed seeking a decree for the amount of the loss. North British & Mercantile Ins. Co. v. Lathrop (1895) 70 Fed. 429, 17 C. C. A. 175.

The transferees of stock of a national bank, who are parties defendant to a suit by a receiver of the bank to enforce the individual liability against the transferror on the ground that he transferred the stock to escape it, cannot by a supposed cross-bill inject into such a suit the litigation of the question whether or not the vendor deceived and defrauded them by the transfer. Stuart v. Hayden (1895) 72 Fed. 402, 18 C. C. A. 618, decree affirmed (1898) 18 Sup. Ct. 274, 169 U. S. 1, 42 L. Ed. 639.

A transferee of national bank stock cannot recover the consideration paid therefor, by cross-bill, in an action brought by a receiver to enforce against the transferror his statutory liability, as such cross-bill raises an independent controversy, in which the receiver has no interest. Stuart v. Hayden (1898) 18 Sup. Ct. 274, 169 U. S. 1, 42 L. Ed. 639, affirming decree (1895) 72 Fed. 402, 18 C. C. A. 618.

A cross-bill is properly filed to establish an equitable title to letters patent, the legal title to which is in the plaintiff in the original bill for an infringement. Brandon Mfg. Co. v. Prime (C. C. 1878) Fed. Cas. No. 1,810.

Where suit for injunction is brought by a railroad company having the prior right of way, to enjoin intrusion thereon by another company, the right to enter and use such right of way may be enforced on cross-bill. Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. Co. (C. C. 1883) 17 Fed. 867.

A bill to remove a cloud on his title, alleged that defendant issued an attachment in Iowa against R., and levied on the land in question, which stood in the name of R.'s wife; that defendant filed a supplemental petition in that suit against R. and wife alleging that the land actually belonged to R., and had been conveyed by him to his wife in fraud of creditors; that without service on or notice to Mrs. R., and without appearance by her, defendant obtained a decree under which the land was sold, and he became the purchaser; that complainant had in good faith obtained the title from Mrs. R. Held that, as by the laws of Iowa a creditor may attach land fraudulently conveyed, and afterwards file a bill to set aside the fraudulent title, defendant had a right in this suit to file, as germane to the bill, a cross-bill alleging that complainant was not a bona fide purchaser, and praying to have his pretended title declared void, and the title declared to be in defendant. Remer v. McKay (C. C. 1889) 38 Fed. 164.

To a bill to foreclose a mortgage on the property and franchises of a street railroad company, which mortgage covered after-acquired property, interveners filed a cross-bill, alleging that a certain portion of the after-acquired property had been acquired by funds furnished by the interveners under contracts by which the company was to construct and operate that portion of its line for a certain time and in a certain manner; that the bondholders and the corporation had conspired together to file the bill for foreclosure, and by the sale to deprive the interveners of their rights in the property; that accordingly a receiver had been appointed, who refused to operate that portion of the line, whereby interveners had been deprived of the advantages provided for in the said contracts; and that the contracts provided that, upon the failure of the company to operate the line, a conveyance of it was to be made to interveners. The prayer was for such conveyance. Held that, as the claim of the interveners was adverse to the parties to the bill, the cross-bill should be dismissed. Farmers' Loan & Trust Co. v. San Diego Street Car Co. (C. C. 1889) 40 Fed. 105.

In a suit for relief on account of interference and infringement, a cross-bill seeking relief for an alleged infringement of defendant's patent by complainant cannot be filed, not being germane to the original suit. Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co. (C. C. 1891) 46 Fed. 851.

A petition by bondholders seeking to recover damages from their trustee for maladministration of the trust cannot be filed as a cross-bill in a proceeding for the foreclosure of the deed of trust. Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C. 1893) 53 Fed. 850, decree reversed Gasquet v. Fidelity Trust & Safety Vault Co. (1893) 57 Fed. 80, 6 C. C. A. 253.

One T. G. made an assignment for the benefit of his creditors, certain of whom were preferred in the assignment. One E. G. brought a suit for the purpose of establishing a partnership with T. G. in part of the assigned property. This question was litigated between E. G. and the assignees and the preferred creditors, and decided in favor of E. G. After the entry of a decree in the suit, two of the preferred creditors, neither of whose claims had been reduced to judgment, filed separate bills of intervention, in the nature of cross-bills, claiming that E. G. was estopped, as against them, to claim an interest in the assigned property, because she had permitted T. G. to represent it as his own, and also claiming that a mortgage held by one of the preferred creditors, who was also one of

the assignees, was void as against creditors. Held, that such bills were not objectionable on the ground that the matters alleged were concluded by the decree on the original bill, since they asserted equities which the assignees could not have asserted, and which neither were nor could have been litigated in the original suit, but that such bills must be dismissed, both because they sought to introduce matters foreign to the original bill, and not proper subjects for cross-bills, and because the claims of the interveners had not been reduced to judgment. Goff v. Kelly (C. C. 1896) 74 Fed. 327.

Where the defendant in a bill to foreclose a mortgage given to secure a note pleads usury as a defense, he may set up, by cross-bill, a claim, under R. S. § 1391, for double the amount of interest he has paid complainant. Weathersbee v. American Freehold Land Mortg. Co. (C. C. 1896) 77 Fed. 523.

In a suit to obtain the appointment by a court of equity of a trustee in place of one deceased, the court may entertain a cross-bill by beneficiaries of the trust for the purpose of ascertaining and enforcing their rights in the trust fund, and on such cross-bill it may require an accounting by the representatives of the deceased trustee, or others connected with the trust, and compel restitution of any part of the fund shown to have been illegally diverted; but such cross-bill is auxiliary to and dependent upon the original suit, and cannot be extended to matters not connected with the fund which the court is called upon to administer, although arising out of the transactions in connection with which the trust was created. Hogg v. Hoag (C. C. 1901) 107 Fed. 807, decree affirmed (1907) 154 Fed. 1003, 83 C. C. A. 677.

A cross-bill cannot be maintained to enjoin a complainant from exercising the rights asserted and sought to be established by his bill, and which must necessarily be adjudicated in determining the issues joined by the bill and answer. Sunset Telephone & Telegraph Co. v. City of Eureka (C. C. 1903) 122 Fed. 960..

Where, pursuant to a compromise agreement, a wife conveys certain real estate to the complainant, and other real estate to complainant's counsel, in payment of his fees, a request of defendant to file in the original suit a cross-bill bringing such counsel into the litigation, seeking to set aside such compromise and deeds as fraudulently obtained, will be denied, as not within the office of a cross-bill. Bunel v. O'Day (C. C. 1903) 125 Fed. 303.

In a suit under R. S. § 4915, post, § 9460, to compel issuance of a patent, against the patentee who was adjudged priority of invention in interference proceedings, a cross-bill by defendant for infringement of his patent is not germane. Kilbourn v. Hirner (C. C. 1908) 163 Fed. 539.

Where, pending suit by an insurance company to cancel a policy for misrepresentation, the insured died, and by supplemental bill the beneficiary was restrained from bringing any action on the policy, his right to recover thereon was proper matter for a cross-bill in order that the court having taken jurisdiction for one purpose might determine the whole matter. Royal Union Mut. Life Ins. Co. v. Wynn (C. C. 1910) 177 Fed. 289.

A cross-bill in a suit by the owner of land leased by him to reform contracts by which he bound himself jointly with his tenant to sell and deliver a stated quantity of hops each year for five years held germane to the original suit, so that the court may retain jurisdiction to determine damages sustained by the tenant by reason of an alleged wrongful ouster from the premises. Miller v. Uhlman (D. C. 1912) 198 Fed. 233.

124. Necessity of cross-bill.—On a bill to set aside an agreement or conveyance the conveyance cannot be established without a cross-bill filed by defendant. Carnochan v. Christie (1826) 24 U. S. (11 Wheat.) 446, 6 L. Ed. 516.

Where the purchaser at a judicial sale filed a bill to restrain a creditor of the vendor from enforcing a judgment, it was an irregular method for the creditor to file an answer claiming that the sale was void because of fraud, but he should have done so by cross-bill. Ford v. Douglas (1847) 46 U. S. (5 How.) 143, 12 L. Ed. 89.

It is the general rule in equity that a defendant can obtain affirmative relief only by filing a cross-bill. McPherson v. Cox (1877) 96 U. S. 404, 24 L. Ed. 746; Wood v. Collins (1894) 60 Fed. 139, 8 C. C. A. 522; Hill v. Ryan Grocery Co. (1896) 78 Fed. 21, 23 C. C. A. 624; Nelson v. Lowndes County (1899) 93 Fed. 538, 35 C. C. A. 419; Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co. (1903) 126 Fed. 46, 60 C. C. A. 588; Chapin v. Walker (C. C. 1881) 6 Fed. 794; Armstrong v. Chemical Nat. Bank (C. C. 1883) 37 Fed. 466; Interstate Building & Loan Ass'n v. Edgefield Hotel Co. (C. C. 1903) 120 Fed. 422 (judgment affirmed [1904] 134 Fed. 74, 67 C. C. A. 200); Corbin v. E. Taussig & Co. (C. C. 1904) 132 Fed. 662 (decree modified Taussig v. Corbin [1906] 142 Fed. 660, 73 C. C. A. 656); Mitchell v. International Tailoring Co. (C. C. 1909) 169 Fed. 145.

No cross-bill is necessary to enable a court of equity to grant any relief to defendant, which the principle that he who asks equity must do equity requires. Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co. (1903) 126 Fed. 46, 60 C. C. A. 588.

A cross-bill seeking a discovery from

complainants is unnecessary, in view of Act July 6, 1862, § 1; Act July 2, 1864, § 3—permitting parties to be witnesses. Heath v. Erie Ry. Co. (C. C. 1872) Fed. Cas. No. 6,307.

A controversy in an equity suit which would be raised by a counterclaim in a state court, in a federal court must be presented by a cross-bill. Brande v. Gilchrist (C. C. 1883) 18 Fed. 465.

It is not necessary to file a cross-bill to reform a contract which is already before the same court in equity at the suit of the other party; but the defendant should plead the facts relied upon by way of answer, even if they vary a written contract, and the court will enforce the contract as it is found to have been made or as it ought to be reformed, as the case may be. Northern R. Co. v. Ogdensburg & L. C. R. Co. (C. C. 1883) 18 Fed. 815.

Where a bill is filed to execute a conveyance, the conveyance cannot be set aside without a cross-bill by a defendant, and the converse of the proposition is equally true. Meissner v. Buek (C. C. 1886) 28 Fed. 161.

A defendant cannot have a decree against a co-defendant without a cross-bill with proper prayer and process or answer, as in an original suit. Commercial Bank v. Sandford (C. C. 1900) 103 Fed. 98.

125. Right to file cross-bill.—Cross-bills by some of the defendants in a suit to establish the relative rights of the parties to the waters of the same stream are maintainable, although they may admit the right of complainants, since a decree between the defendants may be necessary to prevent a decree for complainants from working injustice. Rickey Land & Cattle Co. v. Miller & Lux (1910) 31 Sup. Ct. 11, 218 U. S. 258, 54 L. Ed. 1032, affirming decree (1907) 152 Fed. 11, 22, 81 C. C. A. 207, 218.

Under the practice of the federal courts one claiming an interest in the subject of litigation cannot properly be made a party defendant against the objection of complainant, and hence a cross-bill filed by a person thus coming into the cause should be dismissed. Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33, appeal dismissed (1895) 16 Sup. Ct. 1202, 163 U. S. 688, 41 L. Ed. 311, and Gregory v. Van Ee (1896) 16 Sup. Ct. 431, 160 U. S. 643, 40 L. Ed. 566.

In a suit by a nonresident against citizens of the state to have his title quieted as to one, and for a partition against the other, the former defendant may file a cross-bill to have the title of both the other parties declared void. Schenck v. Peay (C. C. 1868) Fed. Cas. No. 12,450.

A controversy between codefendants cannot be the matter of a cross-bill unless its settlement is necessary to a complete decree upon the case made by the original bill. Weaver v. Alter (C. C. 1878) Fed. Cas. No. 17,308.

Where the parties desire, permission will be given for a cross-bill to be filed, instead of defendant's bringing up the reformation of the contract in suit by way of answer to the original bill. Northern R. Co. v. Ogdensburg & L. C. R. Co. (C. C. 1884) 20 Fed. 347.

In a suit to foreclose a chattel mortgage, properly cognizable in equity, a party claiming the property may intervene, and it is not necessary that he put his claim into judgment before filing his cross-bill, as he already has such an interest in the property as will enable him to question the validity of the mortgage. Osborne & Co. v. Barge (C. C. 1887) 30 Fed. 805.

It is a rule of equity pleading prevailing in the federal courts that one who is not a party to a suit cannot file or join in a cross-bill or other pleading to the merits until he has been made a party by some recognized method of equity procedure. United States Gypsum Co. v. Hoxie (C. C. 1909) 172 Fed. 504.

Where, in a suit in the nature of a bill for specific performance, complainant prayed for an accounting under a patent license, defendant was not for that reason precluded from filing a cross-bill against complainant for an accounting of matters arising out of the contract in order to save such right in case complainant elected to dismiss before hearing. Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579.

One not a party to a suit in equity cannot file or join in a cross-bill, or other pleading, to the merits until he becomes a party by some recognized mode of equity procedure. Lovell v. Latham & Co. (D. C. 1914) 211 Fed. 374, order modified Knauth, Nachod & Kuhne v. Latham & Co. (C. C. A. 1915) 219 Fed. 721.

126. Leave or direction of court to file cross-bill.—The filing of a cross-bill on a petition without the leave of the court is an irregularity, and such cross-bill may be properly set aside. Bronson v. La Crosse R. Co. (1864) 69 U. S. (2 Wall.) 283, 17 L. Ed. 725.

Permission to file a cross-bill which seeks to suspend a decree for the discharge of the trustee in a voting trust agreement, and the transfer of the stock to the new trustee, is properly refused defendants who assert claims to the stock antagonistic to the holders of the trust certificates, unless they apply for an injunction and give security—especially where there are some shares of stock held by the trustee to which such defendants assert no claim. Moore Printing Typewriter Co. v. National Savings & Trust Co. (1910) 31 Sup. Ct. 64, 218 U. S. 422, 54 L. Ed.

1093, affirming decree (1908) 31 App. D. C. 452.

When persons who are not necessary or proper parties to a bill are given leave by the court, for the protection of an apparent right, to intervene and file an answer and cross-bill, if the cross-bill filed under such permission violates the rules applicable to such bills, and appears to be an abuse of the leave granted to file it, the court will withdraw its permission, and dismiss the bill, without putting the complainant to a demurrer. Dickerman v. Northern Trust Co. (1897) 80 Fed. 450, 25 C. C. A. 549, affirming decree Northern Trust Co. v. Columbia Straw-Paper Co. (C. C. 1896) 75 Fed. 936, decree affirmed Dickerman v. Northern Trust Co. (1900) 20 Sup. Ct. 311, 176 U. S. 181, 44 L. Ed. 423.

The granting or refusing of permission to file a cross-bill is largely in the discretion of the court, and the refusal of such permission in a cause which had been pending for several years after it had been heard and the merits passed on was a proper exercise of such discretion. Huff v. Bidwell (1907) 151 Fed. 563, 81 C. C. A. 43.

Where, by consent, permission is given by the court for a cross-bill to be filed, instead of defendant's bringing up the reformation of the contract in suit by way of answer to the original bill, it will be on condition that if defendant succeeds in reforming the contract, and thereby prevails in the litigation, he shall take no costs up to the time when permission was granted, and shall pay the costs of the action up to that time. Northern R. Co. v. Ogdensburg & L. C. R. Co. (C. C. 1884) 20 Fed. 347.

Where, in a suit in equity in a federal court to foreclose a chattel mortgage, an assignee of the mortgagor for the benefit of his creditors files a cross bill averring that the mortgage is a fraud on creditors, the court may entertain the proceeding, although he did not obtain leave of court to file his bill. Osborne & Co. v. Barge (C. C. 1887) 30 Fed. 805.

A cross-bill may be filed without leave of the court, and the question of the right to file it may be made on demurrer. Neal v. Foster (C. C. 1888) 34 Fed. 496.

Where a defendant asks leave to file a cross bill, and for an injunction against the complainant, leave to file the cross-bill may be given without determining the right to the injunction. Brush Electric Co. v. Brush-Swan Electric Light Co. (C. C. 1890) 43 Fed. 701.

An order giving leave to serve a cross-bill by substitution may be set aside when improvidently made. Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C. 1893) 53 Fed. 850, decree reversed Gasquet v. Fidelity Trust & Safety Vault Co. (1893) 57 Fed. 80, 6 C. C. A. 253.

While a cross-bill cannot be maintained in a suit after it has been settled, a tenant in common who has been impleaded in a suit between the cotenants to establish the interest of each and obtain partition, and whose interest is admitted by the pleadings, cannot be deprived of the right to file a cross-bill therein at any time it may become necessary to protect his interest in the property by a settlement between his co-tenants. Ulman v. Iaeger's Adm'r (C. C. 1907) 155 Fed. 1011.

The defense of laches in bringing a suit or in prosecuting it after it is brought may be considered on final hearing although not pleaded, and a defendant will not be granted leave to file a cross-bill raising such issue to be disposed before the hearing on the original bill, especially where under the rules he might have expedited the hearing, but made no effort to do so. Under-Feed Stoker Co. of America v. American Stoker Co. (C. C. 1909) 169 Fed. 891.

A cross-bill in equity cannot properly be filed without leave of court. Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579.

A cross-bill by a party to the suit, tendered contemporaneously with the answer, may be filed without leave of court. Christmas Gold Mining Co. v. Milliken (D. C. 1912) 200 Fed. 316.

127. Jurisdiction of subject-matter.—A railway company filed a bill against another company, to subject the property of the latter to the payment of advances made to it, and by a supplemental bill the trustee in a mortgage given by defendant was made a party. Held, that such trustee could file a cross-bill praying for the foreclosure of the mortgage, and it was competent for the court to render a decree of foreclosure on such bill, as the subject-matter of the cross-bill was the same as that of the original bill, and the court, having jurisdiction of that, had jurisdiction of all the parties, though their citizenship might not give it jurisdiction. Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co. (1890) 11 Sup. Ct. 61, 137 U. S. 171, 34 L. Ed. 625.

A cross-bill seeking affirmative relief, although relating to a subject germane to the matter of the original bill, must rest upon some independent and recognized ground of equitable jurisdiction. Jackson v. Simmons (1900) 98 Fed. 768, 39 C. C. A. 514.

The filing of a cross-bill in a suit to quiet title, alleging possession in defendant, and praying that its own title be established and quieted, confers jurisdiction on a court of equity to determine the question of title, as between the parties, and grant relief to the one entitled to the same, although the fact that plaintiff was not in possession would have defeated the jurisdiction upon the original bill. Sanders v. Vil-

lage of Riverside (1902) 118 Fed. 720, 55 C. C. A. 240.

A cross-bill will not be sustained when the facts merely authorize recovery of damages for which there is adequate remedy at law. Lautz v. Gordon (C. C. 1886) 28 Fed. 264.

The fact that a complainant is beyond the jurisdiction of the court, so that defendant cannot sue him in that forum in an original action, does not enlarge defendant's right to file a cross-bill in the suit brought by complainant. Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co. (C. C. 1891) 46 Fed. 851.

As to any relief claimed in a cross-bill which is not strictly in the nature of a defense to the original bill, the cross-bill is an original bill, so that no decree can be rendered in a United States court against a defendant as to such matters, if defendant is not an inhabitant of the district in which suit was brought, or cannot be found therein. Bates v. Delavan (N. Y. 1835) 5 Paige, 299.

128. Time for filing cross-bill.—A defendant cannot file a cross-bill until the original bill is answered. Allen v. Allen (Super. Ct. Ark. 1828) Fed. Cas. No. 18,223.

An application for leave to serve a cross-bill that involves the taking of additional testimony, in a case that has been heard on proofs taken and a decree rendered, is too late, and leave should be refused. Rogers v. Riessner (C. C. 1887) 31 Fed. 591.

A cross-bill, not seeking to introduce new testimony on the matters in issue in the original suit, may be filed after publication has passed, or the testimony taken. Neal v. Foster (C. C. 1888) 34 Fed. 496.

A cross-bill may be filed after answer filed, where the complainant is seeking to discontinue, and the object of the cross-bill is to enable the defendants to take an aggressive attitude and settle finally the rights in litigation. Pullman's Palace Car Co. v. Central Transp. Co. (C. C. 1891) 49 Fed. 261.

129. Form and requisites of cross-bill.—An answer and a cross-bill in equity should be separate pleadings, although they may be filed under one cover. United Cigarette Mach. Co. v. Wright (C. C. 1904) 132 Fed. 195.

130. Sufficiency of cross-bill.—Creditors of a corporation filed a bill joining B., who was alleged to be asserting a vendor's lien on property transferred to the company. A mortgagee of the company's property filed a cross-bill, alleging that B. had entered into contracts to convey the property to the company's vendor, and that the latter's right and interest had been transferred to the company, and by it mortgaged, and prayed for the specific performance of B.'s contracts, and for a foreclosure of the mortgage, and an accounting. Held, that the cross bill was not multifarious. Brown v. Guarantee Trust & Safe-Deposit Co. (1888) 9 Sup. Ct. 127, 128 U. S. 403, 32 L. Ed. 468.

The failure of a cross-bill for the recovery of a debt, and the enforcement of a pledge to secure the same, to allege a demand, is not ground for the reversal of a decree based thereon, where the original bill denied the indebtedness and the pledge. Troendle v. Van Nortwick (1900) 98 Fed. 785, 39 C. C. A. 286.

Where parties having claims against the mortgagor file a cross-bill in a suit to foreclose a chattel mortgage, and in their bill fail to show that their claims have been reduced to judgment, except the claim of one of them, and set up an assignment for the benefit of the mortgagor's creditors, and aver that the mortgage is fraudulent as to creditors, a demurrer to the cross-bill will be sustained as to the parties who have not obtained a lien on the property by action at law. Osborne & Co. v. Barge (C. C. 1887) 30 Fed. 805.

A cross-bill seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed. American & General Mortg. & Inv. Corp. v. Marquam (C. C. 1894) 62 Fed. 960.

Where a bill to quiet title to a part interest in a mining claim alleged that defendant claimed title to such interest by virtue of forfeiture proceedings under the statute against complainant's grantor, which were alleged to be void, and proofs were taken upon the issue so raised without objection, it is not essential to the granting of relief to the defendant prayed for by a cross-bill that such forfeiture proceedings should have been again pleaded in the cross-bill. Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C. 1905) 139 Fed. 838.

In a suit to enjoin diversion of water from a stream, a cross-bill filed by a defendant against the complainant, which merely alleges a priority of right and diversion by complainant, and prays affirmative relief, sets up only matter of defense, and is demurrable; for a defendant cannot by calling his pleading a cross-bill, and praying for affirmative relief, require complainant to answer the same, where the matter set up is purely defensive. Miller & Lux v. Rickey (C. C. 1906) 146 Fed. 574, decree affirmed Rickey Land & Cattle Co. v. Miller & Lux (1907) 152 Fed. 11, 81 C. C. A. 207, and order affirmed Same v. Wood (1907) 152 Fed. 22, 81 C. C. A. 218, decrees affirmed Same v. Miller & Lux (1910) 31 Sup. Ct. 11, 218 U. S. 258, 54 L. Ed. 1032.

Where a cross-bill does not state facts entitling the cross-complainants to affirmative relief, it cannot be aided by the prayer demanding it. U. S. v. Reese (C. C. 1909) 166 Fed. 347.

A cross-bill filed in an equity suit will

not be stricken out on demurrer, where it may appear on the hearing that defendant is entitled to affirmative relief, to which such cross-bill is necessary and appropriate. Ewing v. Seaboard Air Line Ry. (C. C. 1910) 175 Fed. 517.

131. Parties.—New parties cannot be introduced by cross-bill. Shields v. Barrow (1854) 58 U. S. (17 How.) 130, 15 L. Ed. 158; U. S. v. Woods (1915) 223 Fed. 316, 138 C. C. A. 578; Randolph v. Robinson (C. C. 1879) Fed. Cas. No. 11,561; Thruston v. Big Stone Gap Imp. Co. (C. C. 1898) 86 Fed. 484; Newton v. Gage (C. C. 1907) 155 Fed. 598; Central Trust Co. of New York v. Cincinnati, H. & D. Ry. Co. (C. C. 1908) 169 Fed. 466.

In a suit in equity by the purchaser of coal rights in lands for a specific enforcement of the contract, the terms of which were in dispute between the parties, the defendant cannot by cross-bill bring in as parties defendant the agents who made the contract, on his behalf and with his approval, to have their right to commissions determined, a controversy which has no relevancy to the principal suit, and in which complainant has no interest. Patton v. Marshall (1909) 173 Fed. 350, 97 C. C. A. 610, 26 L. R. A. (N. S.) 127.

New parties cannot be brought into a suit in equity by a cross-bill; but, if the interest of defendant requires their presence, he should take the objection of nonjoinder and compel complainant to amend. Id.

A corporation which has obtained the title of one of original defendants pendente lite may become a defendant, and seek relief by cross-bill, although it has also acquired the sole complainant's title pendente lite. Barnard v. Hartford, P. & F. R. Co. (C. C. 1878) Fed. Cas. No. 1,003.

Persons not parties to the original bill shown to be necessary on the cross-bill brought for relief as well as defense are properly made parties. Brandon Mfg. Co. v. Prime (C. C. 1878) Fed. Cas. No. 1,810.

New parties may be brought in by a cross-bill which seeks affirmative relief, and is not merely defensive, when they are necessary to the granting of such relief. Ulman v. Iaeger's Adm'r (C. C. 1907) 155 Fed. 1011.

132. Process.—Substituted service of a cross-bill against alien complainants in the original bill cannot be made upon their solicitors, where they file a stipulation that the answers may be amended by setting up the matter contained in the cross-bill. Heath v. Erie Ry. Co. (C. C. 1872) Fed. Cas. No. 6,307.

A cross-bill should be stricken from the files if filed without notice to the solicitor of the defendant. Webster Loom Co. v. Short (C. C. 1876) Fed. Cas. No. 17,343.

A bill and cross-bill do not necessarily constitute one suit, and defendants in the cross-bill must be served unless they voluntarily appear. Lowenstein v. Glidewell (C. C. 1878) Fed. Cas. No. 8,575.

A cross-bill being auxiliary to the original bill, service may be had on the attorney of record, and it is no objection to it that the party is out of the jurisdiction of the court. Gregory v. Pike (C. C. 1886) 29 Fed. 588.

A rule to plead to a cross-bill was presented personally to the active member of the firm of the solicitors of defendant in the cross-bill, and service was admitted by his clerk by his directions. Another clerk of such firm had told defendant, in the cross-bill that he (the clerk) would not acknowledge service of the cross-bill, and, if defendant was served, such clerk would attend to it, but it did not appear that complainant in the cross-bill, or his solicitor, knew of such conversation or understanding. A nonresident solicitor had also been retained by defendant in the cross-bill, and had appeared in the case. Defendant knew of the filing of the cross-bill, and expected to be required by notice on process to make defense. Held, that the service was sufficient. Dunlevy v. Dunlevy (C. C. 1889) 38 Fed. 459.

Though it were insufficient to attempt to compel the appearance of defendant in the cross-bill by anything less than personal service of the subpœna, and a decree on the cross-bill was entered by default, the error could be remedied only by bill of review or appeal. Id.

(J) Replication

133. Nature and office.
134. Necessity.
135. Time for filing.
136. Form and requisites.
137. Sufficiency.
138. Failure to reply.

See rule 31, ante, p. 2511.

133. Nature and office.—A replication to a plea is always an admission of the sufficiency of the plea itself, as much so as if it had been set down for argument and allowed; and, if the facts relied on by the plea are proved, a dismissal of the bill on the hearing is a matter of course. Hughes v. Blake (1821) 19 U. S. (6 Wheat.) 453, 5 L. Ed. 303, affirming (C. C. 1818) Fed. Cas. No. 6,845.

The replication to an answer in equity cannot be made to perform the office of exceptions. Robinson v. American Car & Foundry Co. (1905) 135 Fed. 693, 68 C. C. A. 331, affirming decree (C. C. 1904) 132 Fed. 165, and writ of certiorari denied (1906) 27 Sup. Ct. 777, 203 U. S. 590, 51 L. Ed. 330.

A special replication which sets up new matter and matter accruing since the filing of the bill will be stricken out on motion. Mason v. Hartford, P. & F. R. Co. (C. C. 1882) 10 Fed. 334.

134. Necessity.—The answer of every defendant, when sufficient, must be re-

plied to without reference to the state of the cause or of the pleadings in regard to any other defendant. Coleman v. Martin (C. C. 1868) Fed. Cas. No. 2,986.

135. Time for filing.—Where, on argument, the pleas are sustained as sufficient, complainant should be allowed, by replication, to put in issue the allegations of the plea. U. S. v. Dalles Military Road Co. (1891) 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560, reversing (C. C. 1889) 40 Fed. 114 (C. C. 1890) 41 Fed. 493, and U. S. v. Wallamet V. & C. M. Wagon Road Co. (D. C. 1890) 42 Fed. 351.

Under general equity rules 61 and 66, after an answer is filed on any rule day, complainant has until the next rule day to file exceptions thereto for insufficiency, and, if he files no exceptions, until the next succeeding rule day to file a general replication. Hendrickson v. Bradley (1898) 85 Fed. 508, 29 C. C. A. 303, certiorari denied (1898) 18 Sup. Ct. 943, 171 U. S. 686.

Plaintiff allowed to file a general replication after the cause was set down for hearing on bill and answer and a reference to an auditor. Peirce v. West (C. C. 1816) Fed. Cas. No. 10,909.

Plaintiff will not be allowed to file replication and take testimony on payment of costs, after dismissal of bill after hearing on bill and answer, where no mistake or inadvertence is suggested. Bullinger v. Mackey (C. C. 1877) Fed. Cas. No. 2,126.

The court may allow a replication to be filed nunc pro tunc, where reasonable excuse for delay is given, and defendant is not prejudiced; and the pendency of negotiations for a settlement after the filing of the answer is a sufficient excuse for such delay. Robinson v. Randolph (C. C. 1879) Fed. Cas. No. 11,963.

Where defendant neglects for a long time to take advantage of plaintiff's failure to reply to a plea or set it down for a hearing, the court will give plaintiff further time. Sayles v. Erie Ry. Co. (C. C. 1879) Fed. Cas. No. 12,418.

A replication filed without leave, after the expiration of the time prescribed by rule 66, may be ordered to stand, in the discretion of the court. Fischer v. Hayes (C. C. 1881) 6 Fed. 76.

A replication due at the October rules not having been filed, defendants filed a motion to dismiss December 3d. A special replication was thereafter filed. Held, that the motion must be sustained. Blue Ridge Clay & Retort Co. v. Floyd-Jones (C. C. 1886) 26 Fed. 817.

It is proper, under United States equity rules, for a defendant to enter appearance, and file his answer before the rule day at which the writ was returnable, and reply should be filed on or before the rule day succeeding that on which the writ was returnable. Heyman v. Uhlman (C. C. 1888) 34 Fed. 686.

Where the United States voluntarily comes into a federal court for relief against an individual, its rights are those of an ordinary suitor, and not of a sovereign, and hence it is equally bound to comply with the rule regulating the time for filing pleadings. U. S. v. Barber Lumber Co. (C. C. 1908) 169 Fed. 184.

Where, in a suit by the United States to set aside patents to timber land, no replication was filed within the time required, owing to the mistake or inadvertence of a former district attorney, his successor could file a replication nunc pro tunc, subject to an order requiring him to speed the cause. United States v. Barber Lumber Co. (C. C. 1908) 169 Fed. 184.

136. Form and requisites.—Under equity rule 66, a general replication denies every allegation in the answer or plea not responsive to the bill, and these allegations must be proved by the party making them. Lewis Pub. Co. v. Wyman (C. C. 1909) 168 Fed. 756, decree modified (1910) 182 Fed. 13, 104 C. C. A. 453, which is affirmed (1913) 33 Sup. Ct. 599, 228 U. S. 610, 57 L. Ed. 989.

137. Sufficiency.—A general replication denies every allegation in the answer not responsive to the bill. Humes v. Scruggs (1876) 94 U. S. 22, 24 L. Ed. 51.

Where the replication denies all the allegations in the plea, the plea must be supported by evidence. Gernon v. Boccaline (C. C. 1808) Fed. Cas. No. 5,366.

New matter charged in a special replication, which denies all material parts of the answer, will be considered as surplusage. Duponti v. Mussy (C. C. 1821) Fed. Cas. No. 4,185; Wren v. Spencer Optical Mfg. Co. (C. C. 1879) Fed. Cas. No. 18,062.

Where a plaintiff in equity, instead of setting down the defendant's plea for argument, replies to it, he admits its sufficiency as a defense, if the facts it alleges shall be established. Myers v. Dorr (C. C. 1870) Fed. Cas. No. 9,988.

138. Failure to reply.—The want of a replication will not prejudice the case on the final hearing where the evidence has been taken as if it had been filed. Jones v. Brittan (C. C. 1872) Fed. Cas. No. 7,455.

It cannot be objected at the hearing that there was no replication to the answer, where proofs in support of the answer, and proofs in contradiction thereof, and in rebuttal, have been put in without objection. Fischer v. Wilson (C. C. 1879) Fed. Cas. No. 4,812.

A suit will not be dismissed for want of a replication to an amended answer,

where a motion is pending to strike such answer for irregularity and insufficiency. Allis v. Stowell (C. C. 1880) 5 Fed. 203, 205.

(K) Demurrer and exceptions

139. Practice on demurrer.—Demurrers were abolished by equity rule 29, ante, p. 2508.

(L) Exceptions

See rules 21, 33, ante, pp. 2502, 2511.

140. Exceptions to bill.—See New Jersey v. New York (1832) 31 U. S. (6 Pet.) 323, 8 L. Ed. 414; Livingston v. Story (1835) 34 U. S. (9 Pet.) 632, 9 L. Ed. 255; Livingston v. Story (1837) 36 U. S. (11 Pet.) 351, 9 L. Ed. 746; Maxwell v. Kennedy (1850) 49 U. S. (8 How.) 210, 12 L. Ed. 1051; Commercial Bank of Manchester v. Buckner (1857) 61 U. S. (20 How.) 108, 15 L. Ed. 862; Griffing v. Gibb (1862) 67 U. S. (2 Black) 519, 17 L. Ed. 353; Young v. Martin (1869) 75 U. S. (8 Wall.) 354, 19 L. Ed. 418; Dillon v. Barnard (1874) 88 U. S. (21 Wall.) 430, 22 L. Ed. 673; Carey v. Brown (1875) 92 U. S. 171, 23 L. Ed. 469; Giant Powder Co. v. California Powder Co. (1878) 98 U. S. 126, 25 L. Ed. 77; Mercantile Bank v. Carpenter (1879) 101 U. S. 567, 25 L. Ed. 815; Lansdale v. Smith (1882) 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; Speidel v. Henrici (1887) 7 Sup. Ct. 610, 120 U. S. 377, 30 L. Ed. 718 (affirming decree [C. C. 1883] 15 Fed. 753); State of Kansas v. State of Colorado (1902) 22 Sup. Ct. 552, 185 U. S. 125, 46 L. Ed. 838; Commonwealth of Virginia v. State of West Virginia (1907) 27 Sup. Ct. 732, 206 U. S. 290, 51 L. Ed. 1068; Hinchman v. Kelley (1893) 54 Fed. 63, 4 C. C. A. 189 (affirming judgment [C. C. 1892] 49 Fed. 492); Grether v. Wright (1896) 75 Fed. 742, 23 C. C. A. 498; Stratton v. Dewey (1897) 79 Fed. 32, 24 C. C. A. 435; Brazoria County v. Youngstown Bridge Co. (1897) 80 Fed. 10, 25 C. C. A. 306; MacVeagh v. Denver City Waterworks Co. (1897) 85 Fed. 74, 29 C. C. A. 33; Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520; Walker v. Jack (1898) 88 Fed. 576, 31 C. C. A. 462, reversing decree Jack v. Walker [C. C. 1897] 79 Fed. 138); Post v. Beacon Vacuum Pump & Electrical Co. [1898] 89 Fed. 1, 32 C. C. A. 151 (denying rehearing 84 Fed. 371, 28 C. C. A. 431); Richardson v. Loree (1899) 94 Fed. 375, 36 C. C. A. 301; Strang v. Richmond, P. & C. R. Co. (1900) 101 Fed. 511, 41 C. C. A. 474; Nash v. Ingalls (1900) 101 Fed. 645, 41 C. C. A. 545 (affirming decree [C. C. 1897] 79 Fed. 510); Edward P. Allis Co. v. Withlacoochee Lumber Co. (1901) 105 Fed. 680, 44 C. C. A. 673; Emmons v. National Mut. Building & Loan Ass'n (1905) 135 Fed. 689, 68 C. C. A. 327; Thurmond v. Chesapeake & O. Ry. Co. (1905) 140 Fed. 697, 72 C. C. A. 191; Fowler v. Osgood (1905) 141 Fed. 20, 72 C. C. A. 276, 4 L. R. A. (N. S.) 824; City of Memphis v. Postal Telegraph Cable Co. (1906) 145 Fed. 602, 76 C. C. A. 292 (reversing decree [C. C. 1905] 139 Fed. 707); Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259; Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259; Robinson v. Chicago Rys. Co. (1909) 174 Fed. 40, 98 C. C. A. 26; Wilson v. Plutus Mining Co. (1909) 174 Fed. 317, 98 C. C. A. 189; National Casket Co. v. Stolts (1909) 174 Fed. 413, 98 C. C. A. 617; Chapin v. Dougherty (1910) 183 Fed. 309, 105 C. C. A. 521; Bower v. Stein (1910) 177 Fed. 673, 101 C. C. A. 299 (affirming decree [C. C. 1908] 165 Fed. 232); Sage Land & Improvement Co. v. Ripley (1912) 192 Fed. 785, 114 C. C. A. 339; Board of Levee Com'rs of Tensas Basin Levee Dist. v. Tensas Delta Land Co. (1913) 204 Fed. 736, 123 C. C. A. 40; U. S. v. Mackey (1914) 216 Fed. 126, 132 C. C. A. 370 (reversing decree [D. C. 1913] 214 Fed. 137); Gallagher v. Roberts (C. C. 1806) Fed. Cas. No. 5,194; Harrison v. Rowan (C. C. 1819) Fed. Cas. No. 6,143; Wisner v. Ogden (C. C. 1827) Fed. Cas. No. 17,914; Burnley v. Jeffersonville (C. C. 1844) Fed. Cas. No. 2,181; Atwill v. Ferrett (C. C. 1846) Fed. Cas. No. 640; Surget v. Byers (C. C. 1845) Fed. Cas. No. 13,629; Foster v. Swasey (C. C. 1846) Fed. Cas. No. 4,984; Pierpont v. Fowle (C. C. 1846) Fed. Cas. No. 11,152; Woodworth v. Edwards (C. C. 1847) Fed. Cas. No. 18,014; Bayerque v. Cohen (C. C. 1856) Fed. Cas. No. 1,184; Woodworth v. Edwards (C. C. 1847) Fed. Cas. No. 18,014; Copen v. Flesher (C. C. 1861) Fed. Cas. No. 3,211; Beard v. Bowler (C. C. 1866) Fed. Cas. No. 1,180; Lamb v. Starr (C. C. 1868) Fed. Cas. No. 8,021; Hodge v. North Missouri R. R. (C. C. 1869) Fed. Cas. No. 6,561; Newby v. Oregon Cent. Ry. Co. (C. C. 1870) Fed. Cas. No. 10,145; Heath v. Erie Ry. Co. (C. C. 1871) Fed. Cas. No. 6,306; Hunt v. Oliver (C. C. 1871) Fed. Cas. No. 6,894; Noyes v. Willard (C. C. 1871) Fed. Cas. No. 10,374; Pond v. Vermont Val. R. Co. (C. C. 1874) Fed. Cas. No. 11,265; Amory v. Lawrence (C. C. 1872) Fed. Cas. No. 336; Dillon v. Barnard (C. C. 1874) Fed. Cas. No. 3,915; Hill v. Bonaffon (C. C. 1876) Fed. Cas. No. 6,488; Brandon Mfg. Co. v. Prime (C. C. 1878) Fed. Cas. No. 1,810; Nicholas v. Murray (C. C. 1878) Fed. Cas. No. 10,223; Equitable Life Assur. Soc. v. Patterson (C. C. 1880) 1 Fed. 126; Chicago, St. L. & N. O. R. Co. v. Macomb (C. C. 1880) 2 Fed. 18; Pettit v. Town of Hope (C. C. 1880) 2 Fed. 623; Ormsby v. Union Pac. Ry. Co. (C. C. 1888) 4 Fed. 170; Dakin v. Union Pac. Ry. Co. (C. C. 1880) 5 Fed. 665; Hayes v. Dayton (C. C. 1880) 8

Fed. 702; Hodder v. Kentucky & G. E. Ry. Co. (C. C. 1881) 7 Fed. 793 (affirming decree Wright v. Kentucky & G. E. Ry. Co. [1886] 6 Sup. Ct. 697, 117 U. S. 72, 29 L. Ed. 821); Buerk v. Imhaeuser (C. C. 1881) 8 Fed. 457; Adams v. Howard (C. C. 1881) 9 Fed. 347; Dwight v. Central Vermont R. Co. (C. C. 1881) 9 Fed. 785; Secor v. Singleton (C. C. 1881) 9 Fed. 809; Crescent City Live Stock Landing & Slaughterhouse Co. v. Butchers' Union Live Stock Landing & Slaughterhouse Co. (C. C. 1882) 12 Fed. 225; Chapman v. Ferry (C. C. 1882) 12 Fed. 693; La Croix v. May (C. C. 1883) 15 Fed. 236; Pelham v. Edelmeyer (C. C. 1883) 15 Fed. 262; Socola v. Grant (C. C. 1883) 15 Fed. 487; Wells v. Oregon Ry. & Nav. Co. (C. C. 1883) 15 Fed. 561; Greenwalt v. Duncan (C. C. 1883) 16 Fed. 35; Newman v. Moody (C. C. 1884) 19 Fed. 858; Fuller v. Knapp (C. C. 1885) 24 Fed. 100; Preston v. Smith (C. C. 1886) 26 Fed. 884; Union Pac. Ry. Co. v. Meier (C. C. 1886) 28 Fed. 9; Woodfin v. Phœbus (C. C. 1887) 30 Fed. 289; U. S. v. American Bell Tel. Co. (C. C. 1887) 30 Fed. 523; Jones v. Slauson (C. C. 1888) 33 Fed. 632; Hazard v. Dillon (C. C. 1888) 34 Fed. 485; Beekman v. Hudson River West Shore Ry. Co. (C. C. 1888) 35 Fed. 3; Horsford v. Gudger (C. C. 1888) 35 Fed. 388 (reversed [1890] 10 Sup. Ct. 1069, 136 U. S. 639, 34 L. Ed. 556); Mercantile Trust & Deposit Co. v. Rhode Island Hospital Trust Co. (C. C. 1888) 36 Fed. 863; Crouch v. Kerr (C. C. 1889) 38 Fed. 549; Consolidated Roller Mill Co. v. Coombs (C. C. 1889) 39 Fed. 25; McCabe v. Mathews (C. C. 1889) 40 Fed. 338; U. S. v. Southern Pac. R. Co. (C. C. 1889) 40 Fed. 611; Town of Strawberry Hill v. Chicago, M. & St. P. Ry. Co. (C. C. 1890) 41 Fed. 568; Northern Pac. R. Co. v. Roberts (C. C. 1890) 42 Fed. 734 (decree affirmed Roberts v. Northern Pac. R. Co. [1895] 15 Sup. Ct. 756, 158 U. S. 1, 39 L. Ed. 873); Cornell v. Green (C. C. 1890) 43 Fed. 105 (appeal dismissed [1896] 16 Sup. Ct. 969, 163 U. S. 75, 41 L. Ed. 76); Merriam v. Holloway Pub. Co. (C. C. 1890) 43 Fed. 450; Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co. (C. C. 1891) 46 Fed. 72; Failey v. Talbee (C. C. 1893) 55 Fed. 892; Puget Sound Nat. Bank v. King County (C. C. 1893) 57 Fed. 433; Pennefeather v. Baltimore Steam Packet Co. (C. C. 1893) 58 Fed. 481; Harvey v. Richmond & M. Ry. Co. (C. C. 1894) 64 Fed. 19; Gillette v. Doheny (C. C. 1895) 65 Fed. 715; Merrill v. Town of Monticello (C. C. 1895) 66 Fed. 165; Ulman v. Iaeger (C. C. 1895) 67 Fed. 980; Preston v. Finley (C. C. 1896) 72 Fed. 850; Griswold v. Bacheller (C. C. 1897) 77 Fed. 857; Hutton v. Joseph Bancroft & Sons Co. (C. C. 1897) 83 Fed. 17; Einstein v. Schnebly (C. C. 1898) 89 Fed. 540; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3 (C. C. 1898) 90 Fed. 598; Edwards v. Bay State Gas Co. of Delaware (C. C. 1898) 91 Fed. 946; Pacific Live Stock Co. v. Hanley (C. C. 1899) 98 Fed. 327; Stokes v. Farnsworth (C. C. 1900) 99 Fed. 836; Farson v. City of Sioux City (C. C. 1901) 106 Fed. 278; Barrett v. Twin City Power Co. (C. C. 1901) 111 Fed. 45; Keasby & Mattison Co. v. Philip Cary Mfg. Co. (C. C. 1901) 113 Fed. 432; Merrimac Mattress Mfg. Co. v. Schlesinger (C. C. 1903) 124 Fed. 237; Dupree v. Leggett (C. C. 1903) 124 Fed. 700; Empire City Amusement Co. v. Wilton (C. C. 1903) 134 Fed. 132; Kessler & Co. v. Ensley (C. C. 1904) 129 Fed. 397; O'Shaughnessy v. Humes (C. C. 1904) 129 Fed. 953; Rankin v. Miller (C. C. 1904) 130 Fed. 229; Maeder v. Buffalo Bill's Wild West Co. (C. C. 1904) 132 Fed. 280; Howe & Davidson Co. v. Haugan (C. C. 1904) 140 Fed. 182; Pennsylvania Co. v. Bay (C. C. 1905) 138 Fed. 203; Young v. Mercantile Trust Co. (C. C. 1905) 140 Fed. 61 (decree affirmed [1906] 145 Fed. 39, 75 C. C. A. 264); U. S. v. Hyde (C. C. 1906) 145 Fed. 393; Star Ball Retainer Co. v. Klahn (C. C. 1906) 145 Fed. 834; North Chicago St. R. Co. v. Chicago Union Traction Co. (C. C. 1907) 150 Fed. 612; Snyder v. De Forest Wireless Telegraph Co. (C. C. 1907) 154 Fed. 142; Board of Trade of City of Chicago v. National Board of Trade of Kansas City, Mo. (C. C. 1907) 154 Fed. 238; Sabre v. United Traction & Electric Co. (C. C. 1907) 156 Fed. 79; Mathieson v. Craven (C. C. 1908) 164 Fed. 471; Victor Talking Mach. Co. v. Hoschke (C. C. 1909) 169 Fed. 894; London Guarantee & Accident Co. v. Bell Telephone Co. of Buffalo (C. C. 1909) 171 Fed. 278; Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. 1909) 171 Fed. 778 (decree modified [1910] 184 Fed. 199, 107 C. C. A. 93); Larabee v. Dolley (C. C. 1909) 175 Fed. 365 (order reversed Dolley v. Abilene Nat. Bank, of Abilene, Kan. [1910] 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. [N. S.] 1065, and decree affirmed Assaria State Bank of Assaria v. Dolley [1910] 31 S. Ct. 189, 219 U. S. 121, 55 L. Ed. 123); U. S. v. Kettenbach (C. C. 1909) 175 Fed. 463; Robinson v. Mutual Reserve Life Ins. Co. (C. C. 1909) 175 Fed. 629; Wright v. St. Louis Southwestern Ry. Co. (C. C. 1910) 175 Fed. 845; St. Louis & S. F. R. Co. v. Allen (C. C. 1910) 181 Fed. 710; Howard v. National Telephone Co. (C. C. 1910) 182 Fed. 215; Jackson Skirt & Novelty Co. v. Rosenbaum (C. C. 1911) 190 Fed. 197; Foster-Eddy v. Baker (C. C. 1911) 192 Fed. 624; Hosmer v. Jewett (D. C. 1872) Fed. Cas. No. 6,713; Shainwald v.

Lewis (D. C. 1895) 69 Fed. 487; U. S. v. Peralta (D. C. 1900) 99 Fed. 618; Wright v. Skinner (D. C. 1905) 136 Fed. 694; Stephens v. Gall (D. C. 1910) 179 Fed. 938; Carpenter v. Knollwood Cemetery (D. C. 1912) 198 Fed. 297; A. B. Dick Co. v. Fuller (D. C. 1912) 198 Fed. 404; Smith v. Bowker-Torrey Co. (D. C. 1912) 199 Fed. 985; Atlantic Dynamite Co. v. Reger (D. C. 1912) 200 Fed. 1002; Card v. Standard Coal & Coke Co. (D. C. 1912) 202 Fed. 351; Crown Feature Film Co. v. Bettis Amusement Co. (D. C. 1913) 206 Fed. 362; Fordham v. Hicks (D. C. 1915) 224 Fed. 810.

141. Exceptions to answer.—See Penn v. Butler (C. C. 1801) Fed. Cas. No. 10,931; Read v. Consequa (C. C. 1822) Fed. Cas. No. 11,607; Bradford v. Geiss (C. C. 1825) Fed. Cas. No. 1,768; Griswold v. Hill (C. C. 1825) Fed. Cas. No. 5,835; Brent v. Venable (C. C. 1827) Fed. Cas. No. 1,842; Patriotic Bank v. Bank of Washington (C. C. 1839) Fed. Cas. No. 10,808; Brooks v. Byam (C. C. 1840) Fed. Cas. No. 1,947; Surget v. Byers (C. C. 1845) Fed. Cas. No. 13,629; Chapman v. School Dist. (C. C. 1865) Fed. Cas. No. 2,607; La Vega v. Lapsley (C. C. 1871) Fed. Cas. No. 8,123; Chicago, St. L. & N. O. R. Co. v. Macomb (C. C. 1880) 2 Fed. 18; Fuller v. Knapp (C. C. 1885) 24 Fed. 100; U. S. v. McLaughlin (C. C. 1885) 24 Fed. 823; American Loan & Trust Co. v. East & West Ry. Co. (C. C. 1889) 40 Fed. 384; Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co. (C. C. 1890) 43 Fed. 391; Schultz v. Phenix Ins. Co. of Brooklyn (C. C. 1896) 77 Fed. 375 (decree reversed Phenix Ins. Co. v. Schultz [1897] 80 Fed. 337, 25 C. C. A. 453); Whittemore v. Patten (C. C. 1897) 81 Fed. 527; Lovell v. Johnson (C. C. 1897) 82 Fed. 206 (decree affirmed [1898] 91 Fed. 160, 33 C. C. A. 426); Whittemore v. Patten (C. C. 1897) 84 Fed. 51; Walker v. Jack (1898) 88 Fed. 576, 31 C. C. A. 462 (reversing decree Jack v. Walker [C. C. 1897] 79 Fed. 138); Willis v. Terry (C. C. 1899) 98 Fed. 8; Stokes v. Farnsworth (C. C. 1900) 99 Fed. 836; Barrett v. Twin City Power Co. (C. C. 1901) 111 Fed. 45; Savings & Trust Co. of Cleveland, Ohio, v. Bear Valley Irr. Co. (C. C. 1902) 112 Fed. 693; Pennsylvania Co. v. Bay (C. C. 1905) 138 Fed. 203; Way v. Hygienic Fleeced Underwear Co. (C. C. 1906) 144 Fed. 870; Dr. Miles Medical Co. v. Snellenburg (C. C. 1907) 152 Fed. 661; Blanton v. Chalmers (C. C. 1908) 158 Fed. 907; Greene v. Aurora Rys. Co. (C. C. 1908) 158 Fed. 909; Gorham Mfg. Co. v. Weintraub (C. C. 1910) 180 Fed. 639; Manhattan Trust Co. v. Chicago Electric Traction Co. (C. C. 1910) 188 Fed. 1006; Louisville & N. R. Co. v. Wright (C. C. 1911) 190 Fed. 252; Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579.

(M) Motions

142. Jurisdictional questions.
143. Striking out pleading.
144. —— Part of pleading.

See rule 29, ante, p. 2508.

142. Jurisdictional questions.—An objection to the jurisdiction of the court for any reason not apparent on the face of the bill must be taken by special plea, and cannot be raised by a motion. Desert King Min. Co. v. Wedekind (C. C. 1901) 110 Fed. 873.

A question of jurisdiction should not be disposed of on motion, but on hearing. Cushing v. Laird (D. C. 1870) Fed. Cas. No. 3,508.

143. Striking out pleading.—It is error to strike from the files an amendment to the bill which explains the delay of complainant in bringing suit, and is an answer to the charge of laches, upon which a demurrer to the bill has been sustained. Lant v. Manley (1896) 75 Fed. 627, 21 C. C. A. 457, reversing decree (C. C. 1895) 71 Fed. 7.

An order denying a motion to strike answers from the files, with leave to defendants to further verify their answers, "if so advised," is merely permissive, and not a decision that further verification is necessary. McGorray v. O'Connor (1898) 87 Fed. 586, 31 C. C. A. 114, affirming decree (C. C. 1897) 79 Fed. 861.

Since a bill in equity need state only the ultimate facts a court should be cautious not to strike out a bill for mere lack of fulness of detail. Clinchfield Coal Corporation v. Steinman (1914) 217 Fed. 875, 133 C. C. A. 585. But a court has power to strike from its files a rambling and verbose bill, of excessive length, containing much impertinent and scandalous matter, and to permit complainants to file within a stated time, as of the date of the original filing, a new bill not exceeding a prescribed length. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14. But see Polk v. Mutual Reserve Fund Life Ass'n (C. C. 1904) 128 Fed. 524, holding that mere prolixity and verbosity in a bill do not warrant striking it from the files, when the redundant matter can to a large extent be eliminated on exceptions.

A bill in equity, filed without being signed by the plaintiff or his counsel, will be stricken from the files. Roach v. Hulings (C. C. 1840) Fed. Cas. No. 11,874.

An answer to a cross bill filed by a person not named in the bill nor admitted as a defendant will be stricken from the files. Putnam v. New Albany (C. C. 1869) Fed. Cas. No. 11,481.

An objection that a bill in equity is filed under a champertous agreement must be raised by answer, and not by

motion to take the bill from the files. Sperry v. Erie Ry. Co. (C. C. 1869) Fed. Cas. No. 13,237.

Answer in name of three defendants, signed and sworn to by two only, will be stricken from files, but with leave to amend. Bailey Washing Mach. Co. v. Young (C. C. 1874) Fed. Cas. No. 751.

The sufficiency or regularity of an answer, may be raised by motion to strike the answer from the files. Allis v. Stowell (C. C. 1880) 5 Fed. 203.

Where defendant objects on an application for leave to file an amended bill, and states that he will present his objection on motion to strike it out, the motion to strike out will be considered as if it were an application to file the bill with objections thereto. Metropolitan Nat. Bank v. St. Louis Dispatch Co. (C. C. 1889) 38 Fed. 57.

Whether defendant may set up a certain defense by plea may be determined on a motion to strike the plea from the files, where the question is discussed on its merits in the briefs. Union Switch & Signal Co. v. Philadelphia & R. R. Co. (C. C. 1895) 69 Fed. 833.

Matters set up in a combined "plea and answer" in the form of pleas, but which might properly be pleaded by way of answer, will not be stricken out on motion. Nor will a plea to the jurisdiction, where the same point has been previously raised, and passed on adversely, on a motion for a preliminary injunction. Standard Distilling & Distributing Co. v. Woolsey (C. C. 1902) 121 Fed. 1016.

A cross-bill filed by the defendant in a suit in equity in a federal court, which makes no one defendant and which prays for no process, and on which no process is issued, is a nullity, and should be attacked by a motion to strike. Wright v. St. Louis Southwestern Ry. Co. (C. C. 1910) 175 Fed. 845.

144. —— Part of pleading.—Averments challenging the foreign citizenship of a corporation are properly stricken from the answer in a suit by such corporation to enjoin state officials from enforcing a forfeiture of its right to do business in the state because of its claim of right to remove an action against it from a state court to a federal court. Harrison v. St. Louis & S. F. R. Co. (1914) 34 Sup. Ct. 333, 232 U. S. 318, 58 L. Ed. 621, affirming decree St. Louis & S. F. R. Co. v. Cross (C. C. 1909) 171 Fed. 480.

A motion to strike out parts of the answer must be denied when not sufficiently specific to identify the portions to be stricken. McGorray v. O'Connor (1898) 87 Fed. 586, 31 C. C. A. 114, affirming decree (C. C. 1897) 79 Fed. 861.

There is no regular mode of pleading, like a demurrer, to test the legal validity of part of an answer; but possibly, on motion, some order might be taken to dispose of part of a case in the first instance, if it should be found that great delay and expense might thereby be avoided. Adams v. Bridgewater Iron Co. (C. C. 1881) 6 Fed. 179.

The court will only order that matters clearly impertinent be stricken out. Where there are here and there useless or impertinent words, the court will remedy it in the adjustment of costs. U. S. v. McLaughlin (C. C. 1885) 24 Fed. 823.

A defense pleaded in an answer cannot be stricken out on the ground that it is rambling and verbose. Stokes v. Farnsworth (C. C. 1900) 99 Fed. 836.

In equity the question of the legal sufficiency of the facts averred to constitute a defense to the case made by the bill cannot be presented on a motion to strike out such defense. Id.

A motion to strike out parts of an amended bill as "irrelevant, redundant, surplusage, and immaterial," while a proper pleading under the Idaho Code, is not proper practice on the equity side of the federal court sitting in that state; such objection being availed of by exceptions for impertinency. U. S. v. Kettenbach (C. C. 1909) 175 Fed. 463.

In a suit in equity for infringement of a patent, a paragraph of the answer alleging that complainant is a party to an unlawful conspiracy, which tends to oppress defendants in their business, will be stricken out on motion. Johns-Pratt Co. v. Sachs Co. (C. C. 1910) 176 Fed. 738.

(N) Amended and supplemental pleading

145. Right to amend bill in general.
146. Discretion of court.
147. Amendment of bill.
148. —— Condition of cause.
149. —— Matter arising after filing bill.
150. —— Matter making new case.
151. —— As to relief prayed.
152. —— Operation and effect.
153. —— Plea or answer to amended bill.
154. Amendment of plea or answer.
155. —— Condition of cause.
156. —— Matter making new defense.
157. —— Operation and effect.
158. Amendment to conform to proofs.
159. Application for leave to amend, and proceedings thereon.
160. Conditions on amendment.
161. Form and sufficiency of amended pleading.
162. Supplemental bill or cross-bill.
163. —— Necessity.
164. —— Grounds in general.
165. —— Sufficiency of original bill.
166. —— Matters arising before filing of original bill.
167. —— Change of facts or interest of parties.
168. Time for filing.
169. —— Leave of court.
170. —— Form and sufficiency.
171. —— Construction and operation.
172. —— Answer.
173. Supplemental answer.

See rules 19, 28, 45, ante, pp. 2502, 2507, 2515; and see § 1591, post, and notes thereunder.

145. Right to amend bill in general.—When objections to the jurisdiction of

the court to entertain a bill in equity, in the form in which it is framed, have been sustained, and there has been no general appearance, demurrer, plea, or answer, the complainant has an undoubted right to amend his bill. Insurance Co. of North America v. Svendsen (C. C. 1896) 74 Fed. 346.

146. Discretion of court.—After a demurrer to a bill is allowed, the right to amend rests in the discretion of the court, and leave to amend will not be granted unless it is necessary to promote or attain the ends of justice in the case. McKemy v. Supreme Lodge A. O. U. W. (1910) 180 Fed. 961, 104 C. C. A. 117; Hunt v. Rousmaniere (C. C. 1821) Fed. Cas. No. 6,898; Dowell v. Applegate (C. C. 1881) 8 Fed. 698.

An amendment praying for the enforcement of the individual liability of the stockholders in favor of the original complainant, and any other creditors who might join was within the discretion of the court, although the remedy by bill in equity to enforce the individual liability of stockholders was given by an act which took effect between the date of the filing of the original bill and the making of the amendment. Richmond v. Irons (1887) 7 Sup. Ct. 788, 121 U. S. 27, 30 L. Ed. 864, reversing decree Irons v. Manufacturers' Nat. Bank (C. C. 1886) 27 Fed. 591.

Though the original bill charged the fraud to have been committed by representing that the conveyance would facilitate litigation in which an estate was involved, an amended bill, filed after a demurrer to the orginal bill is sustained, charging defendant with having misrepresented the nature of the instrument executed by complainant, does not set up such different ground for relief that it is an abuse of discretion to refuse to strike it from the files. Jones v. Van Doren (1889) 9 Sup. Ct. 685, 130 U. S. 684, 32 L. Ed. 1077, reversing decree (C. C. 1883) 18 Fed. 619.

Leave to amend an answer, after a master's report has been filed, and the cause heard on exceptions thereto, lies within the discretion of the court. Hudson v. Randolph (1894) 66 Fed. 216, 13 C. C. A. 402.

When leave to file an amended answer and cross bill is sought long after the cause is at issue on the original pleadings, and only a few days before the time fixed for closing the evidence, the matter lies within the court's discretion, and it may properly examine the legal sufficiency of the facts averred, and look into the evidence already taken, to see if there is a probability that defendant can support his new averments. Ritchie v. McMullen (1897) 79 Fed. 522, 25 C. C. A. 50, modifying decree McMullen v. Ritchie (C. C. 1894) 64 Fed. 253, and certiorari denied (1897) 18 Sup. Ct. 945, 168 U. S. 710, 42 L. Ed. 1212.

Leave was granted to amend a cross-bill, which had been referred to a master for hearing, by a date specified, and the hearing was postponed, to permit the reformation of the pleadings; but the cross-complainant filed no amended cross-bill, and proceeded with the hearing without asking further time. Held, that it was within the discretion of the court to refuse to permit an amended cross-bill to be filed on application made more than six months after the hearing had been closed, and the master had filed his report. Ferguson Contracting Co. v. Manhattan Trust Co. (1902) 118 Fed. 791, 55 C. C. A. 529.

The allowance or refusal of leave to amend a pleading is a matter largely within the discretion of a trial court. Williams v. Cobb (1914) 219 Fed. 663, 134 C. C. A. 217.

In action against executor, legatee, and trustee, to enforce liability as stockholder of insolvent national bank, brought on the theory that he was liable as legatee, denial of leave to amend bill held not an abuse of discretion. Id.

Applications to amend an answer are in the discretion of the court. Caster v. Wood (C. C. 1831) Fed. Cas. No. 2,505; Smith v. Babcock (C. C. 1839) Fed. Cas. No. 13,008.

Before amendments to the answer are allowed, the court should be satisfied that the reasons for them are cogent and satisfactory, and that the applicant has not been guilty of gross negligence, etc. Smith v. Babcock (C. C. 1839) Fed. Cas. No. 13,008.

The court has power to permit an amendment, by the addition of a claim inadvertently omitted, although not strictly within the rules, where its rejection would result in no advantage to either party, subject, however, to any defense which might have been presented if the claim had been originally placed in the bill; costs, if any, to be borne by plaintiff. Nellis v. Pennock Mfg. Co. (C. C. 1889) 38 Fed. 379.

In a cause which had been pending for several years a hearing was had, lasting several days, and oral arguments were made. Thereafter written briefs were submitted, a decision filed, and the draft of a proposed decree submitted. Held, that the court, in the exercise of its discretion, would not thereafter permit defendants to amend their answer by withdrawing repeated admissions of their citizenship as alleged by complainants, and substituting averments showing that they were citizens of another state, so that the jurisdiction of the court would be defeated, especially where defendants were necessarily conversant with the facts from the beginning, and the suit was to enforce a mechanic's lien; so that, in case the suit were dismissed, there was grave doubt whether complainant would not be debarred by lapse of time from bringing a new suit in a state court. Gubbins

v. Laughtenschlager (C. C. 1896) 75 Fed. 615.

Leave to amend a bill after a demurrer has been sustained thereto is not a matter of right, but rests in the discretion of the court, and will not be granted in a suit to charge directors of a corporation with a highly penal statutory liability on account of transactions several years old, and difficult of ascertainment, where application to amend was not made for a year after the demurrer was sustained. Boston & A. R. Co. v. Parr (C. C. 1899) 98 Fed. 483.

147. **Amendment of bill.**—A defective bill cannot be aided by a replication, but should be amended. Vattier v. Hinde (1833) 32 U. S. (7 Pet.) 252, 8 L. Ed. 675.

Although the bill made no distinction between the characters in which the executor acted, as executor proper, and as executor having a power coupled with a trust, yet, as no objection was taken in the court below on this ground, an amendment was not imperatively necessary; the material facts being alleged on which the claim rested. Taylor v. Benham (1847) 46 U. S. (5 How.) 233, 12 L. Ed. 130.

Where a case for relief is made out in a court of equity, but it is not the case disclosed by the bill, the court may allow an amendment of the pleadings. Neale v. Neale (1869) 76 U. S. (9 Wall.) 1, 19 L. Ed. 590.

A defect in a bill in a federal court, which fails to aver the citizenship of a party, may be cured by amendment. Howard v. De Cordova (1900) 20 Sup. Ct. 817, 177 U. S. 609, 44 L. Ed. 908.

An intervener who asserts in his petition a general lien, in favor of the class of creditors of whom he is one, on securities in the hands of a receiver of the court, may properly be permitted, in the discretion of the court, to amend his petition by alleging a specific lien in his own favor on certain of such securities, growing out of facts which were not known to him at the time he filed his original petition, and to rely upon both liens; the two not being inconsistent. Anthony v. Campbell (1901) 112 Fed. 212, 50 C. C. A. 195.

Where a bill presents a case in a double aspect, by charging that certain acts of defendant constitute an infringement of a patent and also unfair competition, praying relief on both grounds, an order sustaining a demurrer addressed to the bill in one aspect is merely interlocutory, and remains subject to revision by the court until final decree, and the court may at any time permit an amendment relating to that feature of the bill. Globe-Wernicke Co. v. Fred Macey Co. (1902) 119 Fed. 696, 56 C. C. A. 304, writ of certiorari denied Same v. Macey (1904) 24 Sup. Ct. 858, 194 U. S. 634, 48 L. Ed. 1160.

Plaintiff cannot amend his bill by alleging that defendants were severally president, secretary, and directors of the association, as this is unnecessary in a suit against them individually, and would be improper if intended to make the suit one against the association as a whole. Tyler v. Galloway (C. C. 1882) 13 Fed. 477.

An amendment allowed to the bill on the final hearing, stating the value of the matter in dispute to be over $500. Collinson v. Jackson (C. C. 1882) 14 Fed. 305.

A defendant cannot require the complainant to amend his bill. Phelps v. Elliott (C. C. 1886) 26 Fed. 881; North Chicago St. R. Co. v. Chicago Union Traction Co. (C. C. 1907) 150 Fed. 612.

The original bill to foreclose a mortgage on tangible property, a good will, and a share of stock, and two amended bills, alleged that the tangible property had been destroyed, and it was therefore held that complainant could obtain no relief in that suit. Held, that leave to file a third amended bill, alleging the existence of the tangible property, for the purpose of reaching the intangible property, should be denied. Metropolitan Nat. Bank v. St. Louis Dispatch Co. (C. C. 1889) 38 Fed. 57.

A bill, defective for want of an averment of the amount in controversy, will not be dismissed where it does not affirmatively appear that the court is without jurisdiction, but plaintiff will be given leave to amend. Home Ins. Co. v. Nobles (C. C. 1894) 63 Fed. 641.

A bill may be amended on the hearing of an application for a preliminary injunction by supplying allegations necessary to show that individual defendants on whom notice of the application has been served are officers and members of a voluntary association sought to be bound by the injunction, and the amendment becomes effective at once for the purposes of the hearing, which, unless new parties are made necessary thereto, or other considerations require it, need not be postponed to await the issuance, service, and return of new process, as it does not proceed upon the process of subpœna, but upon the notice prescribed. American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3 (C. C. 1898) 90 Fed. 598.

Jurisdiction must affirmatively appear at every stage of a case, and the court is without authority to permit amendments to supply essential jurisdictional averments in the bill. Dickinson v. Consolidated Traction Co. (C. C. 1902) 114 Fed. 232, judgment affirmed (1903) 119 Fed. 871, 56 C. C. A. 401, and writ of certiorari denied (1903) 24 Sup. Ct. 841, 191 U. S. 567, 48 L. Ed. 305.

In a suit in equity against two defendants, one of which was a nonresident corporation, for infringement of patents, the bill alleged a conspiracy and a joint infringement by defendants

within the district of suit; the corporation by selling to its codefendant, and the latter by buying and using the infringing article in said district. Both defendants appeared, and filed a joint and several answer, denying the alleged infringement. Held, that such appearance by the corporation was limited to the cause of action stated in the bill, and did not empower the court to permit its amendment by dismissing as to the other defendant and alleging infringement generally by the corporation in said district "and elsewhere in the United States," and that it had conspired "with others" to infringe. Western Wheeled Scraper Co. v. Gahagan (C. C. 1907) 152 Fed. 648.

148. —— Condition of cause.—Mere formal amendments may be made at any stage in the progress of a cause; but amendments changing the character of either the bill or answer, so as to make substantially a new case, should rarely be made after the cause is set for hearing, much less after it has been heard. Walden v. Bodley (1840) 39 U. S. (14 Pet.) 156, 10 L. Ed. 398; Taylor v. Longworth (1840) 39 U. S. (14 Pet.) 172, 10 L. Ed. 405.

An amendment to a bill in equity which would so change its character as to make substantially a new case will not be allowed after the cause has been argued, especially when no evidence is offered to show that the amendment could not have been made a part of the original bill. Snead v. McCoull (1851) 53 U. S. (12 How.) 407, 13 L. Ed. 1043.

Amendment to a bill for infringement of a patent should be allowed, even after final decree, and although it changed the character of the bill, where it was clear that the cause was tried as it must have been had the bill been originally drawn as amended. Tremaine v. Hitchcock (1874) 90 U. S. (23 Wall.) 518, 23 L. Ed. 97.

Eight years after a bill in equity had been filed, and on the day it was dismissed on a final hearing on the pleadings and proofs, an amended bill was filed without leave. Held, that it must be disregarded in the consideration of the case in the supreme court. Terry v. McLure (1880) 103 U. S. 442, 26 L. Ed. 403.

Where the prayer was that an account be taken of the rents and profits which the purchaser had enjoyed, and of the amount paid on his purchase, that the title of the complainants be quieted, and that they have such other relief as equity might require, held, that the complainants were properly permitted at the final hearing to amend the prayer of the bill so as to ask, in the alternative, for a decree for the balance of the purchase money, and a lien on the land to secure it. Hardin v. Boyd (1885) 5 Sup. Ct. 771, 113 U. S. 756, 28 L. Ed. 1141, distinguishing Shields v. Barrow (1854) 17 How. 130, 15 L. Ed. 158.

After the announcement of the final decision of the chancellor upon the merits of a case, it is proper to refuse to permit the pleadings to be amended, so as to meet objections which were raised at the hearing, two months before the decision was rendered, especially where such amendment would not affect the grounds on which the decision is based. Blair v. Harrison (1893) 57 Fed. 257, 6 C. C. A. 326; Claflin v. Bennett (1892) 51 Fed. 693.

When objections to testimony as not founded on the pleading are technical purely, and do not affect the merits, an amendment to the pleadings will be allowed before entry of decree. Hamilton v. Southern Nevada Gold & Silver Co. (C. C. 1887) 33 Fed. 562.

After the cause has been prepared for trial, hearing had, and the issues fully submitted, the discretion of the court is not so easily moved to allow amendments in material matters as in the earlier stages, when the issues are in a formative condition. Gubbins v. Laughtenschlager (C. C. 1896) 75 Fed. 615.

When the substance of the bill contains ground for relief, and the prayer and proofs are in conformity therewith, leave to amend, enlarging the claim of right, and changing the character or quantity of the relief sought, will not be granted after replication filed and proofs taken. Bass, Ratcliff & Gretton v. Christian Feigenspan (C. C. 1897) 82 Fed. 260.

Complainant in equity, after the pleadings have been closed and the evidence has been taken and is ready for printing, is not entitled to leave to file a substituted bill of complaint, except to make the pleadings correspond to the evidence. Old Dominion Copper Mining & Smelting Co. v. Lewisohn (C. C. 1909) 176 Fed. 745.

It is within the discretion of the court to permit the amendment of a bill pending a demurrer thereto. Crown Feature Film Co. v. Bettis Amusement Co. (D. C. 1913) 206 Fed. 362.

149. —— Matter arising after filing bill.—A plaintiff who had no cause of action at the time of the filing of his bill cannot, by amendment, introduce one which accrues thereafter; but where the original bill states a cause of action, although defectively, the defects will be cured by amendment. Mellor v. Smither (1902) 114 Fed. 116, 52 C. C. A. 64.

Where matters sought to be brought into the pleadings have occurred since the filing of the original bill, they may not be brought in by amendment. Kryptok Co. v. Haussmann & Co. (D. C. 1914) 216 Fed. 267.

150. —— Matter making new case.—A bill in chancery cannot be so amended as to introduce new matter, and entirely change the original purposes of the suit. Shields v. Barrow (1854) 58 U. S. (17 How.) 130, 15 L. Ed. 158;

Goodyear v. Bourn (C. C. 1855) Fed. Cas. No. 5,561.

Amendments which change the character of the bill so as to make substantially a new case should rarely, if ever, be admitted after the cause has been set for hearing, much less after it has been heard. Walden v. Bodley (1840) 14 Pet. 156, 160, 10 L. Ed. 156.

An amendment to a bill does not set forth a new and different cause of action, so as to forbid its allowance in the court's discretion, where the purpose of both bills is to establish a resulting trust arising from the same transactions and based on the same general rule of law applicable to resulting trusts. Brainard v. Buck (1902) 22 Sup. Ct. 458, 184 U. S. 99, 46 L. Ed. 449, affirming judgment (1900) 16 App. D. C. 595.

Amendments to a bill, consisting merely of the omission of all allegations against one defendant, and changes in the prayer for specific relief made necessary by such omission, do not make the bill state a new and independent cause of action. Pendery v. Carleton (1898) 87 Fed. 41, 30 C. C. A. 510.

Where, after the institution of a suit in a federal court to liquidate a Pennsylvania trust company and the appointment of a receiver to that end, the Attorney General instituted proceedings in a state court under a state statute and obtained a decree dissolving the corporation from which no appeal was taken, the federal court, after payment of all the corporation's debts, could not properly allow an amendment of the bill and an intervention on the part of stockholders to obtain a distribution of the surplus assets through the federal court's receiver, as the amendment constituted a wholly different and new cause of action. Lyon v. McKeefrey (1909) 171 Fed. 384, 96 C. C. A. 340.

If an amendment to a bill have the effect of making a new case, or if it makes a case inconsistent with the position of the complainants in the suit at law where they are seeking a new trial, a motion to take such amendment from the files is a proper one and will be allowed. Oglesby v. Attrill (C. C. 1882) 14 Fed. 214.

Where a bill to enjoin a judgment alleges that defendant was not legally served with process, and that he never appeared in the action, either in person or by attorney, an amendment thereto alleging that said defendant never acknowledged service of process in said action, either in person or by attorney, and that the acknowledgment of service which had been made by an attorney was made without his authority, does not change the character of the bill. Mills v. Scott (C. C. 1890) 43 Fed. 452.

Where the object sought by a bill was to establish a trust in complainant's favor in a tract of land, and to compel the defendant to convey the title thereto to complainant, on the ground that, through fraud and irregularities, defendant had been permitted to enter the land from the United States, a second pleading, which seeks to quiet the complainant's title to the land, cannot be regarded as an amendment of the original bill, which may be filed under leave to amend, since it not only states a different cause of action, but one which depends for its support on a different and inconsistent state of facts. Savage v. Worsham (C. C. 1892) 104 Fed. 18.

A Massachusetts corporation directed its solicitor to institute a suit for infringement of a patent of which it was owner. Such corporation had succeeded one having precisely the same name, but organized under the laws of Delaware, and through a mistake of fact the solicitor described the complainant in the bill as a corporation of Delaware, but, on the fact appearing in the evidence, by leave of court amended the bill to conform thereto, and the case proceeded to final hearing. Held, that the amendment did not change the cause of action, but merely corrected a mistake of fact; that the Massachusetts, and not the Delaware, corporation, was in fact the complainant from the beginning; and that the amendment did not necessitate a dismissal. Confectioners' Machinery & Mfg. Co. v. Racine Engine & Machinery Co. (C. C. 1908) 163 Fed. 914, decree affirmed Racine Engine & Machinery Co. v. Confectioners' Machinery & Mfg. Co. (1909) 170 Fed. 1021, 95 C. C. A. 671.

An amendment of a bill in equity should not be allowed setting up a new cause of action and requiring additional parties; especially where the statutory period of limitation has expired, and the defendants, as privies in estate, are entitled to the benefits of the statute. Judson v. Courier Co. (D. C. 1885) 25 Fed. 705.

151. —— **As to relief prayed.**—Where the prayer of a bill is that the court will set aside a contract on the ground of fraud, complainant cannot amend by substituting a prayer that the court would either set it aside on the ground of fraud, or, if it was valid, would enforce its specific performance. Shields v. Barrow (1854) 58 U. S. (17 How.) 130, 15 L. Ed. 158.

A bill filed by an assignee in bankruptcy alleged that the bankrupt and defendant had been partners in the mining business; that an attempt to form a corporation was made for the purpose of selling some interest in the property, but that the incorporation was not perfected, and that the business was carried on as a partnership; that the bankrupt had pledged stock to defendant without consideration; and that defendant was threatening to sell the same,—and prayed for an injunction restraining the sale, and that the pledge might be decreed void, and that defendant account in regard to the partnership, etc. It appeared that the pledge was made for an admitted debt, incapable of

ascertainment at the time, but which was less than the amount of the pledge. Held, that the prayer of the bill might be amended so as to ask that, in the event that the court should find that the corporation was duly organized and that the pledge was valid, there should be an ascertainment of the amount due thereon, and a decree for redemption of the pledge. Maynard v. Tilden (C. C. 1886) 28 Fed. 688.

The prayer of a bill to enforce the right of redemption from a mortgage, and to an accounting from defendants as mortgagees in possession, is not narrowed by an amendment asking cancellation of the mortgage as invalid, but remains intact and authorizes the granting of the relief therein prayed for, in case the validity of the mortgage is sustained. Rigney v. De Graw (C. C. 1900) 100 Fed. 213.

A mortgagee filed his petition setting up that he had a mortgage on certain real estate owned by a bankrupt and in the possession of his trustee, and averring that certain taxes and assessments were due and praying that the trustee be directed to pay the same, and, further, that "he be allowed to foreclose his mortgage," with an alternative prayer for a sale by the trustee. The trustee answered, setting up that the mortgage was fraudulent, and praying that the matter be referred to a special master to take testimony. Held that petitioner was thereupon entitled to amend by striking from his petition the prayer with reference to foreclosure, and the alternative prayer for sale by the trustee; it not appearing that the trustee would be prejudiced by such action. In re Wellhouse (D. C. 1902) 113 Fed. 962.

152. —— **Operation and effect.**—Where a corporation was a party defendant to an original bill, it must also be considered a defendant to an amended bill which prays that the "parties defendant" to the original bill be made defendants to the amended bill, and "refers" to the original bill, and "makes the same a part hereof, as if set out herein in hæc verba"; although the amended bill avers that the said organization was never legally incorporated, and that it was in reality a partnership composed of certain individual defendants doing business under the style of the pretended corporation. Empire Coal & Transp. Co. v. Empire Coal & Min. Co. (1893) 14 Sup. Ct. 66, 150 U. S. 159, 37 L. Ed. 1037.

An amended bill, unlike an amendment to the original bill, speaks from the time it was filed, and not from the filing of the original bill. Columbia Valley R. Co. v. Portland & S. Ry. Co. (1908) 162 Fed. 603, 89 C. C. A. 361.

An amendment to a pleading which sets forth no new cause of action relates back to the filing of the pleading amended, and the case stands as though the amendment had then been filed. Armstrong Cork Co. v. Merchants' Refrigerating Co. (1910) 184 Fed. 199, 107 C. C. A. 93, modifying judgment (C. C. 1909) 171 Fed. 778.

Where complainant filed an amendment, waiving relief prayed on the ground of the invalidity of the foreclosure proceedings, and prayed only that the purchasers be decreed to hold as trustees, he impliedly affirmed the legality of the purchasers' title. Buchler v. Black (1915) 226 Fed. 703, 141 C. C. A. 459, affirming decree (D. C. 1914) 213 Fed. 880.

An amendment of the bill when allowed after answer and replication does not open the pleadings unrestrictedly. Keene v. Wheatley (C. C.) Fed. Cas. No. 7,644.

An amendment to a bill offered by a complainant on the hearing of a motion for a preliminary injunction, where no answer has been filed and complainant has the right to amend as of course, will be accepted and considered as a part of the application for injunction; especially where it relates to a formal matter not affecting the merits. Spaulding v. Evenson (C. C. 1906) 149 Fed. 913, order affirmed (1907) 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904.

153. —— **Plea or answer to amended bill.**—When a bill is amended in a material matter, defendant is entitled to additional time to answer the amended bill. Nelson v. Eaton (1895) 66 Fed. 376, 13 C. C. A. 523.

On amendment of bill after answer, defendant cannot allege by way of plea a personal disability in the complainant as having existed at the commencement of the suit. Keene v. Wheatley (C. C.) Fed. Cas. No. 7,644.

An amendment of a bill for discovery, by making it one for discovery and relief, is such a change as justifies an amendment of the answer, since making the bill one for relief entitles the defendants to set up all their defenses; and, if the amendment of the answer were not allowed, they would be cut off from a full defense. Perkins v. Hendryx (C. C. 1887) 31 Fed. 522.

Under the practice in federal courts of equity, an amendment of a bill does not entitle a defendant who has answered the original bill to plead or answer anew to the entire bill, but only to any new matter introduced by the amendment. North Chicago St. R. Co. v. Chicago Union Traction Co. (C. C. 1907) 150 Fed. 612.

154. **Amendment of plea or answer.**—Equity is very reluctant to allow amendments to let in new facts or defenses, wholly dependent on parol evidence, as this would encourage carelessness in drawing answers, and encourage the manufacturing of testimony. Smith v. Babcock (C. C. 1839) Fed. Cas. No. 13,008.

In matters of form, mistakes of dates,

and verbal inaccuracies, courts of equity are very indulgent in allowing amendments of answers; but they are slow to allow amendments as to material facts or which change essentially the grounds of defense. Id.

Amendments of the answer to let in writings and documents omitted by accident or mistake will be readily granted. Id.

Answer in name of three defendants, sworn to by two only, will be stricken from files, but with leave to amend. Bailey Washing Mach. Co. v. Young (C. C. 1874) Fed. Cas. No. 751.

An amendment to a plea so as to raise a multitude of issues will not generally be allowed. Giant Powder Co. v. Safety Nitro Powder Co. (C. C. 1884) 19 Fed. 509.

155. —— **Condition of cause.**—Defendant will not be permitted to amend his answer, after the opinion of the court and the testimony have indicated in what respect it may be modified so as to effect his purpose. Calloway v. Dobson (C. C. 1807) Fed. Cas. No. 2,-325.

Leave to file an amended answer presenting only cumulative evidence will not be granted after a jury trial has been had on an issue made on the bill and answer. New York Wire-Railing Co. v. Cake (C. C. 1863) Fed. Cas. No. 10,217.

A new defense not allowed to be inserted by amendment after a reference to a master before whom it was available to defendant. Evory v. Candee (C. C. 1880) Fed. Cas. No. 4,582.

A motion by one defendant in equity to withdraw an answer and file the same plea as is filed by its codefendant will be granted when not made for the purpose of setting up a merely technical defense, nor after evidence has been taken, and it is probable that it will be more convenient to try the issue raised by the plea first, and where a replication has been filed to the codefendant's plea. United States v. American Bell Tel. Co. (C. C. 1889) 39 Fed. 716.

In a controversy between two railroad companies, their receivers and creditors, as to the rentals due for the use of certain rolling stock, defendant will not be permitted, after the filing of the master's report, to amend its answer so as to interpose a new setoff, when it appears that the same claim is the subject of a cross bill pending in another court, where the matter can be adjudicated on its merits. Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C. 1892) 50 Fed. 857.

Amendments cannot be allowed to an answer after the time for taking testimony by the complainant has expired, the purpose of which is to make certain a construction of the original answer contended for by defendant, but disputed by complainant. Such amendment is either unnecessary, or it makes a change in the issues not permissible by the defendant at that stage of the case. Southern Ry. Co. v. North Carolina Corp. Commission (C. C. 1900) 105 Fed. 270.

156. —— **Matter making new defense.**—Amendments making new case should rarely to permitted after cause has been set for hearing. Walden v. Bodley (1840) 14 Pet. 156, 160, 10 L. Ed. 398.

An amendment setting up a new defense in the answer will not be allowed where the matter proposed, with reasonable diligence, could have been sooner introduced. India Rubber Comb Co. v. Phelps (C. C. 1870) Fed. Cas. No. 7,025.

The court will not allow the theory of defense set up by the original answer to be changed in several important particulars merely on the ground that defendant filed the answer under a mistake, when no new facts are alleged, and there is no request to have a single fact in the bill changed. Waterman v. Merrill (C. C. 1870) Fed. Cas. No. 17,258.

157. —— **Operation and effect.**—Amendments, regularly made, cannot be avoided by a motion to strike from the record, or set aside, the order allowing them. Lichtenauer v. Cheney (C. C. 1881) 8 Fed. 876.

Where an answer containing an admission of a contract as stated in the bill was amended by withdrawing the admission, the admission must be considered and accorded such influence as may seem just. Kenah v. The John Markee, Jr. (D. C. 1880) 3 Fed. 45.

158. **Amendment to conform to proofs.**—Where evidence was taken as to the validity of a location of land which was not distinctly put in issue by the pleadings, the testimony as to that point should be disregarded, and the pleadings allowed to be amended to allow its determination if the merits appear to justify it. Crocket v. Lee (1822) 20 U. S. (7 Wheat.) 522, 5 L. Ed. 513.

An amendment constitutes a departure from the original cause only where the pleader deserts in point of fact the ground that he had first taken, or where he puts the same facts on a new ground in point of law. An amendment of a bill to conform to the proofs construed, and held not to state a new cause of action. Galesburg & K. Electric Ry. Co. v. Hart (1915) 221 Fed. 7, 136 C. C. A. 533.

In a suit to set aside a contract, variances will be allowed to be cured by amendments on easy terms, where the substance of the contract appears; and so also as to mistakes in form in pleading the statute of frauds. Tufts v. Tufts (C. C. 1847) Fed. Cas. No. 14,233.

Bill in equity amended to conform to proofs and admissions in answer, where subject-matter not changed. Battle v. Mutual Life Ins. Co. (C. C. 1873) Fed. Cas. No. 1,109. See Neale v. Neale (1869) 9 Wall. 1, 19 L. Ed. 590.

A court of equity always has the power to conform the pleadings to the evidence by allowing amendments after the proofs have been taken and are before it. Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1911) 190 Fed. 602.

159. Application for leave to amend and proceedings thereon.—Defendants are chargeable with notice of an application to file a supplemental bill, where such bill was tendered when the court was open, leave to file was given in open court, and defendants' attorney was served with a copy on the day it was tendered and filed. Rio Grande Dam & Irrigation Co. v. U. S. (1909) 30 Sup. Ct. 97, 215 U. S. 266, 54 L. Ed. 190, affirming decree U. S. v. Rio Grande Dam & Irrigation Co. (1906) 85 Pac. 393, 13 N. M. 386.

Where demurrers to a cross bill are sustained, leave may be granted to amend, with directions to redraft pleadings so as to conform to the equity practice of the court. Hodder v. Kentucky & G. E. Ry. Co. (C. C. 1881) 7 Fed. 793.

Motion for an amendment to answer, and commission to take testimony in a foreign country, to prove who is the original inventor of a patent, will not be allowed when the affidavits filed by plaintiff show that there is no evidence to sustain the amendment. Hicks v. Otto (C. C. 1883) 17 Fed. 539.

Where an amendment is proposed and allowed at the hearing in open court, in the presence of both parties, it will be presumed that it was made upon sufficient evidence, and not for the purpose of vexation or delay. Mills v. Scott (C. C. 1890) 43 Fed. 452.

An affidavit of defendant's attorney in a suit on a contract for insurance, that affiant had only learned, since filing his answer, that complainant sought merely the usual form of policy, and not an unrestricted one, is insufficient to justify granting leave to amend the answer when the bill clearly shows that only the usual form of policy was sought. Schultz v. Phenix Ins. Co. (C. C. 1896) 77 Fed. 375, decree reversed Phenix Ins. Co. v. Schultz (1897) 80 Fed. 337, 25 C. C. A. 453.

Motion for leave to amend a bill considered. Postal Telegraph Cable Co. v. Livermore & Knight Co. (D. C. 1912) 194 Fed. 180.

160. Conditions on amendment.—On allowing an amendment to conform the bill to the proofs, the court may impose any conditions not unreasonable in themselves. Neale v. Neale (1869) 76 U. S. (9 Wall.) 1, 19 L. Ed. 590.

To hear a cause, without some terms imposed, on an amended bill, filed after replication without leave of the court, is a gross irregularity, and good ground for reversal. Washington & G. R. Co. v. Bradleys (1869) 77 U. S. (10 Wall.) 299, 19 L. Ed. 894.

A material amendment of a bill after answer must be on payment of all costs, including the solicitor's fee. Wallace v. Taylor (C. C. 1807) Fed. Cas. No. 17,103.

Where defendants have been once ordered to answer more fully, and exceptions to omissions and evasions are again sustained, the court will allow further amendments only upon payment of costs, to be followed by harsher measures if there are further omissions. Kittredge v. Claremont Bank (C. C. 1846) Fed. Cas. No. 7,859.

Leave to fine an amended answer after the taking of testimony granted on conditions. Farmers' Loan & Trust Co. v. Central Park, N. & E. R. R. Co. (C. C. 1910) 175 Fed. 528.

161. Form and sufficiency of amended pleading.—An affidavit filed in the course of a hearing on an application for the appointment of a receiver for the property of a corporation cannot be considered as an amended or supplemental bill, where leave was not asked or granted to file an amended pleading; nor can the statements made in such affidavit render one a necessary party to the suit who was not such under the allegations of the bill. Sidway v. Missouri Land & Live Stock Co. (C. C. 1902) 116 Fed. 381.

Where a pleading has been dismissed on a definite ground and is amended to obviate the difficulty, the new pleading will be construed, if possible, so as to respect the previous decision and conform thereto. Bogert v. Southern Pac. Co. (D. C. 1914) 215 Fed. 218.

162. Supplemental bill or cross-bill.—A supplemental bill setting up matters of complaint which have no connection with the original bill will be dismissed. Minnesota Co. v. St. Paul Co. (1867) 73 U. S. (6 Wall.) 742, 18 L. Ed. 856.

Where a state board of transportation had made an order requiring a railroad company to appear before it and show cause why a reduction in certain freight rates should not be made, and a temporary injunction was sought by a supplemental bill to restrain the board from entering upon such hearing, which relief was based on the ground that the board had no power to order a reduction in rates, it was held that an order denying a temporary injunction was properly entered because it was doubtful whether the relief sought by the supplemental bill could be obtained otherwise than by an original bill. Higginson v. Chicago, B. & Q. R. Co. (1900) 102 Fed. 197, 42 C. C. A. 254.

The rules governing the federal court in determining whether a bill is original and independent or ancillary and auxiliary in the matter already before

the court. Schenck v. Peay (C. C. 1868) Fed. Cas. No. 12,450.

Where a bill filed by the assignee contains all the material averments of an original bill, together with a statement of supplemental matter showing the assignment subsequent to the institution of the suit, it must be considered as an original bill in the nature of a supplemental bill, notwithstanding that it is denominated by the pleader a "supplemental and amended bill." Ross v. City of Ft. Wayne (C. C. 1893) 58 Fed. 404, decree reversed (1894) 63 Fed. 466, 11 C. C. A. 288.

Where a bill to restrain infringement of a patent by an assignee conformed in form and substance to the requirements of an original bill in the nature of a supplemental bill, it was not objectionable on the ground that it was a supplemental bill only. Haarmann-DeLaire-Schaffer Co. v. Leuders (C. C. 1904) 135 Fed. 120.

Where, after the pleadings are closed and the evidence taken, complainant deems it necessary to file an amendment to the bill, he should present specific amendments to the paragraphs of the original bill, supporting his application by affidavits, and not make an application to file a substituted bill, which the court would not grant unless satisfied that complainant is entitled to make all the changes which would be made by the substituted bill. Old Dominion Copper Mining & Smelting Co. v. Lewisohn (C. C. 1909) 176 Fed. 745.

If a supplemental bill be filed after decree, it must not only be germane to the purpose of the original bill, but must be in aid of the decree or to revise it, and it cannot then perform the office of an amended bill unless the matter of amendment was not known, or for some reason, not chargeable to the fault of the complainant, could not be brought to the attention of the court by way of amendment during the progress of the case and before decree. Mitchell v. Big Six Development Co. (C. C. 1911) 186 Fed. 552.

163. —— Necessity.—Where matters sought to be brought into the pleadings have occurred since the filing of the original bill, they must be brought in by supplemental bill. Veazie v. Williams (C. C. 1843) Fed. Cas. No. 16,906; Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267; Copen v. Flesher (C. C. 1861) Fed. Cas. No. 3,211; Kryptok Co. v. Haussmann & Co. (D. C. 1914) 216 Fed. 267.

But where plaintiff has no cause of action when his bill is filed, he cannot cure the defect by bringing in subsequent matters constituting a good cause of action by a supplemental bill. Kryptok Co. v. Haussmann & Co. (D. C. 1914) 216 Fed. 267.

164. —— Grounds in general.—An amendment to a cross-bill, allowed at the hearing, making it to conform to the proof, and changing the ground upon which defendant originally based his right to relief, is not error, where the matter incorporated by such amendment was alleged in complainant's bill, and by it brought out in the proof. Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank (1890) 10 Sup. Ct. 550, 134 U. S. 276, 33 L. Ed. 900, affirming decree Chicago & P. R. Co. v. Same (C. C. 1886) 26 Fed. 820.

An agreement to compromise litigation should be presented to the court by supplemental bill. Coburn v. Cedar Valley Land & Cattle Co. (1891) 11 Sup. Ct. 258, 138 U. S. 196, 34 L. Ed. 876, affirming (C. C. 1886) 29 Fed. 584.

A dependent or supplemental bill in the original suit will lie to aid, enjoin, or regulate the original suit, to restrain, avoid or enforce the judgment and decree therein; to enforce, to enjoin the enforcement of, or to obtain an adjudication of liens upon or claims to property to which the court acquired jurisdiction in the original suit. Lang v. Choctaw, O. & G. R. Co. (1908) 160 Fed. 355, 87 C. C. A. 307.

The fact that the complainant desires to drop out of the case some of the parties defendant to the original bill does not of itself give him the right to proceed by supplemental bill, especially when it appears that such change of parties is not essential. Mosgrove v. Kountze (C. C. 1882) 14 Fed. 315.

Where, in a creditors' suit, the circuit court decreed that a conveyance of property by the debtor to a codefendant be set aside as in fraud of complainant's rights, subject to a lien on the property by a third person for money advanced towards the erection of a building thereon after the conveyance, which decree was affirmed by the circuit court of appeals, the question of the right of such third person to a lien is res judicata in the suit, and cannot be reopened by a supplemental bill, though such third person was not a party to the original bill or the decree. Voorheis v. Blanton (C. C. 1899) 96 Fed. 497.

Where suits by railroad companies to restrain the enforcement of a state statute fixing freight rates, on the ground that it was confiscatory and unconstitutional, were pending in a federal court at the time of the enactment of a second statute fixing passenger rates, the question of the constitutionality of the second act may properly be raised and determined in the pending suits on supplemental bills. St. Louis & S. F. R. Co. v. Hadley (C. C. 1907) 155 Fed. 220.

165. —— Sufficiency of original bill.—A plaintiff who had no cause of action at the time of the filing of his bill cannot, by a supplemental bill, introduce one which accrues thereafter; but where the original bill states a cause of action, material facts occurring after the bill

was filed may be brought in by a supplemental bill. Mellor v. Smither (1902) 114 Fed. 116, 52 C. C. A. 64.

A defective bill, affording no ground for proceeding, cannot be sustained by filing a supplemental bill, founded on matters taking place after the filing of the original. Putney v. Whitmire (C. C. 1895) 66 Fed. 385.

If the original bill fails to set up a state of facts justifying the relief sought, a supplemental bill, based on facts afterwards occurring, cannot be sustained. But if the original bill is well founded, it is then permissible to set forth subsequent facts showing a right to further relief, within the scope of the relief sought in the original bill. New York Security & Trust Co. v. Lincoln St. Ry. Co. (C. C. 1896) 74 Fed. 67.

166. —— Matters arising before filing of original bill.—Matters existing at the time of filing the bill and omitted therefrom should be brought in by amendment, but matters arising thereafter and after answer filed can only be brought in by a supplemental bill. Swatzel v. Arnold (C. C. 1869) Fed. Cas. No. 13,682.

Plaintiffs' bill alleged that defendant was about to sell certain stocks delivered to it as collateral security for money loaned to plaintiffs, and it prayed a full accounting, an injunction against the threatened sale, and that in case any sales were made before final hearing they might be declared void. After an account had been taken, plaintiffs filed a supplemental bill, alleging that a sale had been made, and praying damages. Held that, as plaintiffs knew all the facts connected with the sale before defendant answered, this new matter should have been brought in by amendment to the original bill. Henry v. Travelers' Ins. Co. (C. C. 1891) 45 Fed. 299.

Where the complainant had no knowledge of the entry of certain judgments, alleged to be fraudulent, until after the filing of the amended bill, a supplemental bill may be filed, setting up the facts and bringing in necessary parties, when the general character of the suit is not changed. Nevada Nickel Syndicate v. National Nickel Co. (C. C. 1898) 86 Fed. 486.

Complainant will not be given leave to file a supplemental bill after final hearing and decision on the original bill and a prior supplemental bill, to set up facts to make a new and different case, all of which, so far as appears, were known to complainant months before the hearing and before the filing of the former supplemental bill, and some of them before the filing of the original bill. Healey Ice Mach. Co. v. Green (C. C. 1911) 184 Fed. 515, decree affirmed Same v. Greene (1911) 191 Fed. 1004, 111 C. C. A. 668.

167. —— Change of facts or interest of parties.—A supplemental bill is filed on leave and for matter happening after the filing of the bill, and is designed to supply some defect in the structure of the original bill. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209.

When, at the time of filing a bill, there are liens on the property involved, which while they exist, are an obstacle to complainant's full satisfaction, and such liens are subsequently removed, this new matter may be set forth by a supplemental bill. Sheffield & B. Coal, Iron & Railway Co. v. Newman (1896) 77 Fed. 787, 23 C. C. A. 459, certiorari denied Neely v. Newman (1897) 18 Sup. Ct. 944, 168 U. S. 708, 42 L. Ed. 1211.

When a suit for the foreclosure of a mortgage has been commenced, based upon a default in interest alone, and, while the suit is pending, the trustee of the mortgage, under the provisions thereof, elects to declare the principal of the bonds secured by it due because of the nonpayment of interest, such election is properly the subject of a supplemental bill, but, if introduced into the suit by amendment to the original bill, objection must be made by demurrer, plea, or answer; otherwise it is waived. Seattle, L. S. & E. Ry. Co. v. Union Trust Co. (1897) 79 Fed. 179, 24 C. C. A. 512.

Where leave is given to file a supplemental bill to introduce matters arising subsequent to the filing of the original bill, the court will permit other matters to be incorporated therein which might have been brought into the original bill by amendment. Mellor v. Smither (1902) 114 Fed. 116, 52 C. C. A. 64.

Where plaintiff had an inchoate title to land in suit, but which was imperfect because of the invalidity of a sheriff's deed, it was not error to permit the bringing forward by supplemental bill of a curative deed executed pending the suit. Reeve v. North Carolina Land & Timber Co. (1905) 141 Fed. 821, 72 C. C. A. 287, writ of certiorari denied (1906) 27 Sup. Ct. 776, 203 U. S. 588, 51 L. Ed. 329.

Complainant brought a suit in equity against a corporation and certain individuals to obtain a reconveyance of standing trees to which he had an equitable title, which he had conveyed to the individual defendants, for the benefit of the corporation. Pending the suit, a compromise agreement was made between complainant and the corporation, by which the latter agreed to "forthwith" cause a reconveyance to be made of certain of the trees, and of the remainder on payment of a sum for which they stood as security; it was also stipulated that the cause should stand continued to await the final determination of an action at law pending between the parties for the purpose of enabling complainant, if neces-

sary, to enforce the latter conveyance. Such conveyance was subsequently made, but no conveyance was made of the trees, which were to be reconveyed forthwith; but, on the contrary, the corporation caused certain of them to be cut and converted the same to its own use. Held, that the compromise agreement had the effect of a consent decree, and under its terms complainant had the right, by a supplemental bill in the original cause, not only to require such conveyance, but also an accounting for the trees so converted as ancillary relief, especially in view of the fact that his title to the trees was equitable and would not sustain an action at law for the conversion. Chapman v. Yellow Poplar Lumber Co. (1906) 143 Fed. 201, 74 C. C. A. 331.

Where there is a transfer of interest in premises pending a suit in relation thereto, a supplemental bill may be filed by or against the purchaser. Hoxie v. Carr (C. C. 1832) Fed. Cas. No. 6,802.

New oral testimony tending merely to corroborate evidence on the one side, or to contradict evidence on the other, on the points in issue, is not a sufficient foundation for a supplemental bill. Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267.

No new evidence is a sufficient foundation for a supplemental bill, unless it be of such a nature that it would, if unanswered, require a reversal of the decree. Id.

An application to file a supplemental bill seeking to set up duress by threats made and carried out subsequently to the commencement of the suit will be denied. Lyster v. Stickney (C. C. 1882) 12 Fed. 609.

Where the complainant has, since bringing the suit, parted with his whole interest in the subject-matter, and those for whom he was trustee have transferred their whole interest in the subject-matter to A., and the title to any sum of money which may be recovered has become vested in A., the remedy of A. is by an original bill in the nature of a supplemental bill, and not by a supplemental bill. Campbell v. City of New York (C. C. 1888) 35 Fed. 14.

Where, after final decree, a person who has succeeded to the interest of the complainant in such manner as to entitle him to the full benefit of the decree finds it necessary to invoke further action of the court to obtain such benefit, he may file a supplemental bill therefor in the original suit. Secor v. Singleton (C. C. 1890) 41 Fed. 725.

Where a patent, with all rights and claims under it, is assigned to a stranger pending suit for infringement, the assignee cannot obtain the benefit of the proceedings brought by the assignor, by means of a supplemental or amended bill, but he may do so by means of an original bill in the nature of a supplemental bill. Ross v. City of Ft. Wayne (C. C. 1893) 58 Fed. 404.

After the direction of a decree for complainant, a stranger will not be given leave to file a bill in the nature of a supplemental bill, for the purpose of setting up a purchase of the cause of action by him, until a decree has actually been entered in favor of the original complainant. Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co. (C. C. 1896) 72 Fed. 325.

One purchasing a contract which is the subject of a pending suit may set up his interest and obtain the benefit of the proceedings already had, by obtaining leave to fill an original bill in the nature of a supplemental bill. Id.

Assignees of defendants restrained from using a trade-mark, who use the mark, but do not base their claim to use it on any rights supposed to be derived from the original defendants, cannot be brought into the original suit by supplemental bill. Dadirrian v. Gullian (C. C. 1897) 80 Fed. 986.

A supplemental bill by the purchaser is a proper proceeding to obtain a restraining order, where stockholders are attempting by proceedings in a state court to nullify a decree of the circuit court foreclosing a mortgage on corporate property. Central Trust Co. v. Western N. C. R. Co. (C. C. 1898) 89 Fed. 24.

The assignee of a claim for damages for the infringement of a trade-mark pending a suit by the assignor against the infringer, in which an injunction has been granted and a decree entered for an accounting may have the benefit of the prior litigation, and be substituted as complainant in the existing suit, by filing an original bill therein in the nature of a supplemental bill. Walter Baker & Co. v. Baker (C. C. 1898) 89 Fed. 673.

Where, in a creditors' suit, the circuit court decreed that a conveyance of property by the debtor to a codefendant be set aside as in fraud of complainants' rights, subject to a lien on the property by a third person for money advanced towards the erection of a building thereon after the conveyance, which decree was affirmed by the circuit court of appeals, the question of the right of such third person to a lien is res judicata in the suit, and cannot be reopened by a supplemental bill, though such third person was not a party to the original bill or the decree. Voorheis v. Blanton (C. C. 1899) 96 Fed. 497.

Where, pending a suit in equity for infringement of a trade-mark, complainant sold its business, good will, and trade-marks to another, but did not convey its right to recover for past infringement, it parted with only a part of its interest in the suit, and the court, having acquired jurisdiction, will retain it to dispose of all the questions involved, and will permit the filing of a supplemental bill to bring the grantee before it as a party complainant. Cur-

tis Davis & Co. v. Smith (C. C. 1901) 105 Fed. 949.

Where the rights of persons who were not parties to a suit in equity are affected by the decree entered therein, and they seek to obtain a modification of such decree by setting up matters which occurred pending the suit, but which were not presented to the court, the proper practice is by the filing of a supplemental bill in the nature of a bill of review. Thompson v. Schenectady Ry. Co. (C. C. 1903) 119 Fed. 634.

New matter arising after the filing of a bill, and which is confirmatory of its allegations, may properly be set up by a supplemental bill, even though it might be proved under the original bill. Napier v. Westerhoff (C. C. 1907) 153 Fed. 985.

An original bill, in the nature of a supplemental bill, filed by a complainant to bring in new facts, where a supplemental bill would have been proper, may be allowed to stand, where it is stipulated that proofs previously taken may be used, so that the defendant is not prejudiced. Vigneron v. Auto Time Saver Repair Kit Co. (C. C. 1909) 171 Fed. 580.

168. Time for filing.—A supplemental bill to admit new evidence, which the party might by due diligence have originally introduced, is never granted after an interlocutory decree. Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267.

A disclosure cannot be asked in a supplemental bill after the receiver, under a decree for complainants, has proceeded to reduce defendant's assets into his possession. Dunham v. Eaton & H. R. Co. (C. C. 1861) Fed. Cas. No. 4,150.

A delay of 18 months after the discovery of new facts held fatal to the application. Blandy v. Griffith (C. C. 1873) Fed. Cas. No. 1,530.

The proceeds of the sale were taken into consideration in the accounting had in the case, and at the hearing plaintiffs did not insist on any exceptions to the master's report. The supplemental bill was filed more than five years after plaintiffs had notice of the sale, and several months after final decree. Held, that the supplemental bill was filed too late. Henry v. Travelers' Ins. Co. (C. C. 1891) 45 Fed. 299.

The supreme court dismissed an appeal from the circuit court, with a mandate requiring appellant to pay the costs. Thereafter the appellant, without paying the costs, brought a bill in the circuit court to review its judgment, which was demurred to for want of an allegation that the costs were paid. The court held that this was not a ground of demurrer, but that the proper remedy was to stay proceedings until payment of the costs. No order was asked fixing a time for such payment, and payment was made and accepted by defendant's counsel two months and twelve days thereafter. Held, that the delay was not so unreasonable as to debar plaintiff from filing a supplemental bill alleging such payment. Miller v. Clark (C. C. 1892) 49 Fed. 695.

Leave to file an original bill in the nature of a supplemental bill by one purchasing a contract which is the subject of a pending suit in equity, to set up his interest, and obtain the benefit of the proceedings already had, cannot be denied, even after final hearing, and the direction of a decree in favor of the original complainant. Hazleton Tripod-Boiler Co. v. Citizens' St. Ry. Co. (C. C. 1896) 72 Fed. 325.

In determining whether a supplemental bill filed after decree is demurrable for laches, reference may be had to the record, including the answer in the original case. Mitchell v. Big Six Development Co. (C. C. 1911) 186 Fed. 552.

169. —— Leave of court.—A supplemental bill is filed by leave of the court. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209.

All that the court inquires into, on petition for leave to file a supplemental bill, is to see whether probable cause exists for granting the leave, and whether the petition states facts or circumstances which, if properly pleaded, would sustain a supplemental bill. Parkhurst v. Kinsman (C. C. 1848) Fed. Cas. No. 10,758.

Leave to file a supplemental bill making a new party and containing new matter against the original party granted, on petition alleging that such new party had become interested in the subject-matter since filing the original bill. Id.

The petition for leave to file a supplemental bill need not embrace the averments intended to be inserted therein; but it must show the ground upon which the relief is asked. Id.

On application for leave to file a new bill upon the discovery of new facts, the counter affidavits must be examined and considered by the court. Blandy v. Griffith (C. C. 1873) Fed. Cas. No. 1,530.

Leave to file a supplemental answer setting up a judgment in bar was granted after the same had become final by affirmance on appeal, on renewal of a former motion to set up the same judgment by way of amended answer which had been denied because of the pendency of an appeal therefrom. Robinson v. Satterlee (C. C. 1874) Fed. Cas. No. 11,967.

Leave will not be granted after decree to file a supplemental bill for the purpose of setting up matters which might, by the use of due diligence, have been ascertained and pleaded by way of amendment in the original suit.

Mosgrove v. Kountze (C. C. 1882) 14 Fed. 315.

Complainant brought suit in equity for cancellation of a mining lease, which he had declared forfeited, as a cloud on his title, and to enjoin the lessee from further operation or trespasses on the mining property. Between the time of the filing of the bill and the issuance of a preliminary injunction, defendant continued to operate the mine, and paid complainant the royalty stipulated in the lease on the ore mined, which complainant accepted. Subsequently final decree was entered granting complainant the relief prayed for. Held, that complainant could not maintain a supplemental bill, not filed until nearly five years after decree, to recover damages for the waste and trespass committed by defendant by operating the mine between the time of the declared forfeiture and the granting of the injunction, as the facts were fully known to him before decree, and might have been set up by way of amendment to the original bill. Mitchell v. Big Six Development Co. (C. C. 1911) 186 Fed. 552.

170. —— Form and sufficiency.—A. brought a bill in equity against B., alleging that A. and B. were partners; that an attempt was made to incorporate, but the incorporation was not perfected, and the business continued as a partnership; that certificates of stock were issued for the purpose of distributing evidence of the ownership of the property among the parties interested; that A. pledged to B. certain of the certificates of stock for advances made by B.; that said advances were in reality advances on account of A.'s share of the undistributed profits in B.'s hands, and that the pledges were void; and prayed for a partnership accounting, and that the pledges be declared void. An amendment to the prayer of the bill was allowed, to enable the plaintiff to redeem the stock, in case the court should find that the corporation was duly organized, and that the pledges were valid. Held, that a supplemental bill, averring that there was a corporation, and alleging facts relating to its management, such as were claimed to entitle plaintiff to have the funds of the corporation (which were in B.'s hands at his death) divided between the stockholders, would not be allowed to be filed, although the facts alleged occurred subsequent to the filing of the original bill, as it made a case in antagonism to the case made by the original bill. Maynard v. Green (C. C. 1887) 30 Fed. 643.

The fact that original and amended complaints and answers, and contracts, deeds, leases, and other documents, are set out in a supplemental bill in hæc verba, where a clear and concise statement of the facts as to their existence, character, and substance was sufficient, furnishes no substantial reason for expunging them from the record, when they contain relevant matter, and are pertinent to the issue raised. Nevada Nickel Syndicate v. National Nickel Co. (C. C. 1898) 86 Fed. 486.

Where leave is asked to file a substituted bill of complaint, the court can only permit or reject it, and cannot be expected to revise it, and permit it to be filed if drawn in a different form. Old Dominion Copper Mining & Smelting Co. v. Lewisohn (C. C. 1909) 176 Fed. 745.

171. —— Construction and operation.—Where, pending a suit to restrain infringement of a patent, it was assigned, and the assignee filed an original bill in the nature of a supplemental bill, and claimed no title through persons not complainants in the original bill, but who joined in the assignment, the defendants could avail themselves of any equity or defense which had arisen since the original bill was filed, or which could be urged against the new complainant, but which did not exist against the original complainant; but in all other respects the assignee was entitled to the benefit of all the proceedings in the original suit. Haarmann-DeLaire-Schaffer Co. v. Leuders (C. C. 1904) 135 Fed. 120.

172. —— Answer.—Defenses which have been considered on an original bill cannot be again set up by the same defendants in an answer to a supplementary bill. Scott v. Lazell (C. C. 1910) 177 Fed. 608.

173. Supplemental answer.—A defendant who answers generally as to a matter of which he has no particular knowledge may file a supplemental answer after he has acquired particular knowledge. Caster v. Wood (C. C. 1831) Fed. Cas. No. 2,505.

Leave will not be given to file a supplemental answer based upon a fact which was known to the party at the time of the original answer, and was not omitted through mistake. Suydam v. Truesdale (C. C. 1855) Fed. Cas. No. 13,656.

Leave to file a supplemental answer should be granted where the proposed defenses are an agreement by which it is alleged defendant would be discharged from liability, the agreement not being shown by the opposing affidavits; and a prior judgment in an action in which the pleadings show a similar cause of action. Thames & Mersey Marine Ins. Co. v. Continental Ins. Co. (C. C. 1889) 37 Fed. 286.

(O) Signature, verification, and filing

174. Signature.
175. Certificate of counsel.
176. Verification.
177. —— Authority to take.
178. —— Bill.
179. —— Answer.

180. —— Pleas.
181. —— Waiver by bill of answer under oath.
182, 183. Withdrawal of pleadings.

174. Signature.—See rule 24, ante, p. 2503.

As to necessity of bill being signed, see Roach v. Hulings (C. C. 1840) Fed. Cas. No. 11,874; Dwight v. Humphreys (C. C. 1842) Fed. Cas. No. 4,-216.

A signing by counsel on the back of the bill is sufficient. Dwight v. Humphreys (C. C. 1842) Fed. Cas. No. 4,-216.

Counsel must sign the answer unless it is taken by commissioners. Davis v. Davidson (C. C. 1846) Fed. Cas. No. 3,631.

The court may allow defendant to sign his answer where objected to because not signed. Holton v. Guinn (C. C. 1895) 65 Fed. 450.

A bill in equity in a federal court is not demurrable because not signed or verified by complainant, neither being required by the rules. Fichtel v. Barthel (C. C. 1909) 173 Fed. 489.

175. Certificate of counsel.—There is no equity rule requiring a certificate of counsel that an answer to the merits is well founded in law. McGorray v. O'Connor (1898) 87 Fed. 586, 31 C. C. A. 114, affirming decree (C. C. 1897) 79 Fed. 861.

176. Verification.—See rule 36, ante, p. 2512.

177. —— Authority to take.—An answer is not sufficiently authenticated unless authority of justice of peace before whom it was sworn is shown. Addison v. Duckett (C. C. 1806) Fed. Cas. No. 77.

An answer by a defendant beyond sea will be taken and sworn to by a commission under a dedimus issued by the court. Read v. Consequa (C. C. 1822) Fed. Cas. No. 11,607.

A justice of the peace has authority to administer to defendant an oath to an answer in chancery. U. S. v. Cowing (C. C. 1835) Fed. Cas. No. 14,880.

A bill for an injunction in a federal court, verified before a commissioner of deeds of the city of New York, was improperly verified. Stationary Engineer Pub. Co. v. Comerford (C. C. 1907) 155 Fed. 667.

178. —— Bill.—The verification of the bill may be taken before a notary. Blake Crusher Co. v. Ward (C. C. 1874) Fed. Cas. No. 1,505.

Bill not sworn to, praying injunction and discovery under oath, held sufficient on demurrer. National Hay-Rake Co. v. Harbert (C. C. 1875) Fed. Cas. No. 10,044.

179. —— Answer.—Joint answer, see Davis v. Davidson (C. C. 1846) Fed. Cas. No. 3,631; Bailey Washing Mach. Co. v. Young (C. C. 1874) Fed. Cas. No. 751.

Objection that an answer is not verified may be obviated by the court's allowing its verification. Holton v. Guinn (C. C. 1895) 65 Fed. 450.

Though a corporation is not bound to answer under oath, it is bound to make discovery under seal. Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co. (D. C. 1912) 194 Fed. 172.

180. —— Pleas.—See Ewing v. Blight (C. C. 1855) Fed. Cas. No. 4,589; Computing Scale Co. v. Moore (C. C. 1905) 139 Fed. 197.

181. —— Waiver by bill of answer under oath.—And the defendant has a right to make his answer under oath, although an answer under oath is waived by the bill. Holbrook v. Black (C. C. 1854) Fed. Cas. No. 6,590.

Waiver by bill of oath in answer is ineffectual unless accepted. Heath v. Erie Ry. Co. (C. C. 1871) Fed. Cas. No. 6,306; Amory v. Lawrence (C. C. 1872) Fed. Cas. No. 336.

Where an original bill, by its footnote, waives oath as to all defendants, and another defendant is brought in by amendment and, instead of a new footnote, the original footnote is amended by naming him as defendant, his oath is waived. Fisher v. Moog (C. C. 1889) 39 Fed. 665.

A waiver of answer under oath in a bill destroys its efficacy as a bill of discovery, and the defendant is not required to answer interrogatories propounded therein. McFarland v. State Sav. Bank (C. C. 1904) 132 Fed. 399.

Where a bill was not essentially one for discovery and expressly waived answer under oath, complainant was not entitled to have defendant answer under oath a list of interrogatories attached to the bill. Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579.

The sufficiency of a corporation's answer to a bill is not affected by waiver of answer under oath in the bill. Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co. (D. C. 1912) 194 Fed. 172.

182, 183. Withdrawal of pleadings.—Permitting the withdrawal of an original bill held not an abuse of discretion. City of Vicksburg v. Vicksburg Waterworks Co. (1906) 26 Sup. Ct. 660, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

Defendant held not entitled to withdraw his answer and demur to the bill. Phelps v. Elliott (C. C. 1887) 30 Fed. 396, appeal dismissed (1891) 11 Sup. Ct. 1026, 140 U. S. 694, 35 L. Ed. 745.

An unexplained delay of over six years in filing a petition for leave to withdraw an answer containing admissions which have been made the basis of a decree will prevent the court from granting the relief prayed in favor of adult defendants, where no fraud or collusion is shown. White v. Miller

(1895) 15 Sup. Ct. 788, 158 U. S. 128, 39 L. Ed. 921.

(P) Issues, proof, and variance

184. Issues in general.
185. Matters to be proved.
186. Evidence admissible under pleadings.
187. Variance between allegations and proof.

184. Issues in general.—The replication puts the matter of the plea in issue, and it is incumbent on defendants to support it. Stead v. Course (1833) 8 U. S. (4 Cranch) 403, 2 L. Ed. 660.

Where a bill presents no ground which gives the court jurisdiction to grant equitable relief, such jurisdiction cannot be sustained on the ground that complainant was given a lien by a conveyance made by his debtor, which the bill alleges was fraudulent and void as to him. Maxwell v. McDaniels (1910) 184 Fed. 311, 106 C. C. A. 453.

The cause is not at issue unless it is at issue as to all of the defendants not in default, and taken as confessed as to the others. Gilbert v. Van Arman (C. C. 1875) Fed. Cas. No. 5,414.

Where a replication is put in to a plea, the parties proceed to the examination of witnesses in the same way as in case of a replication to an answer. Reissner v. Anness (C. C. 1877) Fed. Cas. No. 11,687.

Where defendant in a suit in equity interposed a plea setting out agreements by which it alleged it was licensed in perpetuity to make a certain patented machine, and complainants filed a replication of the plea, it was the duty of the court to examine into whether the claim set up in the plea was sustained by the agreements. American Graphophone Co. v. Edison Phonograph Works (C. C. 1895) 68 Fed. 451.

At the hearing upon a plea in equity and a general replication no fact is in issue except the truth of the matter set up in the plea. Vacuum Oil Co. v. Eagle Oil Co. of New York (C. C. 1907) 154 Fed. 867, decree affirmed Eagle Oil Co. of New York v. Vacuum Oil Co. (1908) 162 Fed. 671, 89 C. C. A. 463, and writ of certiorari denied (1909) 29 Sup. Ct. 696, 214 U. S. 515, 53 L. Ed. 1063.

The issues in equity cases must be raised by the allegations in the bill and answer. Doughty v. West (D. C. 1865) Fed. Cas. No. 4,029.

185. Matters to be proved.—Where a material averment in a bill is neither admitted nor denied by the answer, it must be supported by proof. Young v. Grundy (1810) 10 U. S. (6 Cranch) 51, 3 L. Ed. 149.

An allegation in an answer, of a decree in a former suit, pleaded by way of estoppel, being denied by a general replication, must be proved by defendant. Humes v. Scruggs (1876) 94 U. S. 22, 24 L. Ed. 51.

Under United States Circuit Court rule 44 for the districts of Michigan, Michigan Circuit Court rule 7, providing that the facts stated in a notice attached to a plea shall be treated as admissions and need not be proved, was applicable to an action tried in the federal Circuit Court in that state. McIntyre v. Modern Woodmen of America (1912) 200 Fed. 1, 121 C. C. A. 1.

In the case of concealed fraud, complainant must set forth and prove the particularities of the discovery. Badger v. Badger (C. C. 1862) Fed. Cas. No. 718.

The party alleging the mistake must show exactly in what the error consists. Dean v. Equitable Fire Ins. Co. (C. C. 1878) Fed. Cas. No. 3,705.

An allegation in a bill which is neither admitted nor denied must be proved before the plaintiff can have any relief based upon it. Rogers v. Marshall (C. C. 1882) 13 Fed. 59; Smith v. Ewing (C. C. 1885) 23 Fed. 741.

In a suit to determine adverse claims to lands conveyed to defendant by patents from the United States, to entitle complainant to a decree equivalent to a conveyance of title, as prayed for in his bill, the validity of the entries on which his claim is founded must be established by affirmative evidence; and an answer by defendant denying the validity of such entries, and alleging their cancellation and subsequent entry by defendant, and issuance of a patent thereon, may be treated as a negative plea, denying the equities of the bill. Stimson Land Co. v. Rawson (C. C. 1894) 62 Fed. 426.

The burden of proof rests upon the defendant to support a plea. American Graphophone Co. v. Leeds & Catlin Co. (C. C. 1905) 140 Fed. 981.

Facts well pleaded in a bill, and not denied nor controverted by the answer, are not required to be proved, unless the answer demands proof; and general denials in the answer are not entitled to consideration, where they are inconsistent with facts affirmatively alleged. Klenk v. Byrne (C. C. 1906) 143 Fed. 1008.

Where a bill alleges that certain acts were done by defendants partly within the United States and partly within foreign countries, a plea which sets up that such acts were done wholly in foreign countries is not an affirmative but a negative plea, and the burden of proof rests upon the complainant; the effect of the plea being to deny one of the allegations of the bill. Vacuum Oil Co. v. Eagle Oil Co. of New York (C. C. 1907) 154 Fed. 867, decree affirmed Eagle Oil Co. of New York v. Vacuum Oil Co. (1908) 162 Fed. 671, 89 C. C. A. 463, and writ of certiorari denied (1909) 29 Sup. Ct. 696, 214 U. S. 515, 53 L. Ed. 1063.

A plea to a bill in equity held a negative plea, under which the burden of proof rested on complainant to establish a material jurisdictional allegation

of the bill. Chase v. Wetzlar (C. C. 1911) 197 Fed. 119.

186. Evidence admissible under pleadings.—Where a bill is filed to compel the conveyance of legal title to certain land, and the statute of limitations is relied on by defendant, and no disability is alleged by complainant in his bill to take the case out of the statute, the question of disability not being put in issue by the pleadings, the court cannot consider evidence tending to show such disability. Piatt v. Vattier (1835) 34 U. S. (9 Pet.) 405, 9 L. Ed. 173.

When a plea setting up an accord and satisfaction, and certain receipts signed by complainant, is put in issue by a mere general replication, the complainant cannot show mistake in the agreement of accord, or give parol evidence to explain the receipt. Horn v. Detroit Dry-Dock Co. (1893) 14 Sup. Ct. 214, 150 U. S. 610, 37 L. Ed. 1199.

Under a cross-bill to enforce a statutory lien on railroad property in favor of a subcontractor, evidence to prove an agreement, unsupported by allegations in the pleading, by the principal contractor to take, at a stipulated price, certain bonds of the company, which the subcontractor had contracted to receive in part payment for the work done, is irrelevant and inadmissible. Ferguson Contracting Co. v. Manhattan Trust Co. (1902) 118 Fed. 791, 55 C. C. A. 529.

Where the bill sets up title under a will, title by codicils thereto not mentioned in the bill cannot be shown. Langdon v. Goddard (C. C. 1842) Fed. Cas. No. 8,060.

A bill in equity averring a deed to have been a mortgage need not aver that it became so by a defeasance, in order to let in proof of a defeasance. Bentley v. Phelps (C. C. 1847) Fed. Cas. No. 1,332.

A specific legatee is not confined to the particular errors alleged in her bill for an account and satisfaction, as she might be if she was surcharging and falsifying a stated account. Pulliam v. Pulliam (C. C. 1881) 10 Fed. 53.

Where a cause was set down for hearing upon the pleadings on defendant's motion, expressly to preclude complainant from introducing evidence which it was its duty, under the rules, to introduce in time to permit defendants to reply, complainants cannot be permitted to introduce exhibits and documents not made by proper reference a portion of the bill. Robinson Tobacco Co. v. Philips (C. C. 1882) 12 Fed. 670.

A book of accounts, referred to in the answer, but not offered in evidence, is not made evidence because the complainant called for it, and asked, when it was produced, some questions about it which brought out its contents. Treadwell v. Lennig (C. C. 1892) 50 Fed. 872.

187. Variance between allegations and proof.—It is a rule, both at law and in equity, that the allegata and probata must correspond; and however just the demand proved by the complainant in equity, if his proof does not harmonize with the allegations in his bill, he cannot recover. Piatt v. Vattier (1835) 34 U. S. (9 Pet.) 405, 9 L. Ed. 173; Eyre v. Potter (1853) 56 U. S. (15 How.) 42, 14 L. Ed. 592; Troendle v. Van Nortwick (1900) 98 Fed. 785, 39 C. C. A. 286; The Chusan (C. C. 1843) Fed. Cas. No. 2,717; Brooks v. Stolley (C. C. 1846) Fed. Cas. No. 1,963; Fisher v. Boody (C. C. 1852) Fed. Cas. No. 4,814; Beard v. Bowler (C. C. 1866) Fed. Cas. No. 1,180; Battle v. Mutual Life Ins. Co. (C. C. 1873) Fed. Cas. No. 1,109; Bradley v. Converse (C. C. 1876) Fed. Cas. No. 1,775; South Park Com'rs v. Kerr (C. C. 1882) 13 Fed. 502; Babbitt v. Dotten (C. C. 1882) 14 Fed. 19; Grosvenor v. Dashiell (C. C. 1894) 62 Fed. 584 (reversed Dashiell v. Grosvenor [1895] 66 Fed. 334, 13 C. C. A. 593, 27 L. R. A. 67).

Where there is enough in the bill to warrant relief, and to prevent defendants from being taken by surprise, the decree should not be reversed on the ground that the pleading and proof do not sufficiently agree. Moore v. Crawford (1889) 9 Sup. Ct. 447, 130 U. S. 122, 32 L. Ed. 878 (affirming decree Crawford v. Moore [C. C. 1886] 28 Fed. 824); Piatt v. Oliver (C. C. 1840) Fed. Cas. No. 11,115; Tufts v. Tufts (C. C. 1847) Fed. Cas. No. 14,233; Movius v. Lee (C. C. 1887) 30 Fed. 298; Smith v. City of Portland, Id. 734.

There is no such variance between the allegations of a bill seeking to charge with a trust certain property in the hands of the executors of the alleged trustee, and evidence that the latter had turned over the major portion of the property to one who was claimed to have had no authority to receive it, as requires the dismissal of such bill. Darlington v. Turner (1906) 26 Sup. Ct. 630, 202 U. S. 195, 50 L. Ed. 992, reversing decree (1905) 24 App. D. C. 573.

A fatal variance did not exist, where defendant was not misled, and the evidence adduced was the same that would have been offered under an allegation alleging a different relation of the parties, in accordance with the evidence. Lusk v. Bush (1912) 199 Fed. 369, 117 C. C. A. 655.

Where a bill prays that a deed be set aside on the ground that its execution was procured by fraudulent representation of one of the defendants that it was simply a power of attorney, and the evidence shows that complainant had never executed the deed, and that her signature thereto was a

forgery, the variance is fatal. Henry v. Suttle (C. C. 1890) 42 Fed. 91.

Proof of a direct assignment of a patent from a patentee to complainant does not constitute a departure, though the bill alleges an assignment from the patentee through two intermediate parties to the complainant. American Cable Ry. Co. v. City of New York (C. C. 1895) 68 Fed. 227, affirming decree (C. C. 1893) 56 Fed. 149, and decree reversed City of New York v. American Cable Ry. Co. (1895) 70 Fed. 853, 17 C. C. A. 467.

(Q) Defects and objections as to pleadings, and waiver thereof

188. Cure by subsequent pleading.
189. Waiver of objections in general.
190. —— Objections to bill.
191. —— Objections to plea or answer.
192. Objections to replication or want thereof.
193. Objections to amendments.
194. Want of verification.
195. Objections on ground of variance.

188. Cure by subsequent pleading.—A bill, although demurrable, held cured of its defect by respondent's answering over, instead of standing by his demurrer. Provisional Municipality of Pensacola v. Lehman (1893) 57 Fed. 324, 6 C. C. A. 349.

In a suit to set aside a will, where the bill fails to allege the probate of the will, but defendant's answer alleges that it was admitted to probate, the defect in the bill is cured. Richardson v. Green (1894) 61 Fed. 423, 9 C. C. A. 565, affirming decree Green v. Terwilliger (C. C. 1892) 56 Fed. 384, and certiorari denied (1894) 15 Sup. Ct. 1042, 159 U. S. 264, 40 L. Ed. 142.

189. Waiver of objections in general.—Objections made too late, see Bound v. South Carolina Ry. Co. (1893) 58 Fed. 473, 7 C. C. A. 322; Converse v. Michigan Dairy Co. (C. C. 1891) 45 Fed. 18; Chicago, M. & St. P. Ry. Co. v. Pullman Palace-Car Co. (C. C. 1892) 50 Fed. 24.

Defects in pleadings not objected to at trial usually considered waived. Baker v. Whiting (C. C. 1840) Fed. Cas. No. 786.

By answering, defendant waives all objections to the form and manner of proceeding. Newman v. Moody (C. C. 1884) 19 Fed. 858.

Where a complainant has a demurrer and plea set down for argument, instead of moving to strike them from the files or filing a replication, he waives the question whether the defendant has not by his previous action in the suit waived the defense set up by the plea and demurrer. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C. 1894) 61 Fed. 543.

190. —— Objections to bill.—An objection to a bill for defects of form cannot be taken merely at the hearing, but must be specifically stated by demurrer or other pleading. Oliver v. Piatt (1845) 44 U. S. (3 How.) 333, 11 L. Ed. 622; Graves v. Ashburn (1909) 30 Sup. Ct. 108, 215 U. S. 331, 54 L. Ed. 217 (reversing decree Ashburn v. Graves [1907] 149 Fed. 968, 79 C. C. A. 478); Armstrong Cork Co. v. Merchants' Refrigerating Co. (1910) 184 Fed. 199, 107 C. C. A. 93 (modifying judgment [C. C. 1909] 171 Fed. 778); Loveridge v. Larned (C. C. 1881) 7 Fed. 294; Cedar Valley Land & Cattle Co. v. Coburn (C. C. 1886) 29 Fed. 586; Ranger v. Champion Cotton-Press Co. (C. C. 1892) 52 Fed. 611; Morse v. South (C. C. 1897) 80 Fed. 206; West Pub. Co. v. Edward Thompson Co. (C. C. 1909) 169 Fed. 833 (decree modified [1910] 176 Fed. 833, 100 C. C. A. 303); Chicago Ry. Equipment Co. v. Perry Side Bearing Co. (C. C. 1909) 170 Fed. 968 (decree modified Perry Side Bearing Co. v. Chicago Ry. Equipment Co. [1910] 178 Fed. 449, 101 C. C. A. 433); U. S. v. Reading Co. (C. C. 1910) 183 Fed. 427 (decree modified [1912] 33 Sup. Ct. 90, 226 U. S. 324, 57 L. Ed. 243).

Where a defect in plaintiff's title appears on the face of his bill defendant will not be precluded from availing himself of it, on appeal, by his not having denied in his answer the facts necessary to the validity of plaintiff's title and not alleged by him, or taken the objection at the hearing. Kerr v. Moon (1824) 22 U. S. (9 Wheat.) 565, 6 L. Ed. 161.

The court itself may make the objection that the bill is multifarious, where it is necessary and proper to the due administration of justice, though it will not where it can get on to a final decree without embarrassment. Oliver v. Piatt (1845) 44 U. S. (3 How.) 333, 11 L. Ed. 622.

An objection to a bill as being multifarious, if not raised in the lower court, will not be considered on appeal. Id.

An objection that a bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself. Nelson v. Hill (1847) 46 U. S. (5 How.) 127, 12 L. Ed. 81.

Objection held waived by failure to make it in the pleadings. Fitchett v. Blows (1896) 74 Fed. 47, 20 C. C. A. 286.

Where complainant sued in equity for the appointment of receivers for defendant and alleged that it was indebted to complainant in the sum of $25,000, a large part of which was overdue and unpaid, and defendant admitted such allegation, it could not thereafter object that it was insufficient for failure to charge that the claim had been reduced to judgment and execution returned unsatisfied. In re Wm. S. Butler & Co. (1913) 207 Fed. 705, 125 C. C. A. 223.

The objections of multifariousness

and misjoinder of parties come too late, when raised by answer instead of demurrer, and not called to the court's attention until the hearing. Bunnel v. Stoddard (C. C. 1866) Fed. Cas. No. 2,135.

No appearance, demurrer, or answer to a bill will waive its omission to state the citizenship of every necessary party, and that complainants and defendants are citizens of different states. Speigle v. Meredith (C. C. 1868) Fed. Cas. No. 13,227.

No one can object to a bill on the ground of multifariousness unless injured thereby. Buerk v. Imhaeuser (C. C. 1881) 8 Fed. 457.

A defendant, who has answered, cannot defeat a bill to revive the suit, after the death of the complainant, by interposing objections which are, in effect, a demurrer to the original bill. Simmons v. Morris (C. C. 1901) 109 Fed. 707.

191. —— Objections to plea or answer.—Waiver of objections to pleas, see Green v. Bogue (1895) 15 Sup. Ct. 975, 158 U. S. 478, 39 L. Ed. 1061; Goodyear v. Toby (C. C. 1868) Fed. Cas. No. 5,585; Birdseye v. Heilner (C. C. 1885) 27 Fed. 289; Bean v. Clark (C. C. 1887) 30 Fed. 225 (appeal dismissed [1890] 11 Sup. Ct. 1016, 140 U. S. 671, 35 L. Ed. 604); Hatch v. Bancroft-Thompson Co. (C. C. 1895) 67 Fed. 802; McAleer v. Lewis (C. C. 1896) 75 Fed. 734; Cook v. Sterling Electric Co. (C. C. 1902) 118 Fed. 45 (decree affirmed [1907] 150 Fed. 766, 80 C. C. A. 502); Vacuum Oil Co. v. Eagle Oil Co. (C. C. 1903) 122 Fed. 105; Computing Scale Co. v. Moore (C. C. 1905) 139 Fed. 197.

A general replication waives all objection to the sufficiency of the answer. Slater v. Maxwell (1867) 73 U. S. (6 Wall.) 268, 18 L. Ed. 796.

Filing a replication and taking proofs waives no substantial insufficiency of the facts set forth in a plea or answer to constitute a defense. Butler Bros. Shoe Co. v. United States Rubber Co. (1907) 156 Fed. 1, 84 C. C. A. 167, writ of certiorari denied (1908) 29 Sup. Ct. 686, 212 U. S. 577, 53 L. Ed. 658.

A complainant in equity in a federal court joining issue and going to hearing without exception cannot move for decree because of insufficiency of the answer. Sprague v. Provident Savings & Trust Co. (1908) 163 Fed. 449, 90 C. C. A. 71.

Where complainant, instead of setting down the defendant's plea for argument, elects to reply thereto, denying the facts alleged, he admits its sufficiency, both in form and substance, as a defense to all the matter of the bill to which it is pleaded; and, if the facts upon the proofs taken are established, the bill will be dismissed. Myers v. Dorr (C. C. 1870) Fed. Cas. No. 9,988; Cottle v. Krementz (C. C. 1885) 25 Fed. 494.

If matters which should be included in a cross bill are set up in the answer, and no objection is made until the issues are determined upon evidence introduced by both parties, there is a waiver of the technical objection, and the court may grant affirmative relief upon the answer. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 827.

The waiver of an oath to the answer merely affects the evidential character and value of the answer, and does not operate as a waiver of complainant's right to except thereto for failure to answer interrogatories. National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C. 1897) 83 Fed. 26.

Complainant, by setting a suit down for hearing on bill and answer, waives all informalities and irregularities in the answer, which could only be reached by exceptions. Besson & Co. v. Goodman (C. C. 1906) 147 Fed. 887.

Under the rule that affirmative relief may be granted on an answer setting up matters proper for a cross-bill only where the case is heard on the merits without objection to the pleadings, the fact that complainant had replied to an answer claiming affirmative relief did not prevent it from objecting thereto before trial. U. S. v. Reese (C. C. 1909) 166 Fed. 347.

192. Objections to replication or want thereof.—The objection that no replication has been filed is not available in an appellate court. The omission to take objections in the court below is a waiver of them, and they are, moreover, within the provisions of the act of 1789 relating to jeofails. Clements v. Moore (1867) 73 U. S. (6 Wall.) 299, 18 L. Ed. 786.

A point cannot be first made in this court that no replication has been made to an answer in chancery, and therefore that the answer is to be taken as conclusively true in all points. If such a point is made, it should have been made in the court below. Fretz v. Stover (1874) 89 U. S. (22 Wall.) 198, 22 L. Ed. 769.

The want of a replication is waived by submission of the cause on pleadings and proofs. Central Bank v. Connecticut Mut. Life Ins. Co. (1881) 104 U. S. 54, 26 L. Ed. 693.

193. Objections to amendments.—The objection that an amended bill has been filed without leave of court is not available in the appellate court. Clements v. Moore (1867) 73 U. S. (6 Wall.) 299, 18 L. Ed. 786.

Where, on the sustaining of exceptions to an answer, an order is made granting the defendant leave generally to file an amended answer, to which order plaintiff consents, he cannot thereafter object that the order did not specify the particular amendment to be made, or authorize an amendment setting up a new defense. Stokes v. Farnsworth (C. C. 1900) 99 Fed. 836.

194. Want of verification.—Where the loss of a deed or other instrument is made the ground of jurisdiction in equity, and an affidavit of such loss is not annexed to the bill, and an objection is not taken, and defendant answers over to the bill or suffers a decree against him by default, the want of such affidavit is not ground for reversing the decree. Findlay v. Hinde (1828) 26 U. S. (1 Pet.) 241, 7 L. Ed. 128.

195. Objections on ground of variance.—Equity will regard a bill as stating the facts with sufficient clearness to justify the decree which the court below rendered on the pleadings and the evidence. Lusk v. Bush (1912) 199 Fed. 369, 117 C. C. A. 655.

Plaintiff's failure to plead estoppel was waived by defendant's failure to object on that ground to the introduction of evidence which established it. Id.

(R) Evidence

196. Rules of evidence in general.
197. Pleadings as evidence.
198. Answer as evidence.
199. —— Information and belief.
200. —— Responsiveness.
201. —— Waiver of answer under oath.
202. —— For or against codefendant.
203. —— Evidence to overcome answer.
204. Presumptions and burden of proof.
205. Admissibility.
206. Sufficiency.

196. Rules of evidence in general.—Parol testimony is in general inadmissible, both at law and in equity, to vary a written instrument. Hunt v. Rousmanier's Adm'rs (1823) 21 U. S. (8 Wheat.) 174, 5 L. Ed. 589.

Evidence as to confessions and statements by defendant not charged in the bill is equally admissible in equity as at law. Smith v. Burnham (C. C. 1837) Fed. Cas. No. 13,018; Jenkins v. Eldredge (C. C. 1844) Fed. Cas. No. 7,-266.

The rules of evidence, except the answer of the defendant, are the same in chancery as at law. Harmer v. Gwynne (C. C. 1851) Fed. Cas. No. 6,-075.

197. Pleadings as evidence.—Allegations in a pleading by a receiver of a national bank against the directors, charging them with negligence in permitting the cashier to manage the affairs of the bank without supervision, are not admissible against the successor of such receiver, in an action against him by a third party to establish a liability of the bank; the subject-matter of the two suits, as well as the parties, being different. School Dist. of City of Sedalia, Mo., v. De Weese (C. C. 1900) 100 Fed. 705.

Where a plea in bar is filed to a bill in equity before answer, and its averments are in conflict with those in the bill, the averments in the bill will control, though the plea is verified. Mutual Life Ins. Co. v. Blair (C. C. 1904) 130 Fed. 971.

198. Answer as evidence.—See, also, note under equity rule 41.

The answer of one defendant is not evidence against a codefendant. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136; Leeds v. Marine Ins. Co. (1817) 15 U. S. (2 Wheat.) 380, 4 L. Ed. 266. Unless his codefendant is his privy in estate, or claims through him. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136; Clark v. Van Riemsdyck (1815) 13 U. S. (9 Cranch) 153, 3 L. Ed. 688; Leeds v. Marine Ins. Co. of Alexandria (1817) 15 U. S. (2 Wheat.) 380, 4 L. Ed. 266; Osborn v. Bank of United States (1824) 22 U. S. (9 Wheat.) 738, 6 L. Ed. 204.

Only such facts set forth in an answer as are clearly responsive to the allegations of the bill will be considered as evidence in the cause. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136; Russell v. Clark (1812) 11 U. S. (7 Cranch) 69, 3 L. Ed. 271; Roach v. Summers (1873) 87 U. S. (20 Wall.) 165, 22 L. Ed. 252.

It is error in the orphans' court for the county of Washington, in the District of Columbia, to decide a cause against the answer of a defendant, if there is no evidence in the record contradicting such answer, and no replication has been filed. Gettings v. Burch (1815) 13 U. S. (9 Cranch) 372, 3 L. Ed. 763.

The weight of an answer by a corporation under their corporate seal is very much lessened, if not wholly destroyed, by not being under oath. Union Bank of Georgetown v. Geary (1831) 30 U. S. (5 Pet.) 99, 8 L. Ed. 60, affirming Garey v. Union Bank (C. C. 1827) Fed. Cas. No. 5,241a.

An answer to a bill in equity, not verified, performs only the office of a pleading, and is not evidence for any purpose. Patterson v. Gaines (1848) 47 U. S. (6 How.) 550, 12 L. Ed. 553.

The rule that an answer in chancery must be received as true does not extend to matters of affirmative defense. McCoy v. Rhodes (1850) 52 U. S. (11 How.) 131, 13 L. Ed. 634; Clements v. Moore (1867) 73 U. S. (6 Wall.) 299, 18 L. Ed. 786.

The plaintiff in a bill in equity claimed certain shares of bank stock, and alleged that the bank and other persons, all made defendants, set up some claim to the stock. The bank, in its answer, disclosed an apparently valid title to the stock, and neither the plaintiff nor the other defendants denied or introduced any evidence to control the title of the bank. Held, that the bank was entitled to a decree in its favor. Buckingham v. McLean (1851) 54 U. S. (13 How.) 151, 14 L. Ed. 91.

An answer in equity, responsive to the bill, and positively denying the facts charged, is entitled to so great weight, that, when confirmed by testimony even

of a kind not the most satisfactory, it will countervail a case which on its face is a suspicious one. Parker v. Phetteplace (1863) 68 U. S. (1 Wall.) 684, 17 L. Ed. 675.

Impertinent allegations in an answer cannot be used as evidence for defendant, though plaintiffs neglected to file their replication. Gunnell v. Bird (1869) 77 U. S. (10 Wall.) 304, 19 L. Ed. 913.

The rule of equity practice that when a defendant's answer, under oath, expressly negatives the allegations of the bill, and the testimony of one person only affirms them, the court will not decree in favor of the complainant, does not extend to so much of the answer as is not directly responsive to the bill. Seitz v. Mitchell (1876) 94 U. S. 580, 24 L. Ed. 179.

A defendant to a bill in equity, who states in his answer, under oath, the provisions of a writing which is presumed to be in his possession, cannot complain that the court acted upon his admission. Cavender v. Cavender (1885) 5 Sup. Ct. 955, 114 U. S. 464, 29 L. Ed. 212, affirming decree (C. C. 1881) 8 Fed. 641.

While a sworn answer in equity, where oath is not waived, becomes evidence of the facts well pleaded therein, allegations which are not of the facts themselves, but rather of the construction placed on such facts by the pleader, do not preclude the court from resorting to such facts, and placing its own construction thereon. Northern Pac. Ry. Co. v. Boyd (1910) 177 Fed. 804, 101 C. C. A. 18, affirming decree Boyd v. Northern Pac. Ry. Co. (C. C. 1909) 170 Fed. 779, and decree affirmed (1913) 33 Sup. Ct. 554, 228 U. S. 482, 57 L. Ed. 931.

The answer in a suit to enforce a mechanic's lien under the Alaska Code is admissible in evidence as in ordinary cases in chancery. Pioneer Mining Co. v. Delamotte (1911) 185 Fed. 752, 108 C. C. A. 90.

If a corporation's answer, when verified by an officer, is evidence under the equity rule, it is not available to prove an affirmative defense. Coca Cola Co. v. Gay-Ola Co. (1912) 200 Fed. 720, 119 C. C. A. 164.

An answer admitting the right of complainant, but setting up new matter in bar, or an affirmative claim, or averring a discharge, is not evidence in defendant's favor. Tilghman v. Tilghman (C. C. 1832) Fed. Cas. No. 14,045.

An answer in equity, although under oath, is not evidence for defendant, in so far as it sets up new facts by way of avoidance of the matters averred in the bill; but such allegations must be proved by evidence aliunde. Pennsylvania Co. v. Cole (C. C. 1904) 132 Fed. 668.

199. —— Information and belief.—A denial expressly based on want of knowledge, information, or belief, although contained in a sworn answer, is not evidence in the case, and its only effect is to require the complainant to make some proof on the point. Hanchett v. Blair (C. C. A. 1900) 100 Fed. 817.

The answer of a defendant who has no personal knowledge of the facts alleged, though responsive to the bill, is not evidence. Dutilh v. Coursault (C. C. 1837) Fed. Cas. No. 4,206; White v. Jones (D. C. 1873) Fed. Cas. No. 17,-550.

A defendant may answer an allegation in a bill that he has no knowledge, information, or belief concerning the same, and the effect is to leave the matter to be proven by the plaintiff; but such answer is not equivalent, as evidence to a denial of the fact alleged, nor can the defendant add a direct denial thereof to his answer that he has not even a belief on the subject. The Holladay Case (C. C. 1886) 27 Fed. 830.

General allegations in an answer, made on information and belief, without verifying circumstances of time, place, or amount, even when responsive to the bill, are not entitled to much weight as evidence. Allen v. O'Donald (C. C. 1886) 28 Fed. 17, decree affirmed Cross v. Allen (1891) 12 Sup. Ct. 67, 141 U. S. 528, 35 L. Ed. 843.

200. —— Responsiveness.—An answer which is responsive to the bill, and denies its allegations, must be taken as true, in the absence of evidence contradictory thereof. Childs v. N. B. Carlstein Co. (C. C. 1896) 76 Fed. 86; Reid v. McCallister (C. C. 1885) 49 Fed. 16. But an allegation in an answer, which is not responsive to the bill, is not evidence. Gernon v. Boccaline (C. C. 1808) Fed. Cas. No. 5,366; Randall v. Phillips (C. C. 1824) Fed. Cas. No. 11,555; Robinson v. Cathcart (C. C. 1825) Fed. Cas. Nos. 11,946, 11,947; Flagg v. Mann (C. C. 1837) Fed. Cas. No. 4,847; Wren v. Spencer Optical Mfg. Co. (C. C. 1879) Fed. Cas. No. 18,062; Allen v. O'Donald (C. C. 1886) 28 Fed. 17 (decree affirmed Cross v. Allen [1891] 12 Sup. Ct. 67, 141 U. S. 528, 35 L. Ed. 843).

The rule that responsive allegations in the answer to a bill in equity are conclusive evidence in favor of the respondent, unless overcome by the testimony of two witnesses, or their equivalent, cannot be invoked when the answer is upon information and belief, or is discredited by circumstances. Berry v. Sawyer (C. C. 1882) 19 Fed. 286.

201. —— Waiver of answer under oath.—The waiver by a complainant in equity of an answer under oath does not take away the right to answer under oath, and such answer, so far as responsive to the bill, must, upon motion for a preliminary injunction made upon bill and answer, be taken as true.

Woodruff v. Dubuque & S. C. R. Co. (C. C. 1887) 30 Fed. 91.

A defendant in a bill for discovery and relief, whose oath has been waived, is not thereby excused from answering, and the only effect of dispensing with the oath is to deprive him of the benefit of his own declarations. Admissions contained in such answers are evidence against him. Uhlmann v. Arnholt & Schaeffer Brewing Co. (C. C. 1890) 41 Fed. 369.

Matter contained in an answer made under oath, when an oath thereto is waived in the bill, is not evidence for the respondent after replication and proofs, even when the respondent has died since the answer filed. Treadwell v. Lenning (C. C. 1892) 50 Fed. 872.

Where a bill for injunction waives the oath of respondents, an answer, under oath, denying all the equities of the bill, can be used at the hearing with probative force of an affidavit alone. U. S. v. Workingmen's Amalgamated Council of New Orleans (C. C. 1893) 54 Fed. 994, 26 L. R. A. 158, order affirmed Workingmen's Amalgamated Council of New Orleans v. U. S. (1893) 57 Fed. 85, 6 C. C. A. 258.

If a plaintiff in equity is unwilling that the answer should be evidence against him, he must expressly waive the oath of the defendant in his bill. Conley v. Nailor (D. C. 1886) 6 Sup. Ct. 1001, 118 U. S. 127, 30 L. Ed. 112.

202. —— For or against codefendant.—The answer of a defendant though good evidence against him, is not admissible against a codefendant. Robinson v. Cathcart (C. C. 1825) Fed. Cas. No. 11,946; Dexter v. Arnold (C. C. 1837) Fed. Cas. No. 3,859; Lenox v. Notrebe (Super. Ct. Ark. 1834) Fed. Cas. No. 8,246.

The separate answer of one defendant is not evidence as against a codefendant unless the defendants' admissions out of court would be evidence against each other. Dick v. Hamilton (C. C. 1867) Fed. Cas. No. 3,890. But such rule does not apply where the defendants are all partners in the same transaction. Van Reimsdyk v. Kane (C. C. 1813) Fed. Cas. No. 16,872.

203. —— Evidence to overcome answer.—An answer under oath, denying the allegations of the bill, must be overcome by the testimony of two witnesses, or by one witness and corroborative circumstances. Lenox v. Prout (1818) 16 U. S. (3 Wheat.) 520, 4 L. Ed. 449; Hughes v. Blake (1821) 19 U. S. (6 Wheat.) 453, 5 L. Ed. 303 (affirming [C. C. 1818] Fed. Cas. No. 6,845); Union Bank v. Geary (1831) 30 U. S. (5 Pet.) 98, 8 L. Ed. 60 (affirming Garey v. Union Bank [C. C. 1827] Fed. Cas. No. 5,241a); Carpenter v. Providence Washington Ins. Co. (1846) 45 U. S. (4 How.) 185, 11 L. Ed. 931; Vigel v. Hopp (1881) 104 U. S. 441, 26 L. Ed. 765; Morrison v. Durr (1887) 7 Sup. Ct. 1215, 122 U. S. 518, 30 L. Ed. 1225; Campbell v. Northwest Eckington Imp. Co. (1913) 33 Sup. Ct. 796, 229 U. S. 561, 57 L. Ed. 1330 (reversing decree [1911] 36 App. D. C. 149); Peeler v. Lathrop (1891) 48 Fed. 780, 1 C. C. A. 93; Jacobs v. Van Sickle (1903) 127 Fed. 62, 61 C. C. A. 598 (affirming decree [C. C. 1903] 123 Fed. 340); Kennedy v. Custer (1909) 174 Fed. 972, 98 C. C. A. 584; Higbie v. Hopkins (C. C. 1805) Fed. Cas. No. 6,466; Gernon v. Boccaline (C. C. 1808) Fed. Cas. No. 5,366; Searcy v. Pannell (C. C. 1812) Fed. Cas. No. 12,584; Hughes v. Blake (C. C. 1818) Fed. Cas. No. 6,845; Harper v. Dougherty (C. C. 1822) Fed. Cas. No. 6,087; Daniel v. Mitchell (C. C. 1840) Fed. Cas. No. 3,562; Langdon v. Goddard (C. C. 1842) Fed. Cas. No. 8,060; Cushing v. Smith (C. C. 1844) Fed. Cas. No. 3,511; Gould v. Same (C. C. 1844) Fed. Cas. No. 5,637; Clark v. Hackett (C. C. 1859) Fed. Cas. No. 2,823; Delano v. Winsor (C. C. 1860) Fed. Cas. No. 3,754; Parker v. Phetteplace (C. C. 1861) Fed. Cas. No. 10,746; Badger v. Same (C. C. 1862) Fed. Cas. No. 718; Walker v. Derby (C. C. 1870) Fed. Cas. No. 17,068; Powden v. Johnson (C. C. 1878) Fed. Cas. No. 11,353; Slessinger v. Buckingham (C. C. 1883) 17 Fed. 454; Walcott v. Watson (C. C. 1892) 53 Fed. 429; Calivada Colonization Co. v. Hays (C. C. 1902) 119 Fed. 202.

Sufficiency of testimony and corroborating circumstances to overcome answer, see Clark v. Van Riemsdyke (1815) 13 U. S. (9 Cranch) 153, 3 L. Ed. 688; Patterson v. Gaines (1848) 47 U. S. (6 How.) 550, 12 L. Ed. 553; Tobey v. Leonards (1864) 69 U. S. (2 Wall.) 423, 17 L. Ed. 842; Slater v. Maxwell (1867) 73 U. S. (6 Wall.) 268, 18 L. Ed. 796; Samuel Bros. & Co. v. Hostetter Co. (1902) 118 Fed. 257, 55 C. C. A. 111; Coonrod v. Kelly (1902) 119 Fed. 841, 56 C. C. A. 353; Snow v. Hazlewood (1907) 157 Fed. 898, 86 C. C. A. 226 (writ of certiorari denied [1903] Hazlewood v. Snow [1908] 28 Sup. Ct. 762, 210 U. S. 434, 52 L. Ed. 1136); Kirkpatrick v. McBride (1912) 202 Fed. 144, 120 C. C. A. 322 (decree modified on rehearing [1913] 203 Fed. 449, 120 C. C. A. 328); Hayward v. Eliot Nat. Bank (C. C. 1874) Fed. Cas. No. 6,273; Berry v. Sawyer (C. C. 1884) 19 Fed. 286; Cady v. Barnes (D. C. 1913) 208 Fed. 361.

The testimony of two witnesses, or its equivalent, to support an allegation in a bill, though denied by a sworn answer, is not required, where such denial is made for want of sufficient knowledge, information, or belief on the part of defendant as to the fact alleged: the only effect of such denial being to require some proof on the point. Savings & Loan Soc. v. Davidson (1899) 97 Fed. 696, 38 C. C. A. 365 (affirming

decree Sanford v. Savings & Loan Soc. [C. C. 1893] 80 Fed. 54; Blair v. Silver Peak Mines (C. C. 1899) 93 Fed. 332 (denying rehearing [C. C. 1898] 84 Fed. 737).

204. Presumptions and burden of proof.—If the answer of the defendant admits a fact alleged in the bill, but insists on matter of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. Clarke v. White (1838) 37 U. S. (12 Pet.) 178, 9 L. Ed. 1046.

In a suit in equity to impeach the validity of a note and deed of trust, as forgeries, held that the issue is one entirely of fact, in which the burden of proof is upon the plaintiffs. Cissel v. Dutch (1888) 8 Sup. Ct. 829, 125 U. S. 171, 31 L. Ed. 642.

Equity will not presume a ratification of a fraudulent contract by the injured party. Northern Pac. R. Co. v. Kindred (C. C. 1881) 14 Fed. 77.

Where a bill is filed to subject real estate to the payment of debts of the ancestor of defendant, the failure of plaintiff to present his claim when the estate was administered was evidence of laches, placing the burden on plaintiff to excuse the same. Chewett v. Moran (C. C. 1883) 17 Fed. 820.

Besides the ordinary burden of proof which rests upon every litigant who holds the affirmative of an issue, there is in this class of cases the additional burden of overcoming the strong presumption created by the contract itself. Harrison v. Hartford Fire Ins. Co. (C. C. 1887) 30 Fed. 862.

Where an insurance company procures an injunction in the federal court, restraining a policy holder from suing on the policy until after the time limited thereby for such suit, and defendant, by cross bill, asks to recover the amount of the loss under the policy, the court will presume, in determining whether such affirmative relief can be granted in equity, that, if it denies such relief, a state court, in which an action at law on the policy would have to be brought, would enforce the limitation, notwithstanding the injunction, and defeat recovery. North British & Mercantile Ins. Co. v. Lathrop (C. C. 1894) 63 Fed. 508.

205. Admissibility.—Equity, to determine whether a written instrument is, in effect, a mortgage, hears parol evidence, not to contradict or vary the terms of the instrument, but to raise an equity superior to it, and give it effect according to the true intent and purpose of the parties. Pioneer Gold-Min. Co. v. Baker (C. C. 1885) 23 Fed. 258.

An offer of evidence touching a fact which is admitted to be true by the answer will be refused. Robinson v. Philadelphia & R. R. Co. (C. C. 1886) 28 Fed. 577.

In equity, the fact that a witness testifying as an expert is not properly qualified goes to the weight, and not to the admissibility, of his testimony. Stegner v. Blake (C. C. 1888) 36 Fed. 183.

Parol evidence is admissible in equity to show that a deed absolute was intended as a mortgage, having been placed in escrow, accompanied by a written agreement authorizing redemption by making certain payments. Lewis v. Wells (D. C. 1898) 85 Fed. 896.

206. Sufficiency.—A written instrument will not be reformed upon the ground of mistake unless the same be made out by the clearest and most unequivocal evidence. U. S. v. Munroe (C. C. 1830) Fed. Cas. No. 15,835.

Satisfactory proof may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter. Parker v. Phetteplace (C. C. 1861) Fed. Cas. No. 10,746.

Allegation that a defendant fraudulently procured filing of cross-bill without the knowledge of the complainant, and procured the default of defendants and entry of a decree, and fraudulently imposed on the court in filing cross-bill and obtaining a decree, held not sustained. Dunlevy v. Dunlevy (C. C. 1889) 38 Fed. 459.

Evidence held insufficient to establish fraud on the part of defendant national bank in the organization or operation of a corporation, or any action of the bank which rendered it liable in equity to complainant on the contracts of such corporation. Edward P. Allis Co. v. Standard Nat. Bank (1903) 124 Fed. 55, 59 C. C. A. 575.

Fraud justifying relief in equity must be strictly proved. Rice v. Wilson (D. C. 1915) 225 Fed. 159.

(S) Taking and filing proofs

207. Taking in general.
208. Time for taking.
209. Extension of time and reopening proofs.
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221. Objections to evidence.

Mode of taking depositions, see § 1476, ante.

Mode of proof, see § 1470, ante.

See rules 47–55, ante, pp. 2516–2520.

207. Taking in general.—Practice as to taking testimony in equity causes, see Potter v. Beal (1892) 50 Fed. 860, 2 C. C. A. 60; Bischoffscheim v. Baltzer (C. C. 1882) 10 Fed. 1; U. S. v. American Bell Tel. Co. (C. C. 1889)

39 Fed. 230; Board of Trade of City of Chicago v. Tucker (D. C. 1913) 202 Fed. 288; Bronson v. La Crosse & M. R. Co. (D. C. 1861) Fed. Cas. No. 1,-930.

208. Time for taking.—See rule 47, ante, p. 2516; Ingle v. Jones (1869) 76 U. S. (9 Wall.) 486, 19 L. Ed. 621; Mellus v. Howard (C. C. 1855) Fed. Cas. No. 9,403; Wooster v. Clark (C. C. 1881) 9 Fed. 854; Sharon v. Hill (C. C. 1884) 22 Fed. 28; Wenham v. Switzer (C. C. 1891) 48 Fed. 612; Coosaw Min. Co. v. Farmers' Min. Co. (C. C. 1895) 67 Fed. 31.

209. Extension of time and reopening proofs.—The time to take testimony extended where such testimony, if admissible under the answer, applies equally to other cases in which the time to put in proofs has not expired. Wooster v. Howe Sewing Mach. Co. (C. C. 1882) 10 Fed. 666.

Where a defendant answers and demurs, but takes no testimony in support of his answer, and elects to go to a hearing upon his demurrer, leave will not be granted to open proofs upon overruling the demurrer. Orendorf v. Budlong (C. C. 1882) 12 Fed. 24.

When a party's time to take his testimony has expired without its being taken, the court may, on cause shown, allow the testimony to be taken and filed nunc pro tunc. Coon v. Abbott (C. C. 1888) 37 Fed. 98.

Where, in a patent infringement suit, the time for taking testimony has expired, pending the decision of another suit upon the same patent, leave to take further testimony will not be allowed when neither the general nor the particular facts to which the witnesses will testify are given, and no circumstances are stated showing the character or importance of the testimony or why it was not introduced before. Streat v. Steinam (C. C. 1889) 38 Fed. 548.

On defendant's motion for further extension of time for taking testimony, it appeared that complainant's counsel, resident in Hartford, Conn., was in attendance at Cincinnati from February 28th to March 14th, to be present at the taking of defendant's evidence, but that defendant took no evidence except on the first two and last five of those days; four of the latter days being occupied by an expert in answering a single question, without assistance from counsel. Held, that defendant was not entitled to an extension of time for taking additional expert testimony. Allington & Curtis Manuf'g Co. v. Globe Co. (C. C. 1896) 73 Fed. 394.

Where depositions taken in rebuttal, in a suit in equity in a federal court, contain testimony properly in rebuttal, and also additional evidence in support of the main case, the defendant is entitled, on a proper showing to an extension of time, to take testimony to meet such new evidence. West Pub. Co. v. Edward Thompson Co. (C. C. 1907) 152 Fed. 1019.

210. Place of taking.—An examiner of the circuit court for the southern district of New York cannot take testimony outside of his district. Celluloid Mfg. Co. v. Russell (C. C. 1888) 35 Fed. 17.

The mere fact that it is generally advantageous to examine experts orally is not a sufficient reason to justify an order appointing a special examiner to take their testimony orally outside the district. Magone v. Colorado Smelting & Mining Co. (C. C. 1905) 135 Fed. 846.

A federal court has no power to order an examiner appointed to take testimony in an equity case to remove to another district, for use there in examining witnesses, books and documents which have been produced before him by witnesses within the district, obedient to subpœnas duces tecum, and which are merely in his custody temporarily by courtesy. Pepper v. Rogers (C. C. 1905) 137 Fed. 173.

In contempt proceedings for violation of an injunction, an order of the federal court in the western district of New York appointing a special examiner "to take testimony within or without this district" conferred authority on complainant to take testimony in Pittsburg. Board of Trade of City of Chicago v. Tucker (D. C. 1913) 202 Fed. 288.

211. Rebuttal and surrebuttal.—Leave will be granted a defendant to take testimony in surrebuttal to show that decrees put in evidence in rebuttal, which appear upon their face to show a decision by the court after opposition, were not in fact so rendered. Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co. (C. C. 1898) 89 Fed. 593.

Notice of a motion for leave to take testimony in surrebuttal should set forth specifically the precise facts which the applicant desires to prove. Id.

Leave granted defendant in a suit for infringement of a patent to take certain testimony in surrebuttal. Leonard v. Cutler-Hammer Co. (C. C. 1907) 154 Fed. 920.

212. Examiners.—The federal circuit courts have power to appoint examiners, and it is within their discretion to appoint the standing examiners, or designate others. Van Hook v. Pendleton (C. C. 1848) Fed. Cas. No. 16,852.

Examiner's fees are restricted in the second circuit to $3 a day, and 30 cents a folio for typewritten testimony. Edison Electric Light Co. v. Mather Electric Co. (D. C. 1894) 63 Fed. 559.

213. Notice of taking.—On a motion for a preliminary injunction, where either party desires to take the testi-

mony of an unwilling witness, written application should be made to the court, and notice given to the other side. The court will then, if the application be a proper one, appoint an examiner to take such testimony. Hammerschlag Mfg. Co. v. Judd (C. C. 1886) 26 Fed. 292.

214. Examination of witnesses.—A mere witness not a party to a suit cannot be compelled to answer interrogatories attached to the bill. First State Bank of Milliken v. Spencer (C. C. A. 1915) 219 Fed. 503.

Witnesses before an examiner will be compelled to answer, when it seems probable the testimony may be relevant; but care will be exercised to avoid unnecessary and improper inquiry into private affairs. Robinson v. Philadelphia & R. R. Co. (C. C. 1886) 28 Fed. 340.

A witness cannot be excused from answering a question because deemed immaterial by the court, as the party is entitled to have the testimony in the record for use on appeal. Parisian Comb Co. v. Eschwege (C. C. 1899) 92 Fed. 721.

Under the rule of Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521, the parties to a suit in equity in a federal court are entitled to great latitude in the examination of witnesses, to the end that the court of last resort may have a complete record on which it may finally dispose of the cause, and objections for irrelevancy and immateriality are not to be considered. Continental Securities Co. v. Interborough Rapid Transit Co. (C. C. 1910) 183 Fed. 132.

Where witnesses are being examined before a special examiner in support of a contempt proceeding for violation of an injunction, relief against any unfair conduct of the examination should be had by application to the court in the jurisdiction where the examination is being conducted. Board of Trade of City of Chicago v. Tucker (D. C. 1913) 202 Fed. 288.

215. —— Cross-examination.—Where complainants' notice for the taking of testimony signifies a desire that the testimony be taken orally, defendants will be allowed to cross-examine complainants' foreign witness orally if they so elect, immediately following the close of the direct examination. Edison Electric Co. v. Westinghouse, Church, Kerr & Co. (C. C. 1890) 138 Fed. 460.

Where defendants elect to cross-examine complainants' foreign witness orally, complainants will be given leave to withdraw direct interrogatories filed by them, and examine the witness orally. Id.

Where, in the taking of testimony for use at a trial, irrelevant or otherwise improper cross-examination is indulged in, the questions should ordinarily be answered, and the error dealt with as a question of costs. Brown v. Worster (C. C. 1902) 113 Fed. 20.

In taking testimony before an examiner for use on a trial, where there is a doubt as to the relevancy or propriety of a question asked on cross-examination, the witness should be required to answer. Whitehead & Hoag Co. v. O'Callahan (C. C. 1904) 130 Fed. 243.

216. Production of documents.—Books and records of a rival exchange should not be required in proceedings to punish defendants for contempt in violating an injunction, if no relevant testimony is introduced with reference thereto. Board of Trade of City of Chicago v. Tucker (D. C. 1913) 202 Fed. 288.

217. Depositions in general.—In a case falling within Act March 3, 1865, the evidence of the party cannot be taken and admitted under equity rule 70, on the ground that the witnesses are old and infirm. Eslava v. Mazange's Adm'r (C. C. 1871) Fed. Cas. No. 4,527.

That a cause is not on the trial calendar is not sufficient for refusing to permit a party to take depositions, where it has been kept off by stipulation to await the disposition of preliminary motions and not through the default of either party. United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C. 1914) 217 Fed. 175.

218. Suppression of testimony.—The action of an examiner in adjourning the hearing after a witness is tendered for cross-examination is final, and, if the party who offered the witness refuses to produce him for cross-examination, his testimony in chief will be suppressed. Shapleigh v. Chester Electric Light & Power Co. (C. C. 1891) 47 Fed. 848.

A motion to suppress depositions taken in rebuttal, on the ground that the testimony therein is also in chief, must be overruled if any part of such testimony is proper in rebuttal and if the rebuttal testimony cannot be separated from that which is not rebuttal. West Pub. Co. v. Edward Thompson Co. (C. C. 1907) 152 Fed. 1019.

Testimony taken in rebuttal will not be suppressed, on motion or objection of defendant on the ground that it was not proper rebuttal testimony, after the defendant has by leave of court taken testimony in surrebuttal. American Bank Protection Co. v. City Nat. Bank of Johnson City, Tenn. (C. C. 1909) 181 Fed. 375.

219. Filing proofs.—Where the parties stipulate that testimony may be taken before any officer or magistrate, qualified to administer oaths, without special appointment by the court as an examiner, the depositions thus taken must be filed of record, as required by equity rule 67, in cases where an examiner is regularly appointed; and the party in whose behalf the testimony was taken has no right to suppress it.

J. L. Mott Iron Works v. Standard Mfg. Co. (C. C. 1891) 48 Fed. 345.

Where defendant fails to pay the examiner's fees, plaintiff cannot compel defendant's proofs to be filed without paying such fees. Frese v. Biedenfeld (D. C. 1878) Fed. Cas. No. 5,111.

220. Publication.—Where complainant's testimony has all been taken by commission, the evidence will be published before defendant opens his case, with proper precautions that he does not deprive complainant of any advantage he may enjoy by reason of defendant's laches, so that defendant may know whether or not complainant has made out his whole case in chief. Eillert v. Craps (C. C. 1891) 44 Fed. 792.

221. Objections to evidence.—Where a release obtained, pending a bill in equity, by one party from the other, was filed in the cause by the defendant, no exception being taken thereto, and both parties afterwards treating it as regularly in the case, and the plaintiff taking evidence to avoid the release, by showing that it was obtained by duress, it was held that no objection could afterwards be made to the manner of its introduction, and that it had the same effect as if it had been introduced by a cross-bill or supplemental answer. Kelsey v. Hobby (1842) 41 U. S. (16 Pet.) 269, 10 L. Ed. 961.

When a witness has been cross-examined by a party, with a full knowledge of an objection to his competency, he will not be allowed to raise the objection at the hearing. Flagg v. Mann (C. C. 1837) Fed. Cas. No. 4,847.

An objection to the competency of a witness cannot be made after publication, if the incompetency was known before the commission issued. Gass v. Stinson (C. C. 1837) Fed. Cas. No. 5,261.

On an examination to test the credibility of a witness after publication and before the hearing, the interrogatories should be so framed as not to call for evidence on the merits. Id.

Proper practice to test the competency of a witness who has previously testified, after the cause has been referred to a master by interlocutory decree. Id.

An objection to evidence attacking a deed of confirmation set up in the answer in defense of a bill to set aside a conveyance for fraud, on the ground that its validity was not put in issue, is too late when first taken at the hearing. Bunnel v. Stoddard (C. C. 1866) Fed. Cas. No. 2,135.

Where evidence has been taken and filed out of time, but no motion to suppress has been filed, it may be considered. Matthews v. Spangenberg (C. C. 1882) 19 Fed. 823.

The rule in chancery is that, if the testimony was competent when the deposition was taken and filed, it remains competent, and the subsequent death of the party does not affect its use on the trial. The administrator merely takes up the case as it stood when the intestate party died. Sheidley v. Aultman (C. C. 1883) 18 Fed. 666.

Where a party takes evidence plainly inapplicable to any legitimate issues involved, and for a purpose foreign to the litigation, such evidence will, on motion, be stricken out, and costs imposed on the offending party. Griffith v. Shaw (C. C. 1898) 89 Fed. 313.

Under the rules governing appeals in equity, requiring all the evidence, though excluded by the trial court, to be incorporated in the record on appeal, a circuit court has no authority to deny a party the right to take testimony because it deems such testimony irrelevant. Fayerweather v. Ritch (C. C. 1898) 89 Fed. 529.

The interruption of proceedings before an examiner for the purpose of obtaining the opinion of the court on questions raised is not, in general, to be encouraged, but ordinarily the objection should merely be noted and considered on the hearing. De Roux v. Girard (C. C. 1898) 90 Fed. 537.

A federal court will not pass upon questions of the relevancy or materiality of evidence during the examination of a witness before an examiner on a motion to compel an answer, but the proper practice is for the answer to be taken, and incorporated in the record, together with the objection thereto, which will be reserved for final hearing. Maxim-Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co. (C. C. 1900) 103 Fed. 39.

In a suit in equity for infringement of a patent, the question of the relevancy as well as the legal effect of evidence is necessarily reserved until the final hearing and the failure to object to its introduction does not preclude an objection to its relevancy on the hearing. Diamond Drill & Machine Co. v. Kelly Bros. (C. C. 1902) 120 Fed. 282, decree affirmed Kelley Bros. & Spielman v. Diamond Drill & Machine Co. (1903) 123 Fed. 882, 59 C. C. A. 370, decree affirmed on rehearing Kelley v. Same (1904) 129 Fed. 756, 64 C. C. A. 284, writ of certiorari denied (1905) 25 Sup. Ct. 802, 198 U. S. 584, 49 L. Ed. 1173.

Where evidence is taken before an examiner, and it is sought to introduce letters from a husband to his wife, found in the possession of the wife's administrator, after both are dead, the letters, even if privileged under Code Civ. Proc. Cal. § 1881, prohibiting the examination of a husband or wife, during or after marriage, as to communications between them during marriage, should be produced before the examiner

and made part of the record, under the rule of equity practice which requires that evidence objected to and ruled out shall be incorporated in the records, in order that the court may pass upon the records, and this is especially necessary, where the letters constitute the primary evidence of a fact in issue, since, if presented to the court and rejected, the foundation would then be laid for secondary evidence. Lloyd v. Pennie (D. C. 1892) 50 Fed. 4.

(T) Discovery

222. Interrogatories.
223. Cross-bill.
224. Answers to interrogatories—Necessity.
225. —— Waiver of answer under oath.
226. —— Sufficiency.
227. Production and inspection of documents.

See rule 58, ante, p. 2520.
See, also, notes under § 1469, ante.

222. Interrogatories.—A complainant is entitled to a discovery of such documents and facts only as will aid in the maintenance of his title or cause of action. Interrogatories which go beyond this, and seek disclosure of a title or claim of the defendant having no relation to complainant's title or cause of action, are inquisitorial and unwarranted. Kelley v. Boettcher (1898) 85 Fed. 55, 29 C. C. A. 14.

An interrogatory, not so full and precise as it should have been, held still sufficient to call for a full answer to its plain import. Langdon v. Goddard (C. C. 1843) Fed. Cas. No. 8,061.

A bill which requires an answer must contain interrogatories. Wilson v. Stolley (C. C. 1847) Fed. Cas. No. 17,-839.

Interrogatories are not to be framed and limited upon the theory that everything stated in the bill is precisely and in every detail true. Chicago, St. L. & N. O. R. Co. v. Macomb (C. C. 1880) 2 Fed. 18.

Interrogatories in the bill seeking to compel respondents to make discovery, and annex copies of correspondence with persons not parties, for the purpose of developing the system by which they carried on the business of loaning money, are improper, and should be stricken out. Alexander v. Mortgage Co. of Scotland (C. C. 1891) 47 Fed. 131.

Where a bill charges that a corporation is practically the same concern under a corporate organization as a partnership, which is charged with the breach of a certain agreement, and the transfer of such agreement to the corporation, it is permissible to inquire, with the object of connecting the two organizations, into the circumstances connected with the creation of the corporation, and the number of its shares which were acquired by the members of the partnership. Gormully & Jeffery Manuf'g Co. v. Bretz (C. C. 1894) 64 Fed. 612.

Interrogatories must be confined to the matters set up in the bill. Id.

In a patent infringement suit, where one of the issues is as to infringement or noninfringement, interrogatories attached to the bill, which require disclosures going directly to this issue, cannot be objected to on the theory that the bill is for a discovery in aid of an accounting, and that, if any of the defenses set up prevail, the answers would be unnecessary, and therefore ought not to be required at that stage of the case. National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C. 1897) 83 Fed. 26.

A discovery may be had on a supplemental bill, where the facts called for are within the knowledge of defendants, and are material and incidental to the relief sought in the suit. Napier v. Westerhoff (C. C. 1907) 153 Fed. 985.

223. Cross-bill.—A cross-bill seeking discovery from complainant is unnecessary. Heath v. Erie Ry. Co. (C. C. 1872) Fed. Cas. No. 6,307.

224. Answers to interrogatories—Necessity.—See Fuller v. Knapp (C. C. 1885) 24 Fed. 100; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C. 1897) 83 Fed. 26; Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co. (D. C. 1912) 194 Fed. 172.

In an action against persons to enforce a conveyance of certain trust estates and for an account, defendants must answer all interrogatories in relation to the title to the estate and their dealings therewith. Ross v. Gibson (C. C. 1831) Fed. Cas. No. 12,074.

Defendant must either call for proof or admit or waive all controversy as to facts stated in the bill to which he is interrogated. Brooks v. Byam (C. C. 1840) Fed. Cas. No. 1,947.

Defendants are required to answer specifically such interrogatories only as by the note thereunder written they are requested to do. Others may be answered as specifically as the stating part of the bill charges. Buerk v. Imhaeuser (C. C. 1882) 10 Fed. 608.

A complainant cannot interrogate as to matters which he has not put in issue, although he may expand his interrogatories so as to cover every incident of the facts as alleged. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer, and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories. Fuller v. Knapp (C. C. 1885) 24 Fed. 100.

A defendant cannot defeat a full discovery by denying that the evidence will be of assistance to complainant. It is only when it can be seen that the

interrogations, if answered affirmatively, would not assist the complainant in establishing his cause of action, that answers will be dispensed with. Anderson v. Kissam (C. C. 1886) 28 Fed. 900.

A prayer that each of the defendants may be required to answer unto the premises, in a bill for relief, being a good general interrogatory, complainants are entitled to an answer to every material allegation of their bill. McClaskey v. Barr (C. C. 1889) 40 Fed. 559.

A mere statement in argument by defendant's counsel of a reason for declining to answer an interrogatory is not sufficient. The facts which entitle him to protection from answering must be fully stated in the answer. Slater v. Banwell (C. C. 1892) 50 Fed. 150.

Defendant in a suit for accounting, raising by plea to the jurisdiction an issue of fact, as to the amount in dispute, may be required to answer interrogatories in the bill pertinent to the averment of the plea, before the litigation proceeds further. Playford v. Lockard (C. C. 1895) 65 Fed. 870.

Statements in an answer in excuse of the failure of defendant to answer interrogatories contained in the bill, framed under equity rule 44, should be as specific in setting out the grounds for such refusal as would be required in a demurrer for the same purpose. Boyer v. Keller (C. C. 1902) 113 Fed. 580.

A defendant cannot be required to answer an interrogatory requiring it to state how an article manufactured by it is constructed if not constructed as charged in the bill, where it states that such construction is a trade secret. Federal Manufacturing & Printing Co. v. International Bank Note Co. (C. C. 1902) 119 Fed. 385.

Defendants in a suit in equity cannot be required to answer interrogatories by stating facts necessary to complainant's case, but which are not within their knowledge and which they can only ascertain by a tedious and expensive investigation outside of their own records. John D. Parks & Sons Co. v. Bruen (C. C. 1906) 147 Fed. 884.

Though a corporation is not bound to answer under oath, it is bound to make discovery. Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co. (D. C. 1912) 194 Fed. 172.

225. —— **Waiver of answer under oath.**—Upon a bill in equity which waives an oath to the answer, the complainant cannot have discovery. Tillinghast v. Chace (C. C. 1903) 121 Fed. 435; McFarland v. State Sav. Bank (C. C. 1904) 132 Fed. 399; Victor G. Bloede Co. of Baltimore City v. Carter (C. C. 1906) 148 Fed. 127; Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579; Calahan v. Holland-Cook Mfg. Co. (D. C. 1912) 201 Fed. 607.

Where complainant filed a bill for an accounting and foreclosure of a mechanic's lien, the fact that the bill waived an answer under oath did not amount to a waiver of complainant's right to discovery. Utah Const. Co. v. Montana R. Co. (C. C. 1906) 145 Fed. 981.

226. —— **Sufficiency.**—See Hatch v. Bancroft-Thompson Co. (C. C. 1895) 67 Fed. 802; Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co. (D. C. 1912) 194 Fed. 172.

When required by the bill, interrogatories must be answered as to information and belief as well as to knowledge. Kittredge v. Claremont Bank (C. C. 1845) Fed. Cas. Nos. 7,858 (C. C. 1846) 7,859.

A general answer is sufficient for general allegations. Defendant will be required to answer specifically only specific interrogatories. Parsons v. Cumming (C. C. 1871) Fed. Cas. No. 10,775.

Since parties have been made competent as witnesses, the answer to a bill in equity is no longer required to conform to the old rules as to the sufficiency of an answer to a bill of discovery. Field v. Hastings & Bradley Co. (C. C. 1895) 65 Fed. 279.

Where defendants undertook to answer a bill for discovery, they were required to state whether they had knowledge or information respecting the matter alleged in the bill, and, if they had no knowledge or information sufficient to form a belief, they were not required to state their belief. Victor G. Bloede Co. of Baltimore City v. Carter (C. C. 1906) 148 Fed. 127.

227. **Production and inspection of documents.**—The only issue between plaintiff and defendants in a suit in equity was whether a trust fund, received by defendants under certain agreements made between plaintiff and some of the defendants and between plaintiff and a third party, was appropriated by them pursuant to the agreements. Held, that the production by plaintiff of books and documents relating to transactions prior to the date of the agreements would not be compelled. Bischoffsheim v. Brown (C. C. 1886) 29 Fed. 341.

Production of documents, see West Pub. Co. v. Edward Thompson Co. (C. C. 1907) 151 Fed. 138.

Section 1469, ante, does not apply to suits in equity. In equity, such production, by one not summoned as a witness, can ordinarily be compelled only by appropriate allegations in bill or cross bill, upon the answer to which allegations a motion for production is based, and upon such motion the materiality of the evidence sought for can be controverted. Id.

A federal court of equity will not

compel a plaintiff to produce for inspection a deed on which rights in real property alleged in the bill are founded, and a copy of which is attached to the bill as an exhibit on a petition of defendant before answer alleging that such deed is a forgery, but, if genuine, was obtained by fraud; nor will the court enlarge the time for answering until the deed has been filed with the clerk. No litigant can be compelled, as a matter of general right, to produce his evidence for the inspection of his adversary in advance of the hearing, and the defendant is not entitled to an inspection of the deed to enable him to form an opinion as to its genuineness, and thus determine which of the two inconsistent defenses he will make, but he is required to answer the bill in accordance with his knowledge and the facts. Ryder v. Bateman (C. C. 1898) 93 Fed. 31.

The ordinary procedure in equity to compel an adverse party to produce documents is by bill or cross-bill for discovery, on which the materiality of the documents as evidence may be determined, or by a subpœna duces tecum, and the court will not order the production of documents upon motion and an affidavit based solely on information and belief as to the contents of the documents desired, and especially where the moving party has unduly delayed making the application and the granting of it would interfere with the closing of the proofs within the time fixed by order of the court. West Pub. Co. v. Edward Thompson Co. (C. C. 1907) 151 Fed. 138.

Books and records of a rival exchange should not be required in proceedings to punish defendants for contempt in violating an injunction, if no relevant testimony is introduced with reference thereto. Board of Trade of City of Chicago v. Tucker (D. C. 1913) 202 Fed. 288.

(U) Dismissal before hearing

228. Voluntary dismissal.
229. —— Discretion of court.
230. —— Time of dismissal.
231. —— Effect of answer or cross-bill.
232. —— Conditions.
233. —— Effect.
234. —— Revocation.
235. Involuntary dismissal—Grounds in general.
236. —— Defect of parties.
237. —— Want of prosecution.
238. —— Motion and determination thereof.
239. —— Dismissal on court's own motion.
240. —— Dismissal without prejudice.
241. —— Operation and effect.
242. —— Setting aside and reinstatement of cause.

See rule 29, ante, p. 2508.

228. Voluntary dismissal.—Where complainant has, in his bill, tendered relief to defendant, taken evidence, and obtained an injunction, the court may, in its discretion, refuse to allow him to dismiss his suit, where defendant wishes to take advantage of such tender, and may retain jurisdiction to permit the filing of a cross bill for that purpose, even if the facts stated therein more properly constitute a cause of action at law. Pullman's Palace-Car Co. v. Central Transp. Co. (1898) 18 Sup. Ct. 808, 171 U. S. 138, 43 L. Ed. 108, reversing judgment (1896) 76 Fed. 401, 22 C. C. A. 246.

Consent and order for discontinuance are, in effect, a dismissal of the bill. Pictet Artificial Ice Co. v. New York Ice Mach. Co. (C. C. 1882) 12 Fed. 816.

Before the term, complainant, without application to the court, entered a rule in the common rule book discontinuing the cause on payment of costs. Held, that in an equity action an order of the court is necessary to discontinue a suit. American Zylonite Co. v. Celluloid Mfg. Co. (C. C. 1887) 32 Fed. 809.

In a suit by a city against a railroad company, the city cannot contend that, because it intends to commence a proceeding in quo warranto, the company will not be prejudiced by a dismissal of the bill, when it is not clear that the question at issue can be presented in that proceeding, or that a judgment in the suit in equity would not be a bar to such proceeding. City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 55 Fed. 569.

229. —— Discretion of court.—The propriety of permitting a plaintiff to dismiss his bill without prejudice is a matter within the discretion of the court, which discretion is to be exercised with reference to the rights of both parties. Ebner v. Zimmerly (1902) 118 Fed. 818, 55 C. C. A. 430.

230. —— Time of dismissal.—A complainant in an original bill has, as a general rule, the right to dismiss his bill upon payment of costs, provided no decree has been made by which the defendant's rights have been adjudicated. Harding v. Corn Products Refining Co. (1909) 168 Fed. 658, 94 C. C. A. 144 (writ of certiorari denied Corn Products Refining Co. v. Harding [1909] 29 Sup. Ct. 696, 214 U. S. 515, 53 L. Ed. 1063); Lowenstein v. Glidewell (C. C. 1878) Fed. Cas. No. 8,575; Connecticut & P. R. R. Co. v. Hendee (C. C. 1886) 27 Fed. 678; Western Union Tel. Co. v. American Bell Tel. Co. (C. C. 1892) 50 Fed. 662 (decree reversed American Bell Tel. Co. v. Western Union Tel. Co. [1895] 69 Fed. 666, 16 C. C. A. 367); Gilmore v. Bort (C. C. 1905) 134 Fed. 658; U. S. v. Reese (C. C. 1909) 166 Fed. 347.

After an interlocutory decree on the merits, the plaintiff cannot discontinue as of right; and, if such discontinuance can ever properly be allowed after such a decree, it is only when some equity

therefor is shown. Garner v. Second Nat. Bank (1895) 67 Fed. 833, 16 C. C. A. 86, certiorari denied (1896) 16 Sup. Ct. 1201, 163 U. S. 688, 41 L. Ed. 319.

Where a suit was brought by one claiming to be the owner of certain notes pledged as collateral, against the pledgee thereof and the maker, held, that the complainant had no right to dismiss the bill as to the pledgee after the maker had paid the amount of the note into court, and had been dismissed from the case. Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33.

After a decree of reference is entered in accordance with a stipulation of the parties to refer the cause to a master, "to hear the parties, report the facts, and his rulings on any question of law arising in the case," plaintiff cannot dismiss the cause without prejudice. American Bell Tel. Co. v. Western Union Tel. Co. (1895) 69 Fed. 666, 16 C. C. A. 367, reversing Western Union Tel. Co. v. American Bell Tel. Co. (C. C. 1892) 50 Fed. 662.

After report by master, to whom suit was referred to hear and determine, which report contained findings in favor of defendants, held, that the court erred in permitting plaintiff to dismiss his bill without prejudice. Smith v. Carlisle (1916) 228 Fed. 666, 143 C. C. A. 188, reversing decree Carlisle v. Smith (D. C. 1915) 224 Fed. 231.

In a suit involving the title to real estate plaintiff cannot dismiss without prejudice and without the consent of defendant, on payment of costs, even though no cross-bill has been filed, after issue has been joined, and after interlocutory decrees practically deciding the controversy have been entered on demurrer and exceptions to the pleadings. Hershberger v. Blewett (C. C. 1892) 55 Fed. 170, following Chicago & A. R. Co. v. Union Rolling Mill Co. (1884) 3 Sup. Ct. 594, 109 U. S. 702, 27 L. Ed. 1081.

When a cause has been at issue for over two years by filing of replication, and nothing whatever has since been done, complainant cannot then discontinue; and defendant is entitled to put the cause on the calendar, and take an order dismissing the bill. Welsbach Light Co. v. Mahler (C. C. 1898) 88 Fed. 427.

A complainant has an absolute right to dismiss the suit without prejudice at any time before the hearing on payment of costs and without terms, where the dismissal will deprive the defendant of no substantial right accrued since the suit was commenced, and he is not entitled to and has not prayed for any affirmative relief. Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co. (C. C. 1902) 121 Fed. 1015; Gilmore v. Bort (C. C. 1905) 134 Fed. 658; Morton Trust Co. v. Keith (C. C. 1907) 150 Fed. 606.

A complainant is not entitled to dismiss without prejudice after replication filed, and after the expiration of the time for taking testimony. Schmeiser Mfg. Co. v. Blanchard (C. C. 1911) 192 Fed. 362.

Plaintiff held entitled to dismiss bill without prejudice while case was pending on exceptions to master's report, defendant having filed no cross-bill and asked for no affirmative relief. Carlisle v. Smith (D. C. 1915) 224 Fed. 231.

231. —— **Effect of answer or cross-bill.**—Though a complainant may usually, as of course, have his bill dismissed without prejudice on payment of costs, yet the rule does not apply where the dismissal would prejudice defendant in some other way than by the mere prospect of future litigation, e. g. if defendant has gone to the expense of a full preparation for hearing, and has filed a cross-bill asking for affirmative relief. City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 55 Fed. 569; Jesup v. Illinois Cent. R. Co. (C. C. 1896) 43 Fed. 483; Gilmore v. Bort (C. C. 1905) 134 Fed. 658.

After a decree sustaining a cross-bill by one of the defendants, the complainant cannot dismiss his original bill, notwithstanding his failure to reply to a plea to the jurisdiction filed by another defendant. Chicago & A. R. Co. v. Union Rolling-Mill Co. (1884) 3 Sup. Ct. 594, 109 U. S. 702, 27 L. Ed. 1081, affirming decree Massachusetts Mut. Life Ins. Co. v. Chicago & A. R. Co. (C. C. 1882) 13 Fed. 857.

Where an ejectment suit is brought to recover possession of mining property, and, as an auxiliary to the same, a bill in equity is filed to restrain the working of the mine, which ejectment and bill are both dismissed, such dismissal of the bill does not carry out of court with it a cross-bill filed by the defendants for the specific performance of a contract for the conveyance of a portion of the property in question. Such cross-bill, having for its object affirmative relief, may be retained for hearing and decree, notwithstanding the dismissal of the original bill. Markell v. Kasson (C. C. 1887) 31 Fed. 104.

A complainant is not entitled as of right to dismiss his bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void, and showing that defendant is entitled to a decree for its cancellation. Hat-Sweat Mfg. Co. v. Waring (C. C. 1891) 46 Fed. 87.

The complainant in an equity suit will not be allowed to discontinue where an injunction has been granted and the defendant seeks, by a cross-bill consonant with the purpose of the original bill, to take advantage of the testimony in the case and to secure rights which he would otherwise have to secure by an independent action. Pullman's Palace-

Car Co. v. Central Transp. Co. (C. C. 1891) 49 Fed. 261.

In a suit against a railroad company and a foreign trust company, its mortgagees, where the railroad company has gone to the expense of a full preparation for hearing, and has filed a cross-bill asking for affirmative relief, it is entitled to oppose complainant's motion to dismiss without prejudice, and to insist on the trial of the cause, though the trust company, its codefendant, by whom the cause was removed, has filed no cross-bill, and though the railway company has no right to be in the federal circuit court except with the trust company. City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 55 Fed. 569.

Where a cross-bill sets up new matter founded upon the same transaction, not by way of defense, but as ground for affirmative relief—as where, in a suit for the specific enforcement of a contract, the defendant, by a cross-bill, alleges facts which would entitle him to a rescission of the contract, and the retention and enforcement of a lien upon property in his hands, for which he prays—a voluntary dismissal of the original bill does not carry with it the cross-bill. Small v. Peters (C. C. 1900) 104 Fed. 401.

Sufficiency of pleading as cross-bill, see Gilmore v. Bort (C. C. 1905) 134 Fed. 658.

The filing of a so-called cross-bill by defendant praying for a discovery will not prevent such dismissal, where it seeks no affirmative relief and the discovery sought relates solely to matters of defense in the pending suit. Houghton v. Whitin Mach. Works (C. C. 1908) 160 Fed. 227.

Where interveners in a suit to set aside a patent merely demanded affirmative relief in an answer, and did not obtain a standing in court by cross-bill framed and filed according to the rules of equity pleading, they could not object to complainant's motion to dismiss before trial because of their alleged right to affirmative relief. U. S. v. Reese (C. C. 1909) 166 Fed. 347.

232. —— **Conditions.**—In an action for the infringement of a patent, the complainant asked to discontinue on payment of costs. Defendant objected, for the reason that the testimony relied upon to show prior invention was of such a character that defendant might not be able to procure it again. Held that, as a condition of the discontinuance, it should be stipulated that defendant's record may be used in any new suit brought against it by complainant. American Zylonite Co. v. Celluloid Mfg. Co. (C. C. 1887) 32 Fed. 809.

A plaintiff, before voluntarily dismissing a bill in equity, must pay all costs that have accrued in the case. Carlisle v. Smith (D. C. 1915) 224 Fed. 231.

233. —— **Effect.**—The dismissal of a bill to quiet title to a mining claim does not carry with it a cross-bill filed by defendant seeking to have the title to the same claim quieted in him and which alleges facts not alleged in the original bill. Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C. 1905) 139 Fed. 838.

Where plaintiff voluntarily dismisses a suit, without expressing in the order of dismissal that it is without prejudice, the dismissal will be regarded as on the merits. Carlisle v. Smith (D. C. 1915) 224 Fed. 231.

234. —— **Revocation.**—Where a bill against the representatives of a decedent's estate has been voluntarily dismissed by the complainant, it is not reinstated by his filing, several years afterwards, and without leave of court, a withdrawal of the order to dismiss, and a replication to the answer originally filed in the case by the decedent. Willard v. Wood (1896) 17 Sup. Ct. 176, 164 U. S. 502, 41 L. Ed. 531.

An order giving complainant leave to discontinue as to one defendant, "reserving all rights of parties other than said plaintiff," requires further consideration and a formal decree before a dismissal becomes effectual, and may be subsequently revoked, if it appears that such dismissal was under a mistake, and was not equitable. Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33.

235. **Involuntary dismissal—Grounds in general.**—See Dewey v. West Fairmont Gas Coal Co. (1887) 8 Sup. Ct. 148, 123 U. S. 329, 31 L. Ed. 179; Brown v. Davis (1894) 62 Fed. 519, 10 C. C. A. 532 (judgment reversed Masterson v. Brown [1896] 72 Fed. 136, 18 C. C. A. 481); La Vega v. Lapsley (C. C. 1871) Fed. Cas. No. 8,123; Parker v. Town of Concord (C. C. 1889) 39 Fed. 718; Houston v. City and County of San Francisco (C. C. 1891) 47 Fed. 337.

Dismissal of bill on motion held erroneous, unless defensive matter in plaintiff's answers to interrogatories could not have been avoided by evidence in support of bill or any replication that might have been filed. Buffalo Specialty Co. v. Van Cleef (1915) 227 Fed. 391, 142 C. C. A. 87.

Where plaintiff cannot sustain his bill, it must be dismissed at his costs, regardless of grounds of equity. Barns v. Omally (C. C. 1849) Fed. Cas. No. 1,-035.

Where complainant fails to give security or make a deposit, the bill will not be instantly dismissed, but he will be required, on motion, to give the security or make the deposit. Swan v. Wright (C. C. 1879) Fed. Cas. No. 13,-670.

That complainants have supposed themselves entitled to relief under a statute, when they are in fact entitled to relief on general equitable grounds,

does not justify a dismissal of the bill. Adams v. Kehlor Milling Co. (C. C. 1888) 36 Fed. 212.

Where it has been the practice of the court to treat all days in term time as rule days, the failure of the plaintiff to set down a demurrer for argument on the rule day when filed, or on the next rule day, as provided by equity rule 38, is not ground for dismissing the bill. Electrolibration Co. v. Jackson (C. C. 1892) 52 Fed. 773.

Where complainant makes no objection, the court will determine a question of jurisdiction or of personal privilege, raised by defendant by motion to dismiss. Bicycle Stepladder Co. v. Gordon (C. C. 1893) 57 Fed. 529.

A motion to dismiss is not a proper mode of raising the defense of former adjudication. Desert King Min. Co. v. Wedekind (C. C. 1901) 110 Fed. 873.

A bill in equity against an administrator alleged a partnership between complainant and defendant's intestate, and prayed for an accounting as to the partnership business and injunctive relief against interference therewith by defendant. By an answer and a cross-bill defendant denied the partnership and asked affirmative relief. After the case had lain dormant for two or three years defendant filed a supplemental cross-bill alleging a settlement pursuant to which the property in controversy had been transferred to a corporation formed for the purpose. Held, that no issues remained for trial, and that the court would not retain the case for the purpose of litigating the right of defendant to enforce an alleged agreement by plaintiff in the settlement to deliver to defendant certain stock of the corporation, against plaintiff's petition to dismiss. Hartford v. Bridgeport Trust Co. (C. C. 1906) 143 Fed. 558.

It is the duty of the Circuit Court to dismiss, with costs, an original bill between the same parties, the effect of which would be to obstruct, delay, or embarrass it in the execution of a final decree already entered in another suit. Coram v. Davis (C. C. 1909) 174 Fed. 664.

236. —— **Defect of parties.**—A bill will be dismissed where, after objection for want of necessary parties, complainant neglects to bring them in. Greenleaf v. Queen (1828) 26 U. S. (1 Pet.) 138, 7 L. Ed. 85; Hunt v. Wickliffe (1829) 27 U. S. (2 Pet.) 201, 7 L. Ed. 397; Jones v. Brittan (C. C. 1872) Fed. Cas. No. 7,455.

The want of proper parties is not sufficient ground for dismissing a bill. Milligan v. Milledge (1805) 7 U. S. (3 Cranch) 220, 2 L. Ed. 417.

As a general rule, a bill in chancery will not be dismissed for want of the proper parties; but the rule, resting, as it does, upon the supposition that the fault may be remedied and the necessary parties supplied, does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. Fourth Nat. Bank v. Carrolton R. Co. (1870) 78 U. S. (11 Wall.) 624, 20 L. Ed. 82.

When an original cause is pending in the supreme court, and absent parties, whose rights would in effect be determined thereby, cannot be made parties to the suit without ousting the jurisdiction of the court, the case will be dismissed. California v. Southern Pac. Co. (1895) 15 Sup. Ct. 591, 599, 157 U. S. 229, 39 L. Ed. 683.

A bill in a federal court is properly dismissed, where the court cannot obtain jurisdiction over nonresident defendants, who are necessary parties, by service of process in another state or by publication, and such defendants cannot be served within the district, and refuse to appear. Jones v. Gould (1906) 149 Fed. 153, 80 C. C. A. 1, affirming decree (C. C. 1905) 141 Fed. 698.

Failure to make other part owners of a chose in action parties to a suit to enforce a trust is a curable defect, and will not sustain a judgment of dismissal of the bill on the merits, but the bill should be retained until complainants have reasonable opportunity to amend it. Rogers v. Penobscot Min. Co. (1907) 154 Fed. 606, 83 C. C. A. 380.

Where a party not within the jurisdiction files his answer, disclaiming all interest, the bill may be dismissed as to him and continued as to the others. Hinde v. Vattier (C. C. 1830) Fed. Cas. No. 6,512.

The nonappearance of a necessary party who cannot be compelled to appear is good ground for the dismissal of the suit on motion by the other defendants. Picquet v. Swan (C. C. 1830) Fed. Cas. No. 11,135; Abbot v. American Hard Rubber Co. (C. C. 1861) Fed. Cas. No. 9.

Nonjoinder or misjoinder is not ground of dismissal in equity, where the difficulty can be remedied, or where the relief sought can be given without impairing or jeopardizing the interest of any one. Bunce v. Gallagher (C. C. 1867) Fed. Cas. No. 2,133.

Where the defense relied on is that the complainant was at the time of the commencement of the suit non compos mentis, the proper practice is by an application to the court to strike the bill from the files because filed without authority, or to apply for a stay of proceedings until a committee or next friend may be appointed. Dudgeon v. Watson (C. C. 1885) 23 Fed. 161.

Where it did not clearly appear that complainant might not be entitled, on his allegations, to some measure of injunctive relief against defendant, who was a resident of the district and properly served, independent of other nonresident defendants, as to whom the bill was dismissed, the resident defendant

was not entitled to a dismissal of the bill on motion, filed in the place of a demurrer, because of the absence of the other defendants. Jackson v. Hooper (C. C. 1909) 171 Fed. 597.

A bill in equity may be dismissed, when it appears that the relief prayed for cannot be granted without injuriously affecting persons not parties. Id.

237. —— **Want of prosecution.**—Where complainant unreasonably delays compelling an issue, or taking the bill for confessed as to any of defendants, the defendants as to whom the cause is at issue may have an order to compel complainant to speed the cause or have his bill dismissed. Gilbert v. Van Arman (C. C. 1875) Fed. Cas. No. 5,414.

The bill will not be dismissed for want of prosecution for the failure of plaintiff to take testimony within the three months after issue formed. Sargeant v. First Nat. Bank (C. C. 1879) Fed. Cas. No. 12,359.

Where two suits were brought for the infringement of a patent, in different circuits—one against the manufacturer of the infringing device, and the other against a dealer—and the former was decided in the defendant's favor, and the latter, after remaining pending over four years, was subsequently heard, and was submitted upon the same evidence taken in the other case, and the complainant asked that the case might be allowed to remain open until an appeal from the decree in the suit against the manufacturer could be heard and determined, held that, there being no special reasons for granting the request, the case could not be kept standing open any longer, and that the bill should be dismissed. Grain-Drill Mfg. Co. v. Reinstedler (C. C. 1885) 25 Fed. 198.

A cause will not be dismissed for want of prosecution for nine months' delay, where it appears from the affidavits of complainant's counsel that from a conversation with defendant's counsel they were led to believe that a compromise was mutually desired and would be effected, and that they in good faith submitted the matter to their clients, who lived in Ireland, and, not having been yet advised of their intentions as to the proposition, took no proof, understanding defendant to agree that none need be taken pending negotiations, though from the statement of the conversation in the affidavits of defendant and his counsel such impression and delay were not warranted thereby. Beirne v. Wadsworth (C. C. 1888) 36 Fed. 614.

A motion by complainant to dismiss for want of prosecution will not be granted where it appears that defendant has taken testimony in support of his defense and of his claim on his cross bill, and that the next step in the orderly disposition of the cause is one to be taken by complainant himself, namely, the taking of testimony in rebuttal of the defense to the original bill and in answer to the testimony in support of the cross bill. Mackaye v. Mallory (C. C. 1897) 80 Fed. 256.

A delay by complainant of 13 years after joinder of issue without taking any testimony gives defendant a right to a dismissal; and this right is not affected by the fact that complainant then died, and his administratrix obtained an order of revivor, for the latter takes the litigation in the same condition in which the deceased left it. Id.

Where, after the death of complainant in a suit in equity in a federal court, no steps are taken by his representatives within a reasonable time to revive the suit, the court may entertain a motion by defendant to dismiss for want of prosecution; and such motion will be granted without reference to any statute of limitations, when it would be inequitable to allow the defendant to be held in court without a hearing, as where the suit affects the title to property or the right to convey the same. Brown v. Fletcher (C. C. 1904) 140 Fed. 639.

Where the personal representative of a deceased complainant in a suit in a federal court of equity took no steps to revive the suit during more than 18 months, but meantime instituted and prosecuted proceedings in another jurisdiction, the purpose of which was to obtain the same relief sought in such suit, defendant is entitled to a dismissal of the suit on the ground of abandonment. Id.

A motion to dismiss for want of prosecution in failing to exercise diligence to bring the defendants before the court, denied under the facts. Buck v. Felder (D. C. 1912) 208 Fed. 474.

238. —— **Motion and determination thereof.**—After answers to a bill have been filed, and while exceptions to one of the answers are pending, the bill cannot, according to the equity practice of the courts of the United States, be dismissed for want of equity. Betts v. Lewis (1856) 60 U. S. (19 How.) 72, 15 L. Ed. 576.

After setting down a cause for hearing on bill and answer, a motion to dismiss the suit for want of the timely filing of the replication is made too late. Reynolds v. First Nat. Bank (1884) 5 Sup. Ct. 213, 112 U. S. 405, 28 L. Ed. 733.

A bill will not be dismissed for want of proceeding for three terms, without giving one term's notice of the application. Delauney v. Hermann (C. C. 1830) Fed. Cas. No. 3,757.

An order dismissing complainant's bill for want of a replication is of course, and may be entered in the clerk's office without any application to or action by the judge. Robinson v. Satterlee (C. C. 1874) Fed. Cas. No. 11,967.

When the case is at rules, the de-

fendant, in his individual capacity, may make a motion to quash for matters patent in the suit. Baltimore & O. R. Co. v. Hamilton (C. C. 1883) 16 Fed. 181.

The court will not, upon an ordinary notice of motion to dismiss, anticipate the regular trial of a cause, by examining the pleadings and proofs, to determine whether the court has jurisdiction of the action, or whether the complainant is entitled to the relief sought. Fuller v. Metropolitan Life Ins. Co. (C. C. 1887) 31 Fed. 696.

Under the rule established by the decisions of the supreme court, that, under the federal judiciary act, objection to the jurisdiction of the court may be taken in the answer upon a denial of jurisdictional averments, where objection is so taken, a motion to dismiss, based thereon, and upon evidence subsequently taken on the merits, whether considered as a motion or a plea in abatement, will not be deemed a waiver by defendant of the other defenses set up in the answer. Reavis v. Reavis (C. C. 1900) 101 Fed. 19.

A bill will not be dismissed for want of an indispensable party, who is made a defendant, but has not been served, until complainant has been given a reasonable time to obtain service, and he will be allowed more than six months where such defendant resides outside of the state. Blanchard v. Bigelow (C. C. 1901) 109 Fed. 275.

On motion to set aside service on nonresident defendants and dismiss the bill, allegations in the affidavits used on the motion and statements of counsel in the argument could not be considered as supplying an omitted allegation in the bill, from which it could be found that the suit affected property within the district. Jackson v. Hooper (C. C. 1909) 171 Fed. 597.

Where a bill sought to dissolve a corporation and distribute its assets by means of a receiver, motions to discharge the receiver and dismiss the bill would be considered as equivalent to a demurrer to the bill for want of equity. Stevens v. Empire Casualty Co. (C. C. 1910) 180 Fed. 283.

A letter written by complainant in a suit for infringement of a patent to an officer of a licensee corporation, not a party to the suit, in which he stated his information that defendant's attorneys intended to visit the corporation's plants, and expected to obtain information that would tend to depreciate the patent, and suggesting that the officer "see that none of your employés will fail to uphold the patents at the expense of their personal vanity," held susceptible of a construction other than as an attempt to obstruct the due administration of justice by means of false testimony, or by preventing defendant from obtaining testimony, and not ground for dismissal of the suit on a motion made two years afterward, where the suggestion was not acted upon. Chute v. Wisconsin Chemical Co. (C. C. 1911) 185 Fed. 115.

That bills were presented to judge, who allowed them to be filed, held persuasive, though not controlling, on a motion to dismiss, that they made a case for a court of equity. Russell v. Shippen Bros. Lumber Co. (D. C. 1915) 224 Fed. 254.

A motion to dismiss a bill admits all the allegations of the bill which are well pleaded. Id.

Where a bill states a prima facie case, it cannot be dismissed because the chancellor judicially knows of facts that would support an answer, unless his judicial knowledge is so broad that he can properly hold that no facts tend to controvert the answer and support a replication. Bronk v. Charles H. Scott Co. (1914) 211 Fed. 338, 128 C. C. A. 17.

As against motion to dismiss suit for infringing trade-name, held, that it would be assumed that complainant's tire fluid was not patented, and that other brands under distinctive names were on the market. Buffalo Specialty Co. v. Van Cleef (1915) 227 Fed. 391, 142 C. C. A. 87.

On motion to dismiss, held, that it would be assumed that defendants and the public knew relation between unpatented tire fluid sold under trade-name and patent covering combination of tire and tire fluid. Id.

239. —— **Dismissal on court's own motion.**—Where a bill fails to state a case which confers jurisdiction, it is the duty of the court of its own motion to dismiss it. Parker v. Winnipiseogee Lake Cotton & Woolen Co. (1862) 67 U. S. (2 Black) 545, 17 L. Ed. 333; Lewis v. Cocks (1874) 90 U. S. (23 Wall.) 466, 23 L. Ed. 70; McGuire v. Pensacola City Co. (1901) 105 Fed. 677, 44 C. C. A. 670; South Penn Oil Co. v. Miller (1909) 175 Fed. 729, 99 C. C. A. 305; Dumont v. Fry (C. C. 1882) 12 Fed. 21; Stockbridge v. Phœnix Mut. Life Ins. Co. (D. C. 1912) 193 Fed. 558.

Where both parties to a controversy are before the court, and a full hearing has been had upon their respective claims, the suit should be determined on the merits, and it is error to dismiss it without prejudice against the wishes of both parties. Lake St. El. R. Co. v. Ziegler (1900) 99 Fed. 114, 39 C. C. A. 431.

The court may, of its own motion, dismiss a bill because it fails to state facts sufficient to give any right to relief. Fougeres v. Jones (C. C. 1895) 66 Fed. 316.

240. —— **Dismissal without prejudice.**—A dismissal of a suit in equity on the ground that there is an adequate remedy at law should be without prejudice to the right to sue at law. Horsburg v. Baker (1828) 26 U. S. (1

Pet.) 232, 7 L. Ed. 125; Lacassagne v. Chapuis (1892) 12 Sup. Ct. 659, 144 U. S. 119, 36 L. Ed. 368; Sanders v. Devereux (1894) 60 Fed. 311, 8 C. C. A. 629; Auer v. Lombard (1896) 72 Fed. 209, 19 C. C. A. 72; Indian Land & Trust Co. v. Shoenfelt (1905) 135 Fed. 484, 68 C. C. A. 196; Pierpont v. Fowle (C. C. 1846) Fed. Cas. No. 11,152.

Where a party asking the aid of a court of equity refuses to comply with the conditions upon which that aid must depend, the court may refuse its aid and dismiss the bill; but it would be harsh to make the decree of dismission a bar to a future action. Conn v. Penn (1820) 18 U. S. (5 Wheat.) 424, 5 L. Ed. 125.

Where an indispensable party to a bill in equity was omitted, but the court dismissed the bill on its merits, held, that the dismissal should have been without prejudice, since the absence of a necessary party defeated the jurisdiction of the court. Barney v. City of Baltimore (1867) 73 U. S. (6 Wall.) 280, 18 L. Ed. 825; House v. Mullen (1874) 89 U. S. (22 Wall.) 42, 22 L. Ed. 838; Kendig v. Dean (1878) 97 U. S. 423, 24 L. Ed. 1061.

Where a bill filed by two parties shows that one is entitled to equitable relief, but does not show what interest the other has in the subject-matter of litigation, or that he has any, the bill should not, on demurrer, be dismissed generally, for the record could be pleaded in bar to a new suit on the merits; but it should be dismissed without prejudice. House v. Mullen (1874) 89 U. S. (22 Wall.) 42, 22 L. Ed. 838.

Where no evidence was taken, counsel intending that all material facts should be embraced in the pleadings, but all the material facts did not appear, a decree dismissing the bill on its merits was erroneous. Union Pac. Ry. Co. v. Harmon (1893) 54 Fed. 29, 4 C. C. A. 165.

A bill in a federal court, which was multifarious and tendered no clearly defined issue which was within the jurisdiction of the court, held properly dismissed without prejudice. Field v. Camp (1913) 201 Fed. 682, 120 C. C. A. 140, modifying decree (C. C. 1911) 193 Fed. 160.

The court will not make a decree, the execution of which would affect the right of a party not before it, or throw a cloud upon his title; and where such party is necessary to a final decree the bill should be dismissed without prejudice. Young v. Cushing (C. C. 1865) Fed. Cas. No. 18,156.

241. —— Operation and effect.—A decree dismissing the original bill does not dispose of a cross-bill, setting up additional facts, and praying affirmative relief. San Diego Flume Co. v. Souther (1898) 90 Fed. 164, 32 C. C. A. 548; Jackson v. Simmons (1900) 98 Fed. 768, 39 C. C. A. 514; Barnard v. Hartford, P. & F. R. Co. (C. C. 1878) Fed. Cas. No. 1,003.

The dismissal because of estoppel by former decree of a bill filed of the United States to avoid certain patents of land issued by the United States in pursuance of the wagon road grant made by Act July 2, 1864, c. 213, 13 Stat. 355, on the ground that the lands were within an Indian reservation, and therefore excepted from the operation of the grant, requires the dismissal of the cross-bill which seeks to enjoin the allotments of such lands and the issue of patents therefor to the Indians. U. S. v. California & Oregon Land Co. (1904) 24 Sup. Ct. 266, 192 U. S. 355, 48 L. Ed. 476, reversing decree U. S. v. Oregon Cent. Military Road Co. (C. C. 1900) 103 Fed. 549.

After the granting of a preliminary injunction by a circuit court, complainant, by leave of court, filed an amended and supplemental bill. Defendant afterwards appealed from the order granting the injunction, but the record on appeal did not show the amended bill, nor was it called to the attention of the circuit court of appeals. That court, on the hearing, ordered the dismissal of the bill. Held, that on the filing of the amended and supplemental bill such bill, together with the original bill, constituted one pleading and one record, and that the order of the appellate court, having been made upon a defective record, did not operate to dismiss the bill as amended. Berliner Gramophone Co. v. Seaman (1902) 113 Fed. 750, 51 C. C. A. 440; Id. (1902) 115 Fed. 806, 53 C. C. A. 376.

The dismissal of a bill by the court as to a defendant who has been improvidently granted leave to come in as a defendant on his own motion, but who is not a necessary or proper party, does not affect the right of complainant to proceed against the original defendant. Citizens' Savings & Loan Ass'n v. Belleville & S. I. R. Co. (1902) 117 Fed. 109, 54 C. C. A. 495, writ of certiorari denied Belleville & S. I. R. Co. v. Citizens' Savings & Loan Ass'n (1902) 23 Sup. Ct. 845, 187 U. S. 645, 47 L. Ed. 347.

Where complainant in a suit for an accounting did not waive an answer under oath, and, a full verified answer having been filed, the case was dismissed, such dismissal created no equities in defendant's favor and did not affect complainant's right to file a new bill. Speckart v. Schmidt (1911) 190 Fed. 499, 111 C. C. A. 331.

A dismissal of a bill, except upon the merits, is no bar to a subsequent bill for the same cause. Grubb v. Clayton (C. C. 1805) Fed. Cas. No. 5,849a; Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267.

242. —— Setting aside and reinstatement of cause.—Where a case is dismissed in the supreme court for want of jurisdiction, there being a technical defect in the pleadings, the court will not allow the pleadings to be amended at a subsequent term, and the case to be reinstated on the docket. Jackson v. Ashton (1836) 35 U. S. (10 Pet.) 480, 9 L. Ed. 502.

A motion to set aside a dismissal, made nearly five years after the entry of the order of dismissal, without offering any excuse for the delay, will be denied. Robinson v. Satterlee (C. C. 1874) Fed. Cas. No. 11,967.

(V) Hearing, submission of issues to jury, and rehearing

243. Condition of cause.
244. Separate hearings in same cause.
245. Hearing on bill and answer.
246. Submission of issues to jury.
247. —— Issues proper for jury.
248. —— Proceedings for award and framing of issues.
249. —— Verdict and findings.
250. Direction of action at law.
251. Conduct of hearing in general.
252. Reception of evidence.
253. Arguments of counsel.
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257. Rehearing.
258. —— Authority of court or judge.
259. —— Discretion of court.
260. —— Time for application.
261. —— Grounds in general.
262. —— Surprise, accident, or mistake.
263. —— Newly discovered evidence.
264. —— Application and proceedings thereon.
265. —— Evidence on rehearing.

243. Condition of cause.—Where over 90 days elapse after the filing of the replication without the taking of any testimony by plaintiff or any motion to extend the time for taking testimony, and thereafter plaintiff gives notice of motions to strike out certain portions of the answer, which motions are denied, there is no error in then setting the case down for hearing on the bill and answers. McGorray v. O'Connor (1898) 87 Fed. 586, 31 C. C. A. 114, affirming decree (C. C. 1897) 79 Fed. 861.

Where a complainant has failed to take any evidence in support of his bill within the time limited by the rules or to move for an extension, the defendant is entitled to have the case submitted on the pleadings. Schmeiser Mfg. Co. v. Blanchard (C. C. 1911) 192 Fed. 362.

244. Separate hearings in same cause.—A legal proposition will not be decided in advance of final hearing, unless the decision will eliminate a clearly defined and easily stated mass of testimony, the presence or absence of which will not change the balance of the litigation. Boyd v. New York & H. R. Co. (D. C. 1915) 220 Fed. 174.

245. Hearing on bill and answer.—Where a suit is heard on bill and answer, the allegations of fact in the bill that are denied in the answer, are to be taken as disproved, and the averments of fact in the answer whether responsive to the bill or not stand admitted. Leeds v. Marine Ins. Co. of Alexandria (1817) 15 U. S. (2 Wheat.) 380, 4 L. Ed. 266; U. S. v. Trans-Missouri Freight Ass'n (1895) 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73 (affirming decree [C. C. 1892] 53 Fed. 440, and decree reversed [1897] 17 Sup. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007); People's United States Bank v. Gilson (1908) 161 Fed. 286, 88 C. C. A. 332 (affirming decree [C. C. 1905] 140 Fed. 1); Mound City Co. v. Castleman (1911) 187 Fed. 921, 110 C. C. A. 55 (affirming decree [C. C. 1910] 177 Fed. 510); City of Wichita v. Wichita Water Co. (1915) 222 Fed. 789, 138 C. C. A. 337; Lake Erie & W. R. Co. v. Indianapolis Nat. Bank (C. C. 1895) 65 Fed. 690; Besson & Co. v. Goodman (C. C. 1906) 147 Fed. 887; Mound City Co. v. Castleman (C. C. 1910) 177 Fed. 510 (decree affirmed [1911] 187 Fed. 921, 110 C. C. A. 55).

Where a case is set down for hearing on bill, answer, and replication, only those averments of the answer which are responsive to the bill are taken as true, and all allegations in avoidance or justification are denied by the replication and are taken as untrue. Ritterbusch v. Atchison, T. & S. F. Ry. Co. (1912) 198 Fed. 46, 117 C. C. A. 154.

Where a case is set down for hearing on bill, answer, and replication, only those averments of the answer responsive to the bill are taken as true, and all allegations in avoidance or justification denied by the replication are taken as untrue. People's United States Bank v. Gilson (1908) 161 Fed. 286, 88 C. C. A. 332, affirming decree (C. C. 1905) 140 Fed. 1.

Where no plea has been filed, and a demurrer has been overruled, the complainant may go to a hearing on the bill and answer. Poultney v. City of Lafayette (1845) 44 U. S. (3 How.) 81, 11 L. Ed. 503.

On a hearing on the bill, answer, and replication they do not constitute admissions of any of the averments they were interposed to deny. People's United States Bank v. Gilson (1908) 161 Fed. 286, 88 C. C. A. 332, affirming decree (C. C. 1905) 140 Fed. 1.

Application for a decree upon bill and answer must be made, not at chambers, but at the equity term after the cause is put upon the calendar. Campbell Printing-Press & Mfg. Co. v. Manhattan El. Ry. Co. (C. C. 1891) 48 Fed. 344.

At a hearing on the pleadings, embracing bill, answer denying its mate-

rial allegations, and replication reiterating the averments of the bill, the answer must be taken as true, and the bill will be dismissed. U. S. v. Ferguson (C. C. 1892) 54 Fed. 28.

When the existence of a speedy and adequate remedy at law is first relied on at the hearing, the bill will be construed more liberally than if the point had been raised by demurrer. Zimmerman v. Carpenter (C. C. 1898) 84 Fed. 747.

Where a cause is submitted on the pleadings, consisting of bill, answer, and replication, the answer must be taken as true, and the only facts which can be considered as established by the complainant are those set out in the bill which are not properly negatived by the answer. Robinson v. American Car & Foundry Co. (C. C. 1904) 132 Fed. 165, decree affirmed (1905) 135 Fed. 693, 68 C. C. A. 331, writ of certiorari denied (1906) 27 Sup. Ct. 777, 203 U. S. 590, 51 L. Ed. 330.

Where complainant in equity desires to rest his case on the allegations of the answer, the matter should be set down for hearing on the bill and answer. Blanton v. Chalmers (C. C. 1908) 158 Fed. 907.

246. Submission of issues to jury.—The submission of questions of fact to a jury rests in the sound discretion of the court. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136; Massie v. Watts (1810) 10 U. S. (6 Cranch) 148, 3 L. Ed. 181; Garsed v. Beall (1875) 92 U. S. 684, 23 L. Ed. 686; Wilson v. Riddle (1887) 8 Sup. Ct. 255, 123 U. S. 608, 31 L. Ed. 280; Pacific Coal & Transportation Co. v. Pioneer Mining Co. (1913) 205 Fed. 577, 123 C. C. A. 593; Flagg v. Mann (C. C. 1837) Fed. Cas. No. 4,847; Pierpont v. Fowle (C. C. 1846) Fed. Cas. No. 11,152; Herdsman v. Lewis (C. C. 1882) 9 Fed. 853; Fitton v. Phœnix Assur. Co. (C. C. 1885) 23 Fed. 3; U. S. v. Samperyac (Super. Ct. Ark. 1831) Fed. Cas. No. 16,216a.

After an issue ordered, a court of equity may proceed to a final decree without trying the issue or setting aside the order. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136.

A "feigned issue" is one submitted to the jury in an equity case for the assistance and advice of the court. Nashville Ry. & Light Co. v. Bunn (1909) 168 Fed. 862, 94 C. C. A. 274.

On the trial of an issue from chancery, the bill and answer cannot be read in evidence, unless the chancery court so directed when the issue was ordered. King v. Force (C. C. 1820) Fed. Cas. No. 7,791.

A court of equity will not grant an issue to try before a jury questions of fact which have been fully heard before a master, whose findings thereon are approved by the court, where a contrary finding by the jury, if made, would not be followed. Earle v. McCartney (C. C. 1901) 109 Fed. 13, decree affirmed McCartney v. Earle (1902) 115 Fed. 462, 53 C. C. A. 392.

A federal court of equity will not, on demand, after the joining of issue by the pleadings, but before the evidence has been taken in accordance with the usual practice in equity, frame issues to be submitted to a jury, especially when it cannot be known at that stage of the case that such issues will be decisive or even material. Fenno v. Primrose (C. C. 1903) 125 Fed. 635.

Where, in a suit to quiet title, a large amount of testimony has been taken at great expense in time and cost on the question of possession, and the master has made and reported his findings thereon, exceptions to which have been taken and argued to the court, an issue will not be thereafter framed on the question for submission to a jury. Richmond Cedar Works v. Pinnix (D. C. 1913) 208 Fed. 785.

247. —— Issues proper for jury.—The court is competent to determine the question of the competency of a grantor to make the deed, and should not direct an issue to be tried at law, unless a verdict, however it should be found, would be satisfactory to the court. Harding v. Handy (1826) 24 U. S. (11 Wheat.) 103, 6 L. Ed. 429.

It is competent for a court of equity to decide whether a certain person is the heir of a deceased person, and it is not necessary to direct an issue to a jury to try the question in a court of law. Patterson v. Gaines (1848) 47 U. S. (6 How.) 550, 12 L. Ed. 553.

Where the answer denies fraud, but admits all the facts necessary to constitute it, the chancellor does not need a verdict to inform his conscience. Doss v. Tyack (1852) 55 U. S. (14 How.) 297, 14 L. Ed. 428.

Where an intervening petition is filed in a chancery suit, setting up against the receiver appointed in such suit a cause of action at law, it is proper to direct the trial of the issues raised by such petition by jury. Rouse v. Hornsby (1895) 67 Fed. 219, 14 C. C. A. 377, affirming judgment Hornsby v. Eddy (1893) 56 Fed. 461, 5 C. C. A. 560.

An application for a trial by jury, made by defendant under the act of congress providing therefor, is to be determined in the discretion of the court; and, if it appears that the questions involved can be determined more properly by a chancellor, the application for a jury will be refused. Keyes v. Pueblo Smelting & Refining Co. (C. C. 1887) 31 Fed. 560.

Issue directed out of chancery to ascertain whether a partnership, asserted by complainant and denied by defendant, was formed as alleged. Drope v.

Miller (Super. Ct. Ark. 1827) Fed. Cas. No. 4,092a.

248. —— **Proceedings for award and framing of issues.**—The court may direct an issue to be tried without expressly revoking an order of reference to auditors. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136.

A judge, before whom certain issues in equity were tried by a jury, acted as chancellor in making the decree; the same proofs being relied on before the jury and the chancellor. Held, that a previous order by the judge submitting the issues to the jury, and a certificate to himself of the result, were unnecessary. Wilson v. Riddle (1887) 8 Sup. Ct. 255, 123 U. S. 608, 31 L. Ed. 280.

On a motion to send to a jury issues arising on a petition against a receiver for injuries causing death, the court may determine whether the case is one for damages, and, if it finds adversely, may finally dismiss the petition. Miles v. Receivers (C. C.) Fed. Cas. No. 9,544.

Where a feigned issue for trial of a fact is directed by the court, no declaration of any sort is requisite. The case is put on the trial list, and the jury sworn to try the issue, in the words of the order of issue itself. Wilson v. Barnum (C. C. 1849) Fed. Cas. No. 17,786.

249. —— **Verdict and findings.**—Trial of issues of fact in patent cases, see § 1586, post.

The verdict of a jury on an issue directed by a court of chancery is merely advisory. Basey v. Gallagher (1874) 87 U. S. (20 Wall.) 670, 22 L. Ed. 452; Garsed v. Beall (1875) 92 U. S. 684, 23 L. Ed. 686; Watt v. Starke (1879) 101 U. S. 247, 25 L. Ed. 826; Quinby v. Conlan (1881) 104 U. S. 420, 26 L. Ed. 800; Idaho & Oregon Land Imp. Co. v. Bradbury (1889) 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433; Clyde v. Richmond & D. R. Co. (1896) 72 Fed. 121, 18 C. C. A. 467; Day v. Hartshorn (C. C. 1855) Fed. Cas. No. 3,683; Ely v. Monson & B. Mfg. Co. (C. C. 1860) Fed. Cas. No. 4,431; U. S. v. Samperyac (Super. Ct. Ark. 1831) Fed. Cas. No. 16,216a, affirming Samperyac v. U. S. (1833) 32 U. S. (7 Pet.) 222, 8 L. Ed. 665.

The verdict may be set aside. Kohn v. McNulta (1893) 13 Sup. Ct. 298, 147 U. S. 238, 37 L. Ed. 150; Idaho & Oregon Land Imp. Co. v. Bradbury (1899) 10 Sup. Ct. 177, 132 U. S. 509, 33 L. Ed. 433; Goodyear v. Providence Rubber Co. (C. C. 1864) Fed. Cas. No. 5,583.

The verdict is not final until adopted by the court. Allen v. Blunt (C. C. 1845) Fed. Cas. No. 216.

A verdict on an issue at law directed by a court of chancery has the same effect as a verdict on conflicting evidence in an action at law. Brooks v. Bicknell (C. C. 1845) Fed. Cas. No. 1,946.

250. **Direction of action at law.**—Brown v. Cranberry Iron & Coal Co. (1896) 72 Fed. 103, 18 C. C. A. 462; Watson v. Huntington (1914) 215 Fed. 472, 131 C. C. A. 520.

251. **Conduct of hearing in general.**—A case heard and decided in vacation before one judge, by agreement of the parties, is to be considered as if heard and decided before and by the court. Doggett v. Emerson (C. C. 1845) Fed. Cas. No. 3,961.

Complainant in a bill to stay proceedings on a warrant of distress has the right to open and close. Armstrong v. U. S. (D. C. 1833) Fed. Cas. No. 548.

252. **Reception of evidence.**—Taking testimony orally in open court, see Blease v. Garlington (1875) 92 U. S. 1, 23 L. Ed. 521.

After the case has been heard, neither party has a right to file any paper therein except by leave of court. Union Sugar Refinery v. Mathiesson (C. C. 1868) Fed. Cas. No. 14,398.

The accidental omission to make technical proof of an uncontroverted fact, such as corporate capacity to sue, may be supplied. in the discretion of the court. Goodyear v. Blake (C. C. 1869) Fed. Cas. No. 5,560.

Testimony taken more than three months after the filing of a replication, without leave, after the expiration of the time prescribed by rule 66, may be admitted in evidence at the hearing. in the discretion of. the court. Fischer v. Hayes (C. C. 1881) 6 Fed. 76.

Where, in a suit in equity, through mere inadvertence, there has been an omission to prove a certain fact, and the argument on the final hearing has proceeded on both sides on the presumption that the fact was shown, and the court is of the opinion that proof thereof is indispensable, an application to prove the fact is within the exceptions to the general rule forbidding the reception of evidence after final hearing. Rankin v. Miller (D. C. 1912) 199 Fed. 342.

See rule 46, ante, p. 2516.

253. **Arguments of counsel.**—Time for preparation to argue a legal point will not be given where counsel had previous notice that it would arise. Greigg v. Reade (D. C. 1836) Fed. Cas. No. 5,804.

254. **Dismissal at final hearing.**—In a suit against a bank for money deposited by complainant's agent, and applied by the bank to debts due from the agent, the latter is a proper and necessary party, but on a decree for complainant, without there appearing any right or liability for or against the agent, it is proper then to dismiss him. Union Stock Yards Nat. Bank v. Moore (1897) 79 Fed. 705, 25 C. C. A. 150.

A motion by the defendant at the close of plaintiff's case to dismiss a suit of an equitable nature on the ground that plaintiff has failed to make a prima facie case, under Code Civ. Proc. Alaska, § 378 (Act June 5, 1900, c. 786, 31 Stat. 395), which authorizes the dismissal of such a suit whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed, or any part thereof, like a motion in an action at law for a nonsuit or direction of a verdict on the same ground, admits every fact which the evidence proves, or tends to prove, as well as the facts which may naturally and rationally be inferred from the facts proved. Cook v. Klonos (1908) 164 Fed. 529, 90 C. C. A. 403, judgment modified on rehearing (1909) 168 Fed. 700, 94 C. C. A. 144.

On a finding that the evidence did not sustain an ancillary bill to establish an equitable title, filed by defendant in a pending law action, such bill should be dismissed without prejudice. Taylor v. Herndon (1912) 194 Fed. 946, 114 C. C. A. 582.

Bill will be dismissed as to defendants against whom it contains no allegations, though they answered. Andrews v. Solomon (C. C. 1816) Fed. Cas. No. 378.

Where an objection for the want of a party has been sustained at a final hearing, the court, instead of dismissing the bill, usually retains the cause, in order that he may be made a party. Winter v. Ludlow (C. C. 1859) Fed. Cas. No. 17,891.

On a hearing on a plea, replication and proofs, nothing is in issue except the truth of the matters pleaded; and where the proofs sustain the averments of the plea, the sufficiency of which has been previously adjudged, the result must be a dismissal of the bill. Eveleth v. Southern California Ry. Co. (C. C. 1903) 123 Fed. 836.

There being no way to attack the substance of an answer, except to bring the matter forward for hearing on the bill and answer, where a suit is set down for such hearing in good faith, and a separate defense in the answer is insufficient, the bill will not be dismissed, but the insufficient defense will be stricken, and complainant granted leave to file a replication on payment of one-half the costs. Besson & Co. v. Goodman (C. C. 1906) 147 Fed. 887.

255. **Decision.**—A mere opinion expressed by a circuit judge upon a question of fact in an equity case is not a finding of facts. Hendryx v. Perkins (1903) 123 Fed. 268, 59 C. C. A. 266.

Findings of fact and conclusions of law are not made in equity suits in the federal courts. Whitney v. Whitney Elevator & Warehouse Co. (C. C. 1910) 180 Fed. 187, decree affirmed (1910) 183 Fed. 678, 106 C. C. A. 28, writ of certiorari denied Whitney Elevator & Warehouse Co. v. Whitney (1911) 31 Sup. Ct. 472, 219 U. S. 588, 55 L. Ed. 348.

256. **Waiver and correction of irregularities and errors.**—A decree for a sale, made in an equity suit with the approbation of counsel, filed in court, removes all preceding technical objections. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209.

257. **Rehearing.**—See rule 69, ante, p. 2525.

Where a motion is made in the federal courts for leave to file a petition for a rehearing, and the allegations of the insufficiency of the amount involved to allow an appeal are conceded as true by the opposite party, the motion is properly granted, and such party cannot be allowed to show afterwards that the amount involved was sufficient to allow an appeal. Moelle v. Sherwood (1893) 13 Sup. Ct. 426, 148 U. S. 21, 37 L. Ed. 350, affirming decree Sherwood v. Moelle (C. C. 1888) 36 Fed. 478, 1 L. R. A. 797.

Rehearing is the proper remedy for error in law where the original decree is not enrolled. Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856.

An application for a rehearing on the same facts and cases and arguments will not be considered. Tufts v. Tufts (C. C. 1847) Fed. Cas. No 14,232.

Application after argument by the respective parties for permission to take further testimony, and for a reargument of the case, will be denied where the interests of third parties may be thereby injuriously affected. Schneider v. Thill (C. C. 1880) 3 Fed. 95.

An application for a rehearing in a court of original jurisdiction, after entry of a final decree, is not an ex parte proceeding. Giant Powder Co. v. California Vigorit Powder Co. (C. C. 1880) 5 Fed. 197.

Where the court has passed upon all the issues necessary to determine the rights of the parties, a motion for rehearing will be denied. Martindale v. Waas (C. C. 1882) 11 Fed. 551.

258. —— **Authority of court or judge.**—A case was heard by a justice of the supreme court, while holding the circuit court for the district of California in the city of San Francisco, and a decree was entered dismissing the complainant's bill. Held, that complainant's petition for a rehearing could not thereafter be heard ex parte before the justice at Washington. Giant Powder Co. v. California Vigorit Powder Co. (C. C. 1880) 5 Fed. 197.

259. —— **Discretion of court.**—Rehearings in equity after a decree are not a matter of right, but rest in the sound discretion of the court. Daniel v. Mitchell (C. C. 1840) Fed. Cas. No. 3,563.

The granting of a motion for a rehearing after a decree for an injunction and account upon the infringement of

a patent rests in the sound discretion of the judges who heard the cause. American Diamond Rock-Boring Co. v. Sheldon (C. C. 1880) 1 Fed. 870.

An application for a reargument is addressed to the discretion of the court, and the exercise of such discretion is not arbitrary, but is governed by well-established principles. Railway Register Mfg. Co. v. North Hudson Co. R. Co. (C. C. 1886) 26 Fed. 411.

260. —— Time for application.—An application for a rehearing, made after the term at which a final decree is rendered, is too late. Roemer v. Simon (1875) 91 U. S. 149, 23 L. Ed. 267; Brooks v. Railroad Co. (1880) 102 U. S. 107, 26 L. Ed. 91; Bank of Lewisburg v. Sheffey (1891) 11 Sup. Ct. 755, 140 U. S. 445, 35 L. Ed. 493 (affirming Sheffey v. Bank of Lewisburg [D. C. 1887] 33 Fed. 315); Aspen Mining & Smelting Co. v. Billings (1893) 14 Sup. Ct. 4, 150 U. S. 31, 37 L. Ed. 986 (dismissing appeal Billings v. Aspen Mining & Smelting Co. [C. C. 1893] 53 Fed. 561); Graham v. Swayne (1901) 109 Fed. 366, 48 C. C. A. 411; Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,-270; Glenn v. Dimmock (C. C. 1890) 43 Fed. 550; Easton v. Houston & T. C. Ry. Co. (C. C. 1890) 44 Fed. 7.

Cause in equity, in which no appeal lies to the supreme court, may be reheard, if petition is filed before end of next term after final decree. Clarke v. Threlkeld (C. C. 1823) Fed. Cas. No. 2,865.

If the petition for a rehearing be filed during the term, the court will retain jurisdiction over the case, and may subsequently decide upon the application. Giant Powder Co. v. California Vigorit Powder Co. (C. C. 1880) 5 Fed. 197.

After interlocutory decree and order of reference to a master for an account, rule to show cause why the decree should not be opened and a rehearing ordered granted. Spring v. Domestic Sewing Mach. Co. (C. C. 1882) 13 Fed. 446.

It is a general principle of law that a court of chancery may decree a new trial after the courts of law are barred by lapse of time from so doing. Tice v. School Dist. No. 18 (C. C. 1883) 17 Fed. 283.

Where parties, having in their possession evidence deemed material, appeal without moving for a rehearing, and after six months dismiss the appeal and ask for a rehearing on the ground of newly-discovered evidence, their laches is inexcusable, and the motion should be denied. Norton v. Walsh (C. C. 1892) 49 Fed. 769.

261. —— Grounds in general.—A rehearing in the case of the death of the judge will be granted only where the opinion was not actually delivered. Doggett v. Emerson (C. C. 1845) Fed. Cas. No. 3,961.

Rehearings are only allowed where some plain omission or mistake has been made, or where something material to the decree has been overlooked. Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267; Tufts v. Tufts (C. C. 1847) Fed. Cas. No. 14,232.

A rehearing should be allowed in equity only for reasons sufficient to justify a new trial at law. Bentley v. Phelps (C. C. 1847) Fed. Cas. No. 1,332.

Where one brings a suit in equity, and presses it to a hearing on the merits over defendant's objection to the jurisdiction, and it is defeated on the merits, and there are some grounds which would seem to entitle an equity court to jurisdiction, complainant's motion for a rehearing on the ground of want of jurisdiction will be denied. Southern Development Co. of Nevada v. Silva (C. C. 1881) 89 Fed. 418.

A case will not be reopened, for the purpose of allowing it to be prepared anew for trial, where the question to be tried, if the case should be reopened, has already been once thoroughly prepared and presented. Coburn v. Schroeder (C. C. 1882) 11 Fed. 425.

Where defendant answers and demurs, but takes no testimony in support of his answer, and elects to go to a hearing on his demurrer, leave will not be granted to open proofs on overruling the demurrer. Orendorf v. Budlong (C. C. 1882) 12 Fed. 24.

The grounds on which courts ordinarily grant rehearings are upon allegation that any question decisive of the case and duly submitted by counsel has been overlooked by the court, and that the decision is in conflict with an express statute or with a controlling decision, either overlooked by the court or to which attention was not drawn through neglect or inadvertence of counsel. Railway Register Mfg. Co. v. North Hudson Co. R. Co. (C. C. 1886) 26 Fed. 411.

The allegation that one defense was not fully presented at the original hearing is no ground for rehearing. Id.

An application for a rehearing must be denied where it is based solely on evidence already before the court, and passed upon adversely to applicant on rehearing before another judge, and no manifest error is shown. Rogers v. Riessner (C. C. 1888) 34 Fed. 270.

Where a cause has been fully argued and submitted on all the questions involved, and the court enters an order of dismissal for want of jurisdiction, which order it afterwards sets aside, the defendant is not entitled to reargue the case upon the other questions involved. Maffet v. Quine (C. C. 1899) 95 Fed. 199, denying rehearing (C. C. 1899) 93 Fed. 347.

A rehearing will not be granted, to introduce new evidence, known before the briefs were filed, where no motion was then made for permission to introduce the evidence. American Hoist & Derrick Co. v. Nancy Hanks Hay Press & Foundry Co. (D. C. 1915) 224 Fed.

524, denying rehearing (D. C. 1914) 216 Fed. 785.

262. —— **Surprise, accident, or mistake.**—Error of judgment or mistake of counsel as to effect of evidence no ground for rehearing. Baker v. Whiting (C. C. 1840) Fed. Cas. No. 786.

The failure of counsel to properly apply the testimony or to give it due weight, in argument, is not ground for a rehearing. Hunter v. Marlboro (C. C. 1846) Fed. Cas. No. 6,908.

Proper practice in case of surprise in testimony not noticed by answer. Barker v. Stowe (C. C. 1879) Fed. Cas. No. 995.

A court will not grant a rehearing and leave to introduce new evidence which was known to counsel at the time the cause was, at their request, considered and decided on the merits. Colgate v. Western Union Tel. Co. (C. C. 1884) 19 Fed. 828; Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C. 1898) 91 Fed. 212, decree reversed (1899) 93 Fed. 712, 35 C. C. A. 547.

A party cannot obtain a rehearing by simply asserting that the conduct of his adversary's counsel upon the argument was different from what he had anticipated, and that he was surprised because the attack came from an unexpected quarter. Everest v. Buffalo Lubricating Oil Co. (C. C. 1884) 22 Fed. 252.

No mistakes of judgment or want of attention or capacity of counsel afford any just or proper grounds for granting a motion to open a case. Witters v. Sowles (C. C. 1887) 31 Fed. 5.

Plaintiff, after decree on a hearing for which he has set the cause, on supplemental bill and answer thereto, cannot have the case reopened because he was surprised by the allegations in the bill. Perkins v. Hendryx (C. C. 1887) 31 Fed. 522.

A rehearing will not be granted to allow the introduction of evidence which, by due diligence, could have been introduced at the original hearing, on the ground that the party and his counsel were misled as to the real issue by the arguments of the opposing counsel. Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C. 1894) 64 Fed. 125.

To justify a court of equity in granting a rehearing after decree on the ground that through inadvertence or excusable neglect the defendant was not present or represented by counsel on the hearing, in addition to a sufficient legal excuse for such absence, it must be shown that defendant had a good and meritorious defense, or at least that from the evidence the court might, upon argument, reach a different conclusion on the merits. Blair v. Silver Peak Mines (C. C. 1899) 93 Fed. 332, denying rehearing (C. C. 1898) 84 Fed. 737.

A suit in equity was tried on oral testimony taken in open court, the trial lasting nine days. On the first day complainants introduced testimony as to certain physical facts which were pertinent to the issues. Defendants made no claim of surprise, but cross-examined and introduced evidence as to such facts, and submitted the case without objection. Held, that they were not entitled to have the case reopened for further testimony on the ground that they were surprised by such testimony, it having been their duty, if surprised, to at once call the attention of the court to such fact and ask for time to meet such testimony. Anderson Land & Stock Co. v. McConnell (C. C. 1909) 171 Fed. 475.

Surprise as a ground for the granting of a rehearing in equity must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate, and which ordinary prudence and foresight could not guard against. Id.

263. —— **Newly discovered evidence.**—Rehearing not granted if newly-discovered evidence is merely cumulative. Baker v. Whiting (C. C. 1840) Fed. Cas. No. 786; Rogers v. Marshall (C. C. 1882) 13 Fed. 59; Pfanschmidt v. Kelly Mercantile Co. (C. C. 1887) 32 Fed. 667; Witters v. Sowles (C. C. 1887) 32 Fed. 765, 766.

Where newly discovered testimony would not change the result, a rehearing will not be granted. Bentley v. Phelps (C. C. 1847) Fed. Cas. No. 1,332; Adair v. Thayer (C. C. 1881) 7 Fed. 920; McCloskey v. Du Bois (C. C. 1881) 9 Fed. 38; Munson v. City of New York (C. C. 1882) 11 Fed. 72.

Rehearing not granted on ground of newly discovered evidence of which the party, by reasonable diligence, might have obtained knowledge. Prevost v. Gratz (C. C. 1816) Fed. Cas. No. 11,406; Baker v. Whiting (C. C. 1840) Fed. Cas. No. 786.

Rehearing after interlocutory decree granted upon filing supplemental bill, for newly discovered evidence, if of such nature as to entitle party to relief upon bill of review after final decree, but not otherwise. Baker v. Whiting (C. C. 1840) Fed. Cas. No. 786.

A rehearing, when granted on newly discovered evidence of confessions of complainant affecting the merits of the bill. Daniel v. Mitchell (C. C. 1840) Fed. Cas. No. 3,563.

The petitioners must show due diligence to discover and obtain the new evidence at the original hearing, and that it is material to the issue. Reeves v. Keystone Bridge Co. (C. C. 1876) Fed. Cas. No. 11,661.

Upon a petition for leave to reopen a cause and to file a supplemental answer setting up a newly discovered defense, after final hearing and decree,

the evidence must be clearly such as would have availed the defendants if introduced on final hearing. Where, in such a case, the defense sought to be introduced was that a joint patent was the sole invention of one of its patentees, the affidavit of such patentee that he was the sole inventor, and of others that he claimed to them to be the sole inventor, held not to be such proof as would warrant the court in reopening the cause and admitting such defense. Collins Co. v. Coes (C. C. 1881) 8 Fed. 517.

To entitle parties to a rehearing, after an interlocutory decree, on the ground of newly discovered evidence, they must show to the satisfaction of the court that they exercised due and reasonable diligence before the hearing to procure the evidence now sought to be introduced, and the facts and circumstances constituting such diligence must be specifically stated. A general averment is not sufficient. They must show, also, that the new evidence is material. The proper practice suggested. Gillette v. Bate Refrigerating Co. (C. C. 1882) 12 Fed. 108.

Rehearings in equity cases should be generally denied, when the grounds offered therefor pertain to matters of evidence that could just as well have been procured before the trial already had. This should be especially the rule in patent cases when the defense is prior use, since it is seldom that the defendant cannot make it appear that he has discovered new evidence in support of such a defense. Hicks v. Ferdinand (C. C. 1884) 20 Fed. 111.

Matter, having been once decided, will not be reheard because it is alleged that certain drawings before court at first trial were defective, and that evidence now proposed will show the structures in the original and the reissue to be the same, unless the new evidence is so clear and positive that an entirely different case is presented. Hayes v. Dayton (C. C. 1884) 20 Fed. 690.

Upon a decree setting aside a patent for fraud in its procurement, defendant made a motion to reopen the case for further proof, and it did not appear from his affidavit that the testimony sought to be had could not have been easily adduced upon the trial, and no effort for the procurement of such testimony on the trial was set out in the affidavit. Held, that defendant showed no right to have the case reopened. U. S. v. Gunning (C. C. 1885) 23 Fed. 668.

Courts will not open a decree, and admit new defenses and newly discovered evidence, unless it appears that the defendants could not, with reasonable diligence, have discovered the facts which are sought to be introduced when the pleadings were drawn and the testimony taken. Willimantic Linen Co. v. Clark Thread Co. (1885) 24 Fed. 799.

Upon a rehearing, for the purpose of considering the effect of newly discovered evidence, when such evidence is not sufficient to disturb the decree, the circuit court will not make the rehearing the pretext for adjudicating upon the controversy de novo, it having twice been heard before a justice of the supreme court, although the circuit court has serious doubt of the correctness of the superior decision. Reed v. Lawrence (C. C. 1887) 32 Fed. 228.

A rehearing will not be granted on the ground of newly discovered evidence, where the party making the application was put upon inquiry as to such evidence by testimony taken in the case long before the final hearing. Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C. 1899) 99 Fed. 500, denying rehearing (C. C. 1899) 96 Fed. 344.

A court of equity will not grant a rehearing to enable a complainant to have an analysis made of alleged spurious bitters, which defendants were charged with having sold as the product of complainant, where it was fully known before the hearing that the court regarded such analysis as material. Hostetter Co. v. Comerford (C. C. 1900) 99 Fed. 834, denying rehearing (C. C. 1899) 97 Fed. 585.

Defendant agreed to pay plaintiff one-half of anything she could collect on a judgment held by defendant. An attachment suit was accordingly brought, but defendant dismissed the same, and compromised with the judgment debtor. Plaintiff sued to recover her proportion of the amount due on the judgment, but failed to show, by competent evidence, that the debtor owned any particular property which was covered by the attachments. Consequently a decree was entered allowing plaintiff merely one-half of what defendant actually received from the judgment debtor. On motion for rehearing plaintiff offered to show, by alleged newly discovered evidence, certain facts as to the interest the judgment debtor had in his father's estate which could be reached by the attachment. The inventory of the estate had been on file in the probate court for years, and the interest of the judgment debtor could have been proved before the testimony was closed, by proving the appraisal and calling the administrator. So, in the attachment suit, judgment could have been taken and execution levied upon such interest, or the administrator could have been followed and compelled to make disclosure under the state procedure. None of these things was done. Held, that no sufficient diligence was shown to warrant a rehearing. Sowles v. First Nat. Bank (C. C. 1904) 133 Fed. 846.

264. —— Application and proceedings thereon.—Where an issue is directed by the chancellor to the jury, a motion for a new trial can be made only to the chancellor, and the party submitting it

must procure for his use the notes of the proceeding at the trial and of the evidence there given. Watts v. Starke (1879) 101 U. S. 247, 25 L. Ed. 826; Clyde v. Richmond & D. R. Co. (1896) 72 Fed. 121, 18 C. C. A. 467.

Where a verdict, rendered upon the trial of an issue out of chancery, is set aside by the law side of the court, and a new trial ordered, and another verdict is rendered therein, which is certified, a decree entered in conformity therewith will not be reversed on appeal because the first verdict was never certified to the chancery side of the court, by which alone it could be set aside, since the decree of the chancellor adopting the second verdict amounts to an affirmation of the action of the law side of the court. Kerr v. South Park Com'rs (1886) 6 Sup. Ct. 801, 805, 117 U. S. 379, 388, 29 L. Ed. 924, 927, affirming decree South Park Com'rs v. Kerr (C. C. 1882) 13 Fed. 502.

Where there is an issue out of chancery in the United States circuit court, and a verdict thereon, which is certified, and a decree entered thereon, an order made at the next succeeding term nunc pro tunc, permitting a certificate of the evidence on the trial of the issue and the charge to the jury to be filed as a part of the record, is competent, and they will not be disregarded on appeal. Id.

An application for a rehearing, on the ground of newly discovered evidence, which shows no diligence, and does not set out the facts to be proved nor the witnesses to be called, but merely asserts that certain facts were not fully known, cannot be granted. McLeod v. City of New Albany (1895) 66 Fed. 378, 13 C. C. A. 525.

A rehearing will not be granted on the mere certificate of counsel as to the sufficiency of the reasons therefor. Emerson v. Davies (C. C. 1845) Fed. Cas. No. 4,437.

An application for a rehearing must state some reason which would constitute good ground for a new trial at common law. Hunter v. Marlboro (C. C. 1846) Fed. Cas. No. 6,908.

The proper practice to obtain a rehearing before final decree is by petition to the court for leave to file a supplemental bill setting forth the newly discovered evidence. Reeves v. Keystone Bridge Co. (C. C. 1876) Fed. Cas. No. 11,661.

Necessary averments in affidavits on motion for rehearing. Barker v. Stowe (C. C. 1879) Fed. Cas. No. 995.

A petition for a rehearing on the ground of newly discovered evidence, which is signed by the petitioner's solicitor and is verified by him, to the effect that petitioner is a corporation and he is its solicitor, and that such petition is true of his best knowledge, information, and belief, is not sufficient. It must show, by some positive testimony, that the evidence, with the use of reasonable diligence, could not have been procured in time for the former hearing, and so the court may judge if reasonable diligence was used. Page v. Holmes Burglar-Alarm Tel. Co. (C. C. 1880) 2 Fed. 330.

Held, further, that as the circuit court would be held by the circuit judge, in the absence of the justice who heard the cause, the latter would direct the clerk of the court to forward the petition and answer to him at Washington, accompanied with such briefs as counsel might file within a reasonable time to be allowed by the court, and that the application would then be taken up and disposed of, and the judgment of the justice sent to the circuit court, and there entered. Giant Powder Co. v. California Vigorit Powder Co. (C. C. 1880) 5 Fed. 197, 199.

In a case heard by a justice of the Supreme Court holding the circuit court for a district, where complainant's bill was dismissed, his petition for a rehearing could not thereafter be heard ex parte before the justice at Washington; but complainant should file his petition with the clerk of the circuit court, and obtain an order that defendant show cause why his prayer should not be granted, whereupon defendant might answer the petition, and upon such petition and answer the application for rehearing could be heard. Id.

A petition for rehearing, on the ground of newly discovered evidence, must fully state, independently of the accompanying affidavits, the nature of the new evidence relied on, that it was not known to the petitioner until after the decree, and when it did first come to his knowledge. It must further disclose with particularity and detail sufficient facts to show that, with reasonable diligence, the new evidence could not have been known before the hearing on the merits. Allis v. Stowell (C. C. 1880) 85 Fed. 481.

A petition for rehearing must be signed by counsel. Neither it nor the affidavits in its support should be verified before a notary public who is also counsel for petitioner. The affidavits should, by distinct and positive allegations, be made a part of the petition. Id.

A petition is not necessary where there has been only an interlocutory decree ordering an account. Pulliam v. Pulliam (C. C. 1881) 10 Fed. 53.

A motion to reopen a cause and allow defendant to take additional testimony, where defendant did not state that the evidence was not accessible at the trial, or was not then known to him, or that it was material, will be denied. Vermont Farm Mach. Co. v. Converse (C. C. 1882) 10 Fed. 825.

On a petition for a rehearing upon an interlocutory decree in chancery,

the court will, as a matter of course, continue the temporary execution of the decree till the hearing can be had, where to proceed under it might involve large expense, and but little time must elapse before such hearing can be had. Rogers v. Marshall (C. C. 1882) 12 Fed. 614.

When a rehearing is granted for the reason that the court, upon the pleadings and proofs as they stood at the hearing, is inclined to doubt the correctness of the decree, it is the proper practice to set aside such decree until the case is again heard. It would be otherwise if rehearing was granted in order to allow additional proof. In the latter case, the decree should stand pending the rehearing. Rogers v. Marshall (C. C. 1883) 15 Fed. 193.

Where a case is tried upon an agreed statement of facts, a motion for a rehearing will not be granted when the affidavits upon which it is based fail to disclose adequate reason why additional facts, which the party fully knew at the time the agreed statement was signed, should be introduced. Rintoul v. New York Cent. & H. R. R. Co. (C. C. 1884) 20 Fed. 313.

An application for a rehearing and to amend the answer on the ground of newly discovered evidence will be denied where defendant in his affidavit merely alleges in general terms that "he has been eager to collect all material evidence," and "has made great exertion and every reasonable effort to defend the suit." The applicant should state the facts so as to enable the court itself to determine whether reasonable diligence was used. Hicks v. Otto (C. C. 1884) 85 Fed. 728.

A petition for a rehearing, stating in detail the reasons why it should be granted, should be filed, and if the reasons stated are considered sufficient a rehearing will be granted. An ordinary motion for a rehearing is improper, and will be overruled as a matter of course. Harman v. Lewis (C. C. 1885) 24 Fed. 530.

When the decree is interlocutory and not final, the court has power to open the same and allow a new defense on motion, and without the formality of a bill of review; but, when the application is in fact and substance for a rehearing on the ground of newly discovered evidence, it must be supported by the same sort of proof as is required in order to give a party relief upon a bill of review, or a supplemental bill in the nature of review, after a final decree. Willimantic Linen Co. v. Clark Thread Co. (C. C. 1885) 24 Fed. 799.

A party will not be allowed to open a case and have evidence retaken, where his motion papers fail to show newly discovered evidence, or evidence of which the party could not avail himself at the first hearing, and where it appears that the party merely wishes to deny what he did not deny before, but which called for denial then as much as at the time of the application for a rehearing. Witters v. Sowles (C. C. 1887) 31 Fed. 5.

Essentials of a petition for rehearing after an interlocutory decree and the procedure thereon considered. Sheeler v. Alexander (D. C. 1913) 211 Fed. 544.

265. —— **Evidence on rehearing.**—As to the evidence admissible on a rehearing, see Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267.

On a bill to quiet title, the court cannot direct that on a second trial before a court of law the same evidence shall be received as was used upon the first trial. Harmer v. Gwynne (C. C. 1851) Fed. Cas. No. 6,075.

(W) Masters and commissioners, and proceedings before them

266. Appointment, qualification, and tenure.
267. Compensation and fees.
268. Liabilities for official acts.
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299. Confirmation of report.

See rules 59–68, ante, pp. 2521–2524.

266. Appointment, qualification, and tenure.—A master in chancery, being an officer of the court, should be selected and appointed by the court. Any arrangement or agreement by the parties for selecting the master and fixing his compensation, in advance of his appointment, is improper, in disrespect of

the court, and should not be tolerated. Finance Committee of Pennsylvania v. Warren (1897) 82 Fed. 525, 27 C. C. A. 472.

It is not requisite to the validity of an appointment of a standing master that the order of appointment shall be recorded in any book of the court. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 30 C. C. A. 212.

An order appointing a standing master is impervious to collateral attack on the ground that he is ineligible because he was a clerk of the court or a son of one of the judges. That question can be presented only by a direct proceeding to set aside the order of appointment. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 30 C. C. A. 212; Elgutter v. Same (1898) 86 Fed. 500, 30 C. C. A. 218.

The master is a judicial officer, acting as the representative and substitute of the court which appointed him. Bate Refrigerator Co. v. Gillette (C. C. 1886) 28 Fed. 673.

Facts held not to justify removal of master for bad faith or malice. Mason v. Pewabic Min. Co. (C. C. 1900) 100 Fed. 340.

267. Compensation and fees.—The permanent master appointed in two suits to foreclose railroad mortgages was a young man without experience in railway accounts. The suits were not contested, and no matter of importance was litigated before him. His office expenses had been paid, and he had received $6,000 on account of his compensation. The principal part of his work was done by the receiver's auditor, to whom was allowed therefor more than $3,000. The master and the clerk of the court were appointed commissioners to sell the property, which was purchased at the upset price, $500,000, and each received $6,500 as commissions. His services extended very little over two years, during which he was absent five months; and he was also master in another railroad foreclosure suit. Held, that further compensation should be denied. Brown v. King (1894) 62 Fed. 529, 10 C. C. A. 541.

A master was appointed to sell a railroad 112 miles long under a mortgage securing $1,380,000 in bonds, and which was subject to a prior mortgage of $300,000. The road was purchased by the bondholders for $250,000. The master had no extraordinary duties to perform, and the entire period of his service was only two months, the actual time employed probably not exceeding ten days. Held, that an allowance of $4,000 was not justified, and that any sum over $2,500 would be excessive. Finance Committee of Pennsylvania v. Warren (1897) 82 Fed. 525, 27 C. C. A. 472.

A party is not estopped by failing to ask that the compensation of a master be reduced, after it has been fixed by an interlocutory order at a certain sum per month until his discharge, nor by failing to move for his discharge before further services are rendered, from asking that the allowance for such services be reduced on final settlement of his account after his discharge. Pleasants v. Southern Ry. Co. (1899) 93 Fed. 93, 35 C. C. A. 226.

Parties at whose instance and for whose convenience a decree was passed, in a suit in which a receiver had been appointed, appointing a special master to take testimony at a certain place, with authority to employ stenographers, and who participated in the proceedings for taking the testimony, without any motion to amend the decree, or suggestion as to distribution of the costs of the proceedings, cannot afterwards be heard to say that they will be injured by having the compensation of said master and stenographers paid out of the fund in the registry of the court. Edgell v. Felder (1900) 99 Fed. 324, 39 C. C. A. 540.

Where the rules of court fix the per diem compensation of a master, unless an additional allowance is made, a stipulation by which the parties to a suit agree to pay him an increased amount is in violation of such rules, and will not be sanctioned. In re Berkeley (1913) 203 Fed. 7, 121 C. C. A. 359.

Amount of fees, and how determined, see Doughty v. West, Bradley & Cary Mfg. Co. (C. C. 1870) Fed. Cas. No. 4,030.

A special allowance made to a master for his services in executing a decree. Erie Ry. Co. v. Heath (C. C. 1872) Fed. Cas. No. 4,516.

The compensation of masters, whose functions are judicial, may be measured by the standard of judicial salaries. Middleton v. Bankers' & Merchants' Tel. Co. (C. C. 1887) 32 Fed. 524.

A master's fee on adjournment of a hearing should be paid by the party asking the adjournment, and it is good practice to pay such fee when the adjournment is had. Brickill v. City of New York (C. C. 1893) 55 Fed. 565.

Where a session is taken up with taking testimony, for a part of which one party is to pay, and for the remainder of which the other party is to pay, the master's fee for the session is properly chargeable, in equal shares, to both parties, irrespective of the proportionate amount of time consumed by them; and sessions consumed in whole or in part by argument may be settled for in the same way. Id.

At a hearing before a master the party who calls a witness must pay the expense of taking his direct and redirect examination, but the adverse party must pay the expense of the cross and recross examination. Id.

On a hearing before a master, each party should pay, in the first instance, the costs, expenses, and stenographer's and master's fees for taking its own

direct, redirect, cross or recross examination of a witness, but on final decree the sum so paid by the prevailing party may be imposed on the defeated party. Id.

Where, on a hearing before a master, a session is taken up entirely with taking testimony, the expense of which is to be borne by one party, the master's fees for that session must be paid by such party. Id.

Where a decree which, among other matters, fixed the fee of a special master without objection as to its amount, and awarded execution therefor against one of the parties, is appealed from and reversed, and the costs, including such fee, are taxed against the other party, the master is entitled to recover interest from such party from the time his fee was allowed. Jesup v. Wabash, St. L. & P. Ry. Co. (C. C. 1899) 94 Fed. 20.

Fees of a special master held not payable from a fund arising from the sale of the property of an insolvent corporation previously pledged to the payment of receivers' certificates. Buell v. Kanawha Lumber Corporation (D. C. 1912) 201 Fed. 762.

268. Liabilities for official acts.—In case property not embraced in a decree foreclosing a mortgage is seized for sale by the master appointed to sell, such officer is liable to the owner in trespass, or the owner may pursue any other appropriate remedy in any proper court, subject to the limitation that while the property is in the actual or constructive possession of the court under whose process it was taken it cannot be interfered with by any other court. Perry v. Tacoma Mill Co. (1907) 152 Fed. 115, 81 C. C. A. 333.

269. Power to refer to master.—A court of equity may ascertain the facts themselves, if the evidence enables this to be done, or may refer the question to auditors. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136.

The reference of a case to a master, without the consent of parties, to make findings of fact, is not error where such findings are treated as advisory only, and the ultimate findings are made by the court. Babcock v. De Mott (1908) 160 Fed. 882, 88 C. C. A. 64, writ of certiorari denied (1909) 29 Sup. Ct. 690, 212 U. S. 582, 53 L. Ed. 660.

The authority to refer to a master is inherent in the courts of the United States in the exercise of their chancery jurisdiction. Thompson v. Smith (C. C. 1869) Fed. Cas. No. 13,976.

A case should not be referred to a master until the issues made by the pleadings have been settled by a decree. It is not proper to try those issues upon exceptions to the master's report. Ward v. Paducah & M. R. Co. (C. C. 1880) 4 Fed. 862.

270. Discretion as to reference.—Reference to a master to ascertain an amount due is discretionary with the court, and the determination of the amount without such reference is not error. Brown v. Grove (1897) 80 Fed. 564, 25 C. C. A. 644; Pepper v. Addicks (C. C. 1907) 153 Fed. 383.

Where the proof fails to furnish a proper basis for an accounting, but enough appears to make it desirable that the real facts be made to appear, the court may, in its discretion, refer the case to a master, with power to take further testimony and report thereon as to both law and fact. Ridenbaugh v. Burnes (C. C. 1882) 14 Fed. 93.

271. Consent of parties to reference.—The consent of parties to a suit in equity to a reference to a master to find the facts, which will render his finding on conflicting evidence unassailable, cannot be inferred from the mere failure to object to a general order of reference made before the suit was commenced. Guarantee Gold Bond Loan & Savings Co. v. Edwards (1908) 164 Fed. 809, 90 C. C. A. 585, affirming judgment (1907) 104 S. W. 624, 7 Ind. T. 297.

Parties to an equity cause may, by a consent decree, constitute a special master an arbiter to settle specified matters in dispute. Jefferson Hotel Co. v. Brumbaugh (1909) 168 Fed. 867, 94 C. C. A. 279.

Consent of the parties by stipulation will not authorize a master in chancery to act as a referee at law. Farmers' Loan & Trust Co. v. Central R. R. of Iowa (C. C. 1880) 2 Fed. 656.

272. Stipulation to dispense with reference.—Where the extent of respective interests of the parties can be arrived at without a reference to a master, such reference may be dispensed with, upon counsel filing a stipulation to that effect. Dumont v. Fry (C. C. 1882) 13 Fed. 423.

273. Powers and functions of master general.—A commissioner appointed by the court to settle a partnership estate, which consisted of a large amount of real estate and over $25,000 of bills receivable, has power to employ and pay the necessary assistants to enable him to properly look after and handle the property, as well as to procure such legal services as are reasonably required, although he is himself a lawyer; and his employment of his partner as attorney is not objectionable. Gunn v. Ewan (1899) 93 Fed. 80, 35 C. C. A. 213.

On a foreclosure of a mortgage of a portion of a road operating as a part of a larger line, where no separate accounts are kept, held, that the master properly made a pro rata estimate of the earnings and expenses of the whole road. Pullan v. Cincinnati & C. Air-Line R. Co. (C. C. 1873) Fed. Cas. No. 11,462.

The master is bound to follow the orders and directions of the court in the decretal order under which he is ap-

pointed. Felch v. Hooper (C. C. 1878) Fed. Cas. No. 4,718.

The master derives his power from his appointment by the court and from the equity rules, which especially prescribe his duties and the manner of their performance. Bate Refrigerating Co. v. Gillette (C. C. 1886) 28 Fed. 673.

A commissioner may allow for improvements on real estate, though that matter was not embraced in the decree of reference, where the question was raised by the pleadings, and the parties examined witnesses as to the value of such improvements, and agreed to submit it to arbitration, and the master adopted the award. McCormack v. James (D. C. 1886) 36 Fed. 14.

274. Questions and matters proper for reference.—Reference to a special master decreed in a suit begun by an original bill in equity, filed by the commonwealth of Virginia against the state of West Virginia, which seeks an adjudication of the amount due the former state by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by the state of West Virginia at the time of its creation as a state. Commonwealth of Virginia v. State of West Virginia (1908) 28 Sup. Ct. 614, 209 U. S. 514, 52 L. Ed. 914.

Under the circumstances a decree appointing a special master to make a private examination of certain papers, claimed by complainant, to turn over to complainant any papers belonging to him, and to the receiver such papers as belonged to the bank and were not material to the prosecution, and to reserve for further consideration, such as concerned bank transactions, was in violation of the fundamental and constitutional rights of the litigants as to the method of trial. Potter v. Beal (1892) 50 Fed. 860, 2 C. C. A. 60.

A court of equity may hear an intervention without a reference to a special master. Central Trust Co. of New York v. Madden (1895) 70 Fed. 451, 17 C. C. A. 236, affirming decree Same v. Port Royal & W. C. Ry. Co. (C. C. 1894) 63 Fed. 922.

A party to a suit in equity is entitled to the judgment of the court upon the issues raised—especially those of law—and it is not competent for the court to refer the entire decision of the case to a master without the consent of the parties. Garinger v. Palmer (1904) 126 Fed. 906, 61 C. C. A. 436.

A court is not bound to refer to a special master the question of the allowance of counsel fees from a fund in court. Haight & Freese Co. v. Weiss (1908) 165 Fed. 430, 91 C. C. A. 380.

In the event of interrogatories being propounded calling for testimony so clearly and manifestly foreign to the controversy that they ought to be rejected at the very threshold of the case, the court will make a reference to the master, with instructions to report whether any interrogatories to which specific objections are made call for answers manifestly irrelevant to the controversy. Zunkel v. Litchfield (C. C. 1884) 21 Fed. 196.

Plaintiff, to secure a loan of $51,000, conveyed his ranch, and the stock thereon, to defendants, it being agreed that defendants should manage the property, and reimburse themselves from sales. Held, that the status of defendants was that of mortgagees in possession, bound to exercise reasonable care and diligence in preserving the property, and in disposing of it for the benefit of all concerned; that if defendants unnecessarily removed stock to a distant and inhospitable region, where it was abandoned to the rigors of winter, defendants were chargeable for the consequent loss; that charges amounting to $60,000, for transporting and marketing cattle sold for $70,000, were, prima facie, so large as to challenge the closest scrutiny; that plaintiff was entitled to be furnished with explicit and itemized statements of expenditure; and that the case was a proper one for reference to a master to state a true account between the parties. Wann v. Coe (C. C. 1887) 31 Fed. 369.

Where an allegation of inadequate consideration for release by heir of interest in estate is not denied a master may be appointed to ascertain whether the consideration was commensurate with the actual interest released. Balfe v. Tilton (D. C. 1912) 198 Fed. 704.

Issues arising on pleadings should be disposed of by the court in the first instance, especially where a reference would necessarily result in great delay. Pennslyvania Steel Co. v. New York City Ry. Co. (D. C. 1912) 202 Fed. 296.

275. Issues embraced in order of reference.—An order that claimant's petition, the answer thereto, and his replication "be, and the same are hereby, referred to" a master in chancery, "to take proof of the issues joined in said petition, answer, and replication, and to report the same to this court, with his conclusions thereon as to the amount of damages, if any, which" the claimant is entitled to recover under said issues, refers the whole case to the master, and not merely the question of damages. Walker v. Kinnare (1896) 76 Fed. 101, 22 C. C. A. 75.

Where an order of reference recited that, on motion of plaintiff's attorneys, B. was appointed special master to investigate the cause and report to the court what amount, if any, was due by reason of the claim, and that such report be filed "subject to the further orders of the court," the reference was ex parte, and did not refer the issues to the master for final decision. Blassengame v. Boyd (1910) 178 Fed. 1, 101 C. C. A. 129, 21 Ann. Cas. 800, affirming decree Blassingame v. Board of Com'rs

of Haywood County (C. C. 1909) 172 Fed. 630.

276. Evidence on reference—Admissibility, credibility, weight and sufficiency.—The testimony of a witness examined by a master a second time without a special order cannot be admitted to impeach his testimony on the original examination. Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267.

Defendant's request to introduce further evidence held rightly denied by the master where made after he had submitted a draft of his report. Piper v. Brown (C. C. 1873) Fed. Cas. No. 11,-181.

The federal court, may, irrespective of any statute, order the settlement in the state probate court to be taken as a settled account, and to stand before the master as prima facie evidence; but it must appear that the legatee had notice of the making of the settlement. Pulliam v. Pulliam (C. C. 1879) 10 Fed. 23.

Where a supplementary account of the profits since the first accounting is ordered, the master may use on the second accounting the record which he used on his first accounting, without its being put in evidence before him. Reed v. Lawrence (C. C. 1886) 29 Fed. 915.

The use of books of account by a master, after they had been impeached as books of original entry and excluded as evidence, the entries, however, not having been shown to be incorrect or fraudulently made, as data for finding other evidence, and the consideration, in stating the account, of such entries as were corroborated by other evidence, was not error which invalidated his findings. Robinson v. Alabama & G. Mfg. Co. (C. C. 1898) 89 Fed. 218.

The master is not bound by the opinion of other lawyers as to the value of an attorney's services for which claim is made. Taintor v. Franklin Nat. Bank (C. C. 1901) 107 Fed. 825.

A master in determining a disputed issue as to the number of yards of earth moved by a road contractor held not justified in ignoring the measurement made by engineers, which was the method provided by the contract, and finding the quantity by assuming that each team employed on the work moved a certain number of yards per month, especially where it appeared from the evidence that the estimate of the engineers was the more reliable. Blassingame v. Board of Com'rs of Haywood County, N. C. (C. C. 1909) 172 Fed. 630, decree affirmed Blassengame v. Boyd (1910) 178 Fed. 1, 101 C. C. A. 129, 21 Ann. Cas. 800.

The fact that the testimony of a witness is uncontradicted does not require the master to accept it as true and treat the case as one of pure law. Hitner v. Diamond State Steel Co. (D. C. 1913) 207 Fed. 616.

277. —— Examination of witnesses.—Witnesses may be examined viva voce before a master, in view of the twenty-eighth rule of practice for the United States equity courts. Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200.

A witness, who has given his deposition, which has been read at the hearing, cannot be examined anew before the master, without a special order of the court. Gass v. Stinson (C. C. 1837) Fed. Cas. No. 5,261.

Witnesses cannot be examined the second time by a master without a special order of the court, and then only in respect to facts not before testified to by them, and not then in issue. Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267.

The master should choose the best method of taking testimony, under all the circumstances of the case, and, if the cheapest plan is as good as any other, that plan should be adopted. Bate Refrigerating Co. v. Gillette (C. C. 1886) 28 Fed. 673.

278. —— Time and place of taking evidence.—No enlargement of the time for taking testimony in equity before the master can be made unless notice of the application be given to the opposite party. Hunt v. Oliver (C. C. 1871) Fed. Cas. No. 6,894.

The universal practice has been to permit the master to act outside of the territorial jurisdiction of the court, and semble that he may take testimony in foreign countries. Bate Refrigerating Co. v. Gillette (C. C. 1886) 28 Fed. 673.

A master has jurisdiction, in his discretion and for the convenience of the parties, to take testimony outside of the district of his appointment. Consolidated Fastener Co. v. Columbian Button & Fastener Co. (C. C. 1898) 85 Fed. 54.

Where a master is appointed to take testimony in the district in which a suit is pending, and proceeds to take testimony in another district, persons living in the latter district, whose legal domicile is elsewhere, may be compelled to appear, and any person found in such district, who answers a subpœna and appears before the examiner, may be lawfully examined. U. S. v. Standard Sanitary Mfg. Co. (C. C. 1911) 187 Fed. 232.

279. —— Objections.—Where a witness refused to answer a question propounded on a hearing, and the question was certified to the court, but the proponent failed to press the motion to compel the witness to answer, he waived his right to an answer. Dr. Peter H. Fahrney & Sons Co. v. Ruminer (1907) 153 Fed. 735, 82 C. C. A. 621.

Counsel cannot direct a witness not to answer questions believed objectionable, the proper course being to state the objection on the record, after which the answers must be received and the

objections retained to the hearing. Eddy v. Eddy (1909) 168 Fed. 590, 93 C. C. A. 586, writ of certiorari denied (1909) 29 Sup. Ct. 699, 214 U. S. 518, 53 L. Ed. 1065.

The general objection, "irrelevant and incompetent," is not sufficiently specific to be considered on the hearing. Hamilton v. Southern Nevada Gold & Silver Min. Co. (C. C. 1887) 33 Fed. 562.

In taking testimony before a master, questions objected to for irrelevancy and immateriality should be answered, leaving such objections to be ruled on at final hearing. Kansas Loan & Trust Co. v. Electric Ry., Light & Power Co. of Sedalia, Mo. (C. C. 1901) 108 Fed. 702; Chadeloid Chemical Co. v. Chicago Wood Finishing Co. (C. C. 1909) 173 Fed. 797.

The witness must answer, notwithstanding objections unless the matter is clearly privileged, or forbidden on some other grounds of public policy, or is so irrelevant that it would be an abuse of the court's power to compel the witness to answer. In re Felts (D. C. 1909) 205 Fed. 983.

280. Adjournment or continuance of hearing.—It is not an abuse of discretion for a special master to refuse an adjournment for the purpose of permitting a party to have executed and returned certain interrogatories, when the cause has been adjourned several times since the close of the evidence, and no such application has then been made. Third Nat. Bank v. National Bank of Chester Valley (1898) 86 Fed. 852, 30 C. C. A. 436, certiorari denied (1898) 19 Sup. Ct. 887, 171 U. S. 688, 43 L. Ed. 1178.

281. Interference with hearing by interlocutory court orders.—All questions arising before a master in chancery should be presented to the court by objection and exception to his report. Before such report is made, the court will not entertain a motion to instruct the master while discharging his duties according to the best of his ability. Lull v. Clark (C. C. 1884) 20 Fed. 454.

It is only in cases of extreme hardship to the defendant that the court will review an incidental ruling of the master, in the course of the accounting, when that ruling can be reviewed upon exceptions to his report. Welling v. La Bau (C. C. 1885) 32 Fed. 293.

While there can exist no doubt of the power of the court for sufficient cause to vacate or modify any order made by a master, it is not the general practice to interfere with his acts and proceedings in limine, but to wait until the coming in of his report. Bate Refrigerating Co. v. Gillette (C. C. 1886) 28 Fed. 673.

When a cause is referred to a master to take an account of profits or damages, it is his duty to pass upon all the questions of procedure arising before him. His action is subject to review only when he has completed his labors, and filed his report; and the court will not, in the meantime, on the application of a party, give him directions not to take evidence in relation to a particular matter. Hoe v. Scott (C. C. 1898) 87 Fed. 220, 1007.

282. —— Reopening case.—A new defense cannot be set up by exceptions to the report of a master after the merits of the case have been fully considered and determined. City of New Orleans v. Warner (1901) 21 Sup. Ct. 353, 180 U. S. 199, 45 L. Ed. 493, affirming decree (1900) 101 Fed. 1005, 41 C. C. A. 676.

It was not an abuse of discretion for a master in chancery, after having prepared a draft of his report, and submitted it to the parties, to grant a petition of one of the parties to reopen the case to give petitioner an opportunity to put in material testimony inadvertently not offered. Central Trust Co. of New York v. Richmond & D. R. Co. (C. C. 1895) 69 Fed. 761.

One S. intervened in a railroad foreclosure suit, and presented a claim for damages for the death of her husband, alleged to have been caused by the negligence of the receiver of the railroad in a certain particular stated in the petition. The intervention was referred to a master, who heard the evidence, and prepared and submitted to counsel a report, finding against the intervener. S. then applied to have the case reopened, in order to set up and prove a new and different negligent act, which had been suggested in the evidence on the hearings, but was not alluded to in the pleadings as they stood, and had not been relied on by the intervener. Held, that the application came too late, and the master properly refused to reopen the case, or allow the amendment. Central Trust Co. of New York v. Marietta & N. G. Ry. Co. (C. C. 1896) 75 Fed. 41.

After the filing of a special master's report, and taking of exceptions thereto, the court will not allow the cause to be reopened to permit the taking of additional evidence on which to base a recovery, in accordance with the views expressed by the master. Central Trust Co. v. Georgia Pac. Ry. Co. (C. C. 1896) 83 Fed. 386, decree reversed (1898) 87 Fed. 288, 30 C. C. A. 648.

Where abundant notice has been given to all creditors of the proceedings before the master, with full opportunity for all to appear, and the testimony has been taken and closed, and the master's report filed, the proceedings will not be reopened to allow dilatory creditors to appear for the first time, and make objections, and present

testimony. Sands v. E. S. Greeley & Co. (C. C. 1897) 83 Fed. 772.

283. Report—Time of making.—A delay of more than six years after an order of reference to a master in proceedings for the settlement of the affairs of a railroad company in insolvency, before the filing of the master's report, was improper. Bibber-White Co. v. White River Valley Electric R. Co. (C. C. 1909) 175 Fed. 470.

284. —— Submission to parties.—Masters are usually employed in taking accounts and making computations, and in making inquiries and reporting facts. In such references it was usual for the masters to prepare drafts of their reports before argument, and argument was heard by the masters only on objections to the drafts. In such cases manifestly, parties were entitled to an inspection of the drafts, and to be heard on their objections thereto. Hatch v. Indianapolis & S. R. Co. (C. C. 1882) 9 Fed. 856.

Where a reference is made embracing questions of law and fact, and after hearing the testimony and the arguments of counsel the master prepares a report of his findings, it is not necessary to observe the formalities of the old practice in submitting the report to the parties for hearing thereon before the master. Id.

It is not the practice in this district, nor in this circuit, for the master, after having heard full argument, to submit a draft of his report to the parties for a hearing thereon upon objections thereto. When a case has been fully argued in the first instance, the legal right of the unsuccessful party to make objections before the master to the draft of his report, and argue the same, is not recognized in practice. Id.

Where a Circuit Court has referred an equity cause to a master to make and report findings of fact, either with or without consent, it is proper practice for the master to submit a draft of his report to counsel for the respective parties, for the purpose of inviting suggestions or requests for additional findings, or for modifications or greater certainty in those submitted; and it is the duty of counsel in such case to make and file with the master such objections or exceptions to the draft as they deem advisable and proper, and it is within the discretion of the court to refuse to consider any objections or exceptions to the completed report not presented to the master. It is also convenient practice to provide by stipulation or order that objections filed before the master shall stand as exceptions filed with the clerk. Bliss v. Anaconda Copper Min. Co. (C. C. 1907) 156 Fed. 309.

285. —— Matters embodied in report.—The master cannot report as to matters embraced in the bill, but not within his commission. Gordon v. Hobart (C. C. 1842) Fed. Cas. No. 5,608.

A report of the master upon a question not referred to him by the court is erroneous, and subject to exception by the party aggrieved. Taylor v. Robertson (C. C. 1886) 27 Fed. 537, decree reversed Greene v. Taylor (1889) 10 Sup. Ct. 138, 132 U. S. 415, 33 L. Ed. 411.

A master should not rule on requests to make findings of fact, made by a party after service of his draft report, which are not known to the federal equity practice, nor should he embody such rulings if made in his report. Ommen v. Talcott (D. C. 1909) 175 Fed. 261, decree reversed (1911) 188 Fed. 401, 112 C. C. A. 239.

Refused requests for findings held improperly incorporated in the report of a master. Hotchkiss v. National City Bank of New York (D. C. 1911) 200 Fed. 287, decree affirmed Ernst v. Mechanics' & Metals Nat. Bank of City of New York (1912) 201 Fed. 664.

286. —— Return of evidence.—The practice with reference to reports of evidence in proceedings in equity by masters stated. Massie Wireless Telegraph Co. v. Enterprise Transp. Co. (1910) 175 Fed. 6, 99 C. C. A. 146.

The master or auditor should be requested to report specially such evidence as furnishes ground of exception. The facts will not be opened except to correct unquestionable error. Donnell v. Columbian Ins. Co. (C. C. 1836) Fed. Cas. No. 3,987.

It is the duty of a master, in taking testimony in a suit in equity, to take and transmit to the court all the evidence offered, although in making his findings he may disregard such as he deems inadmissible. Huttig Sash & Door Co. v. Fuelle (C. C. 1906) 143 Fed. 363.

It is not necessary nor usual for a master to report all of the evidence taken before him, unless required by the order of reference. Weiss v. Haight & Freese Co. (C. C. 1906) 148 Fed. 399.

287. —— Amendment or correction.—The fact that the execution of the master's orders will involve considerable expense of time and money may justify the hearing of an application to modify or vacate them on the ground that they are made without authority. Bate Refrigerating Co. v. Gillette (C. C. 1886) 28 Fed. 673.

Where the report of a master can be corrected from the facts that appear in the case, aside from the evidence taken before him, it should be done, and a re-reference is unnecessary. Witters v. Sowles (C. C. 1890) 43 Fed. 405.

288. Objections and exceptions to report and proceedings thereon—Necessity of exceptions.—The report of a master is received as true where no exception is taken. Harding v. Handy (1826) 24 U. S. (11 Wheat.) 103, 6 L. Ed. 429.

Where the master is correct in his findings of fact, but errs as to conclusions of law, the rule requiring exceptions to his report is not applicable. Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C. 1889) 40 Fed. 476.

289. —— **Time for objecting and excepting.**—Exceptions to a master's report, not made before the master, will not be heard by the court, in the absence of special circumstances. Gay Mfg. Co. v. Camp (1895) 68 Fed. 67, 15 C. C. A. 226 (denying petition for rehearing [1895] 65 Fed. 794, 13 C. C. A. 137); Gordon v. Lewis (C. C. 1835) Fed. Cas. No. 5,613; Gass v. Stinson (C. C. 1837) Fed. Cas. No. 5,261; Troy Iron & Nail Factory v. Corning (C. C. 1869) Fed. Cas. No. 14,196; Gaines v. New Orleans (C. C. 1871) Fed. Cas. No. 5,-177; American Nicholson Pavement Co. v. Elizabeth (C. C. 1874) Fed. Cas. No. 309; Gray v. New York Nat. Building & Loan Ass'n (C. C. 1903) 125 Fed. 512.

Where amended exceptions to the report of the referees are not filed within the time prescribed by the statute they will be overruled on motion. Syz v. Redfield (C. C. 1881) 11 Fed. 799.

The reason for the rule requiring objections to the findings of a master in chancery to be first made to him on the draft of his report does not fully obtain where the objection is to the principal finding of fact, as he probably would not have changed his conclusion; but it is no hardship to require of the dissatisfied party that he so state his objections, or be deemed to have waived them. Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C. 1889) 40 Fed. 476.

Where a cause is, by consent of parties, referred to a master to hear the testimony, and report findings of fact and conclusions of law thereon, exceptions to any part of his report should be submitted in the first instance to the master for his consideration and action, and the court will not consider exceptions taken for the first time after the master has filed his report, and which involve a review of all the evidence taken. McNamara v. Home Land & Cattle Co. (C. C. 1900) 105 Fed. 202, decree reversed Home Land & Cattle Co. v. McNamara (1901) 111 Fed. 822, 49 C. C. A. 642, writ of certiorari denied McNamara v. Home Land & Cattle Co. (1902) 23 Sup. Ct. 843, 187 U. S. 642, 47 L. Ed. 346.

Under equity rule 66 (193 Fed. xxxvii, 112 C. C. A. xxxvii), exceptions to a master's report must be made within time specified or they will not be considered. Decker v. Smith (D. C. 1915) 225 Fed. 776.

290. —— **Right to except and waiver thereof.**—A waiver of the right to except to a master's report stating an account of the rents and profits of property in dispute admits only the correctness of the report in regard to the amount of such rents and profits, and does not concede the correctness of the final decree determining the title to such profits or to the property itself. Waterman v. Banks (1892) 12 Sup. Ct. 646, 144 U. S. 394, 36 L. Ed. 479; Porter v. Same (1892) 12 Sup. Ct. 650, 144 U. S. 407, 36 L. Ed. 484, reversing Waterman v. Waterman (C. C. 1886) 27 Fed. 827.

Exceptions to the report of a master which present questions of law only are not a waiver of the conclusive effect of his findings of fact. Hattiesburg Lumber Co. v. Herrick (1914) 212 Fed. 834, 129 C. C. A. 288.

Exception to a principal finding of a master, based on all the evidence in his report, is not waived by refraining from making the exception before the master, and subsequently making it before the court, since all that the parties could do would be to request the master to change his finding, a thing which they were under no obligation to do. Jennings v. Dolan (C. C. 1887) 29 Fed. 861, appeal dismissed Dolan v. Jennings (1891) 11 Sup. Ct. 584, 139 U. S. 385, 35 L. Ed. 217.

An intervener who fails to make his case and the amount of his claim reasonably certain cannot except to the master's finding against him. Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C. 1888) 33 Fed. 376.

In proceedings to foreclose a mortgage on the property of a street railroad, where the bill contains no averment as to the pledging of the bonds, nor as to who were the holders of them, but only alleges that enough of them were outstanding to comply with the provisions of the mortgage as to foreclosure, an intervening petitioner cannot be expected to know these circumstances in advance of the evidence, and the fact that his petition of intervention makes no allegations as to the invalidity of the pledging of the bonds will not preclude him from excepting to the master's report sustaining the validity of such a pledge. Farmers' Loan & Trust Co. v. San Diego St. Car Co. (C. C. 1891) 45 Fed. 518.

When a question as to the date from which interest shall run has been decided by the court after full hearing, on a motion for final decree, such decision is binding on a special master to whom the cause is subsequently referred to take an account, and cannot be again raised by exceptions to his report. Nashua & L. R. Corp. v. Boston & L. R. Corp. (C. C. 1892) 49 Fed. 774, motion to dismiss appeal denied (1892) 51 Fed. 929, 2 C. C. A. 542.

Though defendant did not object to the taking of evidence before a master, he did not thereby consent to the master's appointment, nor is he estopped to controvert his findings of fact Southern Ry. Co. v. Simon (C. C. 1910) 184 Fed. 959, decree affirmed Simon v.

Southern Ry. Co. (1912) 195 Fed. 56, 115 C. C. A. 58.

291. —— **Grounds.**—Where the defense of usury pleaded by a defendant in a suit to foreclose a mortgage was adjudged against him by an interlocutory decree, and no application was made to reopen the case to admit newly discovered evidence on the issue, in accordance with the recognized practice in equity, a master to whom the cause was referred to state the account was justified in ignoring testimony introduced before him tending to support the claim of usury, and it was not error for the court to overrule exceptions to his report based on that ground. Deitch v. Staub (1902) 115 Fed. 309, 53 C. C. A. 137.

Error of the master, producing results not materially different from what would be reached if there was no error, is no ground for setting aside or recommitting his report. Mason v. Crosby (C. C. 1847) Fed. Cas. No. 9,236.

A master's report cannot be objected to on the ground that he was not sworn, where the order of reference did not require him to be sworn. Thompson v. Smith (C. C. 1869) Fed. Cas. No. 13,-976.

When the supreme court has decided that plaintiff is entitled to a full accounting in respect to a given series of transactions, upon definite principles of liability, the master's report in respect thereto is not subject to exception because it awards a sum exceeding the amount named in the bill, and it is immaterial whether the bill is amended. Nashua & L. R. Corp. v. Boston & L. R. Corp. (C. C. 1892) 49 Fed. 774, motion to dismiss appeal denied (1892) 51 Fed. 929, 2 C. C. A. 542.

292. —— **Form and sufficiency of exceptions.**—Exceptions to the report of a master must point out specifically the errors relied on, and findings and parts of the report not so specifically excepted to are to be taken as admitted. Harding v. Handy (1826) 24 U. S. (11 Wheat.) 103, 6 L. Ed. 429; Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200; Foster v. Goddard (1861) 66 U. S. (1 Black) 506, 17 L. Ed. 228; Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon (1894) 14 Sup. Ct. 343, 151 U. S. 285, 38 L. Ed. 164; Appeal of Columbus, S. & H. R. Co. (1901) 109 Fed. 177, 48 C. C. A. 275; General Fire Extinguisher Co. v. Lamar (1905) 141 Fed. 353, 72 C. C. A. 501 (writ of certiorari denied [1906] 26 Sup. Ct. 761, 201 U. S. 647, 50 L. Ed. 904); Dexter v. Arnold (C. C. 1834) Fed. Cas. No. 3,858; Greene v. Bishop (C. C. 1858) Fed. Cas. No. 5,-763; Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,296; Neal v. Briggs (C. C. 1901) 110 Fed. 477.

Exceptions to the master's report are regarded so far only as they are supported by the statements of the master, or by evidence to which the attention of the court is called by reference to the particular testimony. Farrar v. Bernheim (1896) 74 Fed. 435, 20 C. C. A. 496; Dexter v. Arnold (C. C. 1834) Fed. Cas. No. 3,858; Greene v. Bishop (C. C. 1858) Fed. Cas. No. 5,-763; Jaffrey v. Brown (C. C. 1886) 29 Fed. 476; Jones v. Lamar (C. C. 1889) 39 Fed. 585; Cutting v. Florida Ry. & Nav. Co. (C. C. 1890) 43 Fed. 743.

An exception to a master's report need not be as full and specific as a special demurrer. Foster v. Goddard (1861) 66 U. S. (1 Black) 506, 17 L. Ed. 228.

An exception to a master's report brings up for examination all questions of fact and law arising on the report. Id.

General exceptions to findings of a master that all the bonds secured by a railroad mortgage had been duly issued and were valid in the hands of the several holders are not sufficiently specific to raise any question as to the validity of the bonds of any particular holder. Appeal of Columbus, S. & H. R. Co. (1901) 109 Fed. 177, 48 C. C. A. 275.

Unless a particular error is pointed out, or an erroneous principle is shown to have been adopted, the master's report will not be disturbed. Mason v. Crosby (C. C. 1847) Fed. Cas. No. 9,-236; Gaines v. New Orleans (C. C. 1871) Fed. Cas. No. 5,177.

An exception which merely alleges that the master has arrived at a wrong conclusion upon the evidence is insufficient. Greene v. Bishop (C. C. 1858) Fed. Cas. No. 5,763.

Where a master had notified the respective attorneys that the draft reports were ready for their inspection, and verbal objections were made before him to his findings, but said objections were not reduced to writing and filed, and the exceptions to the master's report are substantially the same as the verbal objections, it will be sufficient if the objections are reduced to writing and filed with the master nunc pro tunc. Fischer v. Hayes (C. C. 1883) 16 Fed. 469.

Exceptions to the admission or exclusion of evidence taken before a master need not be restated when the exceptions to his report are filed. They can be considered upon the record on the argument of the motion to confirm his report. Marks v. Fox (C. C. 1883) 18 Fed. 713.

Exceptions to a master's report will be overruled, notwithstanding errors committed, if upon the entire report it is evident that the errors did not affect the conclusion. Gottfried v. Crescent Brewing Co. (C. C. 1884) 22 Fed. 433.

Although it is proper to overrule a general exception to the report of a master in chancery as requiring the court to review the entire mass of tes-

timony, yet, where a reassignment of the hearing can be made without prejudice to the interests of the parties and the business of the court, it is discretionary to grant time and leave to amend the exceptions. Jones v. Lamar (C. C. 1889) 39 Fed. 585.

Where a master's report had given priority to certain labor and supply claims under an unconstitutional statute, which was in contravention of the general rules of equity, it was not necessary, on exception thereto, to allege the unconstitutionality of the act. Fidelity Insurance & Safe-Deposit Co. v. Shenandoah Iron Co. (C. C. 1889) 42 Fed. 372.

Exceptions to a master's report, which distinctly point out the findings of fact and conclusions of law excepted to, are sufficient to present such findings and conclusions for review, where the evidence accompanies the report, though such exceptions may be inartistically drawn. Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1893) 57 Fed. 441, following Story v. Livingston (1830) 13 Pet. 359, 10 L. Ed. 200.

If upon facts to which no exceptions have been filed either party would be entitled to judgment without regard to the findings excepted to, the exceptions may be disregarded or overruled, and judgment awarded upon the undisputed findings of fact. Id.

The court is justified in disregarding exceptions which merely state generally that a finding of the master is contrary to the law and the evidence, the consideration of which would require the chancellor to re-examine the entire evidence, and defeat the purpose of the reference. Neal v. Briggs (C. C. 1901) 110 Fed. 477, decree reversed Briggs v. Neal (1903) 120 Fed. 224, 56 C. C. A. 572.

Exceptions to findings of fact by a master should not be the general result, but must be specific, and point out the particular errors relied on, and where they are based on particular evidence should refer to the place in the record where the same may be found. Fordyce v. Omaha, Kansas City & E. R. R. (C. C. 1906) 145 Fed. 544.

The findings of a master as to the amount of damages recoverable by a complainant for infringement of a patent affirmed as against general exceptions which did not point out any evidence to impeach the same. H. C. Cook Co. v. Little River Mfg. Co. (C. C. 1908) 164 Fed. 1005.

293. —— Withdrawal of exceptions.—The formal withdrawal by an exceptor of an exception to a master's report on the order book and in a paper filed by the exceptor in the cause is a sufficient withdrawal of the exception, although no order of discontinuance is allowed by court, and the report will stand confirmed, under equity rule 83, after the lapse of time fixed therein. Gasquet v. Crescent City Brewing Co. (C. C. 1892) 49 Fed. 493.

294. —— Hearing on exceptions.—It is not error for the court, on exceptions to a special master's report, to refuse to consider certain depositions that had not been used before the master. Third Nat. Bank v. National Bank of Chester Valley (1898) 86 Fed. 852, 30 C. C. A. 436, certiorari denied (1898) 19 Sup. Ct. 887, 171 U. S. 688, 43 L. Ed. 1178.

Where the findings of a master are in favor of complainant, and defendant files exceptions thereto, the burden of sustaining the exceptions rests on defendant, and the court is not warranted in dismissing the suit for want of prosecution without disposing of them. Henry v. Harris (1913) 201 Fed. 872, 120 C. C. A. 210, reversing order (D. C. 1912) 191 Fed. 868.

A master's report held reviewable on exceptions only as to conclusions of law. Hattiesburg Lumber Co. v. Herrick (1914) 212 Fed. 834, 129 C. C. A. 288.

There is no rule in the circuit court forbidding a report to be considered at the term to which it is made. Coates v. Muse (C. C. 1821) Fed. Cas. No. 2,-916.

A new hearing of exceptions to a master's report will not be allowed. Felch v. Hooper (C. C. 1878) Fed. Cas. No. 4,718.

All questions determined in the former decree may be considered on exceptions to the master's report. Pulliam v. Pulliam (C. C. 1881) 10 Fed. 53.

On exceptions to a master's report, the court will not verify each interest calculation. Chandler v. Pomeroy (C. C. 1898) 87 Fed. 262, decree affirmed (1899) 96 Fed. 156, 37 C. C. A. 430.

295. —— Presumption as to return of evidence.—An order of the court that the master should take and report the evidence, his report of it, and the legal presumption of his faithful discharge of official duty constitute competent proof that he had returned all the evidence before him, in the absence of evidence to the contrary. Guarantee Gold Bond Loan & Savings Co. v. Edwards (1908) 164 Fed. 809, 90 C. C. A. 585, affirming judgment (1907) 104 S. W. 624, 7 Ind. T. 297.

296. —— Effect of absence of proof that all evidence is returned.—A master's conclusions of fact upon the evidence cannot be impeached when the order of reference does not require him to send up the testimony, and there is no certificate that the entire evidence is returned. Sheffield & Birmingham Coal, Iron & Ry. Co. v. Gordon (1894) 14 Sup. Ct. 343, 151 U. S. 285, 38 L. Ed. 164.

The master's finding of facts on the evidence cannot be impeached in the absence from the record of his certificate or other proof that the evidence is the entire evidence which was before

him, relative to specific findings challenged. Wheeler v. Abilene Nat. Bank Bldg. Co. (1908) 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917.

The master's finding of facts on the evidence cannot be impeached in the absence from the record of a certificate or other proof that the evidence presented is the entire evidence, or that it was all the evidence which was before him relative to the specific finding challenge. Guarantee Gold Bond Loan & Savings Co. v. Edwards (1908) 164 Fed. 809, 90 C. C. A. 585, affirming judgment (1907) 104 S. W. 624, 7 Ind. T. 297.

Where, on exceptions to a master's report, the evidence, other than certain exhibits, was not before the court, the finding of fact by the master would be taken as true. Atlas Nat. Bank v. Abram French Sons Co. (C. C. 1905) 134 Fed. 746.

297. —— Conclusiveness of report.— The master's findings of fact have been held to have the effect of a jury verdict. Putnam v. Commonwealth Ins. Co. (C. C. 1880) 4 Fed. 753; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C. 1888) 33 Fed. 803. And as a general rule his report is presumptively correct. Walker v. Kinnare (1896) 76 Fed. 101, 22 C. C. A. 75; Chandler v. Pomeroy (C. C. 1898) 87 Fed. 262 (decree affirmed [1899] 96 Fed. 156, 37 C. C. A. 430); McNulty v. Wiesen (D. C. 1908) 158 Fed. 221; In re Senoia Duck Mills (D. C. 1912) 193 Fed. 711. And should be set aside by the court only in case of manifest error. Kimberly v. Arms (1889) 9 Sup. Ct. 355, 129 U. S. 512, 32 L. Ed. 764; Camden v. Stuart (1892) 12 Sup. Ct. 585, 144 U. S. 104, 36 L. Ed. 363; Girard Life Insurance, Annuity & Trust Co. v. Cooper (1896) 16 Sup. Ct. 879, 162 U. S. 529, 40 L. Ed. 1062 (following Camden v. Stuart [1892] 12 Sup. Ct. 585, 144 U. S. 104, 36 L. Ed. 363 and affirming decree [1892] 51 Fed. 332, 2 C. C. A. 245); Farrar v. Bernheim (1896) 75 Fed. 136, 21 C. C. A. 264; Lake Erie & W. R. Co. v. City of Fremont, Ohio (1899) 92 Fed. 721, 34 C. C. A. 625; Appeal of Columbus, S. & H. R. Co. (1901) 109 Fed. 177, 48 C. C. A. 275; Cimiotti Unhairing Co. v. American Fur Refining Co. (1909) 168 Fed. 529, 93 C. C. A. 546 (affirming decree [C. C. 1908] 158 Fed. 171); Houston Oil Co. of Texas v. Wilhelm (1910) 182 Fed. 474, 104 C. C. A. 618; Connor v. U. S. (1914) 214 Fed. 522, 131 C. C. A. 68; Grushlaw v. Phœnix Knitting Works (1915) 223 Fed. 513, 139 C. C. A. 61; Jaffrey v. Brown (C. C. 1886) 29 Fed. 476; Stanton v. Alabama & C. R. Co. (C. C. 1887) 31 Fed. 585; Central Trust Co. v. Texas & St. L. Ry. Co. (C. C. 1887) 32 Fed. 448; Same v. East Tennessee Land Co. (C. C. 1897) 79 Fed. 19; Kilgour v. National Bank (C. C. 1899) 97 Fed. 693; Western Union Tel. Co. v. American Bell Tel. Co. (C. C. 1900) 105 Fed. 684 (decree reversed [1903] 125 Fed. 342, 60 C. C. A. 220); Taintor v. Franklin Nat. Bank (C. C. 1901) 107 Fed. 825; Reading Ins. Co. v. Egelhoff (C. C. 1902) 115 Fed. 393; Des Moines Water Co. v. City of Des Moines (C. C. 1911) 192 Fed. 193; In re Taff & Conyers (D. C. 1910) 182 Fed. 899; Des Moines Gas Co. v. City of Des Moines (D. C. 1912) 199 Fed. 204; In re Stafford (D. C. 1915) 226 Fed. 127. Or where not supported by any substantial evidence. Hattiesburg Lumber Co. v. Herrick (1914) 212 Fed. 834, 129 C. C. A. 288; Huttig Sash & Door Co. v. Fuelle (C. C. 1906) 143 Fed. 363. Or clearly against the weight of the evidence. Third Nat. Bank v. National Bank of Chester Valley (1898) 86 Fed. 852, 30 C. C. A. 436 (certiorari denied [1898] 19 Sup. Ct. 887, 171 U. S. 688, 43 L. Ed. 1178); In re Utica Pipe Foundry Co. (D. C. 1915) 221 Fed. 787. And this is especially true where the evidence is conflicting. Bridges v. Sheldon (C. C. 1880) 7 Fed. 17; Jaffrey v. Brown (C. C. 1886) 29 Fed. 476; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 31 Fed. 246; Clyde v. Richmond & D. R. R. Co. (C. C. 1895) 69 Fed. 673; In re Murray (D. C. 1882) 13 Fed. 550; Peterson v. Mettler (D. C. 1912) 198 Fed. 938.

But in some circumstances the report will be considered merely advisory. United States Trust Co. v. Mercantile Trust Co. (1898) 88 Fed. 140, 31 C. C. A. 427 (affirming decree Mercantile Trust Co. v. Atlantic & P. R. Co. [C. C. 1897] 80 Fed. 18); Jefferson Hotel Co. v. Brumbaugh (1909) 168 Fed. 867, 94 C. C. A. 279. As where the reference is without consent. Bosworth v. Hook (1897) 77 Fed. 686, 23 C. C. A. 404; Blassengame v. Boyd (1910) 178 Fed. 1, 101 C. C. A. 129, 21 Ann. Cas. 800 (affirming decree Blassingame v. Board of Com'rs of Haywood County [C. C. 1909] 172 Fed. 630); Bliss v. Anaconda Copper Min. Co. (C. C. 1909) 167 Fed. 342 (judgment affirmed Same v. Washoe Copper Co. [1911] 186 Fed. 789, 109 C. C. A. 133); Blythe v. Thomas (D. C. 1891) 45 Fed. 784, decree affirmed Thomas v. Blythe (1893) 55 Fed. 961, 5 C. C. A. 356. Or where the constitutionality or validity of a law or ordinance is involved. Cumberland Telephone & Telegraph Co. v. City of Louisville (C. C. 1911) 187 Fed. 637. Or where the validity of rates and charges fixed by public authority are alleged to be in violation of constitutional rights. San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County (C. C. 1911) 191 Fed. 875.

The report of auditors appointed by consent of parties in a suit in equity

is not in the nature of an award by arbitrators, but may be set aside by the court, if it is unsatisfactory or inaccurate. Field v. Holland (1810) 10 U. S. (6 Cranch) 8, 3 L. Ed. 136.

The weight to be given to findings of fact made by a master considered. Hitner v. Diamond State Steel Co. (D. C. 1913) 207 Fed. 616.

Where, in accordance with a written stipulation of the parties, the whole case is submitted to a master, to find both the law and facts, his findings are conclusive on both parties, except so far as they are excepted to. Sanders v. Village of Riverside (1902) 118 Fed. 720, 55 C. C. A. 240.

The finding of the master is conclusive on the question of the allowance of interest as a bona fide compensation for services not otherwise compensated, and not a mere cover for usury. Pulliam v. Pulliam (C. C. 1882) 10 Fed. 53.

The finding of the master is conclusive on the question of the allowance of interest as a bona fide compensation for services not otherwise compensated and not a mere cover for usury. Bridges v. Sheldon (C. C. 1880) 7 Fed. 17.

A finding by a master in chancery as to the amount of damages will not be interfered with unless it is so inadequate or excessive as to be unreasonable. Murphy v. Southern Ry. Co. (C. C. 1900) 99 Fed. 469.

A finding by a master in chancery as to a question of boundaries, based on an examination of deeds and upon conflicting oral testimony, should not be lightly interfered with. Id.

The master's report on the propriety of reducing employés' wages on the petition of a receiver is not conclusive on the court. United States Trust Co. v. Omaha & St. L. Ry. Co. (C. C. 1894) 63 Fed. 737.

Where receivers employed counsel under an agreement that his compensation should be determined by a master in chancery under the supervision of the court, and a reference was had and acquiesced in, with directions to determine the compensation, the master's report must be accepted by the court, in the absence of evidence of bias or clear mistake. Walters v. Western & A. R. Co. (C. C. 1895) 69 Fed. 706.

On the hearing of a bill in equity for an injunction to abate a bridge over a navigable river, on the ground of its being an obstruction to navigation, the report of a commissioner, to whom the case was referred to take testimony and report whether the bridge was such an obstruction, made after the examination of many scientific and other witnesses, is entitled to the weight of a verdict, and will be taken by the court as a basis of action, unless shown to have been made under improper influence or a mistake of fact. Pennsylvania v. Wheeling & B. Bridge Co. (1851) 54 U. S. (13 How.) 518, 14 L. Ed. 249.

298. **Recommittal.**—The court may direct further investigation where the master's report discloses facts which, in its opinion, should be further investigated. Magic Ruffle Co. v. Elm City Co. (C. C. 1877) Fed. Cas. No. 8,950.

Where a master, to whom a reference has been made to ascertain the profits made by defendant in the use of an infringing machine, was unable to determine the length of time the said machine was used by defendant, and such inability could have been obviated by an examination of defendant's books, and plaintiff neglected to obtain an order compelling their production after defendant refused to produce them, the case will not be sent back to the master for review. Fischer v. Hayes (C. C. 1883) 16 Fed. 469.

Where a case is referred back to a master in chancery to take additional proof, and the proof so taken is on the same subject, it does not make out a new case; and hence an objection that the master had no power to admit it because it makes out a different case from that made on the former hearing will not lie. Wooster v. Simonson (C. C. 1884) 20 Fed. 316.

Small errors in master's statement of an account are not ground for requiring him to restate the account, even in a case in which exceptions to his report were sustained on other grounds. Taylor v. Robertson (C. C. 1886) 27 Fed. 537, decree reversed Greene v. Taylor (1889) 10 Sup. Ct. 138, 132 U. S. 415, 33 L. Ed. 411.

The want of a statement in the master's report that the same damages were included in two suits is no ground for setting aside and recommitting the reports, the fact being conceded. Jennings v. Dolan (C. C. 1887) 29 Fed. 861.

In a claim for damages for injuries sustained by passengers falling off a railway platform, on which they had alighted safely, and after they had been warned by an official as to their danger, the master did not rule specifically as to the effect of the warning in obliging the passengers to take greater care, but referred to it as insufficient to fulfill the company's obligation. Held, that the question as to the effect of the warning had not received sufficient attention. Missouri Pac. R. Co. v. Texas & P. Ry. Co. (C. C. 1888) 33 Fed. 359.

Although a master's report may be inaccurate in some statements of fact, or may omit some, unless it appears that the defects are such as to work some material prejudice to the party excepting, whereby an unjust result is reached, a re-reference or vacation of the report will not be directed. McEl-

roy v. Swope (C. C. 1891) 47 Fed. 380.

The very long pendency of a suit in equity is good reason for a computation of damages or profits by the court, if it can be done, instead of again referring the cause to a master. Campbell v. City of New York (C. C. 1897) 81 Fed. 182.

A master, after having filed his report, asked and was granted leave to withdraw it for correction. He afterwards filed a second report, in which many of the findings of the former report, both of fact and law, were reversed. Held that, no notice of a reconsideration having been given the parties, the second report could not be permitted to stand, nor, in view of the subsequent action of the master, could the first report be accorded the advisory weight usually given to a master's report, but that the master should be required to report the evidence taken by him, and the issues thereon would be tried de novo by the court. National Folding-Box & Paper Co. v. Dayton Paper Novelty Co. (C. C. 1899) 91 Fed. 822.

Where a master is permitted to withdraw his report for correction or amendment, he should not reverse his former findings as to the facts or law without notice to the parties. A reconsideration by him of the case on its merits after a report filed is within the spirit of rule 75, requiring notice. Id.

Upon a reference to ascertain the damages for infringement of a patent complainant introduced before the master testimony given by defendant in another suit as to the profits made by him by the use of the infringing machines. Defendant's counsel made no effort to correct such testimony, but elected to rely on his exception to the master's report on the ground that the testimony was incompetent. Held that, after the court had overruled such exception, it would not reopen the hearing before the master to permit defendant to show that his testimony in the previous suit was inaccurate. Cimiotti Unhairing Co. v. Bowsky (C. C. 1902) 113 Fed. 699.

Where it appears from the report of a master, which is not contradicted, that neither party requested a finding on a particular matter, but the same was virtually waived, the court will not, on exceptions to the report, refer it back to have such finding made. Reading Ins. Co. v. Egelhoff (C. C. 1902) 115 Fed. 393.

Where, in a suit involving title to real property, an order was made for the examination of certain claimants of an interest therein pro interesse suo, and they filed no answer to the petition, order, and affidavits, and offered no proof in their own behalf, and it appeared that they did not fully understand what was required of them, the master's finding, on the evidence introduced, that the claimants had no title to the property, and that it belonged to complainant as administrator, would be set aside, and the record referred back to the master for further proceedings. Westlake v. Marrin (C. C. 1910) 176 Fed. 742.

It is not usual for the court to recommit a report to the master who made it to take further testimony and revise his conclusions after full opportunity has been given parties to introduce testimony, and especially where the party moving has filed no exceptions to the report. Empire Trust Co. v. Egypt Ry. Co. (C. C. 1910) 182 Fed. 100.

299. Confirmation of report.—Where a master has stated an account, allowing interest on some items, and not on others, and the report is confirmed without exception on that ground, the amount stated will be regarded as including the interest at the time of the report. Robinson v. Alabama & G. Mfg. Co. (C. C. 1898) 89 Fed. 218.

The finding of a special master adverse to a claim for damages, involving an issue of fact which depended upon the credibility of witnesses who testified before him, confirmed. Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1909) 170 Fed. 626.

(X) Decree and enforcement thereof

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336. —— Restraining enforcement.

See rules 8, 71, 72, ante, pp. 2498, 2526.

Final record, see § 1604, post.

300. Nature and essentials.—A decree directing certain acts to be done to en-

able a party to execute certain duties assigned to him, and dismissing the bill, is erroneous, as it places the cause out of the power of the court; and it is no answer to such objection that the acts ordered have been performed. The error is in the decree. Greenleaf v. Queen (1828) 26 U. S. (1 Pet.) 138, 7 L. Ed. 85.

Where a bill to compel defendants to deliver up a deed is dismissed on the ground that the deed is void on its face, and consequently cannot injure complainant, the decree should assign the reason for the dismissal. Peirsoll v. Elliott (1832) 31 U. S. (6 Pet.) 95, 8 L. Ed. 332.

An orally expressed opinion or finding of a judge in a case not tried to a jury does not, according to the practice of the federal courts, constitute a judgment, and is subject to modification or change until it has become a written order of the court. Judson v. Gage (1899) 98 Fed. 540, 39 C. C. A. 156.

There is no rule in equity that the court shall in its decree find all the facts necessary to sustain the decree, except where in the absence of a finding of facts it would be impossible to tell what the decree in fact meant. Liebing v. Matthews (1914) 216 Fed. 1, 132 C. C. A. 245.

Entry of an order in a stockholder's suit appointing a receiver, with instructions to sell all of the property of a mining corporation, without determining the issues joined by the pleadings and heard on proofs, held error. Tenabo Mining & Smelting Co. v. Bates (1915) 220 Fed. 756, 136 C. C. A. 362.

The decree must be so framed that all persons shown to have a claim on the fund may be brought in for their distributive shares. Marsh v. Burroughs (C. C. 1871) Fed. Cas. No. 9,112.

An opinion filed dismissing a bill, with costs, without a formal decree attached thereto, becomes, in effect, such a decree on the acquiescence of complainant for a period of nearly 12 years. Hubbell v. Lankenau (C. C. 1894) 63 Fed. 881.

It is the duty of the party desiring the allowance of an appeal to prepare the form of a decree, and not of the court or the adverse party. Id.

Though the practice exists in the federal courts of signing decrees, a decree may pass on an oral direction by the judge in open court to enter it; the judge's signature being only evidence to the clerk that it has in fact been passed, so that he may safely enter it. Ommen v. Talcott (D. C. 1910) 180 Fed. 925.

301. —— Condition of cause.—Where it appears by the final decree that all the exceptions taken to the report of a master were disposed of, being allowed or disallowed, this is sufficient, though it does not appear that they were formally allowed or overruled. Oliver v. Piatt (1845) 44 U. S. (3 How.) 333, 11 L. Ed. 622.

Where a bill is brought by creditors against a corporation and its debtors to compel the collection of what was due to it and the payment of the debts, the court could not make a final decree until after the report by the master. Ogilvie v. Knox Ins. Co. (1862) 67 U. S. (2 Black.) 539, 17 L. Ed. 349.

302. —— Essentials as to parties.—The supreme court of the United States will not make a final decree upon the merits of a case, unless all persons who are essentially interested are made parties to the suit, although some of those persons are not within the jurisdiction of the court. Russell v. Clark (1812) 11 U. S. (7 Cranch) 69, 3 L. Ed. 271.

In equity, an interlocutory decree, which decides to a great extent the merits of a cause, ought not to be made until all the parties to the bill, and all parties in interest, are before the court. Conn v. Penn (1820) 18 U. S. (5 Wheat.) 424, 5 L. Ed. 125.

A court can make no decree in an equity suit which so involves the interests of a person not a party to the suit that complete justice between the parties cannot be done without affecting his rights. Shields v. Barrow (1854) 58 U. S. (17 How.) 130, 15 L. Ed. 158; Barney v. City of Baltimore (1867) 73 U. S. (6 Wall.) 280, 18 L. Ed. 825.

303. Consent decree.—An Illinois decree for the separate maintenance of the wife held not to be denied conclusiveness in the courts of another state on the question of her desertion, on the theory that it was rendered by consent. Harding v. Harding (1905) 25 Sup. Ct. 679, 198 U. S. 317, 49 L. Ed. 1066, reversing judgment (1903) 74 P. 284, 140 Cal. 690.

Where a decree against infants who have appeared by guardian ad litem does not purport upon its face to have been rendered by consent, it will not be set aside on bill of review on the ground that it was in fact rendered by consent, where it is not shown that such consent was fraudulent, or in some way injurious to the infant defendants. Franklin Savings Bank v. Taylor (1893) 53 Fed. 854, 4 C. C. A. 55, reversing decree Taylor v. Franklin Sav. Bank (C. C. 1891) 50 Fed. 289, and certiorari denied (1894) 14 Sup. Ct. 1146, 154 U. S. 503, 38 L. Ed. 1078.

A woman who is fully informed of all the terms of a consent decree cannot, after receiving pursuant thereto a large sum in cash, which she does not offer to return, avoid the execution of the decree on the ground that she was misled. New England Mortgage Security Co. v. Tarver (1894) 60 Fed. 660, 9 C. C. A. 190.

Orders and final decree taken under stipulation in pending case, in vacation, without sanction of court, not set aside on summary motion. Bayerque v.

Jackson Water Co. (C. C. 1856) Fed. Cas. No. 1,136.

As between parties who claimed title under such a decree, and purchasers from their grantees who all acted upon the hypothesis that the decree was valid, the court will act upon a like hypothesis, and hold that there was no mistake which equity will correct. Kinney v. Consolidated Va. Min. Co. (C. C. 1877) Fed. Cas. No. 7,827.

A supplemental decree, purporting to be entered by consent, made after final adjudication and after the end of the term, and not based on any allegations in the pleadings, held void. Id.

Where many terms have elapsed since the entering of a decree by consent and the payment of damages by defendant, leave will not be given him to file a supplemental bill to set aside the decree on the ground of a mistake of fact. In re Pentlarge (C. C. 1879) Fed. Cas. No. 10,962.

The distinction between a final decree and a stipulation upon which such a decree may be entered is that the sanction of the court to the agreement of the parties is necessary to give such agreement the effect of a final decree. Roemer v. Neumann (C. C. 1886) 26 Fed. 332.

A decree of sale entered by consent of parties pending a reference to settle the receiver's accounts, while the priority of certain liens claimed was undetermined, and before any distribution was ordered among ante-receivership creditors, was not a final decree. Knox v. Columbia Liberty Iron Co. (C. C. 1889) 42 Fed. 378, decree reversed Hoffman v. Knox (1892) 50 Fed. 484, 1 C. C. A. 535.

304. Decree pro confesso.—If one of several defendants to a bill making a joint charge of conspiracy and fraud make default, his default and a formal decree pro confesso may be entered, but no final decree on the merits until the case is disposed of with regard to the other defendants. The defaulting defendant is simply out of court, and can take no further part in the cause. Frow v. De La Vega (1872) 82 U. S. (15 Wall.) 552, 21 L. Ed. 60.

The trustee in a voting trust agreement, charged with the duty of holding and voting the corporate stock deposited with it, and with collecting and paying over the dividends to the holders of the trust certificates, which files a bill seeking, in accordance with the trust agreement, to be permitted to resign, and to be discharged from all liability upon transferring the stock to the new trustee chosen by the holders of the trust certificates, held entitled to judgment on the pleadings. Moore Printing Typewriter Co. v. National Savings & Trust Co. (1910) 31 Sup. Ct. 64, 218 U. S. 422, 54 L. Ed. 1093, affirming decree (1908) 31 App. D. C. 452.

Before a bill can be taken for confessed, defendant must have been ruled to answer. Pendleton v. Evans (C. C. 1823) Fed. Cas. No. 10,920; Halderman v. Halderman (C. C. 1839) Fed. Cas. No. 5,908.

The court will not permit the bill to be taken for confessed where defendant offers to file his answer. Halderman v. Halderman (C. C. 1839) Fed. Cas. No. 5,908.

When the question of a suit in equity, as shown by the bill, is whether the policy of the directors of an insurance company in declaring dividends has been lawful and right, and the defendant fails to answer this question after repeated allowances of exceptions for failure to answer the point, the orator is entitled to take the bill as confessed, so far as this point is concerned. Hale v. Continental Life Ins. Co. (C. C. 1884) 20 Fed. 344.

Defendant's solicitor testified that he did not think a notice served on him contained a clause that a final decree would be asked for, and that he would not have admitted service had the clause been included. The letter book of the solicitor serving the notice showed an impression copy of the notice, with the clause copied as part of it, and the solicitor testified that an impression copy was served. Two impression copies were taken. The clause was evidently written after the notice had been otherwise completed, but in the same hand, and with the same ink. Held, that it sufficiently appeared that the clause was in the notice served. Dunlevy v. Dunlevy (C. C. 1889) 38 Fed. 459.

Where an order has been entered that the bill be taken for confessed, defendant, even if he has entered an appearance, is not entitled to notice of subsequent application for final decree, when such application is made in open court. Austin v. Riley (C. C. 1893) 55 Fed. 833.

In suit for foreclosure of a mortgage, the mortgagor was notified to appear on a day named and make answer. The bill was taken pro confesso on the day before. The mortgagor never appeared, and there was a final decree of foreclosure and sale. Held, that the mortgagor was concluded. Roberts v. Brooks (C. C. 1896) 71 Fed. 914, decree affirmed (1897) 78 Fed. 411, 24 C. C. A. 158.

A subpœna issued upon a cross-bill was served upon the counsel of the original complainants, who were nonresidents. They thereupon specially appeared to contest this substituted service, and moved to quash the subpœna. There was pending, at the same time, a motion made by them to dismiss their suit as to the cross-complainant. Held, that pending these motions no binding decree could be entered against them by default on the cross-bill. Blythe v. Hinckley (C. C. 1897) 84 Fed. 228.

On insufficient demurrer, see American Steel & Wire Co. v. Wire Drawers'

& Die Makers' Unions Nos. 1 and 3 (C. C. 1898) 90 Fed. 598.

Though a defendant may be in default, the complainant is not entitled to a decree pro confesso where the allegations of his complaint are insufficient to support a decree in his favor. Wong Him v. Callahan (C. C. 1902) 119 Fed. 381.

When a plea in equity is not properly verified, complainant should disregard the plea and take decree pro confesso. Computing Scale Co. v. Moore (C. C. 1905) 139 Fed. 197.

On overruling plea, see American Graphophone Co. v. Leeds & Catlin Co. (C. C. 1905) 140 Fed. 981.

Where the allegations of the bill are so defective or vague that a precise decree cannot be rendered upon them, proof must be adduced before a decree can be made. U. S. v. Samperyac (Super. Ct. Ark. 1831) Fed. Cas. No. 16,216a.

305. —— **Requisites and validity.**—A supplemental bill filed in open court and served on defendants' attorney on the same day on which it was filed may be taken for confessed in the absence of any appearance or pleading by defendants for more than 20 days under Comp. Laws N. M. 1897, §§ 2685-3377. Rio Grande Dam & Irrigation Co. v. U. S. (1909) 30 Sup. Ct. 97, 215 U. S. 266, 54 L. Ed. 190, affirming decree U. S. v. Rio Grande Dam & Irrigation Co. (1906) 85 P. 393, 13 N. M. 386.

A decree rendered on default against Elizabeth Meyer, on service by publication of a summons directed to Sarah E. Meyers, is void as against her. Meyer v. Kuhn (1895) 65 Fed. 705, 13 C. C. A. 298.

A defendant who has appeared by solicitor is entitled to notice of an application for a decree, after entry of an order pro confesso, for the purpose of being heard upon the form and extent of the decree. Southern Pac. R. Co. v. Temple (C. C. 1893) 59 Fed. 17, applying Thomson v. Wooster (1885) 5 Sup. Ct. 788, 114 U. S. 104, 29 L. Ed. 105.

The omission to enter a formal order that the bill be taken pro confesso against the defendants will not affect the regularity of a final decree, or make it any less absolute. Linder v. Lewis (D. C. 1880) 1 Fed. 378.

306. —— **Opening or setting aside.**—Where a bill is taken pro confesso in a circuit court, a motion to allow an answer to be filed is addressed to the discretion of the court. Dean v. Mason (1857) 61 U. S. (20 How.) 198, 15 L. Ed. 876.

When a decree pro confesso is entered on a bill fatally defective in its jurisdictional averments, it is the duty of the court, on its attention being called to the defect, to open the default, and, if it gives leave to amend the bill, to allow the defendant time to answer. Nelson v. Eaton (1895) 66 Fed. 376, 13 C. C. A. 523.

Within 10 days after a second decree pro confesso, nonresident defendants filed objections to granting a final decree, and moved to have the decree pro confesso set aside, and for leave to file pleas. This motion was overruled, and a final decree entered. Held error, the evidence failing to show that the substituted service was sufficient to justify the first decree pro confesso and the nonresident defendants having been entitled, under Act March 3, 1875, § 8, to come in and defend under the second decree. American Freehold Land Mortgage Co. of London v. Thomas (1896) 71 Fed. 782, 18 C. C. A. 327.

When a demurrer to a bill has been overruled, and a final decree is afterwards regularly rendered by default for want of an answer, the decree will not be set aside without a satisfactory showing that the defendant has a meritorious defense. Ozark Land Co. v. Leonard (C. C. 1885) 24 Fed. 660, motion for modification of supersedeas denied Leonard v. Ozark Land Co. (1885) 6 Sup. Ct. 127, 115 U. S. 465, 29 L. Ed. 445.

Where, at the time the subpœna was served, the bill failed to show jurisdiction of defendant corporation, and the marshal's return shows service only on one B., who was separately named as a defendant, a decree pro confesso against the corporation will be set aside. Non-Magnetic Watch Co. of America v. Association Horlogere Suisse of Geneva (C. C. 1891) 45 Fed. 210.

The federal circuit court has no jurisdiction of a motion to set aside a final decree upon a bill taken for confessed, made after the expiration of the term at which such decree became absolute. Austin v. Riley (C. C. 1893) 55 Fed. 833.

A final decree on a bill taken pro confesso cannot be vacated at a subsequent term, where no application was made at the term at which it was rendered. Stuart v. City of St. Paul (C. C. 1894) 63 Fed. 644.

A decree pro confesso will not be set aside on mere affidavits of defendant and his counsel that there is a good defense, without stating definitely the facts constituting such defense or submitting a sworn answer. Schofield v. Horse Springs Cattle Co. (C. C. 1895) 65 Fed. 433.

A suit was brought in a state court to quiet title under a former foreclosure suit. An administrator ad prosequendum of the estate of the deceased mortgagor was appointed, and service was made upon him. A decree was made that nothing was due on the mortgage and it was ordered to be canceled of record. The subpœna bore date of the return day. An appearance was entered for the administrator by the orator's solicitors, and afterwards a decree pro confesso was taken, and an order for proofs made. Held, that none of these things constituted

objections which could be urged against the decree of the state court. Roberts v. Brooks (C. C. 1896) 71 Fed. 914, decree affirmed (1897) 78 Fed. 411, 24 C. C. A. 158.

A decree entered pursuant to an order pro confesso on a cross bill will be set aside where it appears that there were serious irregularities in the service of the subpœna on the cross bill, and that such bill was amended between the date of the order pro confesso and the date of the decree, by withdrawing certain allegations, and striking out the name of another defendant. Blythe v. Hinckley (C. C. 1897) 84 Fed. 228.

Where the circuit court is without jurisdiction, owing to the nonresidence in the district of a corporation defendant, and this fact is apparent from the face of the bill, advantage may be taken of the defect by a motion to vacate a decree entered pro confesso. Eldred v. American Palace-Car Co. of New Jersey (C. C. 1900) 103 Fed. 209.

Defendants, on presenting answers on the merits, held entitled to have a decree pro confesso vacated on payment of the costs of the suit to the date of their application. McFarland v. State Sav. Bank (C. C. 1904) 129 Fed. 244.

A court of equity may properly set aside a default before decree has been entered to permit a defendant to answer, where it is shown that it resulted from an oversight of counsel in failing to file a pleading. Benjamin Schwarz & Sons v. Kennedy (C. C. 1907) 156 Fed. 316.

Where, in a suit for a patent infringement, defendant, the seller, relied on the manufacturer as intervener defending the suit, it would not be deprived of any defense it might have by the intervener's failure to do so, and was therefore entitled to leave to answer on terms. D. & W. Fuse Co. v. Trumbull Electric Mfg. Co. (C. C. 1910) 183 Fed. 784.

Where the complainant and his counsel failed to appear at the final hearing of an equity cause, from whatever cause, the opening of the decree to permit him to have another hearing is a matter of discretion, and should only be granted upon terms. Karns v. W. L. Imlay Rapid Cyanide Process Co. (C. C. 1911) 184 Fed. 479.

307. —— **Effect.**—Under Sup. Ct. Rules 1822, No. 20, to regulate the practice of the circuit courts in equity causes, no service of an interlocutory decree, taking the bill for confessed, is necessary before final decree. Bank of United States v. White (1834) 33 U. S. (8 Pet.) 262, 8 L. Ed. 938.

Where a decree is entered upon an order taking a bill in equity as confessed for want of an answer, the only question for the consideration of the supreme court, on appeal, is whether the allegations of the bill are sufficient to support the decree. Masterson v. Howard (1873) 85 U. S. (18 Wall.) 99, 21 L. Ed. 764.

One against whom a decree pro confesso has been entered is absolutely precluded from alleging anything in opposition to the decree, so long as it stands unrevoked, except what appears on the face of the bill. Thomson v. Wooster (1885) 5 Sup. Ct. 788, 114 U. S. 104, 29 L. Ed. 105.

An order taking pro confesso bill on foreclosure is not a basis of a final decree, where the bill shows the court to be without jurisdiction. Cuebas y Arredondo v. Cuebas y Arredondo (1912) 32 Sup. Ct. 277, 223 U. S. 376, 56 L. Ed. 476.

Amendment of a bill to foreclose a mortgage, taken pro confesso, so as to create jurisdiction which had not theretofore existed, by dismissing the bill as to all but one defaulting defendant, and striking out the prayer to cut off every interest, will not justify final decree against remaining defendant as of a date before his death, based on the order pro confesso. Id.

Where a decree pro confesso had been entered against a defendant, he was not entitled to notice and to a hearing on the settlement of the final decree. Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co. (1910) 177 Fed. 854, 101 C. C. A. 68.

Where a defendant after decree pro confesso against him was permitted to be heard on objection to the decree, such hearing was mere matter of favor, and hence he could not complain that he had not been heard as fully as he desired. Id.

A complainant is not entitled as of course to a final decree when he has obtained an order pro confesso, he not being permitted to take at his discretion such a decree as he may be willing to abide by. Andrews v. Cole (C. C. 1884) 20 Fed. 410.

308. **Interlocutory decree.**—A decree dismissing a cross bill is not a final decree. Ayres v. Carver (1854) 58 U. S. (17 How.) 591, 15 L. Ed. 179.

A decree against administrators for money in their hands unadministered is not a final decree. Coates v. Muse (C. C. 1821) Fed. Cas. No. 2,916.

The decree on a bill taken pro confesso is always nisi, to be made absolute at the term succeeding that at which service of a copy of a decree shall be returned executed, unless cause is shown to the contrary. Pendleton v. Evans (C. C. 1823) Fed. Cas. Nos. 10,920, 10,921.

Where a bill is taken pro confesso at one session of the court, and service of the decree is made and returned at the same session, it may be made absolute at the following session; otherwise it cannot be made absolute until the third session of the court. Pendleton v. Evans (C. C. 1823) Fed. Cas. No. 10,921.

A decree nisi on default of appear-

ance does not become absolute until the end of the term succeeding that to which the decree shall be returned "executed." Stewart v. Smith (C. C. 1825) Fed. Cas. No. 13,436.

A decree entered as final, with a view to other proceedings upon it as a final decree, will be considered as final from the day of its entry, and it cannot be altered by the court in any material part except on a review or appeal or rehearing allowed for sufficient cause. Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,269.

Such decrees are final, after the end of the term at which they are rendered, unless specially entered otherwise. Id.

A decree requiring the payment of past and future annuities, and making provision for the execution of the same by the appointment of a commissioner and the sale of land, held a final and not an interlocutory decree. Scott v. Hore (C. C. 1875) Fed. Cas. No. 12,-535.

Although there has been an interlocutory decree for plaintiff, when it is shown on the master's report that he is not entitled to recover, a final decree for defendants may be entered. Steam Stone-Cutter Co. v. Sheldons (C. C. 1884) 21 Fed. 875.

A decree entered pursuant to an order pro confesso on a cross bill is not final, but interlocutory, where it leaves undetermined, as between the parties to the original and supplemental bills, the question of the legal ownership of property in dispute, and where, also, it is still necessary to refer the cause to a master for an accounting in respect to rents and profits. Blythe v. Hinckley (C. C. 1897) 84 Fed. 228.

309. —— Amendment or modification.—An interlocutory decree is always open to amendment and correction. De Florez v. Raynolds (C. C. 1880) 8 Fed. 434; Clark v. Blair (C. C. 1883) 14 Fed. 812; Wooster v. Handy (C. C. 1884) 21 Fed. 51; Linder v. Lewis (D. C. 1879) 4 Fed. 318.

The argument on exceptions to a master's report in an equity suit is the final hearing, and all the previous interlocutory orders and decrees in relation to the merits of the suit are open for revision and under the control of the court; and if a court at such time, on examination, changes a previous opinion, or finds this opinion in conflict with the decisions of a higher court, it is bound to reverse its former decree. Fourniquet v. Perkins (1853) 57 U. S. (16 How.) 82, 14 L. Ed. 854.

In railroad foreclosure proceedings a decree of sale was entered, with a reference to a master to ascertain the amount of the indebtedness, the allowances to the receiver as compensation and expenses, and the amount of receiver's certificates outstanding. On the coming in of the report a decree was entered confirming the same, though no sale had yet been made. Held, that the latter decree, taken in connection with the former one, terminated the litigation on the merits, and was a final decree, which could not be modified after the term. Petersburg Sav. & Ins. Co. v. Dellatorre (1895) 70 Fed. 643, 17 C. C. A. 310.

An interlocutory decree adjudging that defendant was chargeable with unfair competition, and directing an accounting for damages and profits, remains under the control of the court, and subject to revision on the merits, until the entry of a final decree. N. K. Fairbank Co. v. Windsor (1903) 124 Fed. 200, 61 C. C. A. 233, reversing decree (C. C. 1902) 118 Fed. 96.

The court may alter its judgment at any time before it is entered up, or, if entered, before it is made final; but after it has been announced it should not be altered without adequate reason and full hearing. Doggett v. Emerson (C. C. 1845) Fed. Cas. No. 3,961.

Previous to entering the final decree the cause remains under the control of the court; any interlocutory decree is subject to examination and modification. Pullan v. Cincinnati & C. Air Line R. Co. (C. C. 1873) Fed. Cas. No. 11,462; Reeves v. Keystone Bridge Co. (C. C. 1876) Fed. Cas. No. 11,661.

A motion to amend an interlocutory decree by striking out a material portion, upon affidavits of facts not put in evidence, will not be entertained. Hop Bitters Mfg. Co. v. Warner (C. C. 1886) 28 Fed. 577.

Before the decree is entered or signed, the court, at the suggestion of either party, or on its own motion, will correct any error or oversight that may appear in the decision or decretal order. Witters v. Sowles (C. C. 1887) 32 Fed. 130.

Where a decree entered pursuant to an order pro confesso on a cross-bill is clearly interlocutory in character, it remains within the control of the court, and may be reconsidered and modified or set aside at the subsequent term. Blythe v. Hinckley (C. C. 1897) 84 Fed. 228.

In a suit in equity to determine the validity of an oil lease, the decree held interlocutory as to an accounting, and would not be held to bind complainant to accept and pay the cost of a well, but would be so modified as to give it an election. Doddridge County Oil & Gas Co. v. Smith (C. C. 1909) 173 Fed. 386.

310. —— Opening or setting aside.—An interlocutory decree will not be set aside for the alleged misuse by counsel of a supreme court decision which was considered by the court before the entry of the decree. A. B. Dick Co. v. Wickelman (C. C. 1896) 77 Fed. 853.

Where an alias process was issued

pursuant to an order of the court, on proof by affidavit that it acquired no jurisdiction under the original process, held, that this in effect vacated an interlocutory decree granted in proceedings under the original process to which a return had been made, which, if true, showed that the court had acquired jurisdiction; that, although the entering of an order vacating the decree would have been more regular, failure to do so did not render the alias process void. Hardy v. Moore (D. C. 1880) 4 Fed. 843.

311. Final decree.—Where, after taking a decree pro confesso, plaintiff was never in a position to claim any benefit from an amendment to the bill, and the withdrawal thereof left the case as if no amendment had been made, plaintiff's right to a final decree was not prejudiced. Sheffield Furnace Co. v. Witherow (1893) 13 Sup. Ct. 936, 149 U. S. 574, 37 L. Ed. 853.

Where cross suits between two lessees of the same property were heard together by a federal court upon motions for preliminary injunctions, submitted on bill, answer, and affidavits in each case, and the rights of the parties depended solely on the validity and construction of the first lease, the facts being substantially undisputed, the court had power to enter final decree on such hearing. Allegheny Oil Co. v. Snyder (1900) 106 Fed. 764, 45 C. C. A. 604, writ of certiorari denied (1901) 21 Sup. Ct. 923, 181 U. S. 618, 45 L. Ed. 1030.

At entry of the final order or decree in equity, all the preceding interlocutory orders and decrees relative to the matters in controversy between the parties in interest are subject to revision by the trial court. Western Union Telegraph Co. v. United States & Mexican Trust Co. (1915) 221 Fed. 545, 137 C. C. A. 113.

A final decree may be taken at any time after 30 days after the bill is taken pro confesso. Consolidated Fruit-Jar Co. v. Strong (C. C. 1879) Fed. Cas. No. 3,130.

The court cannot enter a final decree in case of default and decree pro confesso during the term when the default was taken. Walz v. Brookville Nat. Bank (C. C. 1879) Fed. Cas. No. 17,137.

312. Nature and extent of relief.—Complainants brought suit to compel a bank to transfer to them stock which stood in the name of a person who held it as trustee of complainants. After the bill was filed the stock was applied to the payment of the trustee's debts due to the bank, under an agreement between him and the cashier. Held, that the court would not take notice of the transaction between the trustee and the cashier, it being a well-settled rule that a court is not bound to take notice of any interests obtained in the subject-matter of a suit pending the dispute. Mechanic's Bank v. Seton (1828) 26 U. S. (1 Pet.) 299, 7 L. Ed. 152.

In rendering a decree in chancery, the rights of the parties at the time are to be considered, and not as they were at the time of the institution of the suit. Randel v. Brown (1844) 43 U. S. (2 How.) 405, 11 L. Ed. 318.

A court of equity cannot, when it dissolves an injunction, give judgment, at the same time, against the obligors. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. Bein v. Heath (1851) 12 How. 168, 178, 13 L. Ed. 939.

Where a fund found to be due from a defendant has been attached or assigned in its hands, the decree should provide for payment of the fund into court, and the defendant may protect itself by bringing in the claimants of the fund as parties. Mundy v. Louisville & N. R. Co. (1895) 67 Fed. 633, 14 C. C. A. 583.

A court of equity is not required to go beyond what is necessary to secure to complainant the relief to which he shows himself entitled in the suit. Hill v. Phelps (1900) 101 Fed. 650, 41 C. C. A. 569.

Where a bill seeks to enforce an unrecorded trust interest in a mining claim, the legal title to which is in an assignee of the locator, under a syndicate agreement, to the constitution of which the bill alleges the beneficiaries assented, it is error to decree a revocation and to revest the title of the mine in the beneficiaries who had waived a right to reclaim the mine itself, whether recovery should be limited to a share in the proceeds of the lease and sale under the syndicate agreement. Reed v. Munn (1906) 148 Fed. 737, 80 C. C. A. 215, writ of certiorari denied Munn v. Reed (1907) 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353.

Where a bill filed by an original defendant was not a bill of interpleader, but a cross-bill in aid of its answer, setting up matters necessary to be determined as preliminary to a decision on the original bill, and which the court had jurisdiction to determine, all the parties who submitted their rights to such determination were bound by the decree, even if it did declare legal rights. Robinson v. Brast (1906) 149 Fed. 149, 79 C. C. A. 19, writ of certiorari denied Stephans v. Brast (1907) 27 Sup. Ct. 788, 205 U. S. 541, 51 L. Ed. 921.

In a suit for a settlement between the parties to a contract, by which complainant was to buy and sell lands for defendant, and to receive half of the net profits made thereon, where the contract has been terminated, leav-

ing lands so bought undisposed of, it is competent for the court to direct such lands to be sold by the master, and the profits divided. Hapgood v. Berry (1907) 157 Fed. 807, 85 C. C. A. 171.

On bill by judgment creditor to set aside conveyance as fraudulent, the court will look into the original consideration, and give the creditor only what appears due him. Bean v. Smith (C. C. 1821) Fed. Cas. No. 1,174.

Notes given in settlement of damages for trespass upon mining property are not so connected with a sale of the property between the same parties that an injunction against the collection of the notes will lie as a part of the relief granted upon a rescission of the sale. Emma Silver Min. Co. v. Emma Silver Min. Co. of New York (C. C. 1880) 7 Fed. 401.

Where the president of a national bank, seeking to compel its receiver to turn over to him certain private papers, voluntarily submitted his rights, and asked for affirmative relief, the court would appoint a master to examine it entirely alone, and turn over to complainant any papers belonging to him, and to the receiver such as were the property of the bank, and were not material to the government's case against complainant; and that such as related to bank transactions, and were material to the prosecution, should be held by the clerk for further consideration. Potter v. Beal (C. C. 1892) 49 Fed. 793, distinguishing Boyd v. U. S. (1886) 6 Sup. Ct. 524, 116 U. S. 616, 29 L. Ed. 746.

A decree in equity, giving judgment on a contract by which the defendant is obligated to pay monthly installments, not all of which are due, may provide, also, for future installments, and that judgment may be entered for the same as they fall due, on application to the court and notice to defendant's solicitor. Dancel v. Goodyear Shoe Machinery Co. (C. C. 1905) 137 Fed. 157, decree affirmed (1906) 144 Fed. 679, 75 C. C. A. 481, and writ of certiorari denied Goodyear Shoe Machinery Co. v. Dancel (1906) 26 Sup. Ct. 765, 202 U. S. 619, 50 L. Ed. 1174.

Where there are two citizens, each of whom is engaged in a lawful business, one in mining and the other in farming, and there comes a conflict when neither can enjoy his own property without interfering with his neighbor in the enjoyment of his, the court in determining their respective rights should, where possible, so frame its decree as to avoid the destruction of the rights of either. Bliss v. Anaconda Copper Min. Co. (C. C. 1909) 167 Fed. 342, judgment affirmed Same v. Washoe Copper Co. (1911) 186 Fed. 789, 109 C. C. A. 133.

A court of equity in granting relief is not restricted to the label which complainant has adopted for his pleading, nor by the phraseology of his prayer, but may render such a decree as the facts warrant, and hence, in a suit to enforce an alleged lien on stock deposited in escrow under an executory contract of sale for an unpaid portion of the price, the court properly entered a decree for specific performance of the contract, though complainant had no lien. David v. McRae (C. C. 1910) 183 Fed. 812.

In a suit in equity brought by a lessor of mining property for a cancellation of the lease, and to enjoin waste or trespass by the lessee in continuing to operate the mine after a forfeiture of the lease had been declared, the court had jurisdiction to award damages for such waste or trespass whether committed before or after suit brought; complainant having the right in the latter case to bring in the matter by amendment to the bill. Mitchell v. Big Six Development Co. (C. C. 1911) 186 Fed. 552.

313. — **Conditional relief.**—Where a case for relief is made by the bill, it may be given, by imposing conditions on the complainant, consistently with rules of equity, in the discretion of the court. Walden v. Bodley (1840) 39 U. S. (14 Pet.) 156, 10 L. Ed. 398.

Where a conveyance of a plantation had been obtained by fraud, and the only consideration alleged by the grantee was the cancellation of a certain bond executed by the grantor, and the court set aside the deed, and ordered that the bond, unaffected by any indorsement of credit or payment thereon, should be returned, and that it and the mortgage therewith given should have the same force and effect as if the conveyance had not been made and the bond had not been canceled, held, that the decree was proper in not making the payment of the bond a condition precedent to the reconveyance of the plantation. Neblett v. Macfarland (1875) 92 U. S. 101, 23 L. Ed. 471.

In a suit in equity to recover securities pledged to defendant by a third person, where it is found that complainant's rights in the securities are subject to the pledge, the court has power to decree the payment of defendant's claim as a condition of their redemption, and, necessarily, to declare complainant's rights extinguished if the condition is not performed. Hubbard v. Tod (1898) 19 Sup. Ct. 14, 171 U. S. 474, 43 L. Ed. 246.

Equity may, where the principles of equity require it, condition its grant of relief sought by complainant with the enforcement of a claim, held by defendant, which, by limitations or otherwise, the latter could not enforce. Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co. (1903) 126 Fed. 46, 60 C. C. A. 588.

Adverse equities growing out of or closely connected with the subject-matter of a suit are protected by awarding

a party the relief to which he is entitled only on condition that he accords to his adversary the corresponding right to which he also is entitled. Lynch v. Burt (1904) 132 Fed. 417, 67 C. C. A. 305.

A court of chancery will condition its grant of relief to a complainant with the enforcement of any just claim of the defendant which the complainant ought in equity and good conscience to pay, although on account of the statute of limitations or for some other reason defendant might not be able affirmatively to enforce it. Central Improvement Co. v. Cambria Steel Co. (1912) 201 Fed. 811, 120 C. C. A. 121.

Relief granted in equity may be conditioned upon the enforcement of a claim or equity held by defendant, which, by reason of limitations, an adjudication, or otherwise, could not be enforced in any other way. Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Drake (1914) 214 Fed. 536, 131 C. C. A. 82.

A court of equity, in granting relief to a complainant, may make it conditional on the doing of equity to defendant by paying a sum to which he is justly entitled, although he has filed no cross-bill therefor. Andrews v. Connolly (C. C. 1905) 145 Fed. 43.

314. —— **Relief to particular parties.**—Where a joint liability is asserted in a court of equity, the decree must be made against all the parties before it who do not show personal discharge. Mandeville v. Riggs (1829) 27 U. S. (2 Pet.) 482, 7 L. Ed. 493, reversing Riggs v. Swann (C. C. 1827) Fed. Cas. No. 11,831.

A prayer for an account by the executors alone is improper in a bill to revoke a will, and to recover property sold by such executors, in which bill the purchasers of such property are joined as codefendants. Gaines v. Chew (1844) 43 U. S. (2 How.) 619, 11 L. Ed. 402.

Where a state filed a bill against another state in the supreme court of the United States to determine a boundary, and defendant filed a cross-bill charging complainant with seeking to encroach on defendant's territory, the court could make an affirmative decree for the one state or the other, and establish the disputed line. Missouri v. Iowa (1849) 48 U. S. (7 How.) 660, 12 L. Ed. 861.

Where a lien creditor seeks relief in equity in behalf of himself and other creditors of the same class, the decree should provide for the relief of all. Wabash & E. Canal Co. v. Beers (1862) 67 U. S. (2 Black) 448, 17 L. Ed. 327.

Where a cross-bill and answers are filed in a case, and the decree undertakes to dispose of the whole case, it should dispose of the issues raised in them. Moore v. Huntington (1873) 84 U. S. (17 Wall.) 417, 21 L. Ed. 642.

Where an answer sets up only an agreement for a share in profits, and on hearing before the master that contention is abandoned, and no new claim substituted, the defendant is entitled to no relief. Burke v. Davis (1897) 81 Fed. 907, 26 C. C. A. 675.

Where none of the complainants of record in a suit in equity are entitled to relief, the court cannot grant relief to unnamed persons on whose behalf, as well as the complainants, it is claimed the suit was brought. Watson v. National Life & Trust Co. (1911) 189 Fed. 872, 111 C. C. A. 134.

That a creditor had not reduced its claim to judgment held not a bar to the granting of affirmative relief against a fraudulent trustee of the debtor by a federal court of equity in a suit wherein the court had acquired jurisdiction of the subject-matter and the parties. Central Improvement Co. v. Cambria Steel Co. (1913) 210 Fed. 696, 127 C. C. A. 184.

In a suit to set aside a contract for fraud, where it appears that the contract is valid, the defendant, upon a cross-bill praying such relief, is entitled to a decree declaring the contract valid, and for its enforcement. La Dow v. E. Bement & Sons (C. C. 1895) 66 Fed. 198.

315. —— **Denial of relief.**—The purpose of parties in bringing on the litigation cannot, if their rights are clear, affect the duty of the court to grant the relief asked. Ritchie v. McMullen (1897) 79 Fed. 522, 25 C. C. A. 50, modifying decree McMullen v. Ritchie (C. C. 1894) 64 Fed. 253.

The fact that the court is persuaded that defendants in an equity suit have testified falsely does not justify it in refusing to enter a decree in their favor where required by the other evidence in the case without considering any of their testimony. Armour & Co. v. Renaker (C. C. 1911) 191 Fed. 48, decree affirmed (C. C. A. 1913) 202 Fed. 901.

316. —— **Mortgage foreclosure.**—A personal judgment for a deficiency may be entered on foreclosure, in a federal circuit court, of a vendor's lien expressly reserved in the deed. White v. Ewing (1895) 69 Fed. 451, 16 C. C. A. 296, modifying decree (1895) 66 Fed. 2, 13 C. C. A. 276.

In a suit by creditors against an insolvent corporation and a mortgagee to enforce their claims against the mortgaged property, the legal title to which was in a trustee, where the bill did not ask a foreclosure of the mortgage, and no cross-bill for foreclosure was filed by the mortgagee, the court had no power to grant such foreclosure as a condition to the granting of relief to the complainants against the property subject to the rights of the mortgagee. Stanwood v. Des Moines Savings Bank (1910) 178 Fed. 670, 102 C. C. A. 170.

On foreclosure of a blanket mortgage given by a consolidated company, containing a covenant to pay interest on

mortgages given by the separate companies, the decree cannot extend to the latter where the holders are not made parties. Union Trust Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. 1878) Fed. Cas. No. 14,403.

Where the principal sum named in the mortgage was not due, held, that a decree of foreclosure could go only in respect of interest due and unpaid. Id.

317. Conformity to pleadings and proofs.—A complainant in equity may have relief even against the admissions in his bill. Finley v. Lynn (1810) 10 U. S. (6 Cranch) 238, 3 L. Ed. 211.

The relief afforded by the decree must conform to the case made out by the pleadings as well as to the proofs. Crocket v. Lee (1822) 20 U. S. (7 Wheat.) 522, 5 L. Ed. 513; Piatt v. Vattier (1835) 34 U. S. (9 Pet.) 405, 9 L. Ed. 173; Knox v. Smith (1846) 45 U. S. (4 How.) 298, 11 L. Ed. 983.

A decree for plaintiff, based upon the fact that property conveyed was not that called for by the contract, held not to be sustained, as not conforming to the allegation of the pleadings and proof. Carneal v. Banks (1825) 23 U. S. (10 Wheat.) 181, 6 L. Ed. 297.

Complainants, holding a lien on lands belonging to defendant, held entitled to a discovery, and to have the cloud removed from their title, but equity could not interfere, under the circumstances, to decree that the lands should be sold and the proceeds applied as prayed for. Ward v. Chamberlain (1862) 67 U. S. (2 Black) 430, 17 L. Ed. 319.

Where, in an action to cancel a deed for a mining claim, the pleader used the terms "ore body" and "vein or lode of ore" synonymously in the common parlance of miners, and not with reference to any technical distinction, it could not be contended that the findings were not responsive to the allegations for failure to find as to the value of the "ore body" discovered by plaintiffs' agent, and shown by him to defendant's agent. Synnott v. Shaughnessy (1889) 9 Sup. Ct. 609, 130 U. S. 572, 32 L. Ed. 1038.

Where the complainant is entitled to, and is awarded, the relief prayed in his bill, it is error to require, as a condition precedent to the enforcement of the decree, that he pay a sum found by the master to be due the defendant, where the facts on which such finding is based are not pleaded. Burke v. Davis (1897) 81 Fed. 907, 26 C. C. A. 675.

Where the allegations of a bill and the proofs are wholly at variance, the complainant is not entitled to a decree in conformity with either, since relief can only be granted on the case made by the bill. Baldwin v. Liverpool & London & Globe Ins. Co. (1903) 124 Fed. 206, 59 C. C. A. 660.

Where a bill to cancel certain securities, and for an accounting as to the payment of a debt, did not complain of or ask any relief concerning any transactions prior to March 18, 1902, complainants were not entitled to any relief with reference to such prior transactions. Gage v. J. F. Smyth Mercantile Co. (1908) 160 Fed. 425, 87 C. C. A. 377.

A court of equity may grant relief as to matters occurring subsequent to the filing of the bill, without a supplemental bill, if within the scope of the original bill, when such subsequent matters are presented by defendant in the answer and proofs. City of Denver v. Mercantile Trust Co. of New York (1912) 201 Fed. 790, 120 C. C. A. 100, modifying decree Mercantile Trust Co. of New York v. City of Denver (C. C. 1908) 161 Fed. 769.

Suits in chancery are tried and reviewed in view of the fact that a court of equity has the power, where justice may thereby be done, to grant to litigants the right relief although they have sought the wrong remedy. Central Improvement Co. v. Cambria Steel Co. (1913) 210 Fed. 696, 127 C. C. A. 184.

A decree determining that a labor union was an unlawful combination or conspiracy in restraint of trade in violation of the Sherman Anti-Trust Law could not be sustained where there was no allegation of defendants' violation of such law in the pleadings. Mitchell v. Hitchman Coal & Coke Co. (1914) 214 Fed. 685, 131 C. C. A. 425, appeal granted (1914) 221 Fed. 1022, 136 C. C. A. 665.

A money decree against a defendant railroad company held not within the issues made by the pleadings. Georgia S. & F. Ry. Co. v. Einstein (1914) 218 Fed. 55, 133 C. C. A. 657.

The decree cannot be founded on proof of matters not alleged. Robinson v. Cathcart (C. C. 1828) Fed. Cas. No. 11,947.

A bill for relief on account of fraud in a sale may be broad enough to justify a decree if gross mistake appears. Mason v. Crosby (C. C. 1846) Fed. Cas. No. 9,234.

Complainant, in a suit to determine an adverse claim to land, can only obtain relief upon the grounds alleged in his bill. Code Civ. Proc. Cal. § 738. Burton v. Le Roy (C. C. 1879) Fed. Cas. No. 2,217.

In granting relief, where the complainant's rights are certain and the invasion of them is clearly established, a court of equity cannot consider the inconvenience which will result to defendants from the relief. The only duty of the court is to grant the relief to which the complainant is entitled upon the law and facts of the case. Woodruff v. North Bloomfield G. M. Co. (C. C. 1884) 18 Fed. 753.

The fact that in ancillary probate proceedings the will of a testator was admitted to probate without any expressed reference to a compromise decree entered in the state of original jurisdiction by which contesting heirs not named in the will were given a certain share

in the estate, so that the record in the ancillary proceedings does not show any interest in such heirs, will not preclude a court of equity from fastening a lien upon their interest in the assets within the ancillary jurisdiction; the objection being one of form only, which such court will disregard. Ingersoll v. Coram (C. C. 1905) 136 Fed. 689, decree reversed Coram v. Ingersoll (1906) 148 Fed. 169, 78 C. C. A. 303, which is reversed Ingersoll v. Coram (1908) 29 Sup. Ct. 92, 311 U. S. 335, 53 L. Ed. 208.

Where the fraud alleged in the bill as the sole ground of relief is not proven, a party is not entitled to relief upon other grounds. Britton v. Brewster (D. C. 1880) 2 Fed. 160.

318. —— **Prayer for relief.**—Under a general prayer the court may grant any relief consistent with, and included in, the allegations of the bill. Boone v. Chiles (1834) 33 U. S. (8 Pet.) 532, 8 L. Ed. 1034; Tayloe v. Merchants' Fire Ins. Co. (1850) 50 U. S. (9 How.) 390, 13 L. Ed. 187; Haggart v. Wilczinski (1906) 143 Fed. 22, 74 C. C. A. 176; McKinney v. Big Horn Basin Development Co. (1909) 167 Fed. 770, 93 C. C. A. 258; Hayward & Clark v. McDonald (1912) 192 Fed. 890, 113 C. C. A. 368; Connolly v. Belt (C. C. 1838) Fed. Cas. No. 3,117; Moore v. Mitchell (C. C. 1874) Fed. Cas. No. 9,770; Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C. 1909) 169 Fed. 671 (order affirmed [1909] 176 Fed. 26, 99 C. C. A. 500); Lewis Pub. Co. v. Wyman (C. C. 1909) 168 Fed. 756 (decree modified [1910] 182 Fed. 13, 104 C. C. A. 453, which is affirmed [1913] 33 Sup. Ct. 599, 228 U. S. 610, 57 L. Ed. 989); Rexford v. Southern Woodland Co. (D. C. 1913) 208 Fed. 295.

Under a prayer in a bill for general relief, no decree can be made on proofs entirely outside of the pleadings, on a case not made or contemplated by the bill. English v. Foxall (1829) 27 U. S. (2 Pet.) 595, 7 L. Ed. 531; Hobson v. McArthur (1842) 41 U. S. (16 Pet.) 182, 10 L. Ed. 930; Georgia S. & F. Ry. Co. v. Einstein (1914) 218 Fed. 55, 133 C. C. A. 657.

A court of equity cannot act on a case which is not fairly made by the bill and answer; but it is not necessary that these should point out in detail the means which the court should adopt in giving relief under the general prayer for relief, beyond the specific prayer, and not exactly in accordance with it. Walden v. Bodley (1840) 39 U. S. (14 Pet.) 156, 10 L. Ed. 398.

Relief under a general prayer in a bill which states all the facts should not be denied because it is asked upon a different theory of the law than that upon which a special prayer for relief is based, where both prayers are based upon the same facts, clearly set forth in the bill. Lockhart v. Leeds (1904) 25 Sup. Ct. 76, 195 U. S. 427, 49 L. Ed. 263, reversing judgment (1900) 63 P. 48, 10 N. M. 568.

Although, under modern systems, courts of law may enforce equitable rights, the proof must agree with the pleadings, and the relief granted must be within the prayer for relief and the grounds relied on. Eddy & Bissell Live-Stock Co. v. Blackburn (1895) 70 Fed. 949, 17 C. C. A. 532.

Where a plea in bar meets all the claims made in the bill, and is sustained on issue joined, the defendant is entitled to the benefit of such finding, in a decree dismissing the bill; and the complainant cannot insist that it should have been retained for the purpose of granting him relief not prayed for, and inconsistent with the theory upon which the suit was brought. Rejall v. Greenhood (1899) 92 Fed. 945, 35 C. C. A. 97.

In an action by a mortgagee, who has purchased the property at foreclosure sale, to cut off the right of redemption of a defendant who was not a party to the foreclosure suit, but is alleged to be in privity with a defendant therein, and bound by the decree, the court may properly decree a general foreclosure and a resale of the property under a prayer for general relief, where the evidence warrants such a decree. London & San Francisco Bank v. Dexter Horton & Co. (1903) 126 Fed. 593, 61 C. C. A. 515, writ of certiorari denied Dexter Horton & Co. v. London & San Francisco Bank (1904) 24 Sup. Ct. 856, 194 U. S. 631, 48 L. Ed. 1158.

Where a plaintiff brings a suit in equity, under a misapprehension as to the special relief that he is entitled to, but the bill contains a general as well as special prayer for relief, and sets forth facts showing a right to relief, there is no ground for a demurrer, and the court will grant the proper relief. Patrick v. Isenhart (C. C. 1884) 20 Fed. 339.

In an action between citizens of the same state brought in the federal court to enjoin the construction of defendant's road on the ground that it infringed on plaintiff's franchise, and by the grant to defendant the state had impaired the obligation of plaintiff's charter, the bill containing a prayer for general relief, held, that the court, having decided against plaintiff, could still retain jurisdiction to assess damages, as the prayer for relief was broad enough to include such relief. Omaha Horse Ry. Co. v. Cable Tramway Co. (C. C. 1887) 32 Fed. 727, appeal dismissed Cable Tramway Co. of Omaha v. Omaha Horse Ry. Co. (1891) 11 Sup. Ct. 1018, 140 U. S. 674, 35 L. Ed. 600.

The specific prayers of a bill were that a deed be declared null and void as against the creditors of the grantor, and for the reconveyance of the land and an account of rents. The proofs did not sustain any of the allegations of fraud, and it appeared that the deed

of conveyance was for a valuable and adequate consideration. Held that, under the prayer for general relief, compensation for the value of the improvements was not decreeable. Curry v. Lloyd (D. C. 1884) 22 Fed. 258.

319. Entry and record.—A court of chancery is not bound to inscribe in an order book, upon the application of one of the parties, an order which it may pass in a case before it. Ex parte Story (1838) 37 U. S. (12 Pet.) 339, 9 L. Ed. 1108.

Where at the close of the trial the court announced that they would find in favor of plaintiff, and directed plaintiff's counsel to prepare findings of fact, conclusions of law, and a decree, and allowed 30 days for that purpose, defendants were not entitled to have the whole 30 days elapse before the filing of such finding and decree, but plaintiff was entitled to present for allowance and file the findings and decree immediately; the decree being regarded as final from the date it was filed. Dalton v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99.

In federal courts, and in the American equity practice generally, there has never been an enrollment of the decree in the old English sense; but the decree is regarded as recorded and enrolled at the conclusion of the term. Ommen v. Talcott (D. C. 1910) 180 Fed. 925.

Though the practice exists in the federal courts of signing decrees, a decree may pass on an oral direction by the judge in open court to enter it; the judge's signature being only evidence to the clerk that it has in fact been passed, so that he may safely enter it. Id.

320. —— Entry nunc pro tunc.—A decree nunc pro tunc is always admissible, where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree which was not actually meant to be made in a final form cannot be entered in that shape nunc pro tunc, in order to give validity to an act done by a judicial officer under a supposition that the decree was final, instead of interlocutory. Gray v. Brignardello (1863) 68 U. S. (1 Wall.) 627, 17 L. Ed. 693.

Final decree nunc pro tunc cannot be entered in foreclosure on a pro confesso order where no final decree has been directed. Cuebas y Arredondo v. Cuebas y Arredondo (1912) 32 Sup. Ct. 277, 223 U. S. 376, 56 L. Ed. 476.

If the decree be not actually entered till after the death of the judge who drew it up and announced it, an entry may be made at the next term. Doggett v. Emerson (C. C. 1845) Fed. Cas. No. 3,961.

Final decree was signed by the judge April 25, 1910, and was taken at once to the clerk's office, and there remained until May 17, 1910, when complainant's attorneys paid the fees for entry, and it was then marked "Filed"; the "record of the case" containing the statement that the court caused the final decree to be entered "on the 25th day of April, 1910." Held, that the recital as to the date of entry was a misprision, and should be corrected nunc pro tunc to recite that it was entered May 17, 1910. Ommen v. Talcott (D. C. 1910) 180 Fed. 925.

321. Amendment and modification.—The court has power to modify a final decree until after the expiration of the term at which it was entered. Home St. Ry. Co. v. City of Lincoln (1908) 162 Fed. 133, 89 C. C. A. 133; Reeves v. Keystone Bridge Co. (C. C. 1876) Fed. Cas. No. 11,661; Tilton v. Barrell (C. C. 1883) 17 Fed. 59; Allen v. Wilson (C. C. 1884) 21 Fed. 881; Robinson v. Rudkins (C. C. 1886) 28 Fed. 8.

An interlocutory decree is always open to amendment and correction. De Florez v. Raynolds (C. C. 1880) 8 Fed. 434; Clark v. Blair (C. C. 1883) 14 Fed. 812; Wooster v. Handy (C. C. 1884) 21 Fed. 51; Linder v. Lewis (D. C. 1879) 4 Fed. 318.

From the report of a master in chancery, in an action to enforce a vendor's lien based on a contract for the sale and purchase of land at a certain price per acre, it was evident that the amount of the lien, as fixed by the decree, was found by estimating the quantity of land and not by actual survey. Held that, on the survey being made and the true quantity of land ascertained, the decree should be made to conform to it. Baines v. Clarke (1884) 111 U. S. 789, 4 Sup. Ct. 671, 28 L. Ed. 599.

A court of equity can correct its decrees during the term in which they are entered, and one who, with notice of the proceedings, acquires an interest on the faith of a decree, takes it subject to the possibility of its correction or vacation. Henderson v. Carbondale Coal & Coke Co. (1891) 11 Sup. Ct. 691, 140 U. S. 25, 35 L. Ed. 332.

At the end of the term a decree becomes a finality, and cannot be revised in the same proceeding, except for errors of law apparent on its face which render it void. Farmers' & Merchants' Bank of Phœnix, Ariz., v. Arizona Mut. Savings & Loan Ass'n (1915) 220 Fed. 1, 135 C. C. A. 577, affirming decree Clark v. Arizona Mut. Sav. Loan Ass'n (D. C. 1914) 217 Fed. 640.

During the term the court may modify, supplement, or supersede a final decree in any case; and while it is more orderly and convenient to state in the second decree how far or in what respect it is intended to affect the first one, still this is not actually necessary, and it will be presumed that in giving the second decree the court intended to modify the first one, in so far as they differ, unless the circumstances plainly indicate the contrary. Tilton v. Barrell (C. C. 1883) 17 Fed. 59, judgment

affirmed Barrell v. Tilton (1887) 7 Sup. Ct. 332, 119 U. S. 637, 30 L. Ed. 511.

The irregularity, if any, arising from the failure to specify in the decree the fact of consent of the appointment of a deputy clerk as master as the special reason for the appointment, is a mere defect or want of form, which may be supplied by amendment under the general power of a court of equity, under this section. Fischer v. Hayes (C. C. 1884) 22 Fed. 92, 93.

A motion to amend an interlocutory decree by striking out a material portion, upon affidavits of facts not put in evidence, will not be entertained. Hop Bitters Mfg. Co. v. Warner (C. C. 1886) 28 Fed. 577.

Before the decree is entered or signed, the court, at the suggestion of either party, or on its own motion, will correct any error or oversight that may appear in the decision or decretal order. Witters v. Sowles (C. C. 1887) 32 Fed. 130.

Where a decree finds a contract regarding various loans made by defendant, and directs an accounting, a motion to modify the decree so as to except certain loans will be denied, though an appeal has been allowed, since the decree, if interlocutory, can be corrected on the coming in of the master's report, and, if final, by the supreme court. Henry v. Travelers' Ins. Co. (C. C. 1888) 34 Fed. 258.

A decree entered in a federal court in a suit for an accounting may be modified by the court where it directs the account to be stated in a manner not authorized by the allegations of the bill. Webster v. Oliver Ditson Co. (C. C. 1909) 171 Fed. 895.

In a suit in equity to determine the validity of an oil lease, the decree held interlocutory as to the accounting, and would not be held to bind complainant to accept and pay the cost of a well, but would be so modified as to give it an election. Doddridge County Oil & Gas Co. v. Smith (C. C. 1909) 173 Fed. 386.

322. —— **After term.**—A supplemental bill to modify a decree should not be entertained after the term at which the decree is entered, no new facts pertinent to the litigation being shown. City of Omaha v. Redick (1894) 63 Fed. 1, 11 C. C. A. 1.

In railroad foreclosure proceedings a decree of sale was entered, with a reference to a master to ascertain the amount of the indebtedness, the allowances to the receiver as compensation and expenses, and the amount of receiver's certificates outstanding. On the coming in of the report a decree was entered confirming the same, though no sale had yet been made. Held, that the latter decree, taken in connection with the former one, terminated the litigation on the merits, and was a final decree, which could not be modified after the term. Petersburg Sav. & Ins. Co. v. Dellatorre (1895) 70 Fed. 643, 17 C. C. A. 310.

While a court of equity is without power to modify a final decree after the term at which it is entered, in so far as it determines the rights of the parties, it retains jurisdiction to make further orders directing the manner of its execution, and to that extent it may modify the provisions of the original decree, as by changing the time or terms of a sale of property necessary to carry a decree of partition into effect. Mootry v. Grayson (1900) 104 Fed. 613, 44 C. C. A. 83.

A complainant who causes a decree in his favor to be executed according to a possible interpretation of it, accepts the benefits thereof, and acquiesces therein for six years disentitles himself to call in question the correctness of the decree. Home St. Ry. Co. v. City of Lincoln (1908) 162 Fed. 133, 89 C. C. A. 133.

A Circuit Court of the United States is without authority to correct a judicial error in one of its decrees upon simple motion or petition after the term at which the decree was rendered. Id.

While the court may not after the term amend the principles of a final decree, it has inherent power to modify by a subsequent order the time or manner of its enforcement. Fulton Inv. Co. v. Dorsey (1915) 220 Fed. 298, 136 C. C. A. 108.

A decree for the sale of a railroad, providing that the purchasers shall pay enough money to liquidate certain judgments, etc., may be amended at a subsequent term by providing that the property shall be sold subject to such judgments, etc. Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1878) Fed. Cas. No. 14,259.

The circuit courts of the United States have no power to modify a decree in chancery after the term at which it was entered. Allen v. Wilson (C. C. 1884) 21 Fed. 881.

Decrees in equity are treated as having been enrolled at the term at which they were rendered, and no alteration thereof, other than correction of mere clerical errors, can thereafter be allowed on motion. Robinson v. Rudkins (C. C. 1886) 28 Fed. 8.

Though a court of equity can correct clerical errors in its decrees at any time, it will not interfere to correct an error, which may have been either clerical or judicial, in a decree, entered two years before the application for correction, by a judge other than the one to whom such application is made, and subsequently affirmed on appeal. Hicklin v. Marco (C. C. 1894) 64 Fed. 609.

Where a court has decreed the sale by a master of certain corporate stock on terms stated it will not, at a subsequent term, direct the insertion in the advertisement of a provision that the purchaser shall not have the right to vote the stock until it is fully paid

for, which would be, in effect, an amendment of the decree; at least unless special considerations require it. Earle v. McCartney (C. C. 1901) 112 Fed. 372, decree affirmed McCartney v. Earle (1902) 115 Fed. 462, 53 C. C. A. 392.

After the lapse of more than four years an amicable final decree in equity, in a suit between an assignee in bankruptcy and an assignee under a deed of voluntary assignment, which left the latter liable to account to the creditors of the assignor in a state court for the portion of the assets he had collected, will not be amended upon his petition, on the ground of an alleged mistake in its terms, although the assignee in bankruptcy consents, where the amendment would prejudice the creditors, and they object to its allowance. Coleman v. Neill (D. C. 1882) 11 Fed. 461.

323. **Opening or vacating.**—Although an interlocutory decree conditionally vacating and setting aside a former decree on the ground of accident, mistake, and surprise was irregularly entered, and therefore erroneous, where it has been acquiesced in by defendants, and the court had jurisdiction, it will be held binding on the parties on an appeal by complainants from a final decree dismissing the bill. Dewey v. Stratton (1902) 114 Fed. 179, 52 C. C. A. 135.

After interlocutory decree and order of reference to a master for an account, rule to show cause why the decree should not be opened and a rehearing ordered granted. Spring v. Domestic Sewing Mach. Co. (C. C. 1882) 13 Fed. 446.

Efforts to reopen a final decree should be discouraged, no matter how meritorious the grounds. The party has his remedy by offering a fresh grievance, and upon suit therefor introducing the new defense. Lockwood v. Cleveland (C. C. 1884) 20 Fed. 164.

After a suit has been decided in favor of the complainant, and the cause referred to a master to take an account of damages, the court will not reverse its former decision and dismiss the bill, where the alleged errors concern only disputed questions of fact, and the defendants do not point out any clear mistake of law, or clear and decisive mistake of fact. Coupe v. Weatherhead (C. C. 1888) 37 Fed. 16.

324. —— **Jurisdiction.**—Where the proceedings to obtain relief against a decree are tantamount to the common-law practice of moving to set aside a judgment for irregularity, writ of error, or bill of review, they should be in the court where the decree is rendered; but if they are equivalent to a bill in equity to set aside for fraud, they constitute a new and original proceeding. Sahlgard v. Kennedy (C. C. 1880) 2 Fed. 295.

If, in a direct proceeding to set aside the decree of another court, there are parties before the court other than those in the proceeding in which the decree was rendered, and it is charged that such decree was fraudulent, the court may entertain jurisdiction thereof, and prevent the parties before it from proceeding to enforce such decree or availing themselves of any advantages thereunder. Id.

325. —— **Time.**—A federal court of equity has no power to vacate a decree on motion made after the close of the term at which it was entered. Cameron v. McRoberts (1818) 16 U. S. (3 Wheat.) 591, 4 L. Ed. 467; McGregor v. Vermont Loan & Trust Co. (1900) 104 Fed. 709, 44 C. C. A. 146.

Where a party, interested in the property which was the subject-matter of a suit in equity pending in Georgia, consented to the sale of the property, and afterwards took the benefit of the insolvent law of South Carolina, and at a subsequent period counsel representing him filed a consent decree to complete the sale, and the trustee of his estate under the insolvent law took no steps for 2 years to connect himself with the proceedings in court, and then suffered 15 years more to elapse without moving in the business, it was held that it was too late for such trustee to object to the consent decree. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209.

The court may set aside its decree dismissing a bill, at the same term in which it is rendered, on discovering its own error in law, or that the consent of the complainant to the dismissal was fraudulently obtained. Doss v. Tyack (1852) 55 U. S. (14 How.) 297, 14 L. Ed. 428.

After the lapse of five years from the entry of a decree declaring taxes levied by a county illegal, and enjoining their collection, the county is estopped to sue to set the decree aside for fraud, on the ground of laches. Boone County v. Burlington & M. R. R. Co. (1891) 11 Sup. Ct. 687, 139 U. S. 684, 35 L. Ed. 319.

Where a commission is appointed by the court to mark the boundary between two states separated by a river, a decree confirming their report as to the marking at a certain bridge, leaving the rest of the boundary still to be marked and reported upon, is interlocutory merely, and may be set aside on motion at a subsequent term, for want of proper notice. State of Iowa v. State of Illinois (1894) 14 Sup. Ct. 333, 151 U. S. 238, 38 L. Ed. 145.

A federal circuit court has power to set aside, on motion, after term, a final decree which the judge was induced to enter, without examination, by false representations as to its character. U. S. v. Williams (1895) 67 Fed. 384, 14 C. C. A. 440; Fisher v. Simon (1895) 67 Fed. 387, 14 C. C. A. 443.

A motion for a rehearing, or for the opening of a decree, must not only be filed during the term at which the de-

cree was entered, but also called to the attention of the court, or in some manner entertained by it, as shown by its record, so as to prevent the decree from passing beyond its control on the close of the term; otherwise it has no power to grant the motion at a subsequent term. Graham v. Swayne (1901) 109 Fed. 366, 48 C. C. A. 411.

A circuit court has jurisdiction to entertain a bill to set aside a former decree on the ground of accident, mistake, or surprise, where the requisite facts to entitle complainant to such relief are alleged, although such bill is not presented until the time for an appeal or the filing of a bill of review has expired. Dewey v. Stratton (1902) 114 Fed. 179, 52 C. C. A. 135.

A bill to vacate a decree for fraud cannot be maintained after the lapse of nine years, where during all of the time the complainant had knowledge of the decree and no sufficient facts in excuse of the delay are alleged. Hendryx v. Perkins (1902) 114 Fed. 801, 52 C. C. A. 435, rehearing denied (1902) 116 Fed. 1020, 52 C. C. A. 684, and writ of certiorari denied Perkins v. Hendryx (1902) 23 Sup. Ct. 843, 187 U. S. 643, 47 L. Ed. 346.

A decree entered by mistake, though final, may be vacated by the court after the term in which it was rendered. U. S. v. Castro (C. C. 1868) Fed. Cas. No. 14,754.

Final decrees in equity may be modified or set aside by appeal within the time prescribed by law. Huntington v. Little Rock & Ft. S. R. Co. (C. C. 1882) 16 Fed. 906, decree reversed Little Rock & Ft. S. Ry. Co. v. Huntington (1887) 7 Sup. Ct. 517, 120 U. S. 160, 30 L. Ed. 591.

A bill to set aside a decree filed after the lapse of a greater period than that allowed for a writ of error or appeal from such decree cannot be treated as a bill of review. It is no excuse for the delay that, after entry of the decree, suit to enforce the same equities claimed in the first suit was brought in a state court. On such bill, errors which may have been committed in the entry of the decree cannot be inquired into. Dunlevy v. Dunlevy (C. C. 1889) 38 Fed. 459.

A final decree entered on the report of a special master, appointed in violation of 25 Stat. 437, is not thereby rendered absolutely void, so that the court will have power to set it aside on motion at a subsequent term. Farmers' Loan & Trust Co. v. Iowa Water Co. (C. C. 1897) 80 Fed. 467.

Where certain infants were parties to a suit for partition, a decree adjudicating their interests became conclusive on them, their privies, and alienees on the expiration of six months after they became of age without their having within that time directly attacked the decree either by appeal or bill of review for error appearing on the face of the record. Gillespie v. Pocahontas Coal & Coke Co. (C. C. 1907) 162 Fed. 742, decree reversed (1908) 163 Fed. 992, 91 C. C. A. 494, and writ of certiorari denied Pocahontas Coal & Coke Co. v. Gillespie (1909) 29 Sup. Ct. 700, 214 U. S. 519, 53 L. Ed. 1065.

After the term at which a final judgment or decree is entered, the courts of the United States have no power to open the judgment or decree, and grant a rehearing or let a defendant in to answer, unless at the time at which the judgment or decree is entered some order is made virtually keeping the judgment open for further relief or proceedings. Linder v. Lewis (D. C. 1880) 1 Fed. 378.

A court held to have power at subsequent term to vacate a decree not in due course of procedure or in conformity to the pleadings, and to enter a decree such as was warranted by the pleadings and findings. Clark v. Arizona Mut. Savings & Loan Ass'n (D. C. 1914) 217 Fed. 640, decree affirmed Farmers' & Merchants' Bank of Phœnix, Ariz., v. Same (1915) 220 Fed. 1, 135 C. C. A. 577.

326. —— **Grounds.**—A decree against infants cannot be attacked for mere mistake as against third persons who have in good faith acquired rights under it. Franklin Sav. Bank v. Taylor (1893) 53 Fed. 854, 4 C. C. A. 55, reversing Taylor v. Franklin Sav. Bank (C. C. 1891) 50 Fed. 289, and petition for writ of certiorari denied (1894) 14 Sup. Ct. 1146, 154 U. S. 503, 38 L. Ed. 1078.

A federal circuit court has power to set aside, on motion, after term, a final decree which the judge was induced to enter, without examination, by false representations as to its character. U. S. v. Williams (1895) 67 Fed. 384, 14 C. C. A. 440; Fisher v. Simon (1895) 67 Fed. 387, 14 C. C. A. 443.

A bill for the vacation of a prior decree of the same court, which charges fraud as the ground for the relief asked, will not sustain a decree granting such relief on the ground of mistake of fact, even though such mistake related to the state of the pleadings at the time of the hearing, and was shared by the court, and prevented a determination of the cause on the merits. Hendryx v. Perkins (1902) 114 Fed. 801, 52 C. C. A. 435, rehearing denied (1902) 116 Fed. 1020, 52 C. C. A. 684, and writ of certiorari denied Perkins v. Hendryx (1902) 23 Sup. Ct. 843, 187 U. S. 643, 47 L. Ed. 346.

An original bill to set aside a decree cannot be maintained on the ground of irregularities and errors which might have been corrected on appeal or by a bill of review. Cocke v. Copenhaver (1903) 126 Fed. 145, 61 C. C. A. 211.

A decree in equity will not be declared void for fraud because of suspicious circumstances connected with

its rendition. Jones v. Brittan (C. C. 1872) Fed. Cas. No. 7,455.

After a hearing and decree a cause will not be opened for mere technical and unimportant defects in the steps preliminary thereto, where no injustice has resulted to the parties. Such defects, if not objected to at the time, must be considered as waived. Allen v. City of New York (C. C. 1880) 7 Fed. 483.

Before a motion to reopen a cause and admit a newly-discovered defense, after a final hearing, will be granted, it must be clear that such defense, if it had been made at the final hearing, would have been effectual. Adair v. Thayer (C. C. 1881) 7 Fed. 920.

It being made to appear to the court by the petition of strangers to the record that a decree was obtained by collusion between complainant and defendant, it is annulled and the cause dismissed. Barker v. Todd (C. C. 1882) 15 Fed. 265.

Final decrees in equity may be modified or set aside by an original bill charging fraud or newly-discovered evidence. Huntington v. Little Rock & Ft. S. R. Co. (C. C. 1882) 16 Fed. 906. decree reversed Little Rock & Ft. S. Ry. Co. v. Huntington (1887) 7 Sup. Ct. 517, 120 U. S. 160, 30 L. Ed. 591.

When no additional testimony is taken, the circuit court will not hastily disturb a decree on the point of damages, nor unless it shows manifest injustice. The Lord Derby (C. C. 1883) 17 Fed. 265. following Cushman v. Ryan (C. C. 1840) Fed. Cas. No. 3,515.

Upon a decree setting aside a patent for fraud in its procurement, defendant made a motion to reopen the case for further proof, and it did not appear from his affidavit that the testimony sought to be had could not have been easily adduced upon the trial, and no efforts for the procurement of such testimony on the trial was set out in the affidavit. Held, that defendant showed no right to have the case reopened. U. S. v. Gunning (C. C. 1885) 23 Fed. 668.

After a suit has been decided in favor of the complainant, and the cause referred to a master to take an account of damages, the court will not reverse its former decision and dismiss the bill, where the alleged errors concern only disputed questions of fact, and the defendants do not point out any clear mistake of law, or clear and decisive mistake of fact. Coupe v. Weatherhead (C. C. 1888) 37 Fed. 16.

A suit in equity for infringement of a patent was commenced before the patent expired, and after its expiration a decree by default was entered for injunction and accounting. Complainant's testimony related entirely to a different patent, which concerned the same subject-matter, but which had expired before the suit was begun. Held, that there was not such a want of equity jurisdiction as would compel the court to set aside the decree on motion. Western Electric Co. v. Reedy (C. C. 1895) 66 Fed. 163, decree affirmed Reedy v. Western Electric Co. (1897) 83 Fed. 709, 28 C. C. A. 27.

An interlocutory decree will not be set aside for the alleged misuse by counsel of a supreme court decision which was considered by the court before the entry of the decree. A. B. Dick Co. v. Wickelman (C. C. 1896) 77 Fed. 853.

The fact that any interest, however small, will profit thereby, is not sufficient ground to revoke a decree; the preponderance of equity on the whole case will be looked to. In re Morris (D. C. 1837) Fed. Cas. No. 9,825.

327. —— **Parties.**—A motion to set aside a decree, made by persons not parties to the suit, but who are permitted to intervene only for the purpose of an appeal from the decree as originally rendered, will not operate to suspend such decree. Sage v. Central R. Co. of Iowa (1876) 93 U. S. 412, 23 L. Ed. 933.

Bondholders aggrieved by a decree in a suit to which they were not made parties may apply for relief, or institute such other proceedings as a party to the suit might institute. Campbell v. Railroad Co. (C. C. 1871) Fed. Cas. No. 2,366.

The court will not entertain a summary motion by a stranger to vacate or modify a decree in a patent case. Washburn & M. Mfg. Co. v. Colwell Steel Barb Fence Co. (C. C. 1880) 1 Fed. 225.

It being made to appear to the court by the petition of strangers to the record that a decree was obtained by collusion between complainant and defendant, it is annulled and the cause dismissed. Barker v. Todd (C. C. 1882) 15 Fed. 265.

A manufacturer, on being invited to assume the defense of an infringement suit brought against the purchaser of one of his machines, declined to do so, except to the extent of paying part of the expenses thereof, and by his vacillating course evinced a purpose to take advantage of the judgment if favorable, and escape responsibility if adverse. Held, that he was precluded, after the entry of a final decree, from intervening in the suit for the purpose of having the decree set aside. Ring Refrigerator & Ice-Machine Co. v. St. Louis Ice Manufacturing & Cold-Storage Co. (C. C. 1895) 67 Fed. 535.

328. —— **Proceedings.**—A motion to set aside a final decree, for errors in the master's report not excepted to, on the ground that the party's attorney had improperly consented to the decree and refused to file the exception, is addressed to the discretion of the trial

court, and cannot be considered on appeal. Terry v. Commercial Bank (1875) 92 U. S. 454, 23 L. Ed. 620.

Where a decree was entered against a party by the fraudulent consent of his attorney, it may be set aside by bill of review. Id.

A bill for the vacation of a prior decree of the same court, which charges fraud as the ground for the relief asked, will not sustain a decree granting such relief on the ground of mistake of fact, even though such mistake related to the state of the pleadings at the time of the hearing, and was shared by the court, and prevented a determination of the cause on the merits. Hendryx v. Perkins (1902) 114 Fed. 801, 52 C. C. A. 435, rehearing denied (1902) 116 Fed. 1020, 52 C. C. A. 684, and writ of certiorari denied Perkins v. Hendryx (1902) 23 Sup. Ct. 843, 187 U. S. 643, 47 L. Ed. 346.

Orders obtained upon motion may be discharged upon motion, and orders obtained ex parte may be thus discharged when they have never been assented to by the other party. Eslava v. Mazange's Adm'r (C. C. 1871) Fed. Cas. No. 4,527.

Where the defense sought to be introduced was that a joint patent was the sole invention of one of its patentees, the affidavit of such patentee that he was the sole inventor, and of others that he claimed to them to be the sole inventor, held not to be such proof as would warrant the court in reopening the cause and admitting such defense. Collins Co. v. Coes (C. C. 1881) 8 Fed. 517.

When the decree is interlocutory and not final, the court has power to open the same and allow a new defense on motion, and without the formality of a bill of review; but, when the application is in fact and substance for a rehearing on the ground of newly-discovered evidence, it must be supported by the same sort of proof as is required in order to give a party relief upon a bill of review, or a supplemental bill in the nature of review, after a final decree. Willimantic Linen Co. v. Clark Thread Co. (C. C. 1885) 24 Fed. 799.

A motion to open a decree in order to introduce new evidence is not a motion for a rehearing, technically so called, and is not governed by the stringent rule which requires the petitioner to make out a case beyond a reasonable doubt. Campbell Printing Press & Manuf'g Co. v. Marden (C. C. 1895) 70 Fed. 339.

Where the complainant and his counsel failed to appear at the final hearing of an equity cause, from whatever cause, the opening of the decree to permit him to have another hearing is a matter of discretion, and should only be granted upon terms. Karns v. W. L. Imlay Rapid Cyanide Process Co. (C. C. 1911) 184 Fed. 479.

329. Collateral attack.—In order to obtain relief from a judgment on the ground that it was fraudulently obtained, it must be averred and shown that there was a valid defense on the merits. Kimberly v. Arms (C. C. 1889) 40 Fed. 548, appeal dismissed Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557.

General creditors of a railroad company, who appear before a master to prove their claims in a creditors' suit, but who do not file intervening petitions or otherwise become parties to the record, have no standing to file a petition attacking the validity of the decree entered in the suit, unless by leave of court. Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co. (C. C. 1900) 99 Fed. 171.

Parties to a suit in equity who are brought into appellate proceedings by citation, and given an opportunity to appeal, of which they do not avail themselves, cannot thereafter attack the validity of the decree by a petition filed in the lower court. Id.

330. Construction and operation.—Where the pleadings, including the prayer for relief, are not framed in the way usual in equity when it is meant to bring the respective claims and rights of co-defendants before the court, but are framed as in a controversy between the complainant and defendant chiefly or only, such general language will be confined to these two principal parties alone. Graham v. La Crosse & M. R. Co. (1865) 70 U. S. (3 Wall.) 704, 18 L. Ed. 247.

Under Code Neb. § 429, providing that when a decree shall be rendered in any court of the state for a conveyance, and the parties do not comply therewith within the specified time, it shall have the same effect as if the conveyance had been made conformable thereto, such decree conveys the legal title as fully as if the conveyance had been made by the parties themselves. Langdon v. Sherwood (1888) 8 Sup. Ct. 429, 124 U. S. 74, 31 L. Ed. 344.

In a suit to remove cloud from title, a decree which establishes title in complainant carries with it a right of possession, as effectually as if it made specific provision to that effect, and a supplemental and ancillary bill to effectuate the decree in favor of such complainant's privy in interest and estate may properly pray to have possession delivered up. Root v. Woolworth (1893) 14 Sup. Ct. 136, 150 U. S. 401, 37 L. Ed. 1123, affirming decree Woolworth v. Root (C. C. 1889) 40 Fed. 723.

Where an order directing an accounting states the principle to be followed, and no objection is made thereto until after final decree, four years later,—the opposite party having died in the mean-

time,—it is then too late to contend, for the first time, that certain matters plainly excluded by the order ought to have been taken into consideration. Gunn v. Black (1894) 60 Fed. 151, 8 C. C. A. 534.

An infant who sues by his next friend is as much bound by the judgment of a court having jurisdiction of the parties and subject-matter as if of full age. Kansas City, Ft. S. & M. R. Co. v. Morgan (1896) 76 Fed. 429, 21 C. C. A. 468.

Where a suit is pending in a federal court to obtain a judgment and a decree establishing a mechanic's lien, such a decree will not bind the mortgagee, who is not a party thereto, or affect the rights of a purchaser at the foreclosure sale. National Foundry & Pipe Works v. Oconto City Water Supply Co. (1902) 113 Fed. 793, 51 C. C. A. 465.

Where a suit in the federal courts to annul a judgment of the probate court of F. county, Ark., allowing certain claims against a decedent's estate for fraud, was between the same parties as a prior suit in an Arkansas chancery court to set aside the allowance of such claims, and all the allegations of fraud charged were necessarily involved in such prior suit, in which an adverse decree was rendered, such decree was res judicata of complainant's right to a retrial of such issue in the federal court. Jackson v. Wilkerson (1908) 160 Fed. 623, 87 C. C. A. 525.

The recitals in a judgment or decree by a competent court that defendants have been legally summoned are prima facie evidence thereof. Norton v. Meader (C. C. 1866) Fed. Cas. No. 10,351.

The court in which a bill to foreclose a mortgage has been filed and a trustee appointed has jurisdiction to determine the conflicting rights arising out of its orders in the premises. Bill v. New Albany, etc., Ry. Co. (C. C. 1870) Fed. Cas. No. 1,407.

When a creditors' bill is filed in the state court in Georgia to settle a trust, all creditors notified of the bill according to law are parties and bound by the decree. Samples v. Bank (C. C. 1873) Fed. Cas. No. 12,278.

In determining what has been adjudged, courts will regard the decree, and in case of ambiguity, but not otherwise, be governed by an accompanying opinion. New Orleans, M. & C. R. Co. v. City of New Orleans (C. C. 1878) 14 Fed. 373.

A decree for plaintiff on a bill to set aside a railroad mortgage foreclosure, and subject the property to payment of their judgments, renders the foreclosure invalid only as to the creditors who filed the bill. Barnes v. Chicago, M. & St. P. R. Co. (C. C. 1879) Fed. Cas. No. 1,016.

The parties to a suit in equity are bound by matters of record, and cannot be heard to complain that they were not advised of the contents of a decree passed in such suit in time to appeal therefrom or take other steps to have such decree set aside or reversed. Taylor v. Charter Oak Life Ins. Co. (C. C. 1882) 17 Fed. 566.

Certain minors were served, but no petition for guardian ad litem was presented, and no appointment was made; but their father filed an answer, as guardian ad litem, for them, with a formal consent to act as such guardian. Held, that the decree would bind them. Simmons v. Baynard (C. C. 1887) 30 Fed. 532.

By consent of the parties a cause in equity may be finally heard and decided by a circuit judge of the United States within his circuit, but outside of the district in which the cause is pending; and a recital in the decree directed to be entered on such hearing, in accordance with the usual practice, that the cause was heard in open court in the district, is conclusive on all the parties who participate in the hearing. Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co. (C. C. 1900) 99 Fed. 171.

Under a decree of a federal court of equity, sustaining the validity of an oil lease and awarding the lessee "its direct damages and costs incurred by reason of its exclusion from the lease," it is not entitled to recover from defendant the amount paid its counsel for services, beyond the docket fee taxable under R. S. §§ 823, 824, ante, §§ 1375, 1378, either as costs or direct damages. Doddridge County Oil & Gas Co. v. Smith (C. C. 1909) 173 Fed. 386.

Neither a decree ordering the conveyance of land situated in another state, nor a conveyance made pursuant to it, can operate beyond the jurisdiction of the court unless a conveyance is made by the person holding the title. King v. Tuscumbia, C. & D. R. Co. (D. C. 1846) Fed. Cas. No. 7,808.

331. Performance and enforcement.—The circuit court of Tennessee, as a court of equity, cannot award a writ of habere facias possessionem to enforce its decree. Wallen v. Williams (1813) 11 U. S. (7 Cranch) 602, 3 L. Ed. 452.

Where a party seeks the aid of equity to enforce a decree in his favor which has become ineffective, the doctrine of res judicata will not prevent the court from looking into such decree, and, if found inequitable, from refusing to enforce it except upon equitable terms. Compton v. Jesup (1895) 68 Fed. 263, 15 C. C. A. 397.

A court of equity may condition its decree for the enforcement of a former decree for the continuous use of a right of way or of terminal facilities by equitable terms, or may refuse to enforce it, where, subsequent to the entry of the original decree, such radical changes in the situation, rights, or relations of the parties have been wrought that equity demands such terms or forbids its enforcement; but, in the absence of such changes, the original decree concludes

the rights and remedies of the parties, and must be enforced. St. Louis, K. C. & C. R. Co. v. Wabash R. Co. (1907) 152 Fed. 849, 81 C. C. A. 643, decree modified (1910) 30 Sup. Ct. 510, 217 U. S. 247, 54 L. Ed. 752.

Equity has jurisdiction to protect and effectuate its decrees, standing unreversed, in favor of a purchaser of property thereunder, by ancillary proceedings against any party who interferes with rights therein determined. Alton Water Co. v. Brown (1908) 166 Fed. 840, 92 C. C. A. 598, writ of certiorari denied Lewis v. Alton Water Co. (1909) 29 Sup. Ct. 690, 212 U. S. 581, 53 L. Ed. 659.

An order need not be made limiting the time within which a decree rendered shall be performed before the party may be proceeded against for nonperformance. Souter v. La Crosse R. R. (C. C. 1865) Fed. Cas. No. 13,180.

Neither a petition nor an order for a rehearing of itself stops proceedings under the decree. Vose v. Internal Imp. Fund (C. C. 1875) Fed. Cas. No. 17,008.

A creditor of a firm, at whose suit a special partner is directed to pay a sum of money to the clerk of the court, to be applied in payment of the claims that should be proved against it, is not entitled to maintain an action at law to enforce the decree, either in his own right or as trustee for the other creditors, nor jointly with the clerk, since it did not entitle him to demand judgment for the entire amount. and the amount to which he is entitled was not fixed, nor could it be ascertained from the facts found in the decree. Corbin v. Graves (C. C. 1886) 27 Fed. 644.

Proceedings upon a decree will be stayed for the purpose of allowing parties to take and file testimony newly discovered, when such testimony appears to be material, and its materiality was not so direct and apparent that the failure to discover and produce it on the first hearing amounted to laches. Witters v. Sowles (C. C. 1887) 32 Fed. 765, 766.

Where a party required to pay money under a decree was entitled to have the same applied to the discharge of certain liens, a commissioner will be appointed to act with the payee in receiving the money, and to see that proper releases were given. National Waterworks Co. v. City of Kansas City (C. C. 1895) 65 Fed. 691.

A decree adjudicating priorities among conflicting claimants to water rights and quieting titles thereto, which establishes the status of the parties and property involved, is self-executing, and the court has no further power to appoint commissioners to compel rotation in the use of the water. Ames Realty Co. v. Big Indian Mining Co. (D. C. 1912) 198 Fed. 367.

332. —— **Execution.**—Independently of a rule of court, execution cannot issue in a decree for foreclosure of a mortgage in chancery for the balance left due after a sale of the mortgaged premises, and this applies to the territorial court of Nebraska, as much as to the courts of states organized under the Judiciary Act of 1789. Orchard v. Hughes (1863) 1 Wall. 73, 17 L. Ed. 560.

When a cause is heard on the merits and the rights and equities of a party are adjudged, execution of any part of a decree whereby property may be sold, title transferred, or money paid over to one of the parties, should be withheld until the entire litigation is determined, so that the entire case may be reviewed on a single appeal. Maas v. Lonstorf (1908) 166 Fed. 41, 91 C. C. A. 627.

A money decree in an equitable suit in a federal court is sufficient to sustain proceedings supplementary to execution. Sage v. St. Paul, S. & T. F. Ry. Co. (C. C. 1891) 47 Fed. 3.

333. —— **Sale of property.**—The parts of a railroad lying in counties where a certain judgment constitutes a prior lien cannot be sold, under the judgment, separate from a part lying in another county where a mortgage has priority, but the whole road must be appraised and sold together. Ludlow v. Clinton Line R. Co. (C. C. 1861) Fed. Cas. No. 8,600.

Materialmen are not entitled to payment, in advance of mortgage bondholders, out of the fund arising from a foreclosure sale, notwithstanding promises of payment by the receiver. Denniston v. Chicago, A. & St. L. R. Co. (C. C. 1864) Fed. Cas. No. 3,800.

All questions of priorities should be determined before sale. Campbell v. Texas & N. O. R. Co. (C. C. 1872) Fed. Cas. No. 2,369.

Specific property should be sold separately to give specific incumbrancers an opportunity to protect their securities. Id.

A general judgment creditor under garnishee process against the officers of the company is entitled to the net income of the road between the date of the foreclosure decree and the appointment of a special receiver, where the trustees under the mortgage were not in possession of the road, and did not demand the income, and the decree was silent in regard thereto. Gilman v. Illinois, etc., Tel. Co. (C. C. 1874) Fed. Cas. No. 5,443.

Where there are a larger number of bonds issued than are allowed by law, all at the same time, those bearing the higher numbers stand on an equal footing with the others, in the distribution of the proceeds on foreclosure. Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,297.

Where the road cannot be divided without injury to its value, the court may decree a sale of the entire prop-

erty, though a large part is without its territorial jurisdiction. Wilmer v. Atlanta & R. Air Line Ry. Co. (C. C. 1875) Fed. Cas. No. 17,776.

On mortgage foreclosure the court has no power without the consent of the bondholders to apply the income to a floating debt previously incurred to pay interest on bonds and for supplies and repairs. Duncan v. Mobile & O. R. Co. (C. C. 1876) Fed. Cas. No. 4,137.

On a railroad mortgage foreclosure, interest coupons, which have been partly paid, will be paid before coupons coming due afterwards; and detached coupons in the hands of third parties will be paid before the bonds themselves. Stevens v. New York & O. M. R. Co. (C. C. 1876) Fed. Cas. No. 13,-406.

A purchaser under a decree of foreclosure of a railway mortgage held not a bona fide purchaser as to municipal aid bonds, given on a subscription to stock under a condition with which the company has not complied. Foote v. Mt. Pleasant (C. C. 1878) Fed. Cas. No. 4,914.

A railroad may be sold, subject to claims against it as finally adjudicated, where their amount depends on a long course of litigation. Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1878) Fed. Cas. No. 14,259.

Bondholders, on purchasing at the foreclosure sale, may pay in bonds the residue of their bid, after satisfying the costs and charges of the litigation. Duncan v. Mobile & O. R. Co. (C. C. 1879) Fed. Cas. No. 4,139.

Bondholders not subscribing to a reorganization plan were allowed to participate in the purchase or reorganization on an equal footing with the others, providing they should come in by a day named. Id.

334. —— **Conveyance.**—Where land was fraudulently conveyed before judgment, to prevent the lien thereof from attaching, held, that equity might properly require the debtor and his assignee to join with the receiver in the suit, in making a conveyance to the purchaser at a sale directed by the decree; and that such conveyance would discharge all right of the debtor or of other judgment creditors to redeem the land. McCalmont v. Lawrence (C. C. 1847) Fed. Cas. No. 8,676.

335. —— **Bill to enforce.**—Where a decree in equity is obtained against a defendant for a sum of money and execution has been returned unsatisfied, a court of equity has jurisdiction of a bill alleging that the defendant has secreted his property, and is disposing of the same with the avowed intent of defrauding the complainant and depriving him of the fruits of his decree, and praying an injunction and receiver. Shainwald v. Lewis (D. C. 1881) 6 Fed. 766.

It is not necessary in such a bill, praying an injunction and receiver of defendant's assets, to describe particularly the assets sought to be reached, whether equitable or not. Id.

A bill in equity is the proper remedy for enforcing a decree of another court of equity for an accounting. Collins v. Bradley Co. (D. C. 1915) 227 Fed. 199.

336. —— **Restraining enforcement.**—The trustee under certain mortgages, which had commenced a foreclosure suit in the federal court, in which a receiver of the railroad had been appointed, presented a petition in that suit, praying that one E. might be restrained from enforcing a decree for the return of the property, and required to come in and present his claim in the foreclosure suit. Held, that the court could not entertain such an application to review its decree and prevent enforcement thereof by injunction, and that the possession of the property by the court's receiver did not present a reason for doing so, since his possession was solely for the purposes of the foreclosure suit, and not at all for, or in the interest of, the obligors in the replevin bonds. Central Trust Co. of New York v. Evans (1896) 73 Fed. 562, 19 C. C. A. 563.

While a decree of the circuit court, made in pursuance of the mandate of the circuit court of appeals, stands, such circuit court cannot entertain a proceeding to avoid the effect of such decree by enjoining its enforcement. Id.

(Y) Bill of Review

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337. **Nature and scope of remedy.**—A bill filed after a final decree in the original suit, between the original parties or their privies in representation, to correct errors in the proceedings on the decree, is a bill of review. Whiting v. Bank of United States (1839) 38 U. S. (13 Pet.) 6, 10 L. Ed. 33. But a bill filed by one not personally a party to a prior decree of the court, attacking the validity of such decree and asking its vacation because of matters outside of the decree itself, and not alleged to have been newly discovered, is not a

bill of review. Cutter v. Iowa Water Co. (C. C. 1899) 96 Fed. 777.

Where the defendant, by his answer, admits the claim to be due, and prays contribution from other defendants, without setting up any defense to the demand, he cannot, after a decree and on a bill of review, ask to have the decree set aside on the ground of laches on the part of the complainant in bringing suit. Putnam v. Day (1874) 89 U. S. (22 Wall.) 60, 22 L. Ed. 764.

A bill of review is not considered as a continuance of the former bill, but as in the nature of an original bill, and an appearance thereto is enforced in the same manner as the original bill. Home St. Ry. Co. v. City of Lincoln (1908) 162 Fed. 133, 89 C. C. A. 133.

A court of equity may vacate or modify its decrees by a bill of review filed after the term. Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509.

A bill of review does not lie where the party seeks to set out a new title, and not to support the title in the original cause. Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856.

A bill of review is a proceeding in the nature of a writ of error, and it may be brought to modify or reverse a decree given in a suit in equity in favor of the United States for errors apparent upon the face thereof. Bush v. U. S. (C. C. 1882) 13 Fed. 625. It must be governed practically by the same rules governing appellate courts in considering writs of error. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, affirming decree (C. C. 1907) 156 Fed. 989, writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

After enrollment of a decree, the only regular and safe way to correct a mistake therein is by a bill of review. Robinson v. Rudkins (C. C. 1886) 28 Fed. 8.

Where the rights of persons who were not parties to a suit in equity are affected by the decree entered therein, and they seek to obtain a modification of such decree by setting up matters which occurred pending the suit, but which were not presented to the court, the proper practice is by the filing of a supplemental bill in the nature of a bill of review. Thompson v. Schenectady Ry. Co. (C. C. 1903) 119 Fed. 634.

338. Decrees reviewable.—A decree entered by consent is not the subject of a bill of review. Thompson v. Maxwell (1877) 95 U. S. 391, 24 L. Ed. 481. Such a decree, if responsive to the bill, stands so long as it remains in that form as an obstacle to a rehearing of the cause, to a bill of review, and to an appeal, but, where it recites that it was entered by consent of a party, and he denies seasonably that he consented, a bill of review is an appropriate remedy, and a decree thereon is appealable. Kaw Valley Drainage Dist. of Wyandotte County v. Union Pac. R. Co. (1908) 163 Fed. 836, 90 C. C. A. 320.

A decree entered in conformity with the mandate of an appellate court, to which the case has been appealed, cannot be attacked by original bill on the ground of errors, apparent on the record, not involving the jurisdiction. Kingsbury v. Buckner (1890) 10 Sup. Ct. 638, 134 U. S. 650, 33 L. Ed. 1047.

A bill to review a decree rendered in heir's suit, which ordered the restoration of rents collected in widow's suit, held without equity. Freeman v. Clay (1892) 52 Fed. 1, 2 C. C. A. 587, affirming decree (1891) 48 Fed. 849, 1 C. C. A. 115.

A bill of review will not lie where the original decree has been affirmed on appeal. Franklin Savings Bank v. Taylor (1893) 53 Fed. 854, 4 C. C. A. 55 (reversing decree Taylor v. Franklin Sav. Bank [C. C. 1891] 50 Fed. 289; petition for writ of certiorari denied Franklin Sav. Bank v. Taylor [1894] 14 Sup. Ct. 1146, 154 U. S. 503, 38 L. Ed. 1078); Leslie v. Town of Urbana (1893) 56 Fed. 762, 6 C. C. A. 111.

A bill of review will not lie for error in law where the original decree is not enrolled. But a bill in the nature of a bill of review, and not strictly a bill of review for newly discovered evidence, will lie. Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856. A bill of review based on newly discovered evidence will lie, although the decree was entered by default. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, affirming decree (C. C. 1907) 156 Fed. 989, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346. Such a bill will not lie after the publication or decree below, where a decision has taken place on appeal, unless the right be reserved in the decree of the appellate court, or permission be given on a direct application therefor to that court. Southard v. Russell (1853) 57 U. S. (16 How.) 547, 14 L. Ed. 1052. A circuit court has cognizance of a bill of review founded on newly-discovered evidence, pending an appeal to the supreme court from the decree sought to be reviewed. Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,270.

The court may permit a bill to be filed as an amendment by adding new matter and parties to the original record. Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,270.

A bill in the nature of a bill of review lies only after a final decree, and not upon an interlocutory decree. Jenkins v. Eldredge (C. C. 1845) Fed. Cas. No. 7,267.

A bill of review may be brought to modify or reverse a decree given in a suit in equity in favor of the United States for errors apparent upon the

face thereof. Bush v. U. S. (C. C. 1882) 13 Fed. 625.

Facts presenting a question of error on the face of the record, see Knox v. Columbia Liberty Iron Co. (C. C. 1889) 42 Fed. 378, decree reversed Hoffman v. Knox (1892) 50 Fed. 484, 1 C. C. A. 535.

After enrollment of a decree, the only regular and safe way to correct a mistake therein is by a bill of review. Robinson v. Rudkins (C. C. 1886) 28 Fed. 8.

The circuit court cannot entertain a bill of review to vacate a decree from which the petitioners have been allowed an appeal to the supreme court, though they aver that they do not intend to perfect their appeal in the supreme court. Kimberly v. Arms (C. C. 1889) 40 Fed. 548, appeal dismissed Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557.

339. **Grounds—In general.**—Sufficiency of grounds and allegations thereof, see Shaw v. Little Rock & Ft. S. R. Co. (1879) 100 U. S. 605, 25 L. Ed. 757; Ensminger v. Powers (1883) 2 Sup. Ct. 643, 108 U. S. 292, 27 L. Ed. 732; Ohio Cent. R. Co. v. Central Trust Co. (1890) 10 Sup. Ct. 235, 133 U. S. 83, 33 L. Ed. 561; Scotten v. Littlefield (1914) 35 S. Ct. 125, 235 U. S. 407, 59 L. Ed. 289 (affirming decree In re A. O. Brown & Co. [1914] 213 Fed. 705, 130 C. C. A. 219, which affirmed order In re Brown [D. C. 1913] 213 Fed. 701); Freeman v. Clay (1892) 52 Fed. 1, 2 C. C. A. 587 (affirming decree [1891] 48 Fed. 849, 1 C. C. A. 115); Hill v. Phelps (1900) 101 Fed. 650, 41 C. C. A. 569; In re A. O. Brown & Co. (1914) 213 Fed. 705, 130 C. C. A. 219 (affirming order In re Brown [D. C. 1913] 213 Fed. 701 and decree affirmed Scotten v. Littlefield [1914] 35 Sup. Ct. 125, 235 U. S. 407, 59 L. Ed. 289); Reed v. Stanly (C. C. 1898) 89 Fed. 430; Halsted v. Forest Hill Co. (C. C. 1901) 109 Fed. 820.

A complainant cannot, by a bill of review, assail a decree which enforces payment of the only claim he presented to the court because it did not make further adjudications or grant further relief. Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 569.

There are but three grounds upon which a bill of review can be sustained: First, error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence (and such error must consist of the violation of some statute or rule of law or equity, and not merely in matter of form or in the propriety of the decree); second, new matter which has arisen since the decree; and, third, newly-discovered evidence, which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered. Id.

A bill of review is maintainable after the term of entry of final decree generally for two reasons: First, for error therein apparent upon its face; and, second, on account of newly discovered evidence, material in character, that could not earlier have been discovered with due diligence. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625 (affirming decree [C. C. 1907] 156 Fed. 989, and writ of certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

340. —— **Fraud.**—A bill of review sought on the ground of fraud and perjury will not be entertained, where it appears that the alleged fraudulently procured and perjured evidence was not controlling in the determination of the case on its merits. Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557.

Fraud in obtaining a decree cannot be made the basis of a bill of review. Dowagiac Mfg. Co. v. McSherry Mfg. Co. (1907) 155 Fed. 524, 84 C. C. A. 38.

A bill of review is the proper remedy to vacate a decree for fraud. Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509.

An application for a bill of review will not be granted where no actual fraud is set up, and the affidavits on which the application is based show that no fraud in fact was practiced in obtaining the decree, and no error of law apparent on the face of the decree is either set up or relied on. Tilghman v. Werk (C. C. 1889) 39 Fed. 680.

A bill of review will not be granted because the case was decided in the absence of counsel, where the means of knowledge as to the time of hearing was within reach of counsel, and no effort was made to deceive him by the opposite party, though the petitioner may have been misled by the negligence of, or misinformation received from, his counsel, or of those to whom the counsel had intrusted the business. Id.

A fraud which will sustain a bill of review must be one extrinsic or collateral to the matters tried, and not one which was in issue in the former suit. Reed v. Stanly (C. C. 1898) 89 Fed. 430.

341. —— **For errors and irregularities.**—The decisions of the court upon issues of fact, so far as they depend upon the proofs, are conclusive on a bill of review, and the only questions open for examination are such as arose upon the pleadings, proceedings, and decree, without reference to the evidence. Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557; Jourolmon v. Ewing (1898) 85 Fed. 103, 29 C. C. A. 41 (denying a bill of review [1897] 80 Fed. 604, 26 C. C. A. 23); Quinton v. Neville

(1907) 152 Fed. 879, 81 C. C. A. 673; Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625 (affirming decree [C. C. 1907] 156 Fed. 989, and writ of certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856; Barker v. Barker's Assignee (C. C. 1876) Fed. Cas. No. 987; Yerrington v. Putnam (C. C. 1877) Fed. Cas. No. 18,137; Irwin v. Meyrose (C. C. 1881) 7 Fed. 533; Brown v. White (C. C. 1881) 16 Fed. 900; Wallamet Iron Bridge Co. v. Hatch (C. C. 1884) 19 Fed. 347; Kimberly v. Armes (C. C. 1889) 40 Fed. 548; Reed v. Stanly (C. C. 1898) 89 Fed. 430; Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

A bill of review will lie for errors appearing on the face of the decree. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209; Purcell v. Minor (1866) 71 U. S. (4 Wall.) 519, 18 L. Ed. 459; Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,263; Ross v. Prentiss (C. C. 1846) Id. 12,078; U. S. v. Samperyac (Super. Ct. Ark. 1831) Id. 16,216a.

A bill of review does not lie to reverse a decree on matter of fact not appearing by the record. Whiting v. Bank of United States (1839) 38 U. S. (13 Pet.) 6, 10 L. Ed. 33 (affirming [C. C. 1835] Fed. Cas. No. 17,576); Thompson v. Maxwell Land Grant & R. Co. (1877) 95 U. S. 391, 24 L. Ed. 481.

Though a decree in equity sets forth a hearing on the pleadings and proof and awards relief, yet if a bill of exceptions, signed by the court, and made a part of the record, shows that the judge refused to permit counsel for plaintiff to argue the cause, and allowed defendant's counsel to determine whether the case was controlled by a prior decision, and refused to decide that question himself, the decree on a bill of review by plaintiff must be held for naught. Ensminger v. Powers (1883) 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732.

Where a decree fixes the priority of claims against an insolvent corporation under the authority of an act of the state legislature, the question of the validity of the act not being raised at the time, a bill of review will not lie for apparent error, because the act is subsequently adjudged unconstitutional and void by the state courts on the ground of a defective title. Hoffman v. Knox (1892) 50 Fed. 484, 1 C. C. A. 535, reversing Knox v. Columbia Liberty Iron Co. (C. C. 1889) 42 Fed. 378.

A bill of review, which contains no claim for newly discovered evidence, can only be maintained for errors of law appearing on the record. Cocke v. Copenhaver (1903) 126 Fed. 145, 61 C. C. A. 211.

Miscalculation leading to an excessive decree may be obviated as a ground of review by entering a credit for the excess. Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,263.

A bill of review will not be granted because the case was decided in the absence of counsel, where the means of knowledge as to the time of hearing was within reach of counsel, and no effort was made to deceive him by the opposite party, though the petitioner may have been misled by the negligence of, or misinformation received from, his counsel, or of those to whom the counsel had intrusted the business. Tilghman v. Werk (C. C. 1889) 39 Fed. 680.

A decree in equity dismissing a bill, entered by mistake on bill and answer, when, in fact, the case had not been set down for hearing on bill and answer, was without jurisdiction and void and the complainant is entitled to have the same vacated on the filing of a bill in the nature of a bill of review, and to a hearing on the merits without regard to the lapse of time, where there has not been such laches on his part as to debar him from such relief. Perkins v. Hendryx (C. C. 1906) 149 Fed. 526.

An error of law apparent on the face of the record sufficient to sustain a bill of review is a misconception by the court of what the rule is which will eventually be enforced by the court having the final determination. In re Brown (D. C. 1913) 213 Fed. 701, order affirmed In re A. O. Brown & Co. (1914) 213 Fed. 705, 130 C. C. A. 219, which is affirmed Scotten v. Littlefield (1914) 35 Sup. Ct. 125, 235 U. S. 407, 59 L. Ed. 289.

342. —— **New matter.**—To sustain a bill of review based on newly discovered evidence, such evidence must be new, or else such as the party could not by diligence have known, and the failure to produce it, if existent at the time of the decree, must be accounted for. It must be controlling, not merely cumulative, not mere impeachment of witnesses, nor only increasing doubt as to the real truth. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, affirming decree (C. C. 1907) 156 Fed. 989, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

A bill of review lies for newly discovered evidence, not known, and which by the use of due diligence could not have been known to the party in time for trial. Kennedy v. Georgia State Bank (1850) 49 U. S. (8 How.) 586, 12 L. Ed. 1209; Purcell v. Minor (1866) 71 U. S. (4 Wall.) 519, 18 L. Ed. 459; Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,270; U. S. v. Samperyac (Super. Ct. Ark. 1831) Fed. Cas. No. 16,216a affirmed Sampeyreac v. U. S. (1833) 32 U. S. (7 Pet.) 222, 8 L. Ed. 665.

A bill of review lies for newly discovered evidence. Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509; Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856; Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,263; Ross v. Prentiss (C. C. 1846) Fed. Cas. No. 12,078; Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195; U. S. v. Samperyac (Super. Ct. Ark. 1831) Fed. Cas. No. 16,216a. On new matter which has arisen since the decree. Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195. Except where such evidence is merely impeaching. Southard v. Russell (1853) 57 U. S. (16 How.) 547, 14 L. Ed. 1052; Society of Shakers v. Watson (1896) 77 Fed. 512, 23 C. C. A. 263. Or cumulative, or such as to increase doubt as to the real truth. Society of Shakers v. Watson (1896) 77 Fed. 512, 23 C. C. A. 263; Richardson v. Lowe (1906) 149 Fed. 625, 79 C. C. A. 317; Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, affirming decree (C. C. 1907) 156 Fed. 989, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346. And not change the result. Jourolmon v. Ewing (1898) 85 Fed. 103, 29 C. C. A. 41; Keith v. Alger (1903) 124 Fed. 32, 59 C. C. A. 552; Lafferty Mfg. Co. v. Acme Ry., Signal & Mfg. Co. (1906) 143 Fed. 321, 74 C. C. A. 521; Ward v. Ward (1906) 149 Fed. 204, 79 C. C. A. 162 (denying motion to stay entry of judgment and motion for rehearing [1906] 145 Fed. 1023, 74 C. C. A. 146); Novelty Tufting Mach. Co. v. Buser (1907) 158 Fed. 83. 85 C. C. A. 413, 14 Ann. Cas. 192; Nowell v. International Trust Co. (1913) 203 Fed. 395, 121 C. C. A. 499. Or where it does not appear that diligence was used to procure it. Rubber Co. v. Goodyear (1869) 76 U. S. (9 Wall.) 805, 19 L. Ed. 828; Society of Shakers v. Watson (1896) 77 Fed. 512, 23 C. C. A. 263; Lafferty Mfg. Co. v. Acme Ry., Signal & Mfg. Co. (1906) 143 Fed. 321, 74 C. C. A. 521; Novelty Tufting Mach. Co. v. Buser (1907) 158 Fed. 83, 85 C. C. A. 413, 14 Ann. Cas. 192; Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625 (affirming decree [C. C. 1907] 156 Fed. 989, and writ of certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856; Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,263; Yerrington v. Putman (C. C. 1877) Fed. Cas. No. 18,137; Irwin v. Meyrose (C. C. 1881) 7 Fed. 538; Kelley Bros. & Spielman v. Diamond Drill & Machine Co. (C. C. 1906) 142 Fed. 868 (decree affirmed Birdsboro Steel Foundry & Machine Co. v. Kelley Bros. & Spielman [1906] 147 Fed. 713, 78 C. C. A. 101).

New matter and sufficiency of same, and of allegations thereof, as grounds for bill of review, see Kissinger-Ison Co. v. Bradford Belting Co. (1903) 123 Fed. 91, 59 C. C. A. 221; Keith v. Alger (1903) 124 Fed. 32, 59 C. C. A. 552; Jorgenson v. Young (1905) 136 Fed. 378, 69 C. C. A. 222; Nowell v. International Trust Co. (1913) 203 Fed. 395, 121 C. C. A. 499; McClintock v. City of Pawtucket (1913) 209 Fed. 361, 126 C. C. A. 287 (affirming decree [C. C. 1910] 180 Fed. 320); Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,270; Spill v. Celluloid Mfg. Co. (C. C. 1884) 22 Fed. 94; Tilghman v. Werk (C. C. 1889) 39 Fed. 680; Vetterlein v. Barker (C. C. 1891) 45 Fed. 741; Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

343. Conditions precedent.—On demurrer to a bill of review for failure to show performance of the original decree, held, that nonperformance did not exclude jurisdiction, and that the bill might be maintained upon uncontradicted affidavit of the party that he was unable to perform the decree. Davis v. Speiden (1881) 104 U. S. 83, 26 L. Ed. 660.

On filing a bill of review, complainant must give security, or deposit a sum of money for satisfying the costs, and damages for delay. Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,270; Swan v. Wright (C. C. 1879) Fed. Cas. No. 13,670.

A party is not entitled to bring a bill of review unless he obeys and performs the decree. Swan v. Wright (C. C. 1879) Fed. Cas. No. 13,670; Miller v. Clark (C. C. 1891) 47 Fed. 850. But see Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,263, holding that it is not necessary in all cases to comply with a decree before it can be reviewed, as where a conveyance is required by it. And see Phillips v. Mariner (C. C. 1856) Fed. Cas. No. 11,105.

A defendant in a foreclosure suit appealed from the decree, and the decree was affirmed. Thereupon another defendant filed a petition below for leave to file a bill of review for alleged errors of law, and for newly discovered evidence, but, though the decree was in full force, he neither offered to pay the same or any part thereof, nor alleged any reason for not doing so. Held, that leave to file a bill was properly refused. Ricker v. Powell (1879) 100 U. S. 104, 25 L. Ed. 527.

344. Right of review.—Speculative purchasers of land knowing of a decision adverse to title, where their deed expressly excepted such land in dispute if the title was not recovered in future proceedings, may not maintain a bill of review for newly discovered evidence against a purchaser from the prevailing party in good faith and for value, after affirmance by the appellate court. Hopkins v. Hebard (1914) 35 Sup. Ct. 26, 235 U. S. 287, 59 L. Ed. 232.

A party who has accepted the benefits of a decree is thereby estopped from reviewing it, or from escaping

from its burdens. Hill v. Phelps (1900) 101 Fed. 650, 41 C. C. A. 569.

Purchasers of land from one of the parties to a pending suit involving the title held not entitled to maintain a bill of review as against a purchaser in good faith from the prevailing party after final decree and in reliance thereon. Hopkins v. Hebard (1911) 194 Fed. 301, 114 C. C. A. 261.

A bill of review lies for the party who obtained the original decree in his own favor, if the original decree was injurious to him. Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856.

A bill of review lies only in favor of a party or privy to the original suit, or of one who is aggrieved by the decree. Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,270; Brown v. White (C. C. 1881) 16 Fed. 900. It does not lie on behalf of an assignee. Thompson v. Maxwell (1877) 95 U. S. 391, 24 L. Ed. 481.

No party to a decree can by the general principles of equity claim the reversal of a decree upon a bill of review unless he has been aggrieved by it, whatever may have been his rights to insist upon the error at the original hearing or on an appeal. Brown v. White (C. C. 1881) 16 Fed. 900.

The circuit court cannot entertain a bill of review to vacate a decree from which the petitioners have been allowed an appeal to the supreme court, though they aver that they do not intend to perfect their appeal in the supreme court. Kimberly v. Arms (C. C. 1889) 40 Fed. 548, appeal dismissed Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557.

345. Jurisdiction.—A bill of review for newly discovered evidence should be brought in the court in which the decrees sought to be reviewed were rendered, leave therefor being first obtained from the supreme court and circuit court of appeals, by which they were affirmed. Pittsburg, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co. (1901) 107 Fed. 781, 46 C. C. A. 639, rehearing denied (1901) 109 Fed. 279, 48 C. C. A. 362.

Leave to file a bill of review can only be obtained from the court in which the decree is rendered and enrolled. Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

346. Limitations and laches.—Although bills of review are not strictly within the statute of limitations, yet courts of equity will adopt the analogy of the statute in prescribing the time within which they shall be brought. Thomas v. Brockenbrough (1825) 23 U. S. (10 Wheat.) 146, 6 L. Ed. 287.

A bill of review for error of law apparent on the face of the record must be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed. Thomas v. Brockenbrough (1825) 23 U. S. (10 Wheat.) 146, 6 L. Ed. 287; Rector v. Fitzgerald (1894) 59 Fed. 808, 8 C. C. A. 277 (appeal dismissed [1897] 17 Sup. Ct. 998, 41 L. Ed. 1178); Reed v. Stanley (1899) 97 Fed. 521, 38 C. C. A. 331; Blythe Co. v. Hinckley (1901) 111 Fed. 827, 49 C. C. A. 647 (writ of certiorari denied [1902] 22 Sup. Ct. 941, 184 U. S. 701, 46 L. Ed. 766); Chamberlin v. Peoria, D. & E. Ry. Co. (1902) 118 Fed. 32, 55 C. C. A. 54; Cocke v. Copenhaver (1903) 126 Fed. 145, 61 C. C. A. 211; Jorgenson v. Young (1905) 136 Fed. 378, 69 C. C. A. 222; Home St. Ry. Co. v. City of Lincoln (1908) 162 Fed. 133, 89 C. C. A. 133; Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509; Lewis v. Holmes (1915) 224 Fed. 410, 140 C. C. A. 8; Whiting v. Bank of United States (C. C. 1835) Fed. Cas. No. 17,576; Huntington v. Little Rock & Ft. S. R. Co. (C. C. 1882) 16 Fed. 906 (decree reversed Little Rock & Ft. S. Ry. Co. v. Huntington [1887] 7 Sup. Ct. 517, 120 U. S. 160, 30 L. Ed. 591); Taylor v. Charter Oak Life Ins. Co. (C. C. 1882) 17 Fed. 566; Dunlevy v. Dunlevy (C. C. 1889) 38 Fed. 459; McDonald v. Whitney (C. C. 1889) 39 Fed. 466; Same v. Stanly (C. C. 1898) 89 Fed. 430; Copeland v. Bruning (C. C. 1900) 104 Fed. 169; Halsted v. Forest Hill Co. (C. C. 1901) 109 Fed. 820; Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195. Unless special reasons are shown. Rector v. Fitzgerald (1894) 59 Fed. 808, 8 C. C. A. 277, appeal dismissed (1897) 17 Sup. Ct. 998, 41 L. Ed. 1178.

Where a bill of review is based on fraud in obtaining the decree, or for newly discovered evidence, the time within which it may be filed is governed by the equitable rule of laches. Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509; Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

A court of equity may vacate or modify its decrees by a bill of review filed after the term. Home St. Ry. Co. v. City of Lincoln (1908) 162 Fed. 133, 89 C. C. A. 133; Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509.

What constitutes a reasonable time, see, Scotten v. Littlefield (1914) 35 Sup. Ct. 125, 235 U. S. 407, 59 L. Ed. 289 (affirming decree In re A. O. Brown & Co. [1914] 213 Fed. 705, 130 C. C. A. 219, which affirmed order In re Brown [D. C. 1913] 213 Fed. 701); Hendryx v. Perkins (1902) 114 Fed. 801, 52 C. C. A. 435 (rehearing denied [1902] 116 Fed. 1020, 52 C. C. A. 684, writ of certiorari denied Perkins v. Hendryx [1902] 23 Sup. Ct. 843, 187 U. S. 643, 47 L. Ed. 346); Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

The time which elapsed between the tendering of a bill of review to the federal District Court for Porto Rico for

filing, and the permission given to file, should not be counted in applying the two years' limitation for filing such bill, fixed by analogy to the time allowed by law for an appeal to the federal Supreme Court. Fraenkl v. Cerecedo (1910) 30 Sup. Ct. 322, 216 U. S. 295, 54 L. Ed. 486.

A bill of review in a court of equity, not filed until more than two years after the judgment in the original suit was entered, and until long after the time for an appeal had expired, was too late. Jorgenson v. Young (1905) 136 Fed. 378, 69 C. C. A. 222.

Lapse of time will bar a review, especially where death of persons interested leaves no probability of explanation. Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,263.

A bill of review will not lie for errors on the face of the record in a foreclosure suit, brought after time has expired for redemption. Burley v. Flint (C. C. 1879) Fed. Cas. No. 2,168.

A bill to review a decree of foreclosure and sale comes too late after the lapse of two entire terms since the entry of the decree. Duncan v. Atlantic, M. & O. R. Co. (C. C. 1880) 88 Fed. 840.

In disposing of a petition for a bill of review to a decree ordering the foreclosure of railroad mortgages, the court will take into consideration the laches of the petitioner, where there are no averments in the petition sufficient to excuse the delay. Farmers' Loan & Trust Co. v. Green Bay & M. R. Co. (C. C. 1881) 6 Fed. 100.

Computation of limitation period:

Where a decree has been entered against absent defendants on service by publication, such decree is not final until the expiration of one year, and the time within which a bill of review for errors apparent on the face of the record may be filed by such defendants should be computed from the time when the decree becomes final. Beach v. Mosgrove (C. C. 1883) 16 Fed. 305.

Under the settled rule that a bill of review must be filed within the time allowed by statute for an appeal, an attempted appeal to the supreme court in a case in which no appeal to that court is allowed by law does not operate to suspend the running of the time within which a bill of review may be filed. Blythe Co. v. Hinckley (1901) 111 Fed. 827, 49 C. C. A. 647, writ of certiorari denied (1902) 22 Sup. Ct. 941, 184 U. S. 701, 46 L. Ed. 766.

Though a bill of review must ordinarily be filed within the two years limited for taking an appeal from the decree sought to be reviewed, the time during which the control of the circuit court over the appeal was suspended by an appeal which was subsequently dismissed for failure of the appellants to file and docket the cause in the supreme court will not be computed as a part of the two years. Ensminger v. Powers (1883) 2 Sup. Ct. 643, 108 U. S. 292, 27 L. Ed. 732.

The period between a void order vacating an order made in a foreclosure suit giving certain intervening petitioners a lien prior to the mortgage and an order setting it aside cannot be omitted in computing the time within which the mortgagee might file a bill to review the original order for errors apparent of record, as he had no right to rely on the validity of the vacating order, or on the acquiescence therein of the petitioners. Central Trust Co. v. Grant Locomotive Works (1890) 10 Sup. Ct. 736, 135 U. S. 207, 34 L. Ed. 97.

A bill of review for errors on the face of the decree must be filed within two years from the date of the final decree sought to be reviewed. McDonald v. Whitney (C. C. 1889) 39 Fed. 466.

An application for a bill of review, made in 1889, on facts known by petitioners in 1881, comes too late, even if the facts constituted a good ground for relief. Tilghman v. Werk (C. C. 1889) 39 Fed. 680.

The fact that a bill of review for error of law apparent on the face of the record was filed by leave of court is no defense to the objection that it was filed out of time, since such a bill may be filed without leave as a matter of right, and the leave granted gave no additional rights. Copeland v. Bruning (C. C. 1900) 104 Fed. 169.

A federal court of equity cannot entertain a petition in the nature of a bill of review which is not filed until after the time has expired for taking an appeal from the decree sought to be reviewed, nor if filed in time, where the only ground alleged as the basis for such petition is that the petitioner, who was plaintiff in the suit, holds a claim against the defendant which he was entitled to have allowed by the decree, but which he failed, through his own laches, to present to the master or the court. Halsted v. Forest Hill Co. (C. C. 1901) 109 Fed. 820.

A bill of review for newly discovered matters must be filed within a reasonable time. And after decision of a cause in the Circuit Court of Appeals, a bill of review filed in the Circuit Court without leave of the Circuit Court of Appeals must be considered, in determining whether it was filed within a reasonable time, as filed on the date on which leave to file was subsequently granted by the Circuit Court of Appeals. Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

A decree in equity dismissing a bill, entered by mistake on bill and answer, when, in fact, the case had not been set down for hearing on bill and answer, was without jurisdiction and void and the complainant is entitled to have the same vacated on the filing of a bill in the nature of a bill of review, and to a hearing on the merits without re-

gard to the lapse of time, where there has not been such laches on his part as to debar him from such relief. Perkins v. Hendryx (C. C. 1906) 149 Fed. 526.

347. **Leave to file bill.**—A bill of review for newly discovered matters cannot be filed without leave of the appellate court. Barton v. Barbour (1881) 104 U. S. 126, 26 L. Ed. 672; Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625; Hopkins v. Hebard (1911) 194 Fed. 301, 114 C. C. A. 261; Ross v. Prentiss (C. C. 1846) Fed. Cas. No. 12,078; Camp Mfg. Co. v. Parker (C. C. 1903) 121 Fed. 195.

Leave of court is not required to authorize the filing of a bill for review of errors apparent on the face of the record. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625; Lewis v. Holmes (1912) 194 Fed. 842, 116 C. C. A. 408; Farmers' & Merchants' Bank of Phœnix, Ariz., v. Arizona Mut. Savings & Loan Ass'n (1915) 220 Fed. 1, 135 C. C. A. 577 (affirming decree Clark v. Arizona Mut. Sav. Loan Ass'n [D. C. 1914] 217 Fed. 640); Ross v. Prentiss (C. C. 1846) Fed. Cas. No. 12,078; In re Brown (D. C. 1913) 213 Fed. 701, order affirmed In re A. O. Brown & Co. (1914) 213 Fed. 705, 130 C. C. A. 219, which is affirmed Scotten v. Littlefield (1914) 35 Sup. Ct. 125, 235 U. S. 407, 59 L. Ed. 289.

An original bill, in the nature of a bill of review, for fraud, may be filed as matter of right without leave of court. Northern Illinois Coal & Iron Co. v. Young (C. C. 1882) 12 Fed. 809; Ritchie v. Burke (C. C. 1901) 109 Fed. 16.

As to whether necessary to obtain leave, see, also, Ritchie v. Burke (C. C. 1901) 109 Fed. 16.

The fact that a bill of review for error of law apparent on the face of the record was filed by leave of court is no defense to the objection that it was filed out of time, since such a bill may be filed without leave as a matter of right, and the leave granted gave no additional rights. Copeland v. Bruning (C. C. 1900) 104 Fed. 169.

Where the circuit court has, under and in pursuance of a mandate from the supreme court, entered a decree, it cannot entertain a bill to review such decree, either for errors of law apparent or for newly-discovered evidence, without leave first had from the supreme court. Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557; Kimberly v. Arms (C. C. 1889) 40 Fed. 548.

348. —— **Discretion of court.**—The granting of a bill of review for newly discovered evidence is matter of discretion. Thomas v. Brockenbrough (1825) 23 U. S. (10 Wheat.) 146, 6 L. Ed. 287; Ricker v. Powell (1879) 100 U. S. 104, 25 L. Ed. 527; Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625 (affirming decree [C. C. 1907] 156 Fed. 989, and writ of certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); Hopkins v. Hebard (1911) 194 Fed. 301, 114 C. C. A. 261; Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856; Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,263.

Permitting a bill of review to be filed without a previous payment of the moneys awarded by the decree sought to be reviewed is not an abuse of discretion, where leave to file was conditional upon the furnishing of an indemnity bond, which was thereafter executed. Fraenkl v. Cerecedo (1910) 30 Sup. Ct. 322, 216 U. S. 295, 54 L. Ed. 486.

On an application for leave on the ground of newly discovered evidence, the question of due diligence, as well as the materiality of the new evidence, is one for consideration by that court. Kissinger-Ison Co. v. Bradford Belting Co. (1903) 123 Fed. 91, 59 C. C. A. 221.

349. —— **Application and proceedings thereon.**—As to requisites of application and affidavits, see Nickle v. Stuart (1884) 4 Sup. Ct. 700, 111 U. S. 776, 28 L. Ed. 599; Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856; Poole v. Nixon (C. C. 1834) Fed. Cas. No. 11,-270; Spill v. Celluloid Mfg. Co. (C. C. 1884) 22 Fed. 94; Tilghman v. Werk (C. C. 1889) 39 Fed. 680.

As to when petition will be denied on the ground of laches, see Boston & R. Electric St. Ry. Co. v. Bemis Car Box Co. (1899) 98 Fed. 121, 38 C. C. A. 661; Farmers' Loan & Trust Co. v. Green Bay & M. R. Co. (C. C. 1881) 6 Fed. 100.

A bill of review will not be granted where the court is satisfied that, upon the case offered to be made out, the decree ought to be the same as has been already given. Rubber Co. v. Goodyear (1869) 76 U. S. (9 Wall.) 805, 19 L. Ed. 828.

Though a bill of review on the ground of fraud in obtaining the decree may be filed without leave of the court granting the decree, where that ground of relief is united in the same bill with others, which require such previous leave, the bill cannot be separated and leave granted as to part of the grounds and refused as to the others. Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557.

An application for leave to file a bill of review after the decree has been affirmed is properly made to the appellate court. Society of Shakers v. Watson (1896) 77 Fed. 512, 23 C. C. A. 263, denying motion to file bill of review (1895) 68 Fed. 730, 15 C. C. A. 632.

On a petition to the circuit court of appeals, after a decision of that court affirming a judgment of the circuit court, for leave to file in the lower court a

bill in the nature of a bill of review, it is deemed the better practice to grant such leave as a matter of course, unless there are special reasons to the contrary, without considering the merits of the proposed bill. Seymour v. White County (1899) 92 Fed. 115, 34 C. C. A. 240.

Where a petition is filed in the circuit court of appeals for permission to file a bill in the circuit court to review a decree which has been affirmed on appeal, and the issues raised are such as, if sustained, necessarily require a reversal of such decree, but are of such a character that they cannot properly be determined on affidavits, permission will be given to file the bill in the lower court, provided the petitioner shows himself free from laches, and entitled to raise the issue. Boston & R. Electric St. Ry. Co. v. Bemis Car Box Co. (1899) 98 Fed. 121, 38 C. C. A. 661.

Leave denied where alleged newly discovered evidence was in existence and accessible prior to the original hearing in the cause, see Lafferty Mfg. Co. v. Acme Ry., Signal & Mfg. Co. (1906) 143 Fed. 321, 74 C. C. A. 521.

In case of a bill of review, based upon after-discovered evidence, the question of diligence is necessarily a preliminary one, to be considered and passed upon at the time application is made for leave to file the bill. Having been once disposed of when the bill is allowed, it will not be again considered, and a denial in the answer of the averment of diligence made in the bill raises an immaterial issue. Birdsboro Steel Foundry & Machine Co. v. Kelley Bros. & Spielman (1906) 147 Fed. 713, 78 C. C. A. 101, affirming decree, Kelley Bros. & Spielman v. Diamond Drill & Machine Co. (C. C. 1906) 142 Fed. 868.

Where neither error of law nor newly discovered evidence is shown by a bill of review, leave to file it may be refused, or, if granted, the bill may be dismissed because leave to file was improvidently granted. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, affirming decree (C. C. 1907) 156 Fed. 989, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

The granting of leave to file a bill of review is not such an adjudication of the equitable right of the party to maintain it as to preclude a consideration of the question on final hearing and on appeal. Hopkins v. Hebard (1911) 194 Fed. 301, 114 C. C. A. 261.

The proper practice in respect to filing bills of review is by petition stating the grounds and asking leave to file the bill. Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856; Massie v. Graham (C. C. 1842) Fed. Cas. No. 9,-283.

Upon a petition for a bill of review of a decree ordering a foreclosure of a railroad mortgage by a second-mortgage bondholder, an agreement entered into between the bondholders for the proposed reorganization of the road can only be considered to the extent that the particular interests of the petitioner might be involved. Farmers' Loan & Trust Co. v. Green Bay & M. R. Co. (C. C. 1881) 6 Fed. 100.

Upon petition for a bill of review upon decree of foreclosure of a railroad mortgage by second-mortgage bondholders, they cannot object to the decree on the ground that persons claiming title adversely to part of the mortgaged premises were not made parties, where they deny the railroad's title to such disputed property. Id.

An application to file a bill of review, without the performance of the decree, ought to be made to the court by petition, and on notice to the adverse party, and if it appears that the performance of the decree would destroy the subject of the litigation, it ought to be allowed. Wallamet Iron Bridge Co. v. Hatch (C. C. 1884) 19 Fed. 347, decree reversed Willamette Iron Bridge Co. v. Hatch (1888) 8 Sup. Ct. 811, 125 U. S. 1, 31 L. Ed. 629.

A supplemental bill, after decree, in the nature of a bill of review, cannot be filed without leave of court, but it is discretionary with the court whether to require notice to the defendants therein, or the parties to the decree, before granting such leave. Thompson v. Schenectady Ry. Co. (C. C. 1903) 119 Fed. 634.

350. Parties.—All parties to the original action must be joined in a bill to review. Bank of United States v. White (1834) 33 U. S. (8 Pet.) 262, 8 L. Ed. 938.

The objection that the widow of the testator's son should have been made a party to a bill to review a decree declaring that a trust created by the will in favor of the testator's grandchildren violated the rule against perpetuities is too late when first raised on the hearing of a demurrer to the bill of review, where the fact of her existence does not appear of record. Landram v. Jordan (1906) 27 Sup. Ct. 17, 203 U. S. 56, 51 L. Ed. 88, affirming decree (1905) 25 App. D. C. 291.

Where the defendants in a decree were not necessary parties to the suit, one or more of them may obtain a bill of review to reverse the same, without making the codefendants parties thereto. King v. Dundee Mortg. & Trust Inv. Co. (C. C. 1886) 28 Fed. 33.

Where an original bill in equity was brought against a firm, and after decree dismissing the bill the firm was dissolved by the death of a nonresident partner, the personal representatives of such partner, who were not within the jurisdiction of the court, were not indispensable parties to a bill of review. Perkins v. Hendryx (C. C. 1904) 127 Fed. 448.

To a bill in equity in the nature of a

bill of review to vacate a decree in favor of a partnership, where the partnership has been dissolved and one of the partners has died since the decree was entered, his administrators are substantial, but not necessary, parties, and where they cannot be brought in because out of the jurisdiction the court will not for that reason dismiss the bill, but will permit the suit to proceed against the other partners. Perkins v. Hendryx (C. C. 1906) 149 Fed. 526.

A decree of foreclosure regularly entered under which the property has been sold and the sale confirmed cannot be set aside and the case reopened on petition of one not a party, but who claims some right or interest in the property. Englehard-Hitchcock Co. v. Southern Banking & Trust Co. (C. C. 1908) 162 Fed. 690.

351. **Process.**—When no process is issued on a bill of review, and defendants do not waive process, a decree rendered thereon which alters the decree sought to be corrected so as to give an effect against the defendants which it did not have before is wholly void. Home St. Ry. Co. v. City of Lincoln (1908) 162 Fed. 133, 89 C. C. A. 133.

352. **Form and sufficiency of bill.**—Where a bill of review sets forth the evidence in the original cause, a special demurrer, assigning that error alone, should be sustained. Buffington v. Harvey (1877) 95 U. S. 99, 24 L. Ed. 381.

An allegation in a bill of review that a widow was not a party to an appeal to the supreme court, because no citation was ever served upon her or any agent or attorney of hers, was immaterial, it appearing from the record that this fact was not alleged in the pleadings filed by her in the main case after the cause was remanded, and that the citation was in fact served upon her attorney of record in that case. Freeman v. Clay (1892) 52 Fed. 1, 2 C. C. A. 587, affirming decree (1891) 48 Fed. 849, 1 C. C. A. 115.

A pleading filed may be taken as a bill of review and formal defects therein disregarded where its purpose is that of a bill of review, although it is denominated a petition. Kaw Valley Drainage Dist. of Wyandotte County v. Union Pac. R. Co. (1908) 163 Fed. 836, 90 C. C. A. 320.

The two grounds of error of law in a decree and newly discovered evidence may be joined in the same bill of review; the objection of multifariousness, if urged, being largely within the sound discretion of the court. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, affirming decree (C. C. 1907) 156 Fed. 989, writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

A petition in intervention held sustainable as a bill of review. Farmers' & Merchants' Bank of Phœnix, Ariz., v. Arizona Mut. Savings & Loan Ass'n (1915) 220 Fed. 1, 135 C. C. A. 577, affirming decree Clark v. Arizona Mut. Sav. Loan Ass'n (D. C. 1914) 217 Fed. 640.

A bill of review should state the former proceedings and wherein the party exhibiting it considers himself aggrieved. Kellom v. Easley (C. C. 1870) Fed. Cas. No. 7,668. And must aver performance of, or inability to perform, the decree sought to be reviewed. Armes v. Kimberly (1889) 10 Sup. Ct. 1064, 136 U. S. 629, 34 L. Ed. 557; Kimberly v. Arms (C. C. 1889) 40 Fed. 548.

A bill of review, on the ground of fraud in obtaining the decrees sought to be reviewed, should show how complainants were put on inquiry as to the alleged facts; by what means they learned them; or why the discovery, by the exercise of ordinary prudence, might not have been made when the litigation was begun. Pittsburg, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co. (1901) 107 Fed. 781, 46 C. C. A. 639, rehearing denied (1901) 109 Fed. 279, 48 C. C. A. 362.

A bill of review for fraud or newly discovered evidence should state when the fraud or new evidence was discovered and should contain a prayer for subpœna or process. Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509.

A bill held to show such equity in complainants as entitled them to a hearing on the merits. Thompson v. Schenectady Ry. Co. (C. C. 1903) 119 Fed. 634.

353. **Plea or answer.**—On a bill of review filed by defendant to set aside a decree, he is bound by the answer filed on his behalf by his solicitor, though he did not himself read it, unless he can show mistake or fraud in filing it. Putnam v. Day (1874) 89 U. S. (22 Wall.) 60, 22 L. Ed. 764.

In case of a bill of review, based upon after-discovered evidence, the question of diligence is necessarily a preliminary one, to be considered and passed upon at the time application is made for leave to file the bill. Having been once disposed of when the bill is allowed, it will not be again considered, and a denial in the answer of the averment of diligence made in the bill raises an immaterial issue. Birdsboro Steel Foundry & Machine Co. v. Kelley Bros. & Spielman (1906) 147 Fed. 713, 78 C. C. A. 101, affirming decree Kelley Bros. & Spielman v. Diamond Drill & Machine Co. (C. C. 1906) 142 Fed. 868.

Upon a bill of review for newly discovered evidence, the other party may controvert by plea or answer that it is newly discovered. Dexter v. Arnold (C. C. 1829) Fed. Cas. No. 3,856.

354. **Demurrer.**—See Buffington v. Harvey (1877) 95 U. S. 99, 24 L. Ed. 381; Craig v. Smith (1879) 100 U. S. 226, 25 L. Ed. 577; Acord v. Western Pocahontas Corporation (1909) 174

Fed. 1019, 98 C. C. A. 625 (affirming decree [C. C. 1907] 156 Fed. 989, and writ of certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); Miller v. Clark (C. C. 1891) 47 Fed. 850; Copeland v. Bruning (C. C. 1900) 104 Fed. 169.

355. Hearing and determination.—Where it is the purpose of a bill of review to obtain a reversal of a decree for error of law apparent on the record consideration can be given to the record of the original cause only, the evidence at large cannot be examined or considered, and any facts averred in the bill of review inconsistent with the pleadings and decree in the main case can have no effect in determining the correctness of such decree. Shelton v. Van Kleeck (1883) 1 Sup. Ct. 491, 106 U. S. 532, 27 L. Ed. 269; Quinton v. Neville (1907) 152 Fed. 879, 81 C. C. A. 673; Brown v. White (C. C. 1881) 16 Fed. 900.

Technical rules need not be pursued, see Sampeyreac v. U. S. (1833) 32 U. S. (7 Pet.) 222, 8 L. Ed. 665.

Parties who may allege error, see Whiting v. Bank of United States (1839) 38 U. S. (13 Pet.) 6, 10 L. Ed. 33 (affirming [C. C. 1835] Fed. Cas. No. 17,576); Brown v. White (C. C. 1881) 16 Fed. 900.

On a bill of review, a party is not at liberty to go into the evidence at large in order to establish an objection to the decree, founded on the supposed mistake of the court in its own deductions from the evidence. Id.

The plaintiffs, in a bill of review, cannot object to the nonjoinder of a party in the original bill where the objection was not taken at the original hearing, and it does not appear that they are injured by such nonjoinder. If his interests are affected by the decree, he alone can object to it. Whiting v. Bank of United States (1839) 38 U. S. (13 Pet.) 6, 10 L. Ed. 33, affirming (C. C. 1835) Fed. Cas. No. 17,576.

If bondholders not parties to the suit in which a decree was rendered in favor of the trustee can, under any circumstances, bring a bill of review, they can only have such relief as he would be entitled to in the same form of proceeding. Shaw v. Little Rock & Ft. S. R. Co. (1879) 100 U. S. 605, 25 L. Ed. 757.

If, upon a bill of review, it appears from the record that a party to the cause was served with a subpœna, and did not plead, answer, or demur, the decree was pro confesso as to him, and the fact that he was not named in it is unimportant. Shelton v. Van Kleeck (1883) 1 Sup. Ct. 491, 106 U. S. 532, 27 L. Ed. 269.

The pendency of a prior bill of review, the fact that the present bill was insufficient, that newly discovered evidence was not alleged, that the bill was filed without leave, that there were no specified assignments of error, that it did not appear that complainants would be prejudiced by a dismissal, were no grounds for dismissal on motion of a bill of review for errors apparent on the face of the record. Lewis v. Holmes (1912) 194 Fed. 842, 116 C. C. A. 408.

On the hearing of a bill of review the court can only consider the errors of law apparent on the face of the record, and a fact found or determined by the decree is presumed to have been sufficiently proved by the evidence. Wallamet Iron Bridge Co. v. Hatch (C. C. 1884) 19 Fed. 347 (decree reversed Willamette Iron Bridge Co. v. Hatch [1888] 8 Sup. Ct. 811, 125 U. S. 1, 31 L. Ed. 629); Reed v. Stanley (C. C. 1898) 89 Fed. 430.

356. Decree.—Parties who have contested the validity of decrees in equity by bills of review cannot, after an adverse decision thereon by a court of last resort, question the justice of the decrees by any form of proceeding in the original suits; but, if they have any remaining rights which equity will enforce, they must seek relief by independent proceedings, in which they can assert no claim inconsistent with the adjudications already had. Huntington v. Little Rock & Ft. S. R. Co. (C. C. 1882) 16 Fed. 906.

(Z) Costs

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See §§ 1375, 1378, 1624.

Recovery of less than $500, see § 1609.

357. In general.—See Kell v. Trenchard (1906) 146 Fed. 245, 76 C. C.

A. 611; Bliss v. Anaconda Copper Mining Co. (C. C. 1909) 167 Fed. 1024.

Costs are in the sound discretion of the court. Brooks v. Byam (C. C. 1843) Fed. Cas. No. 1,949; Consolidated California & Va. Min. Co. v. Baker (C. C. 1904) 131 Fed. 989.

The rules for the guidance of the court in allowing or disallowing costs in equity stated by Woodbury, J. Hovey v. Stevens (C. C. 1846) Fed. Cas. No. 6,746.

358. Power to award.—The circuit court in equity may allow costs by virtue of this section. Matheson v. Hanna-Schoelkopf Co. (C. C. 1904) 128 Fed. 162, 164.

359. Discretion of court.—The discretion to apportion costs does not authorize a departure from the usual practice of awarding costs to the prevailing party, unless for some cause shown equity and good conscience require it. Westfeldt v. North Carolina Mining Co. (1910) 177 Fed. 132, 100 C. C. A. 552, denying motion to modify judgment (1909) 166 Fed. 706, 92 C. C. A. 378.

Where both parties are partly wrong, the court may award costs in its discretion, or may refuse to allow costs to either. Blassengame v. Boyd (1910) 178 Fed. 1, 101 C. C. A. 129, 21 Ann. Cas. 800, affirming decree Blassingame v. Board of Com'rs of Haywood County (C. C. 1909) 172 Fed. 630.

360. Amount of recovery.—See § 1609.

Where, on an accounting in an infringement suit, complainant is awarded only nominal damages, it may properly be taxed with all the costs of the accounting, including the hearing on exceptions to the master's report. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. (1910) 183 Fed. 314, 105 C. C. A. 526.

Where a suit for an accounting was rendered necessary, the executor is chargeable with costs, though complainant's demand was greatly reduced. Norman v. Storer (C. C. 1850) Fed. Cas. No. 10,301.

Complainant is not to be refused costs merely because he may not have recovered all that he has in good faith and with reasonable prudence supposed himself entitled to. Draper v. Wattles (C. C. 1879) 81 Fed. 374.

Where the recovery is nominal, only the costs of reference will be taxed against complainant. Kirby v. Armstrong (C. C. 1881) 5 Fed. 801.

Where a master, acting under a decree for an account of profits and damages in infringement of a patent, reports that the defendant has made no profits, and that the plaintiff is entitled only to "nominal damages, with costs," the court will allow full costs to the plaintiff. Kirk v. Du Bois (C. C. 1891) 46 Fed. 486, decree affirmed Du Bois v. Kirk (1895) 15 Sup. Ct. 729, 158 U. S. 58, 39 L. Ed. 895.

The general rule is that, where a complainant recovers only nominal damages and profits on an accounting for infringement, the costs of the reference are taxed against him; but, like other matters of costs in suits in equity, the rule is subject to modification in a particular case, in the discretion of the court, as may be equitable under the circumstances. Kansas City Hay Press Co. v. Devol (C. C. 1904) 127 Fed. 363.

361. Separate suits.—Where certain insurers, having a valid defense to certain actions on policies at law, instituted a suit in equity to determine the respective liabilities of various companies and to enjoin the prosecution of actions at law on the policies, greatly augmenting the costs, which were imposed on the companies in the trial court by a decree against them, which was reversed on appeal, a judgment for costs at the trial should be affirmed. Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt (1908) 162 Fed. 447, 89 C. C. A. 333, reversing decree (C. C. 1907) 151 Fed. 681, and judgment affirmed on rehearing (1909) 175 Fed. 720, 99 C. C. A. 296.

Where insurance companies against which an insured had brought actions at law, although not entitled to such relief, obtained an injunction from a court of equity restraining the prosecution of such actions and a determination of their liability in the court of equity, such court, on the entry of decrees against them, properly charged them with the costs in the actions at law. Spring Garden Ins. Co. v. Amusement Syndicate Co. (1910) 178 Fed. 519, 102 C. C. A. 29.

The general rule is that the prevailing party in cases in equity, as at law, is entitled to recover costs; and a plaintiff in an action in ejectment for mining property and also in a suit in equity against the same defendant to enjoin trespass thereon, who recovers in both cases on issues joined, will be allowed costs in both, although it recovered only as to part of the ground claimed, the title of each party to a portion thereof being stipulated on the trial. Consolidated California & Va. Min. Co. v. Baker (C. C. 1904) 131 Fed. 989.

362. Prevailing party.—Costs will seldom be awarded against the prevailing party, unless he has been guilty of some fault or omission. Higgins v. Eaton (1913) 204 Fed. 273, 122 C. C. A. 471, affirming decree on rehearing (1913) 202 Fed. 75, 122 C. C. A. 1.

Costs are given to the prevailing party, except where such a course would be inequitable. Hunter v. Marlboro (C. C. 1846) Fed. Cas. No. 6,908.

Where complainant fails on the main issues, and succeeds only on an issue

of trivial importance, costs will not be allowed. Marks Adjustable Folding Chair Co. v. Wilson (C. C. 1890) 43 Fed. 302.

363. **Dismissal.**—On dismissal of a bill in the circuit court for want of jurisdiction, no costs can be allowed in that court. Conley v. Ballinger (1910) 30 S. Ct. 224, 216 U. S. 84, 54 L. Ed. 393; Auer v. Lombard (1896) 72 Fed. 209, 19 C. C. A. 72; Pentlarge v. Kirby (C. C. 1884) 20 Fed. 898; International Wireless Telegraph Co. v. Fessenden (C. C. 1904) 131 Fed. 493; Allen v. Consolidated Fruit Jar Co. (C. C. 1906) 145 Fed. 948; Cooper v. New Haven Steamboat Co. (D. C. 1883) 18 Fed. 588.

A stockholders' bill, charging certain directors with fraud in contracts made by them with the corporation, and seeking to enforce the restitution of exorbitant profits made by them in such contracts, was dismissed for want of equity. Held, that plaintiff must pay the costs. Barr v. Pittsburgh Plate-Glass Co. (1893) 57 Fed. 86, 6 C. C. A. 260, affirming decree (C. C. 1892) 51 Fed. 33.

Where a bill in equity filed in a federal court alleges facts which give such court jurisdiction, but is afterward dismissed on a plea in abatement setting up the pendency of a suit in a state court between the same parties in which the state court had acquired prior jurisdiction over the subject-matter of the suit, the case is not one of want of jurisdiction in such sense that the court cannot adjudge costs against the losing party. Westfeldt v. North Carolina Mining Co. (1910) 177 Fed. 132, 100 C. C. A. 552, denying motion to modify judgment (1909) 166 Fed. 706, 92 C. C. A. 378.

Where, in a suit for specific performance in a federal court, defendant raised the question of adequate remedy at law by answer, but did not call the court's attention thereto until final hearing on the merits, after large costs had been incurred in the taking of testimony, the court on sustaining such defense should have directed that a part of the costs should be taxed to defendants. Marthinson v. King (1911) 150 Fed. 48, 82 C. C. A. 360.

A defendant, who obtains judgment dismissing a bill upon one defense, is not precluded from recovering costs because he has pleaded other defenses, which were without merit. Gold v. Gold (1911) 187 Fed. 273, 109 C. C. A. 615.

In the ordinary course of practice, when a bill is dismissed, costs are not awarded to plaintiff. Brooks v. Byam (C. C. 1843) Fed. Cas. No. 1,949.

Defendant is not entitled to costs where a bill is dismissed upon the merits because plaintiff failed to show sufficient title, where a demurrer might have been put in. Id.

Where an injunction is refused, but the plaintiff still has a right to proceed at law if the plaintiff stipulate not to proceed at law, costs will not be awarded to either party. Webb v. Bowers (C. C. 1847) Fed. Cas. No. 17,319.

Respondent held entitled to costs where he was called to defend a suit because of an omission in the record by the clerk, which was corrected pending the suit. Gilman v. Libbey (C. C. 1878) Fed. Cas. No. 5,445.

A cross-bill improvidently filed will be dismissed on motion, but under the circumstances costs may be denied. Lockwood v. Cleaveland (C. C. 1881) 6 Fed. 721.

A bill was filed against defendants individually, alleging that they were members of a copartnership, in which the extent of the interest of each member was measured by the number of shares he held in the copartnership as a joint-stock association. The evidence, however, failed to show that one of defendants was a shareholder. Held that, such defendant having answered jointly with other defendants, the dismissal as to him would be without costs. Tyler v. Galloway (C. C. 1882) 13 Fed. 477.

Where the plaintiffs had a fair cause to suppose that separate insolvency administrations would be necessary in each state, on a dismissal of the bill here the defendant was not allowed costs, but each party was required to pay his own costs. Taylor v. Life Ass'n of America (C. C. 1882) 13 Fed. 493.

After an injunction had been obtained in a suit in equity by the plaintiff express company, restraining the defendant railroad company from excluding the plaintiff's messengers and express matter from the defendant's railroad, the decree was changed, in accordance with the decision in Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 1190, to a decree dismissing the bill, and for reference to a master to ascertain amount to be paid to the defendant railroad company for carrying plaintiff's messengers and express matter during the pendency of the injunction. Held, that defendant was entitled to have the bill dismissed, with costs. Fargo v. Southeastern Ry. Co. (C. C. 1886) 28 Fed. 906.

Costs will not be granted on dismissing a bill after a hearing upon the merits, for objections which might have been taken by demurrer, but which defendants failed to take at any stage of the case. Harland v. Bankers' & Merchants' Tel. Co. (C. C. 1887) 32 Fed. 305.

Where a state railroad commission repealed resolutions it had previously adopted relating to freight rates, for the declared purpose of removing the cause of litigation then pending commenced by a railroad company to en-

join the reduction of rates contemplated by such resolutions, and asks that the suit be dismissed without costs to either party, and the suit is merely dismissed on motion of the complainant, the commission is estopped to ask an amendment of the decree so as to allow it costs as the successful party, on the ground that the resolutions repealed were not in fact the subject of the controversy, but were merely preliminary to subsequent action taken by the board, which was not repealed. Southern Pac. Co. v. Board of Railroad Com'rs (C. C. 1899) 95 Fed. 572.

A decree will not be modified, to allow costs to complainant, where not asked for in his motion to dismiss the suit without costs to either party; no claim of mistake or inadvertence being made. Id.

364. **Amendment of bill.**—Where demurrer to answer is carried back to the complaint, and plaintiff asks leave to amend, taxable costs of the demurrer on leave to amend fall on plaintiff. McCabe v. Cruikshank (C. C. 1901) 106 Fed. 649.

365. **After remand by appellate court.**—Where complainant was denied a mandatory injunction by a court of equity to compel removal of a dam, and, though the court offered him the right to prove and recover damages for flowage in the pending suit, he refused and prosecuted an appeal, unsuccessful, except that the appellate court gave him the same right, reversing the decree for that purpose, he is not entitled to recover costs incurred prior to the time when, after remand, he avails himself of such right. Andrus v. Berkshire Power Co. (C. C. 1909) 169 Fed. 732.

366. **Discovery.**—Where several persons are liable for the same debt, and the creditor is cited to a discovery to ascertain the amount which he has received, and he refuses to make the disclosure, he will be liable to the costs of the bill of discovery. Molyneaux v. Marsh (C. C. 1871) Fed. Cas. No. 9,-703.

367. **Apportionment.**—On dismissal. Taylor v. Life Ass'n of America (C. C. 1882) 13 Fed. 493; Marthinson v. King (1906) 150 Fed. 48, 82 C. C. A. 360.

Where, in a proceeding to determine the priorities of certain liens, the appellants were successful only in part, a provision in the decree that they pay half the costs should not be disturbed. Swift & Co. v. Kortrecht (1902) 112 Fed. 709, 50 C. C. A. 429.

Where the complainant in a suit for infringement established the validity of his patent and its infringement, but, under the circumstances, was not entitled to the relief prayed, costs may be equitably divided. Crier v. Innes (1909) 170 Fed. 324, 95 C. C. A. 508, modifying decree (C. C. 1908) 160 Fed. 103.

Where complainant's right to recover depended on the right of B., who held a contract for road construction, and B.'s answer showed that the county commissioners had offered to pay him $3,-303, which he had refused, plaintiff having recovered a less sum, it appearing that much of the costs of the hearing resulted from plaintiff's attempt to introduce improper evidence, the court did not abuse its discretion in taxing one-half of the costs to plaintiff. Blassengame v. Boyd (1910) 178 Fed. 1, 101 C. C. A. 129, 21 Ann. Cas. 800, affirming decree Blassingame v. Board of Com'rs of Haywood County (C. C. 1909) 172 Fed. 630.

In equity, costs will be refused when both parties are at fault, each being liable for his own costs. Loveridge v. Larned (C. C. 1881) 7 Fed. 294.

Where a bill is sustained with costs against certain respondents, and dismissed with costs as against others, the latter are entitled, not only to have taxed the items special to their defense, but also to have apportioned in their favor the items which were of a joint character. American Box Mach. Co. v. Crosman (C. C. 1893) 57 Fed. 1029.

The costs of a reference to a master of exceptions to an answer may properly be equally divided, where but one of a number of exceptions was sustained, but the answer was plainly insufficient in the matter to which that one related. Willis v. Terry (C. C. 1899) 98 Fed. 8.

Where the bill was dismissed as to one of the three patents in the suit and was sustained as to the other two patents, complainant recovered two-thirds of its costs from defendants, while defendants recovered one-third from complainant. Tesla Electric Co. v. Scott (C. C. 1900) 101 Fed. 524, 525.

Where a master was appointed to hear and determine exceptions to a bill for impertinence, and the contentions of both parties were partially sustained, the costs of the reference should be apportioned. Hall v. Bridgeport Trust Co. (C. C. 1903) 122 Fed. 163.

368. **Half costs.**—A defendant who prevailed in the suit allowed only half costs because of his violation of the rules of evidence by requiring the examiner to copy into the record evidence which was obviously incompetent. Voightmann v. Seely (1912) 198 Fed. 485, 119 C. C. A. 386.

369. **Persons liable.**—One who signs exceptions to a master's report, as trustee for numerous bondholders, is responsible for the costs, and an objection thereto for want of a party so chargeable is invalid. Fidelity Insurance & Safe-Deposit Co. v. Shenandoah Iron Co. (C. C. 1889) 42 Fed. 372.

A bill by trustees to foreclose a mortgage failed to show jurisdiction in the circuit court, but no objection was made

in that court, and there was a decree for complainants. On defendant's appeal, the decree was reversed, and the circuit court of appeals awarded defendant costs in the circuit court, and divided the costs of the appeal. Held, that the judgment as to costs should not be modified so as to show that complainants were liable as trustees only, and not personally. Tug River Coal & Salt Co. v. Brigel (1895) 70 Fed. 647, 17 C. C. A. 367, denying motion to modify judgment as to costs (1895) 67 Fed. 625, 14 C. C. A. 577.

Where persons are made parties complainant to a bill without their knowledge or consent, and a decree is entered against them for costs, such decree is a nullity as to them, and they may have their names stricken from the record on filing a petition therefor in the cause. McGeorge v. Bigstone Gap Imp. Co. (C. C. 1898) 88 Fed. 599.

370. **Security for payment—Discretion of court.**—A federal court of equity has power to require a nonresident plaintiff to give security for costs, without any statute or rule of court specially providing therefor; but the exercise of such power is discretionary, and security will not be required where the nonresidence of plaintiff was disclosed by the bill, but defendant made no motion therefor for several months, during which the issues have been made up and a large part of the testimony has been taken. Karns v. W. L. Imlay Rapid Cyanide Process Co. (C. C. 1910) 181 Fed. 751.

The requiring of cost or injunction bonds in suits by trustees or receivers in bankruptcy relating to the administration of the estate is not governed by state statutes or rules of the court applicable to ordinary suits at law or in equity, but is a matter resting in the discretion of the court, to be exercised in view of the facts in each case. In re Barrett (D. C. 1904) 132 Fed. 362.

371. —— **Additional security.**—Additional security for costs may be required, following the equity practice in the state courts. Deprez v. Thomson-Houston Electric Co. (C. C. 1894) 66 Fed. 22.

In a suit to enjoin the sale of cemetery lands, complainants held not entitled to file an additional bond for costs. Carpenter v. Knollwood Cemetery (D. C. 1912) 195 Fed. 96.

372. —— **Waiver of security.**—Where a bill showed on its face that complainant was a nonresident and that defendant was entitled to security for costs, but no application was made therefor until some 18 months after issue joined, nor until after defendant had been taking proof for 8 months, to rebut plaintiff's prima facie case, defendant's right to security was waived by laches. Winkley Co. v. Bowen Mfg. Co. (C. C. 1910) 180 Fed. 624.

373. **Amount, rate, and items.**—The discretion of a court of equity in a suit for a partnership accounting in which a receiver was appointed did not authorize an order requiring the defendant and the sureties on his cost bond to pay to complainant, under the name of costs, items paid from partnership assets for services and expenses in administering the fund, nor any other items not within the fee bill act. McIntosh v. Ward (1907) 159 Fed. 66, 86 C. C. A. 256.

Where complainant on his own motion dismissed his bill when called for hearing "with usual costs to defendant," allowance by the clerk for certified copy of file wrapper, contents of patent in suit, and certified copies of six other patents, procured by defendants to properly present his defense, were improper. Ryan v. Gould (C. C. 1887) 32 Fed. 754.

The grantees of a lease alleged that the lessor claimed that the lease would terminate with the death of the original lessee, and asked for a reformation of the lease if such was its construction. The lessor answered, asserting such claim, and testimony was taken showing that the lease was to be terminable by the election of the lessor to take certain property on the leased premises at its value; and the lessor submitted to a decree establishing such construction. Held, that the orators were entitled to the costs of taking their testimony and the decree, but not to the costs of the bill. Loomis v. Rutland R. Co. (C. C. 1889) 38 Fed. 280.

374. —— **Drawing pleadings.**—Allowance for drawing pleadings, etc., was not prohibited by R. S. § 823, ante, § 1375, forbidding solicitors in equity to receive any other compensation than that specified in section 824, R. S., section 1378, ante, and also declaring that nothing therein contained shall prevent attorneys from charging or receiving from their clients such reasonable compensation as may be agreed on, or may accord with general usage in the respective states, "in addition to taxable costs." Matheson v. Hanna-Schoelkopf Co. (C. C. 1904) 128 Fed. 162.

375. —— **Fees of master.**—Where the decree of the circuit court finding defendant guilty of infringement, and ordering an account, is set aside on rehearing, or on final decree, with costs, master's fees paid by defendant for the accounting should be taxed against plaintiff as part of the costs. American Diamond Drill Co. v. Sullivan Mach. Co. (1888) 131 U. S. 428, 9 Sup. Ct. 794, 33 L. Ed. 217; Id. (C. C. 1885) 32 Fed. 552.

376. —— **Fees of referees.**—Complainant cannot object that the decree in his favor does not definitely fix the amount of the referee's fees to be paid by defendant, since complainant is not properly concerned in the interest of any one under the decree but himself.

Werner v. Reinhardt (C. C. 1884) 20 Fed. 163.

377. —— **Printing evidence.**—Power to make rules, see Tesla Electric Co. v. Scott (C. C. 1900) 101 Fed. 524.

Where complainant made no objection that certain testimony was immaterial and irrelevant, and made no motion to strike out the same before the testimony was printed, he could not object, after judgment in favor of defendant, to defendant's taxation of the amount paid for printing such testimony as a part of the costs. Taylor v. Marshall (C. C. 1904) 132 Fed. 407.

Where plaintiff furnished a copy of the evidence to defendant the clerk properly taxed to plaintiff 10 cents a folio therefor. L. E. Waterman Co. v. Lockwood (C. C. 1906) 128 Fed. 174.

378. —— **Travel and attendance.**—The successful party is entitled to tax costs for travel annd attendance. L. E. Waterman Co. v. Lockwood (C. C. 1904) 128 Fed. 174.

379. —— **Printing master's report.**—Since United States Circuit Court equity rules 1 and 6, for the Eastern District of Pennsylvania, only provide for the printing of the pleadings and evidence on the hearing of exceptions to a master's report, costs cannot be allowed for printing the report, in the absence of a special order requiring the printing thereof. Matheson v. Hanna-Schoelkopf Co. (C. C. 1904) 128 Fed. 162.

380. **Allowance and taxation.**—See § 1624.

In a suit by a stockholder, in behalf of itself and of such other stockholders as may come in, against a railway company, alleging the making of an illegal contract by the corporation, and praying for an account, an injunction, and the appointment of a receiver, an allowance to the complainant for solicitors' fees pending an appeal from an order appointing a receiver and continuing a restraining order is premature. Jacksonville, T. & K. W. Ry. Co. v. American Const. Co. (1893) 57 Fed. 66, 6 C. C. A. 249, denying motion Pennsylvania Co. for Insurance on Lives and for Granting Annuities v. Jacksonville, T. & K. W. Ry. Co. (1893) 55 Fed. 131, 5 C. C. A. 53.

Courts of equity, having a large discretion in matter of costs, frequently give costs in intermediate stages of a cause, without waiting for a final decree. Avery v. Wilson (C. C. 1884) 20 Fed. 856.

Though, where the decree of the circuit court finding defendant guilty of infringement, and ordering an account, is set aside on rehearing, or on final decree, with costs, master's fees paid by defendant for the accounting should be taxed against plaintiff as part of the costs, the allowance is to be made by the court, not by the clerk. American Diamond Drill Co. v. Sullivan Mach. Co. (C. C. 1885) 32 Fed. 552, appeal dismissed (1888) 9 Sup. Ct. 794, 131 U. S. 428, 33 L. Ed. 217.

381. **On appeal—Prevailing party.**—Where the appeal has substantially prevailed, as where the decree is reversed as to the most important part, the appellant is entitled to the statutory costs. Northern Trust Co. v. Snyder (1897) 77 Fed. 818, 23 C. C. A. 480.

382. —— **Dismissal.**—Where a bill in a United States circuit court contains no averment of the amount or value in controversy, the costs of an appeal taken by complainant will be taxed to him on dismissal of the appeal. Cochran v. Childs (1901) 111 Fed. 433, 49 C. C. A. 421.

383. —— **Affirmance.**—A party claiming an interest in the subject of litigation, who has improperly volunteered himself as a party defendant, against complainant's objection, instead of proceeding by summary petition of intervention, and has secured a decree on a cross-bill, should be required to pay the costs both of the court below and the appellate court, where the latter court affirms the decree on the theory that the cross-bill may be treated as a petition of intervention. Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33.

That the appellate court sustains the decree of the court below on grounds other than those assigned by the latter court is not necessarily a reason for depriving the appellees of their costs on appeal, especially when the appellate court has not found it necessary to go to the extent of considering the reasons on which the court below decided the case. Post v. Beacon Vacuum Pump & Electrical Co. (1898) 89 Fed. 1, 32 C. C. A. 151, reversing judgment on rehearing (1898) 84 Fed. 371, 28 C. C. A. 431.

384. —— **Modification.**—Where a decree, though properly dismissing a bill, is so broad as to shut out any further suit, however great the exigency, it will be modified on appeal, but appellant will not thereby be relieved of costs, he not having made a motion below to amend, and his contention on appeal not having been limited to such amendment. Texas & P. Ry. Co. v. Interstate Transp. Co. (1895) 15 Sup. Ct. 228, 155 U. S. 585, 39 L. Ed. 271, modifying decree (C. C. 1891) 45 Fed. 5.

Where the appellant appeals from the whole decree, but only succeeds in modifying it in a minor particular, neither party will be given the costs of the appellate court. New England R. Co. v. Carnegie Steel Co. (1896) 75 Fed. 54, 21 C. C. A. 219.

385. —— **Reversal.**—In a suit by a stockholder against a corporation, praying for an account and injunction and the appointment of a receiver, an

allowance of compensation to complainant for solicitor's fees, pending an appeal from an order appointing a receiver and continuing a restraining order, should be reversed where, on appeal, the order appointing the receiver has been reversed, the injunction modified, and the property in controversy returned to defendant. Jacksonville, T. & K. W. Ry. Co. v. American Const. Co. (1893) 57 Fed. 66, 6 C. C. A. 249, denying motion Pennsylvania Co. for Ins. on Lives and for Granting Annuities v. Jacksonville, T. & K. W. Ry. Co. (1893) 55 Fed. 131, 5 C. C. A. 53.

On reversal of a decree for complainants, where one of the defendants, who properly made a several defense, took no part in the appeal, by reason of a stipulation under which he had no occasion to do so, he is entitled to costs in the court below, but not to costs in the appellate court. Pollard v. Reardon (1895) 65 Fed. 848, 13 C. C. A. 171.

Where a final decree in equity has been reversed for want of diverse citizenship necessary to the jurisdiction of federal courts, and the bill is subsequently amended so as to obviate that difficulty, the general costs below should be adjudged on final hearing just as in the ordinary case. Tug River Coal & Salt Co. v. Brigel (1898) 86 Fed. 818, 30 C. C. A. 415, affirming Brigel v. Tug River Coal & Salt Co. (C. C. 1896) 73 Fed. 13.

386. —— **Apportionment.**—Where a judgment was reversed on the ground that the federal court had no jurisdiction, which point was first raised on appeal, appellant is entitled to costs in the lower court, but the costs of appeal should be divided. Tug River Coal & Salt Co. v. Brigel (1895) 67 Fed. 625, 14 C. C. A. 577, motion to modify judgment as to costs denied (1895) 70 Fed. 647, 17 C. C. A. 367.

Where certain insurers, having a valid defense to certain actions on policies at law, instituted a suit in equity to determine the respective liabilities of various companies, and to enjoin the prosecution of actions at law on the policies, greatly augmenting the costs which were imposed on the companies in the trial court by a decree against them, which was reversed on appeal, the costs on appeal should be divided, one-half to be paid by the insurance companies and one-half by the claimant. Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt (1908) 162 Fed. 447, 89 C. C. A. 333, reversing decree (C. C. 1907) 151 Fed. 681, and judgment affirmed on rehearing (1909) 175 Fed. 720, 99 C. C. A. 296.

Costs awarded to individuals, as appellants on an appeal from an order enjoining them as representatives of a corporation from further prosecuting a pending suit of the corporation against another, could not be diverted and apportioned in favor of the corporation, not joined in the appeal, without their consent or submission on the hearing, but could properly be so diverted and apportioned, where it appeared that such individuals of their own motion applied for the apportionment, which was made for the equitable purpose of uniting the costs on one side in an offset allowed against costs awarded on the other side. Corn Products Refining Co. v. Chicago Real Estate Loan & Trust Co. (1911) 185 Fed. 63, 107 C. C. A. 283.

387. —— **Expenses of record.**—Where a mass of irrelevant matter was introduced by complainant, and carried into the record on appeal, the defendant, though unsuccessful, will not be condemned to pay the costs caused by the irrelevant evidence. Ecaubert v. Appleton (1895) 67 Fed. 917, 15 C. C. A. 73.

Where a plea in abatement in an equity suit in a Circuit Court was overruled and after a trial of the cause on the merits defendant appealed generally he was justified in bringing up the entire record and to have the expense taxed as costs on a reversal on the ground of error in overruling the plea. Westfeldt v. North Carolina Mining Co. (1910) 177 Fed. 132, 100 C. C. A. 552, denying motion to modify judgment (1909) 166 Fed. 706, 92 C. C. A. 378.

Liability of appellant's solicitors for noncompliance with rules 75–77, see Coxe v. Peck-Williamson Heating & Ventilating Co. (1913) 208 Fed. 409, 125 C. C. A. 628.

On appeal by defendant from a decree against it in an infringement suit, complainant is entitled to demand payment of the cost of printing its record, used on the hearing, which has been taxed against defendant as part of the costs, before furnishing defendant with copies of such record for use in making up the record for appeal. Parsons Non-Skid Co. v. E. J. Willis Co. (C. C. 1911) 192 Fed. 47.

388. —— **Expenses of briefs.**—Disbursements for printing a necessary and proper brief should be taxed in the costs, though it may not have been printed before commencement of the argument. Sackett v. Smith (C. C. 1891) 46 Fed. 39.

389. **Payment and remedies for collection.**—On a hearing before a master, each party should pay, in the first instance, the costs, charges, expenses, stenographer's fees, and master' fees for taking its own direct, redirect, cross, or recross examination of any witness or witnesses; but on final decree the sum so paid by the prevailing party may be imposed on the defeated party. Brickill v. City of New York (C. C. 1893) 55 Fed. 565.

390. —— **Set-Off.**—A bill by trustees to foreclose a mortgage failed to show

jurisdiction in the circuit court, but no objection was made in that court, and there was a decree for complainants. On defendant's appeal, the decree was reversed, and the circuit court of appeals awarded defendant costs in the circuit court, and divided the costs of the appeal. Held, that the judgment as to costs should not be modified so as to allow complainants to set off their liability for costs against the debt due by defendant. Tug River Coal & Salt Co. v. Brigel (1895) 70 Fed. 647, 17 C. C. A. 367, denying motion to modify judgment as to costs (1895) 67 Fed. 625, 14 C. C. A. 577.

Where removal of a cause has been denied by a state court, and it is carried by successive appeals to the supreme court of the United States, where it is reversed because removal was improperly denied, and the cause then proceeds in the United States circuit court, where, on final hearing, judgment is rendered against the appellant, he may, on motion, have his judgment for costs on reversal in the supreme court set off against or deducted from the amount of the recovery; and, if he fails to avail himself of this right, he cannot afterwards assert it in an equity proceeding. National S. S. Co. v. Tugman (1897) 82 Fed. 246, 27 C. C. A. 116.

391. —— **Restitution of costs paid.**— In a suit for infringement of trademark, defendant prevailed on the vital issue as to his right to use on pencils the name "Faber," which was his own name, in connection with one or the other of certain names or initials as prefixes; a decree dismissing the bill and awarding him costs being entered on mandate from the Circuit Court of Appeals. Subsequently the complainant obtained leave to file a bill of review for a modification of the decree awarding an injunction against the use by defendant of the name "Faber" alone, and such modification was made. Held, the Circuit Court could not require defendant to repay the costs under the prior decree. Castell v. Faber (1908) 166 Fed. 281, 92 C. C. A. 199.

Where the United States circuit court has dismissed a bill on the merits, and an appeal to the supreme court has been dismissed because the amount involved gave it no jurisdiction, and its decision as to the amount showed also that the circuit court had no jurisdiction on a bill of review in the circuit court, the original decree should be reversed, but that court cannot order restitution of the costs paid by complainant in the supreme court, or those paid by him in original suit, or tax in his favor costs of the bill of review. Miller v. Clark (C. C. 1892) 52 Fed. 900, appeal dismissed Clark v. Miller (1892) 13 Sup. Ct. 1045, 149 U. S. 770, 37 L. Ed. 960.

392. —— **Stay of subsequent suit.**— Under Code Civ. Proc. N. Y. § 779, by rule made applicable to the procedure in the Circuit Court of the United States in the Northern District of New York, and which provides that when costs directed to be paid by an order, which fixes no time for their payment, are not paid within 10 days, all proceedings on the part of the party required to pay the same are stayed without further direction of the court until the payment thereof, an order of a Circuit Court dismissing a bill at complainant's costs, without prejudice to a new suit, does not prevent complainant from commencing a new suit at once before the costs are paid, the only effect of the nonpayment of the costs in the former suit being to stay the second suit if they are not paid within 10 days. Kellogg Switchboard & Supply Co. v. Glen Telephone Co. (C. C. 1903) 121 Fed. 174.

(ZZ) Appeals

See rules 74–77, ante, pp. 2527–2529.

Bonds, see § 1649, post.

Costs, see notes 381–388, supra.

Time for appeal to circuit court of appeals, see § 1647, post.

Time for appeal to supreme court, see § 1649, post.

Transcripts on appeal, see § 1654, post.

Cited without definite application

Hudson v. Parker (1895) 15 Sup. Ct. 450, 452, 156 U. S. 277, 39 L. Ed. 424; Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259; Steam Stone-Cutter Co. v. Sears (C. C. 1881) 9 Fed. 8; Cook v. Cook (C. C. 1888) 34 Fed. 249; Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

B. Admiralty Practice and Procedure

I. Admiralty Rules.
II. Admiralty Procedure in General.

*I. Admiralty Rules**

Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction, on the Instance Side of the Court, in Pursuance of the Act of the 23d of August, 1842, Chapter 188, 5 Stat. 516

Rule 1. Mesne Process.—*No mesne process shall issue from the District Courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.*

Rule 2. Same—Suits in Personam.—*In suits in personam, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he can not be found, to attach his goods and chattels to the amount sued for; or if such property can not be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition, in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.*

See, particularly, notes 204, 211, 214, 281, 524, 525, post.

Rule 3. Bail—Authority of Marshal—Summary Process.—*In all suits in personam, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.*

See, particularly, notes 208, 268–276, post.

Rule 4. Dissolution of Attachment.—*In all suits in personam, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant whose property is so attached giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.*

See, particularly, notes 277–281, post.

Rule 5. Bonds or Stipulations—How Given and Taken.—*Bonds or stipulations in admiralty suits may be given and taken in*

* An index of the admiralty rules will be found under the heading Admiralty Rules in the general index in Vol. 12. Decisions of the courts construing and applying the rules are set forth, post, under the heading "Admiralty Procedure in General" following the text of the rules.

open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

RULE 6. REDUCTION OF BAIL.—*In all suits in personam, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given, upon motion, and due proof thereof.*

RULE 7. ARREST FOR SUM EXCEEDING $500.—*In suits in personam, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof showing the propriety thereof.*

See, particularly, note 215, post.

RULE 8. SUITS IN REM—CUSTODY OF PROPERTY.—*In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.*

See, particularly, notes 18–132, post.

RULE 9. SAME—PROCESS OF ARREST.—*In all cases of seizure, and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the District Court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.*

See, particularly, note 502, post.

RULE 10. SAME—SALE OF PROPERTY—DELIVERY TO CLAIMANT.—*In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.*

See, particularly, note 257, post.

RULE 11. SAME.—*In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement, to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court or otherwise disposed of, as it may deem most for the benefit of all concerned.*

See, particularly, notes 256, 257, 633–782, post.

RULE 12. SUITS BY MATERIAL-MEN.—*In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam.*

See, particularly, notes 3, 18, 22, 37, 55, 61, 62–74, 505, post.

RULE 13. SUITS FOR WAGES.—*In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone in personam.*

See, particularly, notes 67, 74, post.

RULE 14. SUITS FOR PILOTAGE.—*In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone or the master alone in personam.*

See, particularly, notes 62, 74, post.

RULE 15. SUITS FOR COLLISION.—*In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone in personam.*

See, particularly, notes 74, 166, 173, 188, 356, post.

RULE 16. SUITS FOR ASSAULT.—*In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.*

See, particularly, notes 33, 58, 74, post.

RULE 17. SUITS ON HYPOTHECATIONS.—*In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either in rem or against the master or the owner alone in personam.*

See, particularly, note 74, post.

RULE 18. SUITS ON BOTTOMRY BONDS.—*In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be in personam against the wrongdoer.*

See, particularly, notes 54, 74, 232, post.

RULE 19. SUITS FOR SALVAGE.—*In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed.*

See, particularly, notes 21, 36, 51, 70, 74, 134, 159, 573, post.

RULE 20. PETITORY AND POSSESSORY SUITS.—*In all petitory and possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof, against the master of a*

ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

See, particularly, notes 66, 74, 189, post.

RULE 21. EXECUTION ON DECREE FOR PAYMENT OF MONEY.—*In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate, of the defendant or stipulators.*

See, particularly, notes 472, 515, 521, 754, post.

RULE 22. PLEADINGS—INFORMATIONS ON SEIZURES FOR VIOLATION OF LAWS.—*All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.*

RULE 23. SAME—LIBELS.—*All libels in instance causes, civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and, if the libel be in rem, that the property is within the district; and, if in personam, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights, in rem or in personam (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.*

See, particularly, notes 42, 291–312, 335, 337, 338, 829, post.

RULE 24. SAME—AMENDMENTS.—*In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.*

See, particularly, notes 312, 349–367, 646, post.

RULE 25. STIPULATIONS FOR COSTS AND EXPENSES.—*In all cases of libels in personam, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties, in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.*

See, particularly, note 745, post.

RULE 26. CLAIMS FOR PROPERTY—VERIFICATION—STIPULATIONS.—*In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and bona fide owner, and that no other person is the owner thereof. And, where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And, upon putting in such claim, the claimant shall file a stipulation, with sureties, in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court.*

See, particularly, notes 166, 844, post.

RULE 27. ANSWERS TO LIBELS.—*In all libels in causes of civil and maritime jurisdiction, whether in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.*

See, also, Rule 48, post.
See, particularly, notes 313–330, 823, post.

RULE 28. SAME—EXCEPTIONS.—*The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and, if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.*

See, particularly, notes 324, 330, post.

RULE 29. SAME—DEFAULT—DECREE PRO CONFESSO.—*If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel, at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.*

See, particularly, notes 484, 486, post.

RULE 30. SAME—COMPELLING FURTHER ANSWER.—*In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken*

pro confesso against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

RULE 31. SAME—EXPOSING DEFENDANT TO PROSECUTION.—*The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense.*

See, particularly, notes 315, 829, post.

RULE 32. SAME—ANSWER OF LIBELLANT TO INTERROGATORIES.—*The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises, by attachment, or take the subject-matter of the interrogatory pro confesso in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.*

See, particularly, notes 327, 336, 829, post.

RULE 33. PROCEDURE IN ABSENCE OF PARTY OR INABILITY TO ANSWER.—*Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.*

RULE 34. INTERVENTION.—*If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem for his own interest, and he is entitled, according to the cause of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.*

See, particularly, notes 166, 168, 175, 282, 288, post.

RULE 35. SAME—STIPULATIONS.—*The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.*

RULE 36. EXCEPTIONS TO PLEADINGS FOR SURPLUSAGE, ETC.—*Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.*

RULE 37. FOREIGN ATTACHMENT.—*In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation*

as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

See, particularly, notes 221, 223, post.

RULE 38. BRINGING PROPERTY INTO COURT TO ANSWER EXIGENCIES OF SUIT.—*In cases of mariners' wages, or bottomry, or salvage, or other proceeding in rem, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment, or other compulsive process, to compel obedience thereto.*

See, particularly, notes 226, 247–259, post.

RULE 39. DISMISSAL OF SUIT ON LIBELLANT'S DEFAULT.—*If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.*

See, particularly, notes 124–132, 666, post.

RULE 40. RESCISSION OF DECREE AND REHEARING.—*The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.*

See, particularly, note 484, post.

RULE 41. SALES UNDER DECREE.—*All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.*

See, particularly, notes 532, 568, post.

RULE 42. MONEYS PAID INTO REGISTRY—DEPOSIT IN BANK.—*All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out, except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn and the date thereof.*

RULE 43. SAME—INTERVENTION BY INTERESTED PERSON.—*Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene pro interesse suo for delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily*

to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

See, particularly, notes 573, 591, 601, post.

RULE 44. REFERENCE TO COMMISSIONERS.—*In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.*

RULE 45. APPEALS—TIME THEREFOR.—*All appeals from the District to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit; or in case no such rule or order be made, then within thirty days from the rendering of the decree.*

See, particularly, notes 614, 628, post.

RULE 46. REGULATION OF PRACTICE.—*In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts, respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.*

See, particularly, notes 64, 65, 68, 71, post.

RULE 47. BAIL—CONFORMING TO STATE LAWS—IMPRISONMENT FOR DEBT.—*In all suits in personam, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state courts.*

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter abolished, upon similar or analogous process issuing from a state court.

See, particularly, notes 205, 207, 211, 269, post.

RULE 48. APPLICATION OF RULE 27.—*The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.*

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

RULE 49. FURTHER PROOF ON APPEAL.—*Further proof, taken in a Circuit Court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the twenty-fourth of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same,*

and to put interrogatories, if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel; provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

See, particularly, note 452, post.

RULE 50. SAME—USE IN EVIDENCE.—*When oral evidence shall be taken down by the clerk of the District Court, pursuant to the abovementioned section of the act of Congress, and shall be transmitted to the Circuit Court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.*

RULE 51. PLEADING—REPLICATION—AMENDMENT OF LIBEL.—*When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the District Court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.*

See, particularly, notes 234, 299, 332-334, 377, post.

RULE 52. RECORD ON APPEAL.—*The clerks of the District Courts shall make up the records to be transmitted to the Circuit Courts on appeals, so that the same shall contain the following:*

(1) The style of the court.

(2) The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

(3) If bail was taken, or property was attached or arrested, the process of arrest or attachment and the service thereof; all bail and stipulations; and, if any sale has been made, the orders, warrants, and reports relating thereto.

(4) The libel, with exhibits annexed thereto.

(5) The pleadings of the defendant, with the exhibits annexed thereto.

(6) The testimony on the part of the libellant, and any exhibits not annexed to the libel.

(7) The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

(8) Any order of the court to which exception was made.

(9) Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

(10) The final decree.

(11) The prayer for an appeal, and the action of the District Court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:

(1) The continuances.

(2) All motions, rules, and orders not excepted to, which are merely preparatory for trial.

(3) The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some excep-

tion to a deposition in the District Court was founded on some one or more of these; in which case, so much of either of them as may be [involved in the exception shall] be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and, in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

2. The clerk of the District Court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the District Court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

3. Hereafter, in making up the record to be transmitted to the circuit court on appeal, the clerk of the District Court shall omit therefrom any of the pleading, testimony, or exhibits which the parties by their proctors shall by written stipulation agree may be omitted; and such stipulation shall be certified up with the record.

See, particularly, notes 636, 789, post.

RULE 53. CROSS-LIBEL—SECURITY BY RESPONDENTS.—*Whenever a cross-libel is filed upon any counterclaim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.*

See, particularly, notes 114–117, 283–287, 632, 764, post.

RULE 54. LIMITATION OF LIABILITY OF SHIPOWNERS—LIBEL OR PETITION.—*When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of shipowners and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the is-*

suing of the same; and public notice of such monition shall be given as in other cases, and such further notice reserved through the post office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

See notes 802–804, 812, 825, 842, post.

RULE 55. SAME—PROOF OF CLAIMS.—*Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the right of any person interested to question or controvert the name; and upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense), shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.*

See notes 802, 803, 823, 842, 848, post.

RULE 56. SAME—CONTEST OF LIABILITY.—*In the proceedings aforesaid the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that, in his their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.*

See notes 802, 803, 818, 821, 823, 835, 842, post.

RULE 57. SAME—PROCEEDINGS IN DISTRICT COURTS.—*The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.*

See notes 802, 803, 806, 823, 842, post.

RULE 58. SAME—PROCEEDING IN CIRCUIT COURTS.—*All the preceding rules and regulations for proceeding in cases where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of the United States where such cases are or shall be pending in said courts upon appeal from the District Courts.*

See note 803, post.

RULE 59. SAME—COLLISION CASES.—*In a suit for damage by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against in personam, shall, by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with sufficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.*

See, particularly, notes 68, 162, 163, 166, 173, 181, 313, 352, 719, post.

ADMIRALTY RULES FOR THE SECOND CIRCUIT, ADOPTED MAY 20, 1892, TO TAKE EFFECT ON JULY 1, 1892, AND READOPTED, WITH AMENDMENTS, OCTOBER 5, 1892

RULE 1. APPEALS AND NEW PLEADINGS.—*An appeal to the circuit court of appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice, signed by the appellant or his proctor, that the party appeals to the circuit court of appeals from the decree complained of.*

[*If the appellant desires to make new pleadings or take new evidence on the appeal, his notice of appeal must so state. If the notice does not so state,*] *the appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.*

The words in brackets were stricken out by amendment October 5, 1892.

RULE 2. NOTICE AND BOND.—*Section 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the district court a bond for costs of the appeal, with sufficient surety in the sum of $250, conditioned that the appellant shall prosecute his appeal to effect, and pay the costs if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.*

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the district court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residence of the sureties; and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

RULE 3. REVIEW IN PART ONLY.—*The appellant may also, at his option, state in his notice of appeal that he desires only to review one*

or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.

RULE 4. APOSTLES ON APPEAL TO CONTAIN.—*Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:*

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed; whether or not the defendant was arrested, or bail taken, or property attached or arrested, and, if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner or commissioners, and, if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree, and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners, to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal. [*And*

(8) The assignments of error.]

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

Sec. 3. Where the appellant shall appeal specially, and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

The words in brackets were added by amendment October 5, 1892.

RULE 5. CERTIFYING RECORDS.—*The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or, in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.*

RULE 6. IF APPEARANCE OF APPELLEE NOT ENTERED.—*If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.*

RULE 7. NEW ALLEGATIONS, ETC.—*Upon sufficient cause shown, this court, or any judge thereof, may allow either appellant or appellee to make new allegations, or pray different relief, or interpose a new defense, or take new proofs. Application for such leave must be made within fifteen days after the filing of the apostles, and upon at least four days' notice to the adverse party.*

See note 648, post.

RULE 8. NEW PLEADINGS—NEW TESTIMONY.—*If leave be granted to make new allegations, pray different relief, or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.*

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter testimony within twenty days after such filing.

RULE 9. NEW TESTIMONY—HOW TAKEN.—*Such testimony shall be taken by deposition before any United States commissioner or notary public, upon reasonable notice in writing given to the opposite party; or by commission issued out of this court, with interrogatories annexed. Upon proper cause shown, the court may grant an open commission.*

RULE 10. PRINTING NEW PLEADINGS AND TESTIMONY.—*If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d general rule provided.*

RULE 11. MOTIONS.—*All motions shall be made upon at least four days' notice.*

RULE 12. WRIT OF INHIBITION.—*A writ of inhibition may be awarded by this court on motion of the appellant, to stay proceedings in the court below, when circumstances require.*

RULE 13. MANDAMUS.—*A mandamus may, in like manner, be obtained, to compel a return of the apostles when unreasonably delayed by the clerk or court below.*

RULE 14. CASES TO BE PLACED ON DOCKET.—*Each case shall be placed on the docket as soon as the printing [of the apostles] is completed by the clerk.*

The words in brackets were added by amendment October 5, 1892.

RULE 15. BRIEFS.—*Section 1. Counsel for the appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, and shall, at the same time, serve two copies thereof on the proctors of record, or on the counsel engaged upon the opposite side. This brief shall contain, in order here stated:*

(1) A statement of the nature of the appeal, the court from which the appeal is taken, and a concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they were raised.

(2) If the pleadings have been amended in this court, or new proofs have been taken, it shall be stated what amendments have been made, and in what respect the new proofs have changed, or tended to change, the case as made in the court below.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the folios of the record or to the numbers of the questions, and the authorities relied upon in support of each point.

Sec. 2. The counsel for the appellee shall file with the clerk of the court ten printed copies of his brief, and serve two copies thereof at least ten days before the case is called for argument. His brief shall be of a like character with that required of the appellant, and, in case new proofs are taken on behalf of the appellee, the brief shall so state, and wherein the new proofs have changed the case as made in the court below.

Sec. 3. The reasonable expense of printing briefs shall be an item of taxable costs.

RULE 16. MANDATES.—*The decrees of this court shall direct that a mandate issue to the court below.*

RULE 17. EXTENSION OF TIME.—*The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.*

RULE 18. WHEN RULES OF DISTRICT COURTS TO APPLY.—*In all matters in civil causes of admiralty and maritime jurisdiction, not expressly provided for by the foregoing rules of this court, the rules of practice of the district court of the district in which the cause was decided, being in force at the time, (not being inconsistent with these rules,) will be adopted so far as may seem proper.*

[This rule was added by amendment October 5, 1892:]

RULE 19. WHAT GENERAL RULES SHALL BE DEEMED ADMIRALTY RULES.—*The following of the general rules of this court, and no others, shall be deemed admiralty rules, viz.: Rules 3, 4, 5, 6, 7, 9, 11, 12; section 4 of rule 14; rules 15, 16, 17, 18, 19, 20, 21, 22, 23; section 5 of general rule 24; rules 25, 26, 27, 28, 29; section 4 of rule 30; rules 31, 32, 34, and 36.*

The general rules above referred to are printed in the notes under § 1114, ante.

[The following announcement was made May 9, 1893:]

Hereafter the provision contained in subdivision 6 of section 1 of rule IV in admiralty, that "all opinions of the court, whether upon interlocutory questions or finally deciding the cause," shall be certified up with the apostles, must be strictly complied with, and such opinions must be printed.

ADMIRALTY RULES FOR THE NINTH CIRCUIT, ADOPTED MAY 21, 1900

RULE 1. APPEALS AND NEW PLEADINGS.—*An appeal to the circuit court of appeals shall be taken by filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor that the party appeals to the circuit court of appeals from the decree complained of.*

The appeal shall be heard on the pleadings and evidence in the district court, unless the appellate court, on motion, otherwise order.

This rule so far modifies rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in rule 4 of the Admiralty Rules. (Kenney v. Louie, No. 939. Motion to dismiss appeal denied, May 6, 1903.)

RULE 2. NOTICE AND BOND.—*Section 1. When a notice of appeal is served, the appellant shall file in the clerk's office of the district court a bond for costs of the appeal, with sufficient surety, in the sum of $250, conditioned that the appellant shall prosecute his appeal to effect and pay the costs, if the appeal is not sustained. Such security shall be given within ten days after filing the notice, or the appeal shall be deemed abandoned, and the decree of the court below enforced, unless otherwise ordered by a judge of this court.*

Sec. 2. And if the appellant desires to stay the execution of the decree of the court below, the bond which he shall give shall be a bond with sufficient surety in such further sum as the judge of the district court or a judge of this court shall order, conditioned that he will abide by and perform whatever decree may be rendered by this court in the cause, or on the mandate of this court by the court below.

Sec. 3. The appellant shall, on filing either of such bonds, give notice of such filing, and of the names and residences of the sureties, and if the appellee, within two days, excepts to the sureties, they shall justify, on notice, within two days after such exception.

RULE 3. REVIEW IN PART ONLY.—*The appellant may also, at his option, state in his notice of appeal that he desires only to review one or more questions involved in the cause, which questions must be clearly and succinctly stated; and he shall be concluded in this behalf by such notice, and the review upon such an appeal shall be limited to such question or questions.*

RULE 4. APOSTLES ON APPEAL TO CONTAIN.—*Section 1. The apostles, on an appeal to this court, shall, in cases where a general notice of appeal is served, consist of the following:*

(1) A caption exhibiting the proper style of the court and the title of the cause, and a statement showing the time of the commencement of the suit; the names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place; the several dates when the respective pleadings were filed, whether or not the defendant was arrested, or bail taken, or property attached, or arrested, and if so, an account of the proceedings thereunder; the time when the trial was had, and the name of the judge hearing the same; whether or not any question was referred to a commissioner, or commissioners, and if so, the result of the proceedings and report thereon; the date of the entry of the interlocutory and final decrees; and the date when the notice of appeal was filed.

(2) All the pleadings, with the exhibits annexed thereto.

(3) All the testimony and other proofs adduced in the cause.

(4) The interlocutory decree and any order of the court which appellant may desire to have reviewed on the appeal.

(5) Any report of a commissioner or commissioners to which exception may have been taken, with the order or orders of the court respecting the same, and the exceptions to the report, and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions.

(6) All opinions of the court, whether upon interlocutory questions or finally deciding the cause.

(7) The final decree, and the notice of appeal; and

(8) The assignments of error.

Sec. 2. All other papers shall be omitted unless otherwise ordered by the judge who heard the cause.

Sec. 3. Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal.

RULE 5. CERTIFYING RECORDS.—*The appellants shall, within thirty days after giving notice of appeal, procure to be filed in this court the apostles certified by the clerk of the district court, or in case of a special appeal, the stipulated record, with the certification by the said clerk of all papers contained therein on file in his office.*

See, also, general rule 17.

RULE 6. IF APPEARANCE OF APPELLEE NOT ENTERED.—*If the appellee does not cause his appearance to be entered in this court within ten days after service on his proctor of notice that the apostles are filed in this court, the appellant may proceed ex parte in the cause, and have such decree as the nature of the case may demand.*

RULE 7. NEW ALLEGATIONS, ETC.—*Upon sufficient cause shown, this court or any judge thereof, may allow either appellant or appellee to make new allegations or pray different relief, or interpose a new defense, or make new proofs. Application for such leave may be made at any time after the perfecting of the appeal to this court, and within fifteen days after the filing in this court of the apostles, and*

upon at least four days' notice to the adverse party or his attorney of record.

RULE 8. NEW PLEADINGS—NEW TESTIMONY.—*If leave be granted to make new allegations, pray different relief or interpose a new defense, the moving party shall, within ten days thereafter, serve such new pleading, duly verified, on the adverse party, who shall, if such pleading be a libel, within twenty days answer on oath.*

If leave be given to take new testimony, the same may be taken and filed within thirty days after the entry of the order granting such leave, and the adverse party may take and file counter-testimony within twenty days after such filing.

RULE 9. NEW TESTIMONY—HOW TAKEN.—*Such testimony shall be taken by deposition before the clerk of this court, or any United States commissioner, or any clerk of a district court of the United States, or any notary public, upon reasonable notice, in writing, given to the opposite party or his attorney of record, either in this court or in the court below, which notice must state the name or names of the witness or witnesses and the time and place of taking his or their deposition or depositions; or by commission issued out of this court with interrogatories annexed. Upon sufficient cause shown, the court may grant an open commission.*

RULE 10. PRINTING NEW PLEADINGS AND TESTIMONY.—*If new pleadings are filed or testimony taken in this court, the same shall also be printed and furnished by the clerk, as in the 23d general rule provided.*

RULE 11. MOTIONS.—*All motions shall be made upon at least four days' notice.*

RULE 12. EXTENSION OF TIME.—*The time specified in the foregoing rules for any proceeding may be extended by order of a judge of this court.*

These rules shall go into effect on the first Monday of October, 1900.

Notes of Decisions

II. Admiralty Procedure in General

(A) In general, 1-17.
(B) Remedies in personam and in rem, 18-132.
(C) Parties, 133-187.
(D) Process and appearance, 188-246.
(E) Tender and payment into court, 247-251.
(F) Custody and disposition of property pending suit or at termination thereof, 252-259.
(G) Bonds, stipulations, or other security, 260-288.
(H) Pleading, petitions, and motions, 289-388.
(I) Evidence, and taking and filing proofs, 389-423.
(J) Hearing or trial, and decision, 424-451.
(K) Commissioners and proceedings before them, 452-469.
(L) Decree, and enforcement thereof, 470-593.
(M) Appeal, 594-701.
(N) Costs, 702-796.
(O) Proceedings to limit liability of shipowner, 797-848.

(A) In General

1. Nature and source of admiralty law.
2. —— Application of equitable principles.
3. —— Local or state laws.
4. —— Foreign laws or usages.
5. —— Decisions of foreign courts.
6. General powers of admiralty courts.
7. Admiralty rules in general.
8. —— Power of supreme court.
9. —— Power of district courts.
10. —— Operation and effect of rules in general.
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12. —— Absence of rules.
13. Forms or technicalities.
14. Power of circuit courts.
15. Procedure in prize courts.
16. Maritime liens in general.
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The admiralty law cognizable in the federal courts is that of Great Britain. It is not the civil law of the Roman government. Woodruff v. The Levi Dearborne (C. C. 1811) Fed. Cas. No. 17,988.

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The federal courts are governed, in

commercial and maritime cases, by the general, and not by the local law. Mutual Safety Ins. Co. v. Cargo of The George (D. C. 1845) Fed. Cas. No. 9,981.

The district courts in admiralty are governed by the maritime code possessed before the Revolution, where not altered by law or by a change of circumstance. Thompson v. The Catharina (D. C. 1795) Fed. Cas. No. 13,-949.

In admiralty, it is not good practice to borrow from the other branches of the law merely for the exigencies of one situation, a different mode of procedure from that ordinarily used which will conduce to confusion rather than uniformity of practice. Foster v. Compagnie Française de Navigation à Vapeur (D. C. 1914) 219 Fed. 351.

2. —— **Application of equitable principles.**—A court of admiralty is not bound by the rigid rules of the common law but deals with causes on equitable principles and according to the rules of natural justice. Toledo S. S. Co. v. Zenith Transp. Co. (1911) 184 Fed. 391, 106 C. C. A. 501; Brown v. Burrows (D. C. 1837) Fed. Cas. No. 1,995. See, also, The Harriet (D. C. 1845) Fed. Cas. No. 6,096.

Courts of admiralty, so far as their powers extend, act as courts of equity. Brown v. Lull (C. C. 1836) Fed. Cas. No. 2,018.

While a court of admiralty is often spoken of as one of equity, the phrase means no more than that equitable principles are applied to the solution of matters of maritime jurisprudence, and not that an admiralty court may draw within its jurisdiction matters primarily of nonmaritime cognizance. United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line (D. C. 1910) 180 Fed. 902, decree affirmed (1911) 185 Fed. 386, 107 C. C. A. 442.

3. —— **Local or state laws.**—See, also, notes under § 1537, post.

United States district courts having jurisdiction of a contract, as a maritime one, can, under admiralty rule 12, enforce liens given for its security by state laws. Haritwen v. The Louis Olsen (D. C. 1892) 52 Fed. 652, decree reversed Olsen v. Haritwen (1893) 57 Fed. 845, 6 C. C. A. 608, and following the Lottawanna (1874) 21 Wall. 558, 22 L. Ed. 654.

4. —— **Foreign laws or usages.**—Suits brought in admiralty for causes arising abroad should be tried according to the practice and principles of the courts of admiralty of this country, wholly irrespective of any local law. The Eagle v. Fraser (1868) 75 U. S. (8 Wall.) 15, 19 L. Ed. 365.

The maritime usages of foreign countries are not obligatory upon the courts of the United States, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence. The Elfrida (1898) 19 Sup. Ct. 146, 152, 172 U. S. 186, 43 L. Ed. 413.

Where libels were filed by material men against a foreign vessel that had been repaired in a port of this country, the claims of the different libelants adjudicated on, and the vessel sold to satisfy the same, on a petition of intervention, presented, by the master and seamen, for the purpose of establishing the priority of their respective liens, the maritime law of this country must govern and that, under it, the master has no lien on the vessel, as against material men, for wages or advances. The Graf Klot Trautvetter (D. C. 1881) 8 Fed. 833.

As respects liens arising on contracts made within this jurisdiction by the master of a foreign vessel, and the priorities of such liens in respect to all the claims on the ship, our law, as the law of the place of contract, as well as of the forum, should prevail. The Olga (D. C. 1887) 32 Fed. 329.

If an English vessel, while in an English port, receives advances which, by the laws of England, constitute the advancer a lien claimant, it will become the duty of an American court, upon the arrest of the vessel, to administer and apply, as against her or her proceeds, the law of England exactly as it would be applied, under like circumstances, in an English court. The circumstance that no lien would be created by the American law, under like conditions, is inmaterial. The Maud Carter (D. C. 1886) 29 Fed. 156.

Though the English law gives no lien for supplies, this does not affect the application of the general maritime law to British vessels in other countries, nor abridge the authority of British masters to obtain necessary supplies by simple contracts in foreign ports where the law creates a lien, nor prevent such lien from attaching. The Scotia (D. C. 1888) 35 Fed. 907.

When liens are enforced against an Italian vessel, the provisions of the Italian Code should be observed, by comity, in respect to the claims of those on board, as among themselves. The Olga (D. C. 1887) 32 Fed. 329.

The case of a French seaman for wages on a French vessel will be determined by the marine law of France. Moran v. Baudin (D. C. 1788) Fed. Cas. No. 9,785.

5. —— **Decisions of foreign courts.**—It is essential to the effectiveness of the international navigation rules that there should be close conformity between the admiralty courts of England and the United States in the interpretation of such rules, and for that reason, as well as because of the eminent ability of the judges composing them,

the admiralty decisions of the higher English courts are given high consideration as precedents by the admiralty courts of the United States. The Gov. Ames (1910) 187 Fed. 40, 109 C. C. A. 94, writ of certiorari denied Smith v. Davis (1911) 32 Sup. Ct. 525, 223 U. S. 725, 56 L. Ed. 631.

Our courts of admiralty are not bound by the decision of a foreign court, not of admiralty, based on different principles than those here recognized, and leading to a different result, though professedly deciding according to our law. Lang v. Holbrook (D. C. 1838) Fed. Cas. No. 8,057. But where a reciprocity of decision in certain cases in admiralty is necessary, the court of one country is often guided by the customs, laws, and decisions of the tribunals of another in similar cases. Thompson v. The Catharina (D. C. 1795) Fed. Cas. No. 13,949.

6. General powers of admiralty courts.—The admiralty courts may proceed, under their general powers, in every case in which they are not restricted by statute. U. S. v. The Little Charles (C. C. 1819) Fed. Cas. No. 15,613. And a suit in admiralty will be conducted, tried, and decided according to the usage and practice of that court, though jurisdiction is dependent upon a local law. Boon v. The Hornet (D. C. 1841) Fed. Cas. No. 1,640.

The admiralty creates its own forms of proceeding. The Epsilon (D. C. 1873) Fed. Cas. No. 4,506.

Powers as ample as legislation can give are conferred by law on the district court in cases of admiralty and maritime jurisdiction as to the forms and modes of proceeding, and such alterations or additions thereto as the said courts shall in their discretion deem expedient. The expression "modes of proceeding," as used in this section, embraces the whole progress of the suit and every transaction in it. The Hudson (D. C. 1883) 15 Fed. 162, 175, 176.

7. Admiralty rules in general.—The authority of a court of admiralty, under the statutes and rules of court, to regulate its practice, as is fit and necessary for the advancement of justice, is a power held in trust for the benefit of litigants, and it is the duty of the court to exercise it in proper cases, by adapting its procedure to the practical needs of justice. The Alert (D. C. 1889) 40 Fed. 836, 838.

The practice of the federal courts in admiralty is governed by the rules of admiralty law found in the English Reports. U. S. v. Seven Hundred and Three Casks of Rice (D. C. 1862) Fed. Cas. No. 16,253b.

8. —— Power of supreme court.—The supreme court has power to regulate the practice of the courts of admiralty, and to frame rules in relation to execution, and other process to be used therein. The St. Lawrence (1861) 66 U. S. (1 Black) 522, 17 L. Ed. 180; Ward v. Chamberlin (C. C. 1860) Fed. Cas. No. 17,152; Bailey v. Sundberg (C. C. 1892) 49 Fed. 583, 585, 1 C. C. A. 387.

9. —— Power of district courts.—The district courts in admiralty, in the absense of action by the supreme court, will devise modes of proceeding to enable them to carry into effectual execution any law which they are called upon to administer. The Epsilon (D. C. 1873) Fed. Cas. No. 4,506; The Hudson (D. C. 1883) 15 Fed. 162.

Powers as ample as legislation can give are conferred by law in the district court in cases of admiralty and maritime jurisdiction as to the forms and modes of proceeding, and such alterations or additions thereto as the said courts shall in their discretion deem expedient. The expression "modes of proceedings" embrace the whole progress of the suit and every transaction in it. The Hudson (D. C. 1883) 15 Fed. 162, 175.

10. —— Operation and effect of rules in general.—The rules in admiralty are not to be regarded as restrictive, but as enumerative of the more common remedies. Gates v. Johnson (C. C. 1857) Fed. Cas. No. 5,268.

A rule of practice established by virtue of an act of congress has the force of a statute. Scott v. The Young America (D. C. 1856) Fed. Cas. No. 12,550.

The admiralty rules of a district court provided that, "where a number of days is limited by these rules, juridical days only shall be understood, and the computation shall be by including one and excluding one." Held, that the rules were not concerned with the juridical character of any other days than those that begin and end a period. The Mary B. Baird (D. C. 1899) 97 Fed. 977.

11. —— Effect on jurisdiction.—The admiralty rules prescribed by the supreme court relate merely to the remedy, and were not intended to affect jurisdiction. In re Kirkland (D. C. 1873) Fed. Cas. No. 7,842.

12. —— Absence of rules.—In the absence of rules specially prescribed, the practice of the court will govern as to notice and appeal bonds. Otis v. Rio Grande (C. C. 1870) Fed. Cas. No. 10,614.

13. Forms or technicalities.—A court of admiralty is not restrained from doing substantial justice by mere forms or technicalities. Dexter v. Munroe (D. C. 1861) Fed. Cas. No. 3,863. It is even more free from technical rules than a court of equity. Richmond v.

New Bedford Copper Co. (D. C. 1874) Fed. Cas. No. 11,800.

14. Power of circuit courts.—Under Act May 17, 1848 (9 Stat. 220), conferring concurrent jurisdiction on the circuit and district courts for violations of the provisions relative to food allowance of passengers, it was held that the practice must be in accordance with the procedure at common law, and not according to the admiralty procedure, as the circuit court had no original admiralty jurisdiction. McAfee v. The Creole (D. C. 1851) Fed. Cas. No. 8,655.

15. Procedure in prize courts.—The rules of practice in admiralty are the basis of practice in prize in our national courts. The Wave (D. C. 1862) Fed. Cas. No. 17,298.

In the absence of instructions of the sovereign, the rules of decision of prize courts are to be ascertained by reference to the known powers of such tribunals, and the principles by which they are governed under the public law and the practice of nations. The Amy Warwick (D. C. 1862) Fed. Cas. No. 341.

The practice in prize proceedings is governed by the English practice, where not regulated by decisions or rules of our courts. The Prince Leopold (D. C. 1861) Fed. Cas. No. 11,428.

Common-law principles and rules of evidence cannot be applied in a prize court. The Tulip (C. C. 1812) Fed. Cas. No. 14,234.

But the rules of the prize court, as to the vesting of property, are the same as those at common law. The St. Joze Indiano (1816) 14 U. S. (1 Wheat.) 208, 4 L. Ed. 73, affirming The San Jose Indiano (C. C. 1814) Fed. Cas. No. 12,322.

16. Maritime liens in general.—Maritime liens for supplies and repairs are of ancient origin, and were recognized both in England and on the continent to bind both foreign and domestic vessels. Both have generally been bound upon the continent, and also by the admiralty law of England, but such law was denied enforcement by writs of prohibition from the English common-law courts in the case of foreign and domestic vessels alike. In the American admiralty law there has been a general tendency to hold a vessel liable for her repairs and supplies, unless the owner, to the knowledge of the furnisher, has declined to allow the lien. This general and imperfectly developed rule is subject to exceptions, presumptions, and counter presumptions. Where the owner, to the knowledge of the furnisher at the time of supply, refuses to allow the lien to arise, it does not exist or is deemed to be waived. The Underwriter (D. C. 1902) 119 Fed. 713.

See § 7783, post, and notes thereunder.

17. Proctors.—Without regard to that distinction, courts proceeding according to the civil law admit proctors to exercise all the functions of attorneys at law. The proctor is, in many cases, in point of fact, dominus litis, clothed with all the authority of the party himself. The Harriet (D. C. 1845) Fed. Cas. No. 6,096.

(B) Remedies in personam and in rem

18. Mode and form of procedure in general.
19. Cumulative remedies.
20. —— Breach of contract of carriage.
21. —— Salvage services.
22. —— Supplies.
23. —— Contracts for transportation.
24. —— Recovery of freight.
25. —— Torts in general.
26. —— Collision.
27. —— Wrongful death.
28. Choice of remedies.
29. Election of remedies.
30. Waiver of remedy.
31. What are proceedings in personam in general.
32. Proceedings which must be in personam.
33. —— Assaults.
34. Grounds for proceedings in personam.
35. —— Breach of contract.
36. —— Salvage.
37. —— Supplies.
38. —— Recovery of wages.
39. —— Liability of city.
40. —— Enforcement of right of action given by state statute.
41. Essentials and characteristics of proceedings in rem.
42. —— Property in district.
43. —— Actual seizure or custody of property.
44. —— Interpleader.
45. Conditions precedent to maintenance of suit in rem.
46. Submission to arbitration.
47. Grounds of proceedings in rem.
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65. —— Joint liability.
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72. —— Concurrent proceedings.
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76. — Joint and several liabilities in general.
77. — Several breaches of contract.
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79. — Salvage claims.
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81. — Breaches of contract of affreightment and breach of agreement to insure.
82. — Claim for advances and proceeding on bottomry bond.
83. — Claims for cod bounty and for share of fish taken.
84. — Claims for damages to goods shipped and for breach of warranty of seaworthiness.
85. — Claims for penalty and for damages.
86. — Claims for penalty and for prize.
87. — Claims for wages and for money advanced.
88. Defenses in general.
89. — Contributory negligence.
90. — Assumption of risk.
91. — Res judicata.
92. — Settlement.
93. — Stipulations to abide by result of another suit.
94. Place of bringing suit.
95. Premature commencement of suit.
96. — Completion or sale of vessel.
97. — Completion of undertaking or performance of services.
98. — Credit given or evidence of indebtedness taken.
99. — Ground for dismissal.
100. — Objections and waiver thereof.
101. Laches and stale demands.
102. — What constitutes laches in general.
103. — Effect of absence of persons or res.
104. — Effect of institution or pendency of other proceeding.
105. — Effect of transfer on incumbrance of property.
106. — Enforcement of liens.
107. — Following statutes of limitations.
108. — Pleading.
109. Pendency of other proceedings.
110. — Action in another court.
111. — Objections.
112. Set-off, counterclaim, and cross-suit.
113. — Enforcing claim for contribution.
114. — Cross-action or libel.
115. — Cross-libel to obtain affirmative damages.
116. — Election between cross-libel and other methods of asserting claim.
117. — Election between cross-libel and independent action elsewhere.
118. Consolidation of actions.
119. Severance of actions.
120. Stay of proceedings.
121. — Pending suit in another court.
122. — Pending determination of cross-suit.
123. — Proceedings against nonresidents.
124. Dismissal.
125. — Voluntary discontinuance or dismissal.
126. — Dismissal for want of jurisdiction.
127. — Dismissal for delay in or want of prosecution.
128. — Dismissal in order to use party as witness.
129. — Dismissal without prejudice.
130. — Effect on cross-libel.
131. — Effect of dismissal of cross-libel.
132. — Time of moving to dismiss.

18. Mode and form of procedure in general.—A libel on a seizure is an information; consequently, where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction to which it otherwise belongs. The Samuel (1816) 14 U. S. (1 Wheat.) 9, 4 L. Ed. 23.

The demand of the shipowners for freight and general average in a case of civil salvage is to be pursued against that portion of the proceeds of the cargo which is adjudged to the owners of the goods by a direct libel or petition, not by a claim interposed in the salvage cause. The Sybil (1819) 17 U. S. (4 Wheat.) 98, 4 L. Ed. 522.

The question of the right to sue ship or freight or master or owner for supplies or repairs does not depend on the twelfth rule, but on the general admiralty and maritime law. The Eledona (D. C. 1867) Fed. Cas. No. 4,340.

While a court of admiralty has jurisdiction of a libel in rem against a vessel for damages caused by its negligently running into a beacon fixed in the channel, all the rules of admiralty proceedings are applicable in such suit. The Margaret Thomas (D. C. 1910) 183 Fed. 336.

When either the circuit or district court of the United States is named in an act of congress imposing a duty, or giving a remedy, without special designation of its mode of procedure, the just intendment is in favor of the common-law forms, though the subject-matter referred to be a maritime tort or contract. McAfee v. The Creole (Pa. 1850) 8 Leg. Int. 82.

19. Cumulative remedies.—The right of the admiralty to proceed in rem is cumulative, in many cases, and does not exclude the remedy in personam. A party, however, can have only one satisfaction. Brevoor v. The Fair American (D. C. 1800) Fed. Cas. No. 1,847.

The common-law rule that a statutory remedy which does not negative the remedy at common law is cumulative is applicable to remedies under the maritime law. The Waverly (D. C. 1877) Fed. Cas. No. 17,301. So one having a cause of action in rem against a ship for an injury is at liberty to pursue his remedy against the offending vessel, rather than against the owners. The Slingsby (D. C. 1902) 116 Fed. 227, decree affirmed (1903) 120 Fed. 748, 57 C. C. A. 52, and writ of certiorari denied Whalley v. Travers (1903) 23 Sup. Ct. 849, 188 U. S. 741, 47 L. Ed. 678.

20. — Breach of contract of carriage.—Where the contract for the carriage of a passenger is broken by the interruption of the voyage, he has an action in rem, as well as in personam, to recover back passage money paid

or damages. Stone v. The Relampago (D. C. 1849) Fed. Cas. No. 13,486.

21. —— **Salvage services.**—Suits for salvage may be in personam or in rem (see rule 19). The Centurion (D. C. 1839) Fed. Cas. No. 2,554; Hudson v. Whitmire (D. C. 1896) 77 Fed. 843; Spaulding v. Alaska Commercial Co. (1902) 1 Alaska, 497.

22. —— **Supplies.**—Under the twelfth rule, one who furnishes supplies, etc., to a vessel, domestic or foreign, may proceed in rem against the vessel, or in personam against her master or owner. The Circassian (D. C. 1872) Fed. Cas. No. 2,720a.

23. —— **Contracts for transportation.**—The holder of a bill of lading has a remedy in admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel in rem, where the goods shipped on board are not delivered. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

The jurisdiction of admiralty of contracts for transportation of passengers by sea may be exercised both in rem and in personam. Marshall v. Bazin (D. C. 1849) Fed. Cas. No. 9,125.

24. —— **Recovery of freight.**—An action for the recovery freight lies in admiralty in favor of the master of a ship against the consignee of cargo, equally in personam and in rem. Thatcher v. McCulloh (D. C. 1846) Fed. Cas. No. 13,862.

25. —— **Torts in general.**—Proceedings in admiralty may be prosecuted for marine torts in rem and in personam. Arthur v. The Cassius (C. C. 1841) Fed. Cas. No. 564; McGrath v. Candalero (D. C. 1794) Fed. Cas. No. 8,810; British Consul v. Thompson (D. C. 1799) Fed. Cas. No. 1,899.

26. —— **Collision.**—A libel for collision cannot be brought against a vessel in rem and her owner in personam, unless her owner is also master. The Richard Doane (D. C. 1868) Fed. Cas. No. 11,765. But where a structure lawfully created in the navigable bed of a river is injured by a collision caused by the negligent management of a vessel, the owner of such structure may proceed in admiralty in personam against the owners of the vessel, or in rem against the vessel itself. The Arkansas (D. C. 1883) 17 Fed. 383.

27. —— **Wrongful death.**—The process to enforce the remedy in admiralty for a wrong done or injury incurred by the death of a person may be either in rem or in personam. The Sea Gull (C. C. 1865) Fed. Cas. No. 12,578.

28. **Choice of remedies.**—One having a cause of action in rem against a ship for an injury is at liberty to pursue his remedy against the offending vessel, rather than against the owner. The Slingsby (D. C. 1902) 116 Fed. 227, affirmed (1903) 120 Fed. 748, 57 C. C. A. 52.

29. **Election of remedies.**—Where materialmen have proceeded under the twelfth rule against the vessel instead of the master, such election does not destroy their right to proceed against the master for the same debts. The Felice B. (D. C. 1889) 40 Fed. 653, distinguishing The Aina, Id. 269. But a party who sets up an admiralty lien which fails cannot set up and rely upon a common-law or statutory lien. Taylor v. Commonwealth (C. C. 1875) Fed. Cas. No. 13,787, reversing (D. C. 1874) Fed. Cas. No. 13,788.

30. **Waiver of remedy.**—The taking of personal security is a waiver of the remedy in admiralty, but, if the security is returned, the liability in personam may be enforced by citation or arrest. Marshall v. Bazin (D. C. 1849) Fed. Cas. No. 9,125.

31. **What are proceedings in personam in general.**—Where property had been acquired by agents with full notice of libelant's claim, and on its arrest they intervened by stipulation and answer, the suit might be treated as one in personam against them. Reed v. Hussey (D. C. 1836) Fed. Cas. No. 11,646.

When a cause as instituted is one in rem, and the process directs the seizure of the res only, that the marshal treats the cause as a personal action, and serves the owner with process in the usual form, does not make the suit one in personam. The L. B. X. (D. C. 1898) 88 Fed. 290.

The giving of a bond to release a vessel, under section 1567, post, does not convert the proceeding in rem into a proceeding in personam. Thompson v. The J. D. Morton (1858) 8 Ohio St. 222.

32. **Proceedings which must be in personam.**—A cause of possession, civil and maritime, must be conducted as a proceeding in personam. Blanchard v. The Cavalier (D. C. 1857) Fed. Cas. No. 1,508.

33. —— **Assaults.**—Under rule 16, actions for damages for assaults must be brought in personam, and not in rem. Smith v. The Challenger (1885) 2 Wash. T. 447, 7 Pac. 851.

34. **Grounds for proceedings in personam.**—Where, before the institution of a suit in rem, the thing proceeded against in the libel had been deposited with or acquired by agents, with full notice to them of the libelant's claim upon it, and on its arrest the agents intervened in the suit by stipulation, and answered the libel at large, the suit could be treated as in personam against them. Reed v. Hussey (D. C. 1836) Fed. Cas. No. 11,646.

In an action against a vessel the court cannot take cognizance of collateral equities to enforce them against parties personally. Hence, in an action

by a seaman to recover wages, he cannot be compelled to apply towards his wages a sum in his hands, remaining after the sale of a part of the cargo belonging to claimants thereof. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

35. —— **Breach of contract.**—The holder of a bill of lading has a remedy in admiralty against the master on his undertaking, or personally against the owners of the vessel, where the goods shipped on board are not delivered. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

36. —— **Salvage.**—Where the property is delivered by the salvors to the owners, before a compensation for saving them is made, the salvors may maintain a libel in personam for the salvage. The Emblem (D. C. 1840) Fed. Cas. No. 4,434.

A libel in personam may be maintained in admiralty to recover money awarded to respondent for salvage services by a court without jurisdiction to make such award. American Ins. Co. v. Johnson (D. C. 1827) Fed. Cas. No. 303.

A suit in admiralty in personam will lie against the owner of a ship in favor of a shipper who paid salvage to wreckers with whom the master had fraudulently concerted to strand his vessel. Church v. Shelton (C. C. 1855) Fed. Cas. No. 2,714. But an action for compensation for salvage services rendered to a vessel cannot be maintained in personam against the master unless it was performed for his benefit. Miller v. Kelly (D. C. 1849) Fed. Cas. No. 9,577. The rights acquired by the salvors are only in rem, to be paid by the property. They have no claim in personam against the owners, if they choose to abandon the goods. The Emblem (D. C. 1840) Fed. Cas. No. 4,434.

Under rule 19 of the supreme court, in admiralty, an action for salvage may be maintained against the person upon whose request and for whose benefit the service is performed. The request may be implied as well as expressed. Baxter v. Heilner (D. C. 1889) 38 Fed. 668.

Under the general admiralty law (which is not limited in this respect by admiralty rule 19), a salvor of property which has been taken from his possession by replevin in a state court may maintain a suit in personam against the owner to recover salvage compensation. Hudson v. Whitmire (D. C. 1896) 77 Fed. 846.

37. —— **Supplies.**—Under rule 12 of 1845, the admiralty courts held to have no jurisdiction over suits in personam brought by materialmen to enforce payment of their claims for supplies furnished at the home port. Merritt v. Sackett (D. C. 1849) Fed. Cas. No. 9,484.

38. —— **Recovery of wages.**—A master may maintain a suit in personam in the admiralty for wages, or for compensation in the nature of wages. Hammond v. Essex Fire & Marine Ins. Co. (C. C. 1826) Fed. Cas. No. 6,001.

39. —— **Liability of city.**—The exemption of property belonging to a city (such as ice boats, fire boats, or bath houses) from seizure in rem will not relieve the city from liability to an action in personam for injuries caused by the persons in charge of such property. Workman v. City of New York (1900) 21 Sup. Ct. 212, 179 U. S. 552, 45 L. Ed. 314 (reversing decree City of New York v. Workman [1895] 67 Fed. 347, 14 C. C. A. 530); The F. C. Latrobe (D. C. 1886) 28 Fed. 377; Tebo v. New York (D. C. 1894) 61 Fed. 692.

40. —— **Enforcement of right of action given by state statute.**—A state statute will not enable an administrator to maintain an action in the district court for a personal tort committed on the high seas. Crapo v. Allen (D. C. 1849) Fed. Cas. No. 3,360.

Where a state law merely gives a right of action in personam for a cause of action of a maritime nature, the district court may administer the law by proceedings in personam. City of Norwalk (D. C. 1893) 55 Fed. 98, 104, affirmed (1894) 61 Fed. 364, 9 C. C. A. 521.

41. **Essentials and characteristics of proceedings in rem.**—A court of admiralty can only proceed in rem against the thing itself, or quasi in rem against the proceeds thereof. Carson v. Jennings (C. C. 1804) Fed. Cas. No. 2,464, affirmed in (1807) 8 U. S. (4 Cranch) 2, 2 L. Ed. 531.

All maritime contracts made by the master within the scope of his authority as master under the maritime law per se hypothecate the ship, and performance in whole or in part does not affect the character of the proceeding, whether in rem or in personam. The Williams (C. C. 1873) Fed. Cas. No. 17,710.

An action by a seaman for wages is not divested of its character as a proceeding in rem merely because the attachment was levied on the remnants of the vessel after the same had been adjudicated at public auction to a third person with notice. Reed v. Hussey (D. C. 1836) Fed. Cas. No. 11,646.

Where property in the hands of a third person is arrested, on a claim to a specific lien upon it, that constitutes the suit a suit in rem, whether the third person holds the property as owner of it in his own right or as trustee of the debtor. Id.

A libel in rem may be a proceeding against the property by arrest or attachment. Snow v. 180¾ Tons of Scrap Iron (D. C. 1882) 11 Fed. 517.

Waiver of objection to form of pro-

ceeding, see The Monte A. (D. C. 1882) 12 Fed. 331.

A proceeding in rem is one in which the thing—the property seized—is itself sued instead of a sentient person, and in which, the property itself being sued, its owner is not recognized until he comes in, claims, and defends. The J. W. French (D. C. 1882) 13 Fed. 916. It is a proceeding to give effect to a maritime lien arising either ex contractu or quasi ex contractu, or ex delicto or quasi ex delicto. Beane v. Mayurka (C. C. 1854) Fed. Cas. No. 1,175.

The ordinary mode of enforcing a lien upon a ship is by a proceeding in rem in admiralty; but where chancery has the administration of the fund arising from a sale of the ship, it will settle such a claim for lien. American Ins. Co. v. Coster (N. Y. 1832) 3 Paige, 323.

42. —— **Property in district.**—The court has no jurisdiction of a libel, where, at the time of the service of the warrant of arrest, the vessel was without the limits of the district. Pinckney v. The Hungaria (C. C. 1890) 42 Fed. 510.

As the territorial limits of a federal court's jurisdiction in civil causes in admiralty are confined to the territorial limits of the judicial district, its civil process does not run to that frontier or belt of water recognized by the law of nations as under the control of the littoral owner, for purposes of revenue and defense. For the purposes of a libel in rem, a vessel cannot be considered to be constructively in port, within the court's jurisdiction, though it did not clear when it left port. The arrest of a vessel by a marshal at a place outside of the coast line is void even where that line is ascertained by drawing a line between the most prominent headlands, as the civil process in admiralty cannot issue outside of the territorial limits of the district. When a vessel is outside the territorial limits of a court's civil process, the court cannot obtain jurisdiction of it, for the purposes of a libel in rem, by the consent or stipulation of the master. The Hungaria (D. C. 1889) 41 Fed. 109.

Rule 23, requiring the libel in rem to state that the property is in the district, does not prevent jurisdiction of a vessel which, being within the district at the time the libel is verified, departs before it is filed, but, returning after the filing, is then seized on alias monition. Pacific Coast S. S. Co. v. Bancroft-Whitney Co. (1899) 94 Fed. 180, 36 C. C. A. 135 (affirming decree The Queen [D. C. 1896] 78 Fed. 155); The Queen of the Pacific (D. C. 1894) 61 Fed. 213.

That a vessel was out of the jurisdiction when the libel was filed is immaterial when the attachment was served on the vessel within the district. Kelsey v. The William Kallahan (D. C. 1852) Fed. Cas. No. 7,680.

43. —— **Actual seizure or custody of property.**—In a suit in rem against a vessel an actual seizure is necessary to confer jurisdiction over the vessel. Bruce v. Murray (1903) 123 Fed. 366, 59 C. C. A. 494; Brennan v. The Anna P. Dorr (D. C. 1880) 4 Fed. 459. But see Jones v. The Richmond (D. C. 1858) Fed. Cas. No. 7,492, holding that an action in rem may be brought in admiralty, without arrest of the property proceeded against, or its presence within the territorial jurisdiction, and that in such a case, unless the want of jurisdiction is patent on the libel, the personal appearance of defendant by stipulation and answer, without protest, demurrer, or plea to the jurisdiction, is equivalent to attachment of the property.

The court has no jurisdiction of a cross libel in rem in a collision case, without a seizure of the vessel within the district. The Bristol (D. C. 1870) Fed. Cas. No. 1,889.

It is not essential to the jurisdiction of the court on a libel for collision that the marshal should continuously retain the vessel in his custody. The E. W. Gorgas (D. C. 1879) Fed. Cas. No. 4,585.

44. —— **Interpleader.**—On a libel in personam against a subcharterer to recover freight, it would be permissible to allow respondent, on petition, to pay the freight money into court to abide the decision of a contest between the owner and charterer as to a claim for demurrage in which he is not interested, and to enjoin the suit against him, though by so doing the proceeding would be turned into one in rem against the freight. Copp v. De Castro & Donner Sugar Refining Co. (D. C. 1875) Fed. Cas. No. 3,215.

45. **Conditions precedent to maintenance of suit in rem.**—A libelant is not entitled to maintain a suit in rem in admiralty against a vessel without first paying the costs adjudged against him in an action at law previously brought by him on substantially the same cause of action against the claimant. The President (D. C. 1914) 213 Fed. 121.

46. **Submission to arbitration.**—There is nothing in the nature of the admiralty jurisdiction, or of an appeal in admiralty, which prevents parties in that court, whether sitting in prize or as an instance court, from submitting their case by rule of the court to arbitration, or which varies the effect to be given to such award from that to be given it in any other court. Such award is to be governed by the same general principles which would govern it in a court of common law or of equity. U. S. v. Farragut (1874) 89 U. S. (22 Wall.) 406, 22 L. Ed. 879.

Validity of submission to arbitration in salvage case, see The North Carolina (1841) 40 U. S. (15 Pet.) 40, 10 L. Ed. 653; Church v. Seventeen Hundred

and Twelve Dollars (D. C. 1853) Fed. Cas. No. 2,713.

47. Grounds of proceedings in rem.—A libel in rem against a deposit of freight money will lie to enforce a lien thereon for money borrowed from a bank under an agreement that the freight should stand pledged for its repayment. Bank of British North America v. Freights, etc., of the Ansgar (1905) 127 Fed. 859, C. C. A. decree affirmed Same v. Freights, etc., of the Hutton (1905) 137 Fed. 534, 70 C. C. A. 118.

48. —— Breach of contract.—A contract between the owners of two steamers to use the vessels in connection for the transportation of freight and passengers cannot be enforced in admiralty by a proceeding in rem. Vandewater v. Mills (1856) 60 U. S. (19 How.) 82, 15 L. Ed. 554. And see Vandewater v. The Yankee Blade (C. C. 1855) Fed. Cas. No. 16,847.

A contract to sail a vessel in co-partnership for a share of the earnings affords no remedy in rem for wages. Milne v. The John Cook (D. C. 1844) Fed. Cas. No. 9,617a.

A libel in rem cannot be maintained for the breach of a charter party or contract of affreightments, where the voyage was not undertaken, and no part of the cargo taken on board. The remedy for such a breach is against the parties personally. The Margaretha (1909) 167 Fed. 794, 93 C. C. A. 184; The City of Baton Rouge (C. C. 1883) 19 Fed. 461; Forices v. The Winged Racer (D. C. 1858) Fed. Cas. No. 14,102; Salzobel v. The Rolling Wave (D. C. 1863) Fed. Cas. No. 12,274; The General Sheridan (D. C. 1868) Fed. Cas. No. 5,319; The Monte A. (D. C. 1882) 12 Fed. 331; The J. F. Warner (D. C. 1883) 22 Fed. 342; The Missouri (D. C. 1887) 30 Fed. 384. The cargo must be actively or constructively in the possession of the vessel. Salzobel v. The Rolling Wave (D. C. 1863) Fed. Cas. No. 12,274. Nor will the fact that the charter party contains an express covenant binding the vessel to the merchandise and the merchandise to the vessel make any difference in her liability. The General Sheridan (D. C. 1868) Fed. Cas. No. 5,319. But see The Flash (D. C. 1847) Fed. Cas. No. 4,857, holding that a libel in rem would lie for the refusal to receive on board, and the refusal to deliver cargo contracted by the master to be taken from N. to B. Nor will a libel in rem lie for breach of an executory contract, whereby the libelant was to charter the vessel for the transportation of property. The Pauline (D. C. 1863) Fed. Cas. No. 10,848. Nor for a breach of an executory contract to carry a passenger on a particular vessel, where the vessel has never entered on the performance thereof. The Eugene (D. C. 1897) 83 Fed. 222. CONTRA, The Pacific (C. C. 1850) Fed. Cas. No. 10,643.

But where the contract for the carriage of a passenger is broken by the interruption of the voyage, an action in rem (as well as in personam) will lie to recover back passage money paid or damages. Stone v. The Relampago (D. C. 1849) Fed. Cas. No. 13,486.

A suit in rem will not lie against a vessel for breach of a contract made by the master for the sale and delivery of merchandise, which was not for the benefit of the vessel nor in aid of her navigation. The Pleroma (D. C. 1909) 175 Fed. 639.

An agreement by a carrier to insure cargo, where it is one of the elements of a properly maritime contract of affreightment, may be proved in admiralty and damages recovered for its breach in a suit for other breaches of the contract. Nash v. Bohlen (D. C. 1909) 167 Fed. 427.

The holder of a bill of lading has a remedy in admiralty against the master in his undertaking, or against the vessel in rem, where the goods shipped on board are not delivered. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

A libel in rem may be maintained for damages to a cargo of grain caused by deviation in violation of a condition that no other cargo should be taken, and that the vessel should proceed directly to its destination. Knox v. Ninetta (D. C. 1844) Fed. Cas. No. 7,912.

Where the possession of movable property has been changed, against the right of the true owner, by a maritime tort, or by the breach of a maritime contract, to which the property was subject, the owner may vindicate his title in admiralty by a proceeding in rem. Five Hundred and Twenty-Eight Pieces of Mahogany (D. C. 1874) Fed. Cas. No. 4,845.

Where libelant hired a barge for storage and transportation of grain of the master, who agreed to keep the barge in repair, libelant may maintain a libel in rem for damages to the grain resulting from the master's failure to make repairs. Wood v. The Wilmington (D. C. 1880) 48 Fed. 566.

A tug, then in Philadelphia, contracted to proceed to New York, and tow the bark Francesco from that port to Philadelphia. The tug started to New York with another tow, but abandoned it to go to the rescue of a capsized schooner, and returned with that to Philadelphia. Held, that it had not entered upon performance of the towage contract with the Francesco, which was wholly executory, and hence that a suit in rem against it could not be maintained for breach of such contract. The Francesco (D. C. 1902) 116 Fed. 83.

Where a steamer under a time char-

ter on arriving at a Cuban port, where she was to take on a load of fruit, at once commenced to clean her boilers, which work was completed in less than the usual time, but, before that time expired, she had been loaded by a shipper, and it was discovered on her arrival at such port that there was an error in one of her clearance papers requiring her to go to another port before she could clear for the return voyage, and, when she arrived at her destination, the fruit was overripe, the delay was not due to any fault chargeable to the ship, rendering her liable in rem; it appearing that the clearance papers were obtained by an agent of the charterer, and that the cleaning of the boilers at the time was necessary in the judgment of the officers. The Ask (D. C. 1912) 196 Fed. 165.

49. —— **Advances.**—Admiralty cannot enforce a claim for money advanced on the personal credit of the vessel, owner, or master in a suit in rem. Maitland v. The Atlantic (D. C. 1855) Fed. Cas. No. 8,980.

50. —— **Wharfage claims.**—A claim for wharfage may be enforced by a proceeding in rem. Ex parte Easton (1877) 95 U. S. 68, 24 L. Ed. 373; The Kate Tremaine (D. C. 1871) Fed. Cas. No. 7,622. Except where the vessel belongs in the same port with the wharf. Ex parte Easton (1877) 95 U. S. 68, 24 L. Ed. 373.

51. —— **Salvage services.**—Where a tug was hired at a certain sum per day to go to the assistance of a vessel which had been reported aground, but on arriving at the spot it was found that the vessel had been gotten off and the tug returned home without rendering her any actual assistance, a proceeding in rem would lie to recover the stipulated compensation, since all maritime contracts made by the master within the scope of his authority per se hypothecate the ship, and nonperformance by the tug would not affect the jurisdiction generally or the character of the proceedings. The Williams (C. C. 1873) Fed. Cas. No. 17,710.

An action will lie in rem to recover a salvage compensation against the proceeds of salved property converted into specie, provided the same action would lie against the property itself. Waterbury v. Myrick (D. C. 1828) Fed. Cas. No. 17,253.

52. —— **Misrepresentation or fraud.**—In the case of a charter party, a suit in rem against the vessel is not maintainable for the misrepresentation or concealment of facts by her master or owner in respect to her tonnage or capacity. The Eli Whitney (C. C. 1848) Fed. Cas. No. 4,345.

A libel in rem may be maintained against a sum of money paid into court as compensation for salvage services, where it was alleged that after the money had been so awarded libelant discovered that the services were rendered pursuant to an agreement between the master of the vessel and the salvor that the vessel should be voluntarily wrecked, and the master and salvor divide the salvage award. Church v. Seventeen Hundred and Twelve Dollars (D. C. 1853) Fed. Cas. No. 2,713.

53. —— **Remedies of master or mate of vessel.**—The master of a ship may maintain a suit in admiralty in personam against the owner for his wages or services (perhaps in some capacity other than that of master), but not in rem against the vessel, since he has no lien. The Grand Turk (C. C. 1817) Fed. Cas. No. 5,683; Willard v. Dorr (C. C. 1822) Fed. Cas. No. 17,679; Bartlette v. The Viola (D. C. 1871) Fed. Cas. No. 1,083; The Gate City (D. C. 1872) Fed. Cas. No. 5,267. And the remedy of the master for advances for supplies and repairs is also in personam. Bartlette v. The Viola (D. C. 1871) Fed. Cas. No. 1,083. And the above rule applies also to a mate suing for services rendered as captain. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

54. —— **Suits on bottomry bonds.**—A suit on a bottomry bond, except in certain cases, must be by proceedings in rem against the property hypothecated, or the proceeds, as prescribed by rule 18. Snow v. 180¾ Tons of Scrap Iron (D. C. 1882) 11 Fed. 517.

55. —— **Suits by materialmen for supplies, repairs, or other necessaries.**—Rule 12, on May 1, 1859, provided for proceedings in rem or in personam to enforce liens for supplies and repairs to foreign ships, and "proceedings in personam, but not in rem," for supplies, etc., to domestic ships. In 1872 the rule was changed so as to provide that in all suits for supplies the libelant may proceed against the ship in rem, or against the master, etc., in personam. Held that, prior to the change in 1872, a proceeding in rem could not be maintained for supplies and repairs to a ship in a domestic port. The Lottawanna (1874) 88 U. S. (21 Wall.) 558, 22 L. Ed. 654.

The supreme court in authorizing a proceeding in rem to enforce a domestic lien, and in subsequently taking away the same, did not enlarge or curtail the admiralty jurisdiction conferred upon it by the constitution, but merely made a change in its process or procedure. The repeal of the rule authoring a procedure in rem to enforce a lien given by the local law upon the vessel for supplies or repairs in a domestic port, did not affect cases begun prior thereto. The St. Lawrence (1861) 66 U. S. (1 Black) 522, 17 L. Ed. 180.

While there may be a maritime lien for services rendered to a vessel, either

foreign or domestic, and there may be a presumption that such services were rendered on the credit of the vessel such as in case of salvage or pilotage services, whether such presumption arises, or whether the lien exists, depends on the nature of the services and the circumstances under which they are rendered. The Alligator (1908) 161 Fed. 37, 88 C. C. A. 201. Further, as to credit to vessel or owners as affecting right to file libel in rem, see The Patapsco (1871) 80 U. S. (13 Wall.) 329, 20 L. Ed. 696; Jones v. The Ratler (C. C. 1841) Fed. Cas. No. 7,490; The Acme (C. C. 1870) Fed. Cas. No. 28; Maitland v. The Atlantic (D. C. 1855) Fed. Cas. No. 8,980; Collins v. The Fort Wayne (D. C. 1861) Fed. Cas. No. 3,012; The A. R. Dunlap (D. C. 1869) Fed. Cas. No. 513; The Eclipse (D. C. 1871) Fed. Cas. No. 4,268; The George T. Kemp (D. C. 1876) Fed. Cas. No. 5,341; The Plymouth Rock (D. C. 1877) Fed. Cas. No. 11,236.

Under rule 12, as amended in 1872, ships, whether domestic or foreign, are liable for repairs, etc., furnished at express or implied request of the owner or master, whether in the home port or not. The Augusta (D. C. 1872) Fed. Cas. No. 647.

An hypothecation of vessel by way of a mortgage, for supplies furnished in a foreign port, may be enforced in rem. The Hilarity (D. C. 1829) Fed. Cas. No. 6.480.

Where, after a vessel had been launched and navigated, it was discovered that her engine was inadequate, and it became necessary to supplant it with another, the contract to furnish such new engine is a maritime contract for the repair of a vessel in esse, and hence creates a maritime lien on such vessel for the price of the engine, under Rev. St. Mo. § 770, providing that all boats shall be subject to a lien for repairs, and rule 12. The L. B. X. (D. C. 1899) 93 Fed. 233.

Bar supplies and fixtures furnished to a vessel are not necessaries, for the price of which a suit in rem against the vessel may be maintained under rule 12. The Robert Dollar (D. C. 1902) 115 Fed. 218.

56. —— **Recovery of costs and expenses of other suit.**—The owner of a vessel, which was libeled for collision, but adjudged without fault, cannot maintain a suit in rem in admiralty to recover for the cost and expense incurred by reason of such libel against a third vessel, which was in fact in fault for the collision. The Celtic Monarch (D. C. 1910) 175 Fed. 1006. See also Chambers v. Upton (C. C. 1888) 34 Fed. 473.

57. —— **Torts in general.**—In all cases where maritime torts are the foundation of a legal claim for compensation, a suit in rem affords the appropriate remedy, and the admiralty rules providing for specific cases are not restrictive of instances which give rise to proceedings in rem except as therein expressly prescribed. Aurora Shipping Co. v. Boyce (1911) 191 Fed. 960, 112 C. C. A. 372 (affirming decree The Aurora [D. C. 1910] 178 Fed. 587); McGrath v. Candalero (D. C. 1794) Fed. Cas. No. 8,810.

Where a vessel is injured by a collision with a structure unlawfully placed in the navigable bed of a river, the party creating the obstruction may be sued for the injury in an action in personam, but the owner of the vessel cannot proceed in rem against such structure. The Arkansas (D. C. 1883) 17 Fed. 383.

A suit in rem against a ship cannot be maintained to recover for damage to a tug which was hired and used by the master in a towage service, on the ground that he was bound to return the tug in as good condition as when received, usual wear excepted; the right of action being against the owners on the contract, and not one based on any fault of the ship. The Ville de St. Nazaire (D. C. 1903) 124 Fed. 1008, rehearing denied 126 Fed. 448.

58. —— **Personal injuries.**—The acts of Congress confine the remedy in rem, for injuries from escape of steam, to actions brought by passengers, and the remedy is in personam against owners for such injuries due to others on board. The Highland Light (C. C. 1867) Fed. Cas. No. 6,477.

Persons injured in a collision with a vessel in charge of a licensed pilot are entitled to have their remedy against the vessel. Camp v. The Marcellus (C. C. 1860) Fed. Cas. No. 2,347.

One who is employed to repair a vessel, and who is injured by it when it starts, through the negligence of those in charge thereof, may proceed in rem to recover damages. The Tulchen (Pa. 1880) 14 Phila. 550.

A stevedore, injured while in the employ of a master stevedore employed in loading a ship, through the negligent operation of a steam winch belonging to the ship, and under the management of its officers, may maintain a libel in rem against the ship therefor. The Anaces (1899) 93 Fed. 240, 34 C. C. A. 558, reversing decree (D. C. 1898) 87 Fed. 565.

Under admiralty rule 16, providing that in all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only, a libel against a vessel will not lie for an unprovoked assault committed by the master on a seaman upon the vessel. Hindsgaul v. The Lyman D. Foster (D. C. 1898) 85 Fed. 987; The Falls of Keltie (D. C. 1902) 114 Fed. 357; The Sallie Ion (D. C. 1907) 153 Fed. 659. And the above-stated rule applies to a libel by a passenger on a vessel for assault and battery by the master. The Vueltabajo (D. C. 1908) 163 Fed. 594.

That a seaman was bitten by a dog which was chained under a table in the cabin does not make it a case of assault and battery under the sixteenth rule. The Lord Derby (C. C. 1883) 17 Fed. 265. But a seaman may maintain an action in rem against the vessel for breach of the shipping articles, in that the master did not treat him with proper kindness, but assaulted him. The David Evans (1911) 187 Fed. 775, 109 C. C. A. 623. And a libel in rem is maintainable for injuries to a passenger of a steamboat on the Great Lakes resulting from negligence in the performance of the transportation contract, by reason of which negligence the passenger's state room was entered, and she was assaulted and robbed. The Western States (1908) 159 Fed. 354, 86 C. C. A. 354, affirming decree (D. C. 1907) 151 Fed. 929, and writ of certiorari denied Sweeting v. The Western States (1908) 28 Sup. Ct. 762, 210 U. S. 433, 52 L. Ed. 1136.

While the sixteenth rule protects a ship from liability for damages for assaults committed by her officers, she is liable for injuries inflicted on a seaman by reason of the neglect of the master to protect him from continued abusive treatment by a subordinate officer. The Marion Chilcott (D. C. 1899) 95 Fed. 688.

Where a libel in rem by a seaman for an assault on him by the master contains other allegations stating a cause of action in rem, those relating to such assault may be disregarded, as surplusage, and the misjoinder will not be fatal. The Falls of Keltie (D. C. 1902) 114 Fed. 357. And see The Fred E. Sander (D. C. 1899) 95 Fed. 829.

A libel in rem will not lie to recover damages for intentional and unlawful violence inflicted by the master on a stowaway. The Miami (D. C. 1896) 78 Fed. 818.

59. —— **Death caused by wrongful act.**—There is no admiralty jurisdiction under the general maritime law authorizing the maintenance of a proceeding in rem against a vessel for the death of a person injured as the result of negligence. The Corsair (1892) 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727; The Highland Light (C. C. 1867) Fed. Cas. No. 6,477; The Lotta (D. C. 1907) 150 Fed. 219. CONTRA. The Sea Gull (C. C. 1865) Fed. Cas. No. 12,578; Hollyday v. The David Reeves (D. C. 1879) Fed. Cas. No. 6,625.

A suit in admiralty to recover for the death of a person will not lie in rem against a vessel unless a lien thereon is given by a state or federal statute. The Wydale (C. C. 1889) 37 Fed. 716; The Nora (D. C. 1910) 181 Fed. 845.

Admiralty, in a proceeding in rem, can enforce a right of action given by a state statute for loss of human life, where such loss occurs by reason of the tort of a vessel on the high seas, and the shipowners reside in, and the home port is in, that state. The E. B. Ward (C. C. 1883) 17 Fed. 456. And see The E. B. Ward (C. C. 1885) 23 Fed. 900.

Under a statute providing that a vessel shall be subject to a lien for all demands for damages for injuries done to person or property, and another statute giving a right of action for wrongful death to the personal representative of the decedent, a court of admiralty will entertain a libel in rem against a vessel by the representative of a deceased person to recover damages for his death. Aurora Shipping Co. v. Boyce (1911) 191 Fed. 960, 112 C. C. A. 372 (affirming decree The Aurora [D. C. 1910] 178 Fed. 587); The General Foy (D. C. 1910) 175 Fed. 590.

The statutes of Michigan, Illinois, and Wisconsin, giving a right of action for wrongful death, and the watercraft statute, making vessels liable for injuries inflicted by them, do not give a lien for the damages resulting to the next of kin of one killed in a collision upon the vessel in fault; and a suit in rem in admiralty against the vessel, based on such a claim, cannot be maintained. The Onoko (1901) 107 Fed. 984, 47 C. C. A. 111; The Mariska (1901) 107 Fed. 989, 47 C. C. A. 115 (reversing decree [D. C. 1900] 100 Fed. 500).

A statute of Virginia, authorizing suits for damages for personal injuries to be brought after the death of the person injured, the damages recoverable to be for the benefit of the husband, wife, parent, and child, held not to authorize a libel in rem. The Manhasset (D. C. 1884) 18 Fed. 918.

60. —— **Penalties.**—Generally speaking, a proceeding in rem is proper for the recovery of a penalty for the violation of a statute relating to maritime matters. The Lewellen (D. C. 1868) Fed. Cas. Nos. 8,307, 8,308; Pollock v. The Sea Bird (D. C. 1880) 3 Fed. 573; The Arctic (D. C. 1881) 11 Fed. 177. CONTRA, U. S. v. The C. B. Church (C. C. 1872) Fed. Cas. No. 14,762.

61. —— **Necessity and existence of lien.**—Generally there can be no suit in rem, unless there is a lien on the thing sought to be charged. Willard v. Dorr (C. C. 1822) Fed. Cas. No. 17,679; Beane v. Mayurka (C. C. 1854) Fed. Cas. No. 1,175; Vandewater v. The Yankee Blade (C. C. 1855) Fed. Cas. No. 16,847; Boon v. The Hornet (D. C. 1841) Fed. Cas. No. 1,640; The Henry Dennis (D. C. 1891) 47 Fed. 918; The Southron v. O'Riley (1852) 21 Ala. 228.

No court can by rule create maritime liens or change the order of existing liens. Baldwin v. The Bradish Johnson (C. C. 1878) Fed. Cas. No. 798.

The lex loci contractus is observed in granting or refusing the remedy where a lien is claimed for labor and materials furnished to a vessel in a

port of another country. The Infanta (D. C. 1848) Fed. Cas. No. 7,030.

The proceeding in rem to enforce a lien for damages caused by a collision is not process, or a part of the lex fori. The Avon (C. C. 1873) Fed. Cas. No. 680.

As originally enacted, rule 12 read as follows: "In all suits by materialmen for supplies or repairs, or other necessaries, for a foreign vessel or ship, or for a ship in a foreign port, the libelant may proceed against the ship and freight in rem, or against the master or the owner alone in personam. And the like proceedings in rem shall apply to cases of domestic ships where, by the local law, a lien is given to materialmen for supplies, repairs, or other necessaries." This rule was changed in 1858 to read as follows: "In all suits by materialmen for supplies or repairs, or other necessaries, for a foreign ship or for a ship in a foreign port, the libelant may proceed against the ship and freight in rem, or against the master or owner alone in personam. And the like proceeding in personam, but not in rem, shall apply to cases of domestic ships for supplies, repairs, or other necessaries." This rule was again changed in 1871 to read as follows: "In all suits by materialmen for supplies or repairs, or other necessaries, the libelant may proceed against the ship and freight in rem, or against the master or the owner alone in personam." This last amendment was held to affect merely the remedy, and to be applicable to all suits for repairs or supplies instituted after its passage, whether made or furnished before its passage or not. In re Kirkland (D. C. 1873) Fed. Cas. No. 7,842. CONTRA, The Circassian (D. C. 1872) Fed. Cas. No. 2,720a. This amendment was also held not to revive a claim almost barred by limitation, and make it a lien on the vessel, so as to cut off titles perfected or acquired before such rule was adopted. The Circassian (C. C. 1874) Fed. Cas. No. 2,726. And such amendment did not abrogate the distinction between a domestic contract and a maritime lien, but relates only to the process. The Selt (D. C. 1872) Fed. Cas. No. 12,649.

Under this rule there is a lien enforceable in rem for repairs to a domestic vessel, though no lien is given by the local law. In re Kirkland (D. C. 1873) Fed. Cas. No. 7,842. And see Davis v. New Brig (D. C. 1834) Fed. Cas. No. 3,643, and the Selt (D. C. 1872) Fed. Cas. No. 12,649. And under the same rule a lien exists for necessaries furnished a domestic vessel, though by the law of the place there may be no jurisdiction to enforce it. The Union Express (D. C. 1874) Fed. Cas. No. 14,364.

For decisions under this rule prior to its amendment in 1871, see The Celestine (D. C. 1851) Fed. Cas. No. 2,541; Wick v. The Samuel Strong (D. C. 1855) Fed. Cas. No. 17,607; Russel v. The Asa R. Swift (D. C. 1857) Fed. Cas. No. 12,144; The Gem (D. C. 1858) Fed. Cas. No. 5,303.

A breach of a contract for the hire of a vessel which never entered upon its performance, though part of the consideration was paid, does not create a lien on the vessel, enforceable in admiralty. The William Fletcher (D. C. 1876) Fed. Cas. No. 17,692.

A maritime lien is a jus in re. It accompanies the property into the hands of a bona fide purchaser, and can be enforced or devested only by a proceeding in rem. The Arcturus (D. C. 1883) 18 Fed. 743.

A suit in rem for damages to cargo rests upon a maritime lien which comes into existence at the time the injury is done, and no lien exists in favor of a shipper until cargo is actually shipped. The Ask (D. C. 1912) 196 Fed. 165. See § 7783, post, and notes thereunder.

62. —— Remedy under state statute. —Liens on domestic ships, given by state statutes, in cases of contracts maritime in their nature, may be enforced by process in rem under rule 12. The Robert Fulton (C. C. 1826) Fed. Cas. No. 11,890; Weaver v. The S. G. Owens (C. C. 1849) Fed. Cas. No. 17,310; The Edith (C. C. 1874) Fed. Cas. No. 4,283; The John Farron (C. C. 1876) Fed. Cas. No. 7,341; White v. The Cynthia (C. C. 1880) Fed. Cas. No. 17,546a; Gill v. The Continental (D. C.) Fed. Cas. No. 5,425; Phillips v. The Thomas Scattergood (D. C. 1828) Fed. Cas. No. 11,106; Davis v. New Brig (D. C. 1834) Fed. Cas. No. 3,643; Boon v. The Hornet (D. C. 1841) Fed. Cas. No. 1,640; The Hull of a New Ship (D. C. 1842) Fed. Cas. No. 6,859; Schuchardt v. The Angelique (D. C. 1853) Fed. Cas. No. 12,483b; Dudley v. The Superior (D. C. 1855) Fed. Cas. No. 4,115; The Richard Busteed (D. C. 1858) Fed. Cas. No. 11,764; The Selt (D. C. 1872) Fed. Cas. No. 12,649; Haslett v. The Enterprise (D. C. 1874) Fed. Cas. No. 6,197; Whittaker v. The J. A. Travis (D. C. 1875) Fed. Cas. No. 17,599; The Hezekiah Baldwin (D. C. 1876) Fed. Cas. No. 6,449; The Raleigh (D. C. 1876) Fed. Cas. No. 11,539; The Unadilla (D. C. 1876) Fed. Cas. No. 14,332; The Norfolk (D. C. 1877) Fed. Cas. No. 10,297; The Illinois (D. C. 1879) Fed. Cas. No. 7,005, note; Haritwen v. The Louis Olsen (D. C. 1892) 52 Fed. 652 (following The Lottawanna [1874] 21 Wall. 558, 22 L. Ed. 654, and decree reversed Olsen v. Haritwen [1893] 57 Fed. 845, 6 C. C. A. 608). CONTRA, Tupper v. The St. Lawrence (C. C. 1859) Fed. Cas. No. 14,240; The Adele (D. C. 1867) Fed. Cas. No. 78; New York Mail S. S. Co. v. The Baltic (D. C.

1867) Fed. Cas. No. 10,213; The Island City (D. C. 1869) Fed. Cas. No. 7,109; Jackson v. The Kinnie (D. C. 1869) Fed. Cas. No. 7,137.

Where the state law, in a distinct and separate clause, gives the alternative of proceeding to recover pilotage by a libel in admiralty in any United States district court, and where, by rule 14, adopted by the supreme court of the United States prior to the passage of such state law, it is clearly indicated that the libelant in a suit for pilotage may elect to proceed in rem or in personam, the remedy in rem is proper in suits brought under the state statute. The William Law (D. C. 1882) 14 Fed. 792.

63. Changing proceeding in rem to one in personam.—A libel in rem cannot be changed into a libel in personam against the owner. The Young America (D. C. 1874) Fed. Cas. No. 18,178. But on a libel against a cargo for freight and demurrage, where it is in the hands of a purchaser without notice, freed from the lien, and the consignee appears and admits the claim, the court will turn the proceedings into an action in personam. One Hundred and Eighteen Sticks of Timber (D. C. 1878) Fed. Cas. No. 10,519.

64. Proceedings in personam and in rem for same cause.—There seems to be no fixed rule of admiralty practice, and no reason on general principles, which prevents the joinder in one libel of causes of action in rem and in personam, when such joinder will promote the cause of justice, and conduce to the convenience of the parties and the court, and is not governed by the admiralty rules of the supreme court. Newell v. Norton (1865) 70 U. S. (3 Wall.) 257, 18 L. Ed. 271; The Zenobia (D. C. 1847) Fed. Cas. No. 18,208; The Monte A. (D. C. 1882) 12 Fed. 331; The Thomas P. Sheldon (D. C. 1902) 113 Fed. 779; The Dawn (D. C. 1914) 212 Fed. 564. And see The Martha Anne (D. C. 1843) Fed. Cas. No. 9,146. CONTRA, see The Corsair (1892) 12 Sup. Ct. 949, 145 U. S. 335, 36 L. Ed. 727; Citizens' Bank v. Nantucket Steamboat Co. (C. C. 1811) Fed. Cas. No. 2,730; Hale v. Washington Ins. Co. (C. C. 1842) Fed. Cas. No. 5,916; Dean v. Bates (C. C. 1846) Fed. Cas. No. 3,704; The Alida (C. C. 1882) 12 Fed. 343; The Clatsop Chief (D. C. 1881) 8 Fed. 163. And a district court has power, under rule 46, to establish the practice of permitting process in rem and in personam to issue upon the same libel, either by rule or decision. The Planet Venus (D. C. 1902) 113 Fed. 387.

Where one of two part owners, who appeared as claimants by different proctors after the filing of a libel in rem for collision, stipulated for the release of the vessel and payment of the amount awarded on final decree, a motion that execution issue against the other claimant, in effect making it a suit in personam, would be a clear violation of the fifteenth admiralty rule, forbidding the joinder of a claim in rem with one in personam in the same suit for collision. The Zodiac (D. C. 1881) 5 Fed. 220, 223.

65. —— Joint liability.—Remedies in rem and in personam may ordinarily be sought in one suit, where the vessel and master or owner are conjointly liable. The Merchant (D. C. 1847) Fed. Cas. No. 9,434; The Zenobia, Id. 18,208.

Under rule 46, the court may permit the joinder in an action in tort for a personal injury of a claim in rem against a vessel and one in personam against stevedores, although the latter are neither master nor owner of the vessel, where the injury is alleged to have resulted from the joint negligence of both, and the joinder will best subserve the ends of justice. The Clan Graham (D. C. 1907) 153 Fed. 977. Where a libel is filed for a cause of action upon which both vessel and master may be together liable, the court will not make an order that the libelant elect between the remedy in rem and that in personam, nor that he submit to have either the arrest of the respondent or the attachment against the vessel vacated. The Zenobia (D. C. 1847) Fed. Cas. No. 18,208. A cause of action in rem against a vessel for injury to a stevedore and one in personam against the owner for the same injury may be joined in a single suit in admiralty. The St. David (D. C. 1913) 209 Fed. 985.

66. —— Petitory and possessory suits.—Rule 22 requires that in petitory and possessory suits the proceedings shall be jointly in rem and in personam. Kynoch v. The S. C. Ives (D. C. 1856) Fed. Cas. No. 7,958.

67. —— Seamen's wages.—Rule 13 prohibits the blending of an action against the owner personally with one against the vessel for the recovery of wages. The Ethel (1895) 66 Fed. 340, 13 C. C. A. 504; The Merchant (D. C. 1847) Fed. Cas. No. 9,434.

68. —— Breach of charter party and contract of affreightment.—Under rule 46 of the supreme court an action in rem may be joined with an action in personam against the master or owners for breaches of contracts of affreightment or charter parties (and see rule 59). Arthur v. The Cassius (C. C. 1841) Fed. Cas. No. 564; The Aldebaran (D. C. 1845) Fed. Cas. No. 150; Draper v. The O. C. Clary (D. C. 1863) Fed. Cas. No. 4,071; The Monte A. (D. C. 1882) 12 Fed. 331; The Director (D. C. 1886) 26 Fed. 708; The Baracoa (D. C. 1890) 44 Fed. 102; The Planet Venus (D. C. 1902) 113 Fed. 387. CONTRA, Citizens' Bank v. Nantucket

Steamboat Co. (C. C. 1811) Fed. Cas. No. 2,730.

Hence a shipper, after discovering that the vessel upon which the cargo has been laden is unseaworthy, may proceed in rem against the vessel, and in personam against the master, to recover the cargo wrongfully detained, and for damages for the breach of the contract. The Director (D. C. 1886) 26 Fed. 708.

69. —— **Freight.**—An action in rem against goods shipped may be joined with an action in personam against the consignees for freight. Six Hundred and Thirty Casks of Sherry (C. C. 1878) Fed. Cas. No. 12,918; Vaughan v. Six Hundred and Thirty Casks of Sherry Wine (D. C. 1874) Fed. Cas. No. 16,900.

70. —— **Salvage.**—Under rule 19, a proceeding in rem cannot be joined with a proceeding in personam for salvage of the same goods. The Sabine (1879) 101 U. S. 384, 25 L. Ed. 982; Nott v. The Sabine (C. C. 1876) Fed. Cas. No. 10,366.

The remedy in personam, given by general admiralty rule 19 "against the party at whose request and for whose benefit the salvage services have been performed," is not confined to the legal owner of the property saved, but extends to one who had a direct pecuniary interest in such property. U. S. v. Cornell Steamboat Co. (1906) 26 Sup. Ct. 648, 650, 202 U. S. 184, 50 L. Ed. 987.

71. —— **Collision.**—Under rule 46, a court may permit a suit for collision to be maintained against one vessel in rem and against the owner of another in personam. The Samson (D. C. 1912) 197 Fed. 1017. But see Ward v. The Ogdensburgh (D. C. 1853) Fed. Cas. No. 17,158, The Young America (D. C. 1874) Fed. Cas. No. 18,178, and The Clatsop Chief (D. C. 1881) 8 Fed. 163, in which cases it was held that in a suit for damages by collision a claim in rem and in personam could not be joined in on a libel (based on rule 15). And see, also, The Richard Doane (D. C. 1868) Fed. Cas. No. 11,765, holding that an admiralty suit for a collision could not properly be brought against a vessel in rem, and her owner in personam, unless her owner was also master.

72. —— **Concurrent proceedings.**—Where an admiralty court has jurisdiction of a maritime claim, as a charge for towage under a contract with the owner, express or implied, the libelant may as a general rule proceed against the owner in personam, and if he has a lien upon the vessel towed, given either by the general rules of the maritime law or by a local statute, he may proceed in rem. Mack S. S. Co. v. Thompson (1910) 176 Fed. 499, 100 C. C. A. 57.

A suit in rem and a suit in personam arising out of the same cause of action may be brought concurrently in the same court. La Normandie (1893) 58 Fed. 427, 7 C. C. A. 285; Draper v. The O. C. Clary (D. C. 1863) Fed. Cas. No. 4,071; The Normandie (D. C. 1889) 40 Fed. 590.

Where a suit in rem and a suit in personam are brought concurrently for the same cause of action, the question whether one shall be stayed until the remedy is exhausted in the other is wholly a question of practice, to be determined with reference to the convenient administration of justice. The Normandie (D. C. 1889) 40 Fed. 590. And see La Normandie (1893) 58 Fed. 427, 7 C. C. A. 285.

A stipulation or bond given in a suit for breach of a charter party only covers the value of the property attached and surrendered, so that the filing of a libel in rem does not preclude libelant from proceeding concurrently in personam. Draper v. The O. C. Clary (D. C. 1863) Fed. Cas. No. 4,071.

73. —— **Waiver of objections.**—Failure to object to joinder of a suit in personam with one in rem until final hearing on appeal authorizes the court to disregard an objection made at that time. The Willamette (1895) 72 Fed. 79, 18 C. C. A. 373.

74. **Joinder of causes and proceedings.**—A cause of action at law cannot be united with a cause of action in equity, or either with one in admiralty, so that it is improper to unite a cause of action for foreclosure of a mortgage on a vessel with one to enforce liens for wages of seamen against the vessel. Bruce v. Murray (1903) 123 Fed. 366, 59 C. C. A. 494.

Where a thing is defendant, and several persons are asserting rights in it, distinct but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together, i. e. to rank the claims or to proportion the proceeds, and the parties may be joined. The Prinz Georg (C. C. 1884) 23 Fed. 906.

Where the vessel is liable to two libelants for wages, for which, under the practice of the court in respect to the consolidation of suits, they may be compelled to sue in common, they may join in one action in rem, not only in suing for the common demands, but also in respect to other claims which are peculiar to each. The Merchant (D. C. 1847) Fed. Cas. No. 9,434.

Proceedings against a vessel and against her cargo, for causes of action growing out of the same transaction, may be joined. The Dauntless (D. C. 1881) 7 Fed. 366.

Admiralty rules 12 to 20, inclusive, relating to joinder of causes of action, do not apply to cases not therein enumerated; but the same, under rule 46, may be proceeded with, in this respect, in such manner as the court may deem expedient for the administration of jus-

tice. The Director (D. C. 1886) 26 Fed. 708.

75. —— **Actions ex contractu and ex delicto.**—A court of admiralty may permit the joinder in the same libel of claims in contract and tort. Borden v. Hiern (D. C. 1832) Fed. Cas. No. 1,-655; Welch v. Fallon (D. C. 1909) 181 Fed. 875. Where the causes of action are so united that the same evidence will apply to all. Borden v. Hiern (D. C. 1832) Fed. Cas. No. 1,655.

This rule has been held to apply to a claim for wages and a claim for damages for an assault and battery, committed on the same voyage. Borden v. Hiern (D. C. 1832) Fed. Cas. No. 1,-655. CONTRA, Pratt v. Thomas (D. C. 1837) Fed. Cas. No. 11,377. And see The Guiding Star (D. C. 1880) 1 Fed. 347, holding that in an action in rem a seaman cannot join a claim for wages with one for an assault and battery by an officer of the vessel.

76. —— **Joint and several liabilities in general.**—Where a party has received injuries from the collision of two vessels, each of which was in fault, they both may be proceeded against in one libel, and the damages apportioned between them equally. The Washington v. Cavàn (1869) 76 U. S. (9 Wall.) 513, 19 L. Ed. 787.

A libel may be maintained jointly against a tug and tow for an injury inflicted by a collision of the tow with another vessel; and the fact that one of these vessels may be found on the evidence to be free from blame does not vitiate the libel as against her codefendant. Williams v. The Vanderbilt and The Collins (D. C. 1863) Fed. Cas. No. 17,744.

Separate and distinct trespasses cannot be joined in the same libel against defendants who are not jointly liable. Thomas v. Lane (C. C. 1813) Fed. Cas. No. 13,902.

An action for a joint tort against two or more cannot, in the admiralty, be united with a tort against one separately, if the objection be taken. Roberts v. Skolfield (D. C. 1858) Fed. Cas. No. 11,917.

A claim in a libel against a vessel, alleged to be owned "by J. and other persons to the libelants unknown," in which it was sought to recover money furnished for repairs "on the credit of the owner and said J.," and a claim for money advanced upon a cargo consigned by J. alone, could not be joined, for the transactions out of which they severally arose were unrelated, and the judgments in rem and in personam upon them, respectively, would not affect the same persons. Heney v. The Josie (D. C. 1894) 59 Fed. 782.

77. —— **Several breaches of contract.**—Joinder of a number of claims for damages growing out of contracts of affreightment for distinct lots of merchandise is permissible in admiralty for the purpose of avoiding multiplicity of suits. The Queen of the Pacific (D. C. 1894) 61 Fed. 213. And several demands against the same defendant for breach of the contracts contained in passenger tickets may be united in an action brought by the transferee of such claims in his own name. Cobb v. Howard (C. C. 1856) Fed. Cas. No. 2,924; Id. (D. C. 1852) Fed. Cas. No. 2,925.

78. —— **Several claims for damages.**—Under the rule in admiralty that all parties may join as libelants where their rights of recovery rest on a common cause of action, whether the suit is in personam or in rem, though, as between themselves, their interests may be separate, persons suffering separate injuries from a collision may join in a libel to recover damages therefore from the owner of the vessel in fault. Jacobsen v. Dalles, P. & A. Nav. Co. (D. C. 1899) 93 Fed. 975. And a court of admiralty may properly permit a large number of passengers to join in a single libel in rem against a vessel to recover damages alleged to have been sustained by them severally by reason of the failure to keep the vessel in a cleanly condition during a voyage, and to supply suitable accommodations and a sufficient quantity of wholesome food and provisions; and it is not essential to sustain a decree in favor of each, that his damages should be separately proved, or that all should testify. The Oregon (1904) 133 Fed. 609, 68 C. C. A. 603.

79. —— **Salvage claims.**—Several libels filed against the cargo saved will be joined and considered as one suit for the purposes of awarding salvage. The Mississippi (D. C. 1874) Fed. Cas. No. 9,651.

80. —— **Claims for freight.**—Two demands for damages to freight could not be united in an action in rem in admiralty, where the transactions and the vessels were different. Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C. 1882) 10 Fed. 596, 597.

81. —— **Breaches of contract of affreightment and breach of agreement to insure.**—An agreement by a carrier to insure cargo, where it is one of the elements of a properly maritime contract of affreightment, may be proved in admiralty, and damages recovered for its breach in a suit for other breaches of the contract. Nash v. Bohlen (D. C. 1909) 167 Fed. 427.

82. —— **Claim for advances and proceeding on bottomry bond.**—An allegation founded on an hypothecation of a vessel implied by law for money advanced for repairs, may be united with an allegation on a bottomry bond given for the same consideration. The Hunter (D. C. 1833) Fed. Cas. No. 6,-904.

83. —— **Claims for cod bounty and for share of fish taken.**—An admiralty

court has jurisdiction to decree the bounty allowed to persons employed in the cod fishery, and a claim therefor may be united with a claim for an account of the fish taken. The Lucy Anne (D. C. 1860) Fed. Cas. No. 8,596.

84. —— **Claims for damages to goods shipped and for breach of warranty of seaworthiness.**—In case of a breach of warranty of seaworthiness in a charter party, an action for the recovery of the goods shipped and for damages for the breach of the warranty may be joined. The Director (C. C. 1888) 36 Fed. 335.

85. —— **Claims for penalty and for damages.**—A claim by a seaman against the master for personal damages cannot be joined in the same libel with a claim for a fine imposed for violation of a statute. Knowlton v. Boss (D. C. 1848) Fed. Cas. No. 7,901.

In a libel against a vessel, a count for a penalty under the act regulating the carriage of passengers at sea could be joined with a count for damages. The Prinz Georg (D. C. 1884) 19 Fed. 653.

86. —— **Claims for penalty and for prize.**—A general prize allegation cannot be properly joined with an information on a seizure for the violation of a statute. The Dimon (C. C. 1814) Fed. Cas. No. 3,917.

87. —— **Claims for wages and for money advanced.**—Claims for wages and for moneys advanced to the use of the ship may be united in an action in rem. A seaman claiming both wages and moneys advanced to the ship's use may join in a libel in rem with another seaman claiming wages only, but not in a libel in personam. The Merchant (D. C. 1847) Fed. Cas. No. 9,434.

88. **Defenses in general.**—Where salvors conceal from the court the names of other persons who participated in the salvage service, their libel will be dismissed. Hessian v. The Edward Howard (D. C. 1855) Fed. Cas. No. 6,436.

In a libel by the assignee of a claim for material furnished in the repair of a vessel, a defense that the case does not come within the cognizance of the court, the debt not being created in favor of libelant, and that there was no proof that the vessel repaired was not a domestic one, is insufficient. Cohan v. The Rolling Wave (D. C. 1857) Fed. Cas. No. 2,959a.

It is no defense to a libel against a vessel for failure to deliver goods that no credit is given for the freight earned in carrying other goods. Such claims should be set up by cross-libel. Maxwell v. The Powell (C. C. 1870) Fed. Cas. No. 9,324. In case of a collision between tugs which are both in fault, resulting in injury to a third vessel not in fault, though the owners of the injured vessel bring their libel only against the tug least in fault, they are entitled to recover the whole damage sustained. The Charles Allen (D. C. 1882) 11 Fed. 317.

89. —— **Contributory negligence.**—In admiralty contributory negligence is not a complete defense to a libel for personal injuries. The Max Morris (1890) 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586; The Mabel Comeaux (C. C. 1885) 24 Fed. 490; Anderson v. The Ashebrooke (C. C. 1890) 44 Fed. 124; The Daylesford (D. C. 1887) 30 Fed. 633; Olson v. Flavel (D. C. 1888) 34 Fed. 477. It is not necessarily a bar to recovery. The Daylesford (D. C. 1887) 30 Fed. 633. And see The Explorer (D. C. 1884) 20 Fed. 135; The Wanderer, Id. 140; McCord v. The Tiber (D. C. 1875) Fed. Cas. No. 8,715. But see Gretschmann v. Fix (D. C. 1911) 189 Fed. 716, holding that in a libel in admiralty for the death of a passenger, contributory negligence was a valid defense.

The admiralty rule, apportioning damages when both parties are at fault, extends to all cases of maritime tort occasioned by concurring negligence. The Max Morris (1890) 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586; The Explorer (D. C. 1884) 20 Fed. 135; The Max Morris (C. C. 1886) 28 Fed. 881; Anderson v. The Ashebrook (C. C. 1890) 44 Fed. 124; The Max Morris (D. C. 1885) 24 Fed. 860; The Truro (D. C. 1887) 31 Fed. 158; Olson v. Flavel (D. C. 1888) 34 Fed. 477; Finch v. The Lighter Mystic (D. C. 1890) 44 Fed. 398.

Concurrent negligence of plaintiff being a ground for dismissal of an action for negligence in a common-law court, but not in admiralty, a plea of a former common-law adjudication for defendant is not sufficient, unless it appear that the ground of the adjudication was absence of fault in defendant, and not proof of fault in plaintiff. Carmody v. The City of Rome (D. C. 1891) 49 Fed. 392.

90. —— **Assumption of risk.**—The doctrine of assumption of risk is applied in admiralty as fully as in other branches of jurisprudence, notwithstanding the rule that damages will in some cases of concurrent negligence be divided. The Scandinavia (D. C. 1907) 156 Fed. 403.

91. —— **Res judicata.**—A prior decree on the same cause of action, as a defense in an admiralty cause in favor of the party for whom it was rendered, should be given in evidence, and not set up by summary motion to prevent further hearing or to try the fact upon affidavits. Reed v. The Fanny (D. C. 1858) Fed. Cas. No. 11,645a.

92. —— **Settlement.**—The claimant of a vessel libeled for collision cannot relieve the vessel from liability to the libelant by any settlement, made after the suit was commenced, with one not a party to the record, and without li-

belant's consent. The John B. Dallas (D. C. 1899) 94 Fed. 895.

93. —— **Stipulations to abide by result of another suit.**—See The Wm. Murtagh (D. C. 1883) 17 Fed. 259.

94. **Place of bringing suit.**—See notes to § 1033, ante.

95. **Premature commencement of suit.**—On the arrival of a vessel in port, a seaman may institute an action for wages earned on a previous voyage, though the vessel be not discharged of her previous cargo. The Edward (D. C. 1832) Fed. Cas. No. 4,289.

96. —— **Completion or sale of vessel.**—The lien for work or materials in the construction of a vessel may be enforced before it is finished or sold. Davis v. New Brig (D. C. 1834) Fed. Cas. No. 3,643. And see Parmlee v. The Charles Mears (D. C. 1856) Fed. Cas. No. 10,766.

97. —— **Completion of undertaking or performance of services.**—An admiralty suit in rem to recover for services rendered to a stranded vessel is maintainable, although commenced before the services were fully performed. The Lassell (D. C. 1912) 193 Fed. 539. CONTRA, Boyd v. The Towner (D. C. 1855) Fed. Cas. No. 1,748a.

98. —— **Credit given or evidence of indebtedness taken.**—A lienholder who receives a note for his claim cannot institute proceedings against a vessel until the maturity of the note, but may intervene before such maturity in proceedings instituted by others. Srodes v. The Collier (D. C. 1861) Fed. Cases Nos. 13,272 (C. C. 1861) 13,272a. And where a term of credit is given, the lien cannot be enforced until after its expiration. The John Walls, Jr. (D. C. 1849) Fed. Cas. No. 7,432.

99. —— **Ground for dismissal.**—The jurisdiction of a court of admiralty to enforce a lien for freight is not impaired by the fact that the libel is filed before the freight is actually due. Clark v. Five Hundred and Five Thousand Feet of Lumber (1894) 65 Fed. 236, 12 C. C. A. 628.

A libel for machinery furnished will not be dismissed because filed before the indebtedness actually arose, but such premature action will only affect the question of costs. McNeill v. The Pioneer (D. C. 1892) 53 Fed. 279.

Where a vessel has been attached and sold as perishable, and the resulting fund paid into court for distribution, a libel for a debt acknowledged to exist, the lien of which was discharged by the sale, will not be dismissed even if the debt was not due at the time of suit brought. Williams v. The Papa (D. C. 1891) 46 Fed. 576. But see the Martha (D. C. 1830) Fed. Cas. No. 9,144, holding that a libel brought before the right of action is perfected must be dismissed, if duly excepted to on that ground, though such right becomes perfected during the progress of the suit.

100. —— **Objections and waiver thereof.**—Where a cause of action matured before the hearing, the objection that the suit was commenced before the action matured will be considered waived after answer or claim filed. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163. And see the Edward (D. C. 1832) Fed. Cas. No. 4,289; St. Paul Fire & Marine Ins. Co. v. The Lake Superior (D. C. 1875) Fed. Cas. No. 12,244.

There would be still less reason for allowing such objection after the vessel sued had been condemned and sold in another action, and her proceeds placed in court, subject to those actions and others in prosecution against her. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163.

An objection that a libel is prematurely brought should be raised on the return day of the warrant of arrest by way of exception. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163. It must be raised by plea in abatement or demurrer to be available, where the right of action is perfected before final hearing. And where such plea has not been interposed, the court will not pronounce against the action merely on the ground that it was prematurely brought, if the right of action is perfected before final hearing. But, though such plea be not interposed, the court will protect the parties in the adjustment of costs from any injustice arising from a too early commencement of the suit. The Isaac Newton (D. C. 1847) Fed. Cas. No. 7,089.

The giving of assistance in arresting the goods, and subsequently obtaining the same on stipulation, is a waiver of the objection that the libel was filed too soon. The Salem's Cargo (D. C. 1858) Fed. Cas. No. 12,248.

101. **Laches and stale demands.**—The statute of Anne, limiting suits in the admiralty for seamen's wages to six years, is not a bar to such a suit in the courts of the United States. Willard v. Dorr (C. C. 1822) Fed. Cas. No. 17,679.

Independently of any limitations, courts of admiralty will not entertain suits for stale demands. Willard v. Dorr (C. C. 1823) Fed. Cas. No. 17,680; The Sarah Ann (C. C. 1835) Fed. Cas. No. 12,342.

When the time fixed by the rules of court for making defense has elapsed, and the libel has been taken for confessed, but the formal decree of condemnation and sale has not been entered, on account of the absence of the judge, any maritime claimant who comes in afterwards by petition does so subject to the libel, and cannot be paid till the libelant is paid in full, though his claim was originally prior to the libel. The Sea Lark (D. C. 1888) 34 Fed. 52.

102. —— What constitutes laches in general.—There is no fixed rule of limitation in admiralty, but the matter is left to the discretion of the court, to be governed by the facts and circumstances of the case, considered with due reference to the wants and convenience of commerce and the analogies of the local laws of limitation. Lincoln v. Cunard S. S. Co. (1915) 221 Fed. 622, 137 C. C. A. 346; Duane v. Goodall (D. C. 1863) Fed. Cas. No. 4,105; The Harriet Ann (D. C. 1874) Fed. Cas. No. 6,101; The Blenheim (D. C. 1878) Fed. Cas. No. 1,539.

Whether a claim will be held stale in admiralty does not depend so much upon lapse of time as upon change of circumstances affecting the rights and conditions of parties. Coburn v. Factors' & Traders' Ins. Co. (C. C. 1884) 20 Fed. 644.

Accordingly it has been held that long delay in prosecuting a claim for a share of a whaling voyage would not be fatal, where the delay was not shown to have led to any losses, acts, or divisions of profits injurious to the owners. Joy v. Allen (C. C. 1846) Fed. Cas. No. 7,552. Also that, in the absence of special circumstances, a delay of less than 6 years in bringing a libel in personam for collision would not be considered as laches. Bailey v. Sundberg (1892) 49 Fed. 583, 1 C. C. A. 387, reversing (D. C. 1891) 44 Fed. 807. Also that suit against a vessel for injuries caused by collision, brought about 28 months after the collision, was not an action on a stale demand. Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co. (D. C. 1882) 14 Fed. 699. Also that, where delay for the full period of 4 years allowed by the state statute of limitations in bringing a suit in rem to recover damages to a cargo was not of itself, and in the absence of exceptional circumstances from which laches would be imputable, sufficient to justify the court in declining to entertain the suit. Pacific Coast S. S. Co. v. Bancroft-Whitney Co. (1899) 94 Fed. 180, 36 C. C. A. 135, affirming (D. C. 1896) 78 Fed. 155, reversed in The Queen of The Pacific (1901) 21 Sup. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

On the other hand, it has been held that the lapse of two years was enough to bar a claim for wages on the Western lakes. The Harriet Ann (D. C. 1874) Fed. Cas. No. 6,101. Also that a claim for damages for collision was barred by a delay of over six years where the vessel was for more than a year after the collision within the district in which the owner has continuously resided. Smith v. Sturgis (D. C. 1869) Fed. Cas. No. 13,111. Also that twelve years' delay, unexplained, would affect a demand with the imputation of staleness. Willard v. Dorr (C. C. 1823) Fed. Cas. No. 17,680. Also that a member of a whaling voyage on shares, who failed to prosecute the vessel owner for his share of oil lost abroad till nearly 6 years had elapsed, and the master was dead and insolvent, was barred. Joy v. Allen (C. C. 1846) Fed. Cas. No. 7,552. Also that a libel verified in 1870, but not filed until 1873, for a collision occurring in 1868, would be dismissed on account of its staleness, no excuse being shown for the delay in bringing suit. The Columbia (C. C. 1876) Fed. Cas. No. 3,036. Also that where libelant sued for his share of salvage money that had been received by respondents more than 9 years previously, during which time he made no claim, nor pretended any, and in the meantime the rights and position of the respondents had materially changed, and they had been condemned to pay and had paid to others more than the salvage money they had received, libelant's claim was stale. Coburn v. Factors' & Traders' Ins. Co. (C. C. 1884) 20 Fed. 644. Also that, where creditors of a boat were acquainted with her financial condition, knew her to be insolvent, had opportunity of enforcing their claims, and knowing that others were giving her credit, yet continued to give her additional credit, their claims would be deemed stale and not allowed, if upon sale and distribution of proceeds, there was not sufficient to pay all claims in full. The Thomas Sherlock (D. C. 1884) 22 Fed. 253.

Delay of interveners in a suit in rem in issuing process against the vessel, resulting from their erroneous belief that a stipulation under the original libel, on which the vessel had been released before the filing of their claims, was security for the payment thereof, will not be held as laches, where the error was only disclosed by a decision of the supreme court, reversing a decision below in favor of the interveners. The Oregon (D. C. 1896) 73 Fed. 846.

A libelant entitled to recover damages for an injury against two vessels as joint and several wrongdoers may elect to proceed against either or both; and hence, where he joins both in his libel, his failure to issue process against one does not constitute laches of which the other can complain, though it is compelled by reason of such fact and the consequent intervention of other liens against its co-defendant to bear more than its just proportion of the recovery. The F. W. Vosburgh (D. C. 1899) 93 Fed. 481.

The fact that pending a suit in rem to recover for breach of a contract of affreightment the damages sustained by libelant, with interest and the costs, have increased to a sum in excess of the stipulation given for the release of the vessel, is not such an exceptional circumstance as will authorize the court

to permit an amendment of the libel to bring in the shipowner, and add a cause of action against it in personam, after the lapse of nine years from the filing of the libel, and after a new action would be barred applying by analogy the local statute of limitations. In such case the shipowner might have been joined in the first instance, or at any time thereafter within the statutory period, and the effect of the lapse of time on the amount of the damages was apparent. The Southwark (D. C. 1904) 128 Fed. 149.

103. —— Effect of absence of persons or res.—A demand against a vessel for loss of freight is not barred by lapse of time, where it appears that the demand was prosecuted on the first arrival of the vessel within the district where the cause of action arose. The Blenheim (D. C. 1878) Fed. Cas. No. 1,539.

A claim against a resident master for supplies to foreign vessel is not lost by seven years' delay to enforce it, where his absence prevented service of process. Cadmus v. Polhamus (D. C. 1851) Fed. Cas. No. 2,282a.

Where a vessel, sailing on a voyage from N. to O., remained at O. over a year waiting for freight, and, not obtaining any, the master discharged the seamen, whom he persuaded to return with him to N. to get their wages, and the vessel was then sold, and went on a voyage to L., and thence to N., the seamen could libel her on her arrival at N.; their claims not being stale. The Mary (C. C. 1822) Fed. Cas. No. 9,-186.

Failure to sue foreign owners, upon whom service may be had through an agent, for a period of 16 months, and until the first return of the ship to port, for personal injuries received while stowing cargo, is not such laches as will prevent the maintenance of a suit in rem, where no other liens or rights have intervened; for, by suing in personam, the injured party would be compelled to waive his lien, and rely on a personal judgment against nonresident foreigners. The Conde Wilfredo (1896) 77 Fed. 324, 23 C. C. A. 187.

One having a cause of action in rem against a foreign vessel is not required to find out whether the owners have other property within the jurisdiction which might be attached, nor chargeable with laches, where he libels the ship on her second trip to the port, where she had previously been out 41 days in all since the cause of action arose. The Slingsby (1903) 120 Fed. 748, 57 C. C. A. 52, affirming decree (D. C. 1902) 116 Fed. 227, and writ of certiorari denied Whalley v. Travers (1903) 23 Sup. Ct. 849, 188 U. S. 741, 47 L. Ed. 678.

104. —— Effect of institution or pendency of other proceeding.—Delay pending another case, arising out of the same transaction and substantially involving the merits of the case at bar, and of which both parties are cognizant, will not render a claim stale, so as to preclude the claimant. Jones v. The Richmond (D. C. 1858) Fed. Cas. No. 7,492.

The libel of seamen of a schooner against a steamship to recover for the loss of their effects by a collision will not be dismissed, though process was not issued for five years after the filing of the libel, where other proceedings were pending against the steamship by the owners of the schooner. The Leo (D. C. 1872) Fed. Cas. No. 8,252; Id. (D. C. 1876) Fed. Cas. No. 8,253.

In an action to recover the penalty under R. S. § 4465, post, § 8229, the fact that libelant does not proceed against the vessel until the recovery of judgment in a personal action against the master and owner does not constitute laches. Hatch v. The Boston (D. C. 1880) 3 Fed. 807.

Where defendant was a well-known merchant, accessible daily, and a libel in personam was filed 8½ years after the cause of action accrued, the libel was barred, though ineffectual proceedings in rem for the satisfaction of the same claim had been pending during most of that period. Scull v. Raymond (D. C. 1883) 18 Fed. 547.

Where libelant, owner of a cargo on a vessel lost by collision, did not bring suit for 6½ years after his loss, waiting by advice of counsel until the litigation as to the fault of the vessels had been decided in a suit by the owners of the lost vessel, nothing preventing him or his assigns from suing at any time, his claim is barred. Nesbit v. The Amboy (D. C. 1888) 36 Fed. 925.

105. —— Effect of transfer on incumbrance of property.—When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid, under shorter time, and a more rigid scrutiny of the delay, than when the defendant is the party who owned the property when the lien accrued. The Key City (1871) 81 U. S. (14 Wall.) 653, 20 L. Ed. 896. And see The Bristol (C. C. 1884) 20 Fed. 800; The Alaska (C. C. 1887) 33 Fed. 107; The Utility (D. C. 1831) Fed. Cas. No. 16,806; The D. M. French (D. C. 1865) Fed. Cas. No. 3,938; Magee v. The Lyndhurst (D. C. 1892) 48 Fed. 839. But in order to maintain the defense of stale claim, it is necessary to allege and prove that the respondents are purchasers in good faith, for a valuable consideration, and without notice of the existence of the claim. The Melissa (D. C. 1874) Fed. Cas. No. 9,400; Jones v. The Carrie (D. C. 1891) 46 Fed. 796.

Although there is no statute of limitations barring prosecutions of a suit

in admiralty against a vessel for wages, yet courts of admiralty refuse to enforce such liens, to the prejudice of a bona fide purchaser for value of the res, where the claim has become stale. The Harriet Ann (D. C. 1874) Fed. Cas. No. 6,101. And see The Bolivar (D. C. 1847) Fed. Cas. No. 1,609; The Argo (D. C. 1874) Fed. Cas. No. 515.

Where a libelant suffered over 6 years to elapse before filing his libel, the vessel having been within the district several times, and it appearing further that she had been sold to a bona fide purchaser having no knowledge of the claim, he cannot recover, although the libel was filed before the sale took place. The Robert Gaskin (D. C. 1881) 9 Fed. 62.

A libel for loss of goods filed two years and ten months after the loss, and after a bona fide assignee of the shipper's bill of lading had seized the boat, cannot be maintained, though the boat has been released on bond. The Favorite (D. C. 1866) Fed. Cas. No. 4,696.

Two years' delay to enforce a claim against a vessel, which in the meantime was repeatedly within the jurisdiction of libelant's residence, will bar the claim as against a mortgagee without notice under a mortgage made nine months after the cause of action had accrued. Griswold v. The Nevada (D. C. 1872) Fed. Cas. No. 5,839.

As to what constitutes a bona fide purchaser, see The Robert Gaskin (D. C. 1881) 9 Fed. 62; The Columbia (D. C. 1886) 27 Fed. 704; The American Towing & Lightering Co. v. The Alfred J. Murray (D. C. 1894) 60 Fed. 926.

Evidence that for years libelant had attempted to libel a certain vessel for injuries caused by collision and was unable to find her in the port of New York, in which the action had been commenced and service had on another vessel, is insufficient to show laches of libelant, so as to relieve the purchaser of the libeled vessel, where the vendors were financially responsible and the purchaser had received a warranty bill. The Little (D. C. 1908) 168 Fed. 393.

106. —— Enforcement of liens.—While courts of admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense. No arbitrary period of time for the enforcement of liens has been or will be established in admiralty as an inflexible rule. The delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case. The Key City (1871) 81 U. S. (14 Wall.) 653, 20 L. Ed. 896.

Admiralty will deny the privilege of enforcing a lien which has been suffered to lie dormant without excuse until the right of innocent third parties would be prejudiced if it should be recognized. The Bristol (C. C. 1884) 20 Fed. 800.

Liens equaling or exceeding the whole value of the vessel should be enforced with diligence; otherwise, such claims, after a comparatively short period of inactivity, will be postponed for laches, in favor of subsequent liens acquired without notice. The Young America (D. C. 1887) 30 Fed. 789.

Where there has been no change of ownership in a vessel, forbearance by a seaman to enforce his lien on it for wages due, until after 21 months' continuous service, does not render the claim stale. The Galloway C. Morris (C. C. 1870) Fed. Cas. No. 5,204.

Where no claims of subsequent purchasers, etc., are involved, a maritime lien for damages will not be deemed stale, through a delay of two years in filing the libel, merely on the ground that some witnesses have in the meantime been lost by the respondents. The Martino Cilento (D. C. 1885) 22 Fed. 859.

A maritime lien for repairs, based on a running account extending over nearly four years, during the whole of which time the account was largely reduced by payments made with considerable regularity, the last within a week before the libel to enforce the lien was filed, is not barred by laches, though the last repairs were made nearly a year before the filing of the libel. Starin v. The John Dillon (D. C. 1891) 46 Fed. 527.

A libel to enforce a maritime lien will the same, the policy providing that no attempt was made for over three years to enforce it, though libelant had repeated opportunities to do so, and offers no excuse. Stillman v. The Buckeye State (D. C. 1856) Fed. Cas. No. 13,445.

Where the insurer of a sunken scow made a contract with libelant to raise the same, the policy providing that no action thereon for loss or damage to the vessel should be maintained unless commenced within one year, libelant is barred by laches from maintaining a suit to enforce a lien on the vessel for the service after the expiration of the year, and after the owner's right to recover from the insurer under the policy was barred or had become doubtful. The Paul L. Bleakley (D. C. 1906) 146 Fed. 570.

107. —— Following statutes of limitations.—In the exercise of their admiralty and maritime jurisdiction the United States courts are governed exclusively by the legislation of Congress and the general principles of maritime law. Accordingly they are not bound by state statutes of limitations. The Key City (1871) 81 U. S. (14 Wall.) 653, 20 L. Ed. 896; Pacific Coast S. S. Co. v. Bancroft-Whitney

Co. (1899) 94 Fed. 180, 36 C. C. A. 135 (affirming [D. C. 1896] 78 Fed. 155, and decree reversed [1901] 21 Sup. Ct. 278, 180 U. S. 49, 45 L. Ed. 419); Brown v. Jones (C. C. 1815) Fed. Cas. No. 2,017; Willard v. Dorr (C. C. 1822) Fed. Cas. No. 17,679; Cadmus v. Polhamus (D. C. 1851) Fed. Cas. No. 2,282a; Hall v. Hudson (D. C. 1863) Fed. Cas. No. 5,935; The Queen of The Pacific (D. C. 1894) 61 Fed. 213; The Southwark (D. C. 1904) 128 Fed. 149; Davis v. Smokeless Fuel Co. (D. C. 1910) 182 Fed. 1004 (decree affirmed [1912] 196 Fed. 753, 116 C. C. A. 381).

The period of limitation fixed by statute in common-law actions should not be extended by discretion in admiralty cases, except for some cause of practical inability to sue, or for some peculiarity of a maritime nature that demands recognition in a court of admiralty, and makes it plainly a matter of justice that this discretion should be applied. Nesbit v. The Amboy (D. C. 1888) 36 Fed. 925.

But it seems that such statutes will ordinarily be followed by analogy in the absence of exceptional circumstances. Bailey v. Sundberg (1892) 49 Fed. 583, 1 C. C. A. 387 (reversing [D. C. 1891] 44 Fed. 807); The Sarah Ann (C. C. 1835) Fed. Cas. No. 12,342; Scammon v. Cole (C. C. 1871) Fed. Cas. No. 12,432; Jay v. Allen (D. C. 1846) Fed. Cas. No. 7,235; Cadmus v. Polhamus (D. C. 1851) Fed. Cas. No. 2,282a; Hall v. Hudson (D. C. 1863) Fed. Cas. No. 5,935; Scull v. Raymond (D. C. 1883) 18 Fed. 547; The Southwark (D. C. 1904) 128 Fed. 149.

A provision in a state statute that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons is served on him, etc., does not apply to admiralty suits in the federal courts. Laidlaw v. Oregon Ry. & Nav. Co. (1897) 81 Fed. 876, 26 C. C. A. 665, reversing The Oregon (D. C. 1896) 73 Fed. 846.

The provision of a state statute that a lien given thereby shall not be enforced within 60 days is inapplicable to a suit in admiralty to enforce such lien. The Richard Busteed (D. C. 1858) Fed. Cas. No. 11,764.

The New York statute of limitations in respect to enforcing liens on vessels does not apply to liens arising from torts. Laing v. The G. L. Buckman (D. C. 1864) Fed. Cas. No. 7,988.

A suit is not barred within the time prescribed by the statute of limitations where there has been no change of ownership. The Frank Moffat (D. C. 1878) Fed. Cas. No. 5,060.

Where a lien for supplies furnished a vessel at its home port was, by the terms of the statute conferring it, only enforceable within nine months after the supplies were furnished, and the vessel to which they were furnished was during the whole of the prescribed period in the custody of a state court, the fact of such custody would not enlarge or suspend the operation of the state statute. The Red Wing (D. C. 1882) 14 Fed. 869.

An action in the federal courts to enforce a maritime lien created by state statute is not affected by a limitation provision in such statute requiring an action thereon to be brought within a specified time, such provision being ineffectual and void. The William M. Hoag (D. C. 1895) 69 Fed. 742, decree affirmed (1897) 18 Sup. Ct. 114, 168 U. S. 443, 42 L. Ed. 537. And see The San Rafael (1905) 141 Fed. 270, 72 C. C. A. 388, reversing judgment (D. C. 1904) 134 Fed. 749, and writ of certiorari denied North Pacific Coast R. Co. v. Hall (1906) 26 Sup. Ct. 756, 200 U. S. 619, 50 L. Ed. 623. CONTRA, The Red Wing (D. C. 1882) 14 Fed. 869; The City of Salem (D. C. 1887) 31 Fed. 616, 2 L. R. A. 380; The Menominie (D. C. 1888) 36 Fed. 197.

108. —— Pleading.—An objection that the demand in suit is stale or barred by the statute of limitation cannot be made without being properly stated in the pleadings. Brown v. Jones (C. C. 1815) Fed. Cas. No. 2,017; The Swallow (D. C. 1846) Fed. Cas. No. 13,665; Jones v. The Richmond (D. C. 1858) Fed. Cas. No. 7,492; The Platina, Id. 11,210. It must be made by special plea. The Platina (D. C. 1858) Fed. Cas. No. 11,210.

109. Pendency of other proceedings.—Consignees of a cargo may maintain a libel in personam against the owners of a vessel for a loss sustained by collision, notwithstanding a suit by them against the vessel in another district. Dollner v. Garcia (D. C. 1859) Fed. Cas. No. 3,970.

After decision for libelants in rem for freight and demurrage, it cannot be objected that freight has been found due libelants in a pending suit in personam. Brookman v. Sixty Barrels of Molasses (D. C. 1862) Fed. Cas. No. 1,941a.

The pendency of an action for salvage by the salvor vessel is no bar to a suit by the passengers of the injured vessel for salvage services rendered at the same time. Forbes v. The Merrimac (D. C. 1866) Fed. Cas. No. 4,927.

An action in rem is not a bar to one in personam, growing out of the same facts, and respondent in the latter is not entitled to a stay of proceedings pending an appeal in the former. Providence-Washington Ins. Co. v. Wager (D. C. 1888) 35 Fed. 364.

110. —— Action in another court.—An action at law was brought in a state court by a passenger against the owner of a vessel to recover damages resulting from a collision. After trial, a verdict in favor of the plaintiff, and more than two years after the collision, the defendant instituted proceedings for limitation of liability in a court of ad-

miralty. Held, that the admiralty court had power, by analogy with the powers exercised by courts of equity and bankruptcy, to permit the plaintiff in the state court to prosecute her action to judgment for the purpose of completing the liquidation of her claim for future consideration in the limited liability proceedings, and that under the circumstances here such leave should be granted. Davenport v. Winnisimmet Co. (1908) 162 Fed. 862, 89 C. C. A. 552, writ of certiorari denied Winnisimmet Co. v. Davenport (1908) 29 Sup. Ct. 684, 212 U. S. 576, 53 L. Ed. 657.

The pendency of a replevin in a state court to settle the right of property in a vessel is a bar to a libel in the admiralty to settle the same right between the same persons; not technically a bar as a plea of lis pendens, but effectively so, to prevent a conflict of jurisdiction. Taylor v. The Royal Saxon (C. C. 1849) Fed. Cas. No. 13,803. But see A Raft of Spars (D. C. 1848) Fed. Cas. No. 11,528, holding that a court of admiralty will not order a salvage suit to be set aside or to be stayed because there is pending in a court of law an action of replevin for the salved property, brought by the owner against the salvor, and in which the validity of the salvor's lien upon the property may be determined.

The right of a seaman to sue in admiralty in personam for his wages is not taken away or suspended by an attachment of his wages by trustee process from a state court in an action at law. Bourne v. Ross (C. C. 1883) 17 Fed. 703, affirming (D. C. 1883) 14 Fed. 858.

That libelant brought a suit in a state court for the same cause of action, which he voluntarily discontinued, will not prevent a suit in admiralty. Bingham v. Wilkins (D. C. 1836) Fed. Cas. No. 1,416; The Pioneer (D. C. 1884) 21 Fed. 426. A suit in personam in a state court, by the consignee against the vessel owner for nondelivery, cannot be pleaded in abatement to a suit in rem in admiralty for the same cause. The Prince Albert (D. C. 1871) Fed. Cas. No. 11,426.

111. —— Objections.—The objection that a prior suit for the same cause of action is pending in a state court can only be taken in a suit in rem in admiralty by a dilatory or declinatory exception, under rule 76, and not by a plea in abatement. Certain Logs of Mahogany (C. C. 1837) Fed. Cas. No. 2,559; The Prince Albert (D. C. 1871) Fed. Cas. No. 11,426.

Sufficiency of objection, see, also, The Pioneer (D. C. 1864) Fed. Cas. No. 11,176.

112. Set-off, counterclaim, and cross-suit.—Debts or liabilities of seamen to the master or owner of a vessel for other cause than for misfeasance or nonperformance in the duties of their position cannot be set up against their demand of wages. The Hudson (D. C. 1846) Fed. Cas. No. 6,831. As the seventh amendment to the constitution of the United States preserving the right of trial by jury excludes admiralty jurisdiction over contracts regulated by the common law, no set-off (not otherwise within admiralty jurisdiction) is allowable on a libel for seamen's wages, unless it is a payment on account thereof. Bains v. The James & Catherine (C. C. 1832) Fed. Cas. No. 756. In an action by a seaman to recover wages, the court cannot compel the seaman to apply towards his wages a sum in his hands as acting captain which remained after the sale of part of the cargo belonging to claimants, as, in an action against a vessel, the court cannot take cognizance of collateral equities to enforce them against the parties personally. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

An indebtedness for a house cannot be pleaded in admiralty as a set-off to a claim for unpaid wages as pilot and carpenter of a vessel, in the absence of an allegation that it was agreed that the work performed as pilot and carpenter should be taken in payment for such house. The Two Brothers (D. C. 1880) 4 Fed. 158.

In a proceeding in rem for wages for services as engineer of a steam tug, where it appears that the wages were earned, a defense in the nature of a counterclaim, based on evidence that libelant and another undertook to make certain repairs upon the boat while laid up, and had been overpaid certain sums beyond the work and materials done and furnished, cannot be sustained if not specially pleaded, and because it does not constitute a cause of action against the libelant singly. White v. The Ranier (D. C. 1891) 45 Fed. 773.

Quære, whether the civil-law action of reconvention, or the remedy of compensatio or stoppage, may be had in admiralty. The Hudson (D. C. 1846) Fed. Cas. No. 6,831.

On a libel for freight on coal, compensation for carting it to consignee's coal yard, for which there is no lien in admiralty, may be charged against advances made by consignee. Gaughran v. One Hundred and Fifty-One Tons of Coal (D. C. 1858) Fed. Cas. No. 5,273.

The amount due upon an accounting between the majority and minority owners cannot be applied to diminish the liability of the stipulators on a bond given for the safe return of the vessel. The Susan E. Voorhis (D. C. 1879) Fed. Cas. No. 13,633.

Under a libel on a cargo for the freight, the charterers could not claim a set-off for damages caused by a delay in the arrival of the vessel, as a set-off is unknown to admiralty except as a credit on the particular transaction which is the subject of the libel.

O'Brien v. One Thousand Six Hundred and Fourteen Bags of Guano (D. C. 1882) 48 Fed. 726.

The court will, on a summary application, relieve against an exorbitant demand of damages in a libel; and a claimant who has given bonds for the full amount of such claim is therefore not entitled to set off against libelants' damages the amount paid to the stipulators as compensation for signing his stipulation for value. The Stelvio (D. C. 1887) 30 Fed. 509.

In a suit for materials furnished, and repairs made, to a steam tug, the owners may set up, in their answer, as a counterclaim, an indebtedness due them by the libelants for pulling a steamship off of a marine railway belonging to libelants, and conveying to such railway a hawser, for that purpose, at their request. The C. B. Sanford (D. C. 1885) 22 Fed. 863.

In a suit against a steamer to recover for machinery supplied her, a counterclaim for damages for breach of the contract under which it was supplied is maintainable. The Venezuela (D. C. 1909) 173 Fed. 834.

There is no warrant in the admiralty practice for a counterclaim, and a set-off is cognizable only so far as it relates to the particular transaction which is the subject of the libel, and goes to reduce or overcome the original demand. Davidson v. Green (D. C. 1904) 127 Fed. 999; Hastorf v. Degnon-McLean Contracting Co. (D. C. 1904) 128 Fed. 982; United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line (D. C. 1910) 180 Fed. 902 (decree affirmed [1911] 185 Fed. 386, 107 C. C. A. 442).

There is no general doctrine of set-off recognized in admiralty; and, if the damages set up by respondent exceed libelant's demand, there can be no decree for the balance, nor any subsequent suit therefor. Snow v. Carruth (D. C. 1856) Fed. Cas. No. 13,144.

Courts of admiralty do not take notice of set-offs, except so far as they grow out of a maritime contract, submitted to its cognizance, and then principally by way of diminishing compensation, and not as an independent right. Willard v. Dorr (C. C. 1823) Fed. Cas. No. 17,680.

Admiralty does not take cognizance of set-off, but allowances may be made to the master or owner by rebatement of wages in compensation of losses or injuries incurred by them in consequence of negligence or fault of the mariner in the performance of his duties. The Hudson (D. C. 1846) Fed. Cas. No. 6,831.

Admiralty will not take jurisdiction of a mere legal or statutory set-off, but proceeds with reference to the topic to which set-off relates on broad equitable principles. American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (1902) 116 Fed. 857, 54 C. C. A. 207.

Matters arising out of independent transactions not connected with the transactions upon which the suit was brought cannot be pleaded as a set-off in admiralty. George D. Emery Co. v. Tweedie Trading Co. (D. C. 1905) 143 Fed. 144; The Oceano (D. C. 1906) 148 Fed. 131; Roney v. Chase, Talbot & Co. (D. C. 1907) 160 Fed. 268 (decree reversed [1908] 161 Fed. 309, 88 C. C. A. 389).

A court of admiralty acts upon equitable principles, and upon that ground also should allow as an offset the compulsory payment of a just debt of which the libelant has had the benefit, where no special hardship to the libelant would result. The City of New Bedford (D. C. 1884) 20 Fed. 57.

In a suit in rem against a ship to recover for the destruction of a beacon, for which she was held in fault, the court will not adjudicate a claim by the claimant of the ship against the pilot, who was in charge of her navigation, but will leave such claim to be determined in an independent suit. The Blackheath (D. C. 1907) 154 Fed. 758.

Where stevedores, having contracted to unload a ship, used dynamite to loosen the cargo, after having agreed that there should be no injury to the ship, and injury occurred, the master was entitled to set off a claim for such injury against a libel for stevedores' compensation. The Coningsby (D. C. 1913) 202 Fed. 814.

113. —— Enforcing claim for contribution.—Where the owner of the cargo recovers his whole damage from one of two vessels in fault, the vessel sued may set off in another suit between the owners of the two vessels, tried at the same time, the one-half of the damage to the cargo which ought to be paid by the other vessel. The Canima (D. C. 1883) 17 Fed. 271. Where a schooner was lost in a collision with a steamer, occasioned by the fault of both, and the damages were to be divided equally between the owners of the two, from the damages otherwise due to the owners of the schooner, the owners of the steamer might recoup half of the damages recovered against the steamer by the owners of the cargo that was lost with the schooner. The Hercules (C. C. 1884) 20 Fed. 205.

114. —— Cross-action or libel.—It is not the office of a cross-libel to enforce a new subject-matter introduced into the litigation by strangers to the original suit, and thus create a new liability. The fifty-third rule of the supreme court clearly indicates that parties other than the original parties cannot be joined either as libelants or respondents in a cross-libel. The Ping-On v. Blethen (C. C. 1882) 11 Fed. 607.

This rule does not permit new and distinct matters not involved in the issues tendered by an original libel to be the basis of a cross-libel, but any cause

of action in favor of a party called upon to defend against the original libel founded upon the same contract, or arising out of the same transaction, is a counterclaim which may be set up by a cross-libel. The C. B. Sanford (D. C. 1885) 22 Fed. 863; The Highland Light (D. C. 1898) 88 Fed. 296; George D. Emery Co. v. Tweedie Trading Co. (D. C. 1905) 143 Fed. 144; United Transp. & Lighterage Co. v. New York & Baltimore Transp. Line (D. C. 1910) 180 Fed. 902, decree affirmed (1911) 185 Fed. 386, 107 C. C. A. 442.

This rule is to be given a construction sufficiently broad to allow all matters in dispute between the parties, which must necessarily be considered in the determination of the original case, to be fully considered for all purposes, so that the rights of both parties may be fully protected and finally adjudicated in one suit. The Highland Light (D. C. 1898) 88 Fed. 296.

It is to be construed as embracing cases arising out of the same subject-matter of dispute, when the question in litigation is substantially the same in both suits. The words "cause of action" are not used in this rule in the sense of the same identical legal demand. Vianello v. The Credit Lyonnais (D. C. 1883) 15 Fed. 637. This rule was not intended to give jurisdiction on a cross-libel in rem without seizure of the vessel. The Bristol (D. C. 1870) Fed. Cas. No. 1,889.

A cross-action cannot be maintained which seeks a retrial of matters already adjudicated between the parties. Nor is this rule varied when the subject-matter is the same, although one action be in rem and the other in personam; the thing sued being regarded in admiralty as substituted for its owner, and, when subject to his responsibilities, entitled at the same time to his immunities. The Navarro (D. C. 1845) Fed. Cas. No. 10,059.

Where a libel is filed for freight, a cross-libel for damages sustained by reason of the failure to deliver the freight after tender and demand, and for damages resulting by a forced sale thereof under order of court, cannot be maintained where the cargo was at the time in the custody of the marshal under valid process in the pending suit; the remedy of the claimant in admiralty being in the original suit by giving bond. Henderson v. Three Hundred Tons of Iron Ore (D. C. 1889) 38 Fed. 36.

In a suit for salvage by the crew and owners of a tug for saving a fleet of coal barges which had been loosened from their moorings and scattered by the wind, a counterclaim for the wrongful mooring of the tug to the outer barge of the fleet, whereby the accident occurred, which exposed the barges to the danger from which the tug saved them, is not the proper subject of a cross-libel. Southwestern Transp. Co. v. Pittsburg Coal Co. (D. C. 1890) 42 Fed. 920.

A cross-libel to a libel for repairs on a steamer's boilers, which alleges, by way of counterclaim, a breach of a former and separate contract to repair such boilers, does not arise out of the same cause of action for which the original libel was brought, within the meaning of rule 53. The Zouave (D. C. 1886) 29 Fed. 296.

In a suit by an assignee to recover freight earned under a charter party, a claim, set up in the answer, for coal, which it is alleged was furnished by defendant to libelant's assignor, after the making of the charter party, "solely in reliance on the said contract of affreightment, and with the intention, expectation, and anticipation" that the price of such coal would be retained from the freight earned under such contract, but without alleging any agreement to that effect, does not constitute a set-off which can be entertained in admiralty. Anderson v. Pacific Coast Co. (D. C. 1900) 99 Fed. 109, affirmed (1901) 107 Fed. 973, 47 C. C. A. 106.

In a suit in admiralty to recover for lighterage services rendered under a contract with respondent corporation, a claim by respondent for damages, based on alleged excessive charges paid libelant by respondent under a prior contract between them, made on behalf of respondent by a former officer who was also interested in libelant company, is not one "arising out of the same cause of action for which the original libel was filed," and cannot be set up as a counterclaim under the fifty-third rule. United Transportation & Lighterage Co. v. New York & Baltimore Transp. Line (1911) 185 Fed. 386, 107 C. C. A. 442, affirming decree (D. C. 1910) 180 Fed. 902.

Since, in a suit for towage, the defendant, who has a counterclaim for damages for negligent performance of the contract in excess of the libelant's claim, cannot recover his full damages by answer, but only by cross-libel, and as he cannot split up his cross-demand, but must try it in the cross-suit, he is entitled to have the libel and cross-libel heard together, if brought in the same court. The Ciampa Emilia (D. C. 1889) 39 Fed. 126.

In a suit by the charterers of a vessel to recover under the charter party for damages and loss in respect to the cargo, the owners may maintain a cross-libel for the value of the vessel and for freight, demurrage, etc., upon the ground that she was lost through the fault of the charterers. The Giles Loring (D. C. 1890) 48 Fed. 463.

To a libel in rem to recover money earned by libelants as stevedores in loading certain vessels, a cross-libel may be filed, under rule 53, to recover damages for breach of a promise by plaintiffs to render certain towage services to the vessels in question, where

the agreement for loading the vessels and for the towage were both embodied in the same instrument, and the mutual promises of the parties constituted the consideration of the contract. The Highland Light (D. C. 1898) 88 Fed. 296.

Under a written contract for repairing a vessel, enumerating many items of work to be done and materials furnished, and fixing the price to be paid therefor, and at the end providing that the enumerated details were simply an outline, and that the contractor was to do "a proper and suitable job to put the vessel in first-class shape," all repairs made by the contractor, and which were necessary to put the vessel in good condition, whether specified, or made pursuant to a subsequent oral agreement, but in connection with those specified, were within the written contract, and in a suit to recover for extra repairs, not specified therein, the owner could set off claims for damages arising from the failure of the contractor to complete the specified work in the manner required by the contract. Davidson v. Green (D. C. 1904) 127 Fed. 999.

The admiralty has no jurisdiction of an independent set-off, and hence, in a suit in rem for collision, a so-called "cross-bill," seeking to set off a running account, cannot be maintained. Walton v. The Frank Gilmore (D. C. 1896) 73 Fed. 686.

In a suit in rem to recover damages resulting from a collision, admiralty has no jurisdiction of a cross-libel for unliquidated damages caused by an entirely different collision. Id.

Where a suit in rem for collision was brought in good faith, and there has been no abuse of the court's process, the respondent vessel cannot maintain a cross-libel for damages caused by her seizure and detention. The Amiral Cecile (D. C. 1905) 134 Fed. 673.

Upon a libel in rem, filed for damages caused by a collision, a cross-libel cannot be sustained for salvage on account of services rendered to the injured vessel after the collision. Such a claim does not arise out of the cause of action on which the libel is founded, within the meaning of the fifty-third rule. Crowell v. The Theresa Wolf (D. C. 1880) 4 Fed. 152.

Admiralty rule 53 is to be given a construction sufficiently broad to allow all matters in dispute between the parties, which must necessarily be considered in the determination of the original case, to be fully considered for all purposes, so that the rights of both parties may be fully protected and finally adjudicated in one suit. The Highland Light (D. C. 1898) 88 Fed. 296.

115. —— Cross-libel to obtain affirmative damages.—In an admiralty suit, respondents cannot be allowed damages in reconvention claimed in their answer, when no cross-libel has been filed, and no proper proceedings have been had on such a demand. The Nadia (C. C. 1883) 18 Fed. 729; Ebert v. The Reuben Doud (D. C. 1880) 3 Fed. 520.

In collision cases, if the claimant means to set-off or recoup damages, the fact that the libeled vessel was injured ought to appear by a cross-libel, or by answer, or in some other way. The Sapphire (1873) 85 U. S. (18 Wall.) 51, 21 L. Ed. 814. And see Kennedy v. Dodge (D. C. 1867) Fed. Cas. No. 7,701.

116. —— Election between cross-libel and other methods of asserting claim.—On a libel for freight, the consignee may set up, by way of recoupment, a claim for damages to the goods; but, if the damage exceeds the claim for freight he can have no decree for the excess, nor can he subsequently maintain a suit therefor. Respondent may, at his election, file a cross-libel for such damage, instead of setting it up by way of recoupment, and in such case may have a decree for the excess. Snow v. Carruth (D. C. 1856) Fed. Cas. No. 13,144; Kennedy v. Dodge (D. C. 1867) Fed. Cas. No. 7,701.

A charterer who sets up a neglect of duty by the shipowner merely to repel a claim for demurrage is not thereby prevented from maintaining a cross libel for damages sustained by such neglect. Nichols v. Tremlett (D. C. 1857) Fed. Cas. No. 10,247.

Where a libel for collision has been filed, and the answer alleges injuries sustained, with an appropriate prayer for relief, respondent has the right, without filing a cross-bill, to show damages by way of recoupment to reduce or extinguish libelant's claim. Ebert v. The Reuben Doud (D. C. 1880) 3 Fed. 520.

117. —— Election between cross-libel and independent action elsewhere.—Where a libel has been filed in the Southern district of New York against a vessel for damage by collision, the owner of the vessel so libeled may sue independently for his own damage in the Eastern district of New York, and is not obliged to prosecute his claim by way of cross-libel in the Southern district. Brooklyn & N. Y. Ferry Co. v. The Morrisania (C. C. 1888) 35 Fed. 558.

118. Consolidation of actions.—Causes of action of a like nature, involving substantially the same questions arising out of a collision, though against different vessels, may be consolidated in admiralty. The Burke (C. C. 1878) Fed. Cas. No. 2,159.

Whether or not a multiplicity of persons having claims against a vessel shall be permitted to consolidate their various libels rests in the sound discretion of the court. The Rochester (D. C. 1915) 227 Fed. 203.

Where both parties to a collision file libels, the courts have the power to consolidate the actions, and prescribe one proceeding, and pronounce one decree, for one-half of the difference of damage suffered by the two vessels. The North Star (1882) 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

The several libels filed by the crew of a vessel for wages due, and for compensation and allowance for the reduction of provisions during a voyage, may be consolidated. The Sarah E. Kennedy (D. C. 1885) 25 Fed. 672.

Proceedings on separate libels relating to the distribution of the proceeds of a vessel, her cargo and freight, none of which can be wholly disposed of without regard to one or more of the others, may be consolidated and tried together. The Eliza Lines (C. C. 1894) 61 Fed. 308. And see The Eliza Lines (1902) 114 Fed. 307, 52 C. C. A. 195, modified (1904) 132 Fed. 242, 65 C. C. A. 538, and reversed (1905) 26 Sup. Ct. 8, 199 U. S. 119, 50 L. Ed. 115.

119. Severance of actions.—On libel against a cargo for freight and other charges, where claimants admit that the freight is due, but deny liability for the other charges, the cause of action may be severed, and judgment rendered for libelants for the freight charges, though such separation destroys the right of appeal to the supreme court, by reducing the amount in controversy below its jurisdiction. Larrinaga v. Two Thousand Bags of Sugar (C. C. 1889) 40 Fed. 507.

120. Stay of proceedings.—It is in the discretion of an admiralty court to stay proceedings under a libel until libelant, being out of the jurisdiction, shall enter appearance to a cross-libel. Nichols v. Tremlett (D. C. 1857) Fed. Cas. No. 10,247.

On a libel in personam against a subcharterer to recover freight, respondent, on petition, will be allowed to pay the freight moneys into court to abide the decision of a contest between the owner and charterer as to a claim for demurrage in which he is not interested, and the suit against him will be enjoined, though the result will be to turn the proceeding into one, in rem against the freight. Copp v. Decastro & Donner Sugar Refining Co. (D. C. 1875) Fed. Cas. No. 3,215.

The taking of notes and mortgages from the owners as collateral security after the seizure and bonding of the vessel will not operate to stay the suit nor discharge the surety. The Maggie Jones (D. C. 1877) Fed. Cas. No. 8,947.

121. —— Pending suit in another court.—A salvage suit will not be stayed pending an action of replevin for the salved property in a court of law, in which the validity of the salvor's lien may be determined. In re Raft of Spars (D. C. 1848) Fed. Cas. No. 11,528.

Courts of admiralty recognize legal titles and legal and equitable liens, and if, after a judgment has been rendered in favor of a party having a claim upon the residuum in the registry, it is brought to the notice of the court that an equitable action of nullity has been instituted in a state court to annul the transfer by which said party held title to the claim, on the ground of fraud and simulation, the court of admiralty will order the proceedings on execution of its judgment to pause until the termination of the suit in equity in the state court. The Albert Schultz (D. C. 1882) 12 Fed. 156.

In the case of three litigations against a vessel or its owners, involving title to the same property, brought in different courts, the proceedings in one were stayed unless libelant should elect to stay proceedings in the others. The Idaho (D. C. 1870) Fed. Cas. No. 6,996.

122. —— Pending determination of cross-suit.—Since, in a suit for towage, the defendant, who has a counterclaim for damages for negligent performance of the contract, in excess of the libelant's claim, cannot recover his full damages by answer, but only by cross-libel, and as he cannot split up his cross-demand, but must try it in the cross-suit, he is entitled to have the libel and cross-libel heard together, if brought in the same court. If brought in different courts, judgment on the libel for towage should be stayed until reasonable opportunity had for the trial of the larger counterclaim in the cross-action. The Ciampa Emilia (D. C. 1889) 39 Fed. 126.

123. —— Proceedings against nonresidents.—In the case of a libel in personam against the owners of a foreign ship for injuries by collision, where such owners sought the benefit of the rule of the general maritime law permitting them to abandon their vessel and freight, an injunction should be granted against the prosecution of the libel in personam, providing that the vessel owners, who were nonresidents and could not be served with process, should first enter their appearance. Churchill v. The British America (D. C. 1878) Fed. Cas. No. 2,715.

124. Dismissal.—When a libel is filed claiming a forfeiture of a vessel, and the facts do not authorize the forfeiture alleged, but show an offense against other provisions of the same law under which the forfeiture is alleged to have accrued, the libel will be dismissed. U. S. v. The Hunter (C. C. 1806) Fed. Cas. No. 15,428.

The court may dismiss a libel on exceptions. The Pauline (D. C. 1863) Fed. Cas. No. 10,848.

A possessory suit being discontinued, no appearance having been entered, the marshal was directed to discharge the vessel, and libelant assumed possession.

Held, that the court had no further jurisdiction in such suit, and could not direct the marshal to restore the vessel to the persons from whom he took it. The Jack Jewett (D. C. 1868) Fed. Cas. No. 7,121.

On a libel to recover possession of a vessel wrongfully taken from the owner, brought against the wrongdoer and a purchaser from him in possession, where no decree for damages is asked against the wrongdoer, the libel against him will be dismissed without costs. Thurber v. The Fannie (D. C. 1876) Fed. Cas. No. 14,014.

125. —— **Voluntary discontinuance or dismissal.**—A libelant has the right, at any stage of the cause, voluntarily to discontinue the same on payment of costs. The Oriole (D. C. 1844) Fed. Cas. No. 10,573.

After pertinent evidence offered involving the merits, plaintiff cannot suffer a nonsuit, so as not to be barred, except by consent of the opposite party, or on leave given by the court for sufficient reason. Folger v. The Robert G. Shaw (C. C. 1847) Fed. Cas. No. 4,899.

A verbal agreement between the parties, after libel in admiralty filed, for the settlement and discontinuance of the suit, about the terms of which, however, they soon differed, and which was not set up in the answer afterwards filed, cannot at final hearing, after full proofs taken, be insisted on as having ousted the jurisdiction of the court, even if originally such effect might have been given to it. The Robert Jenkins (D. C. 1885) 22 Fed. 797.

On the voluntary dismissal of a libel, and tender of the accrued costs by the libelant to claimant, the court will not entertain a motion to compel the libelant to file additional stipulations in the cause, and that the court award out of such securities an indemnity to claimant for the wrongful prosecution of the action. Nor will the court, upon the application of claimant, inquire into damages caused him by an unfounded arrest of the ship. The Oriole (D. C. 1844) Fed. Cas. No. 10,573.

126. —— **Dismissal for want of jurisdiction.**—A libel in admiralty was dismissed pro forma for want of jurisdiction in order to allow an immediate appeal. Swaim v. The Franklin (D. C. 1838) Fed. Cas. No. 13,660.

127. —— **Dismissal for delay in or want of prosecution.**—A libel was dismissed for delay in prosecuting the same, where libelant refused the option of going to trial on the libel and answer and replication filed on the day appointed for the special hearing. Douglass v. The Washington (D. C. 1841) Fed. Cas. No. 4,033.

If a court of equity would not dismiss a case because some of the joint plaintiffs refused to proceed, a court of admiralty would not dismiss a libel under similar circumstances. Richmond v. New Bedford Copper Co. (D. C. 1874) Fed. Cas. No. 11,800.

The practice of the court does not authorize the dismissal of a libel for the libelant's delay in bringing the cause to a hearing after issue joined. The claimant has an equal right to move the case. The Mariel (D. C. 1881) 6 Fed. 831.

A suit in admiralty will not be dismissed for neglect to prosecute, where it was placed on the calendar and noticed immediately after issue joined, but was not called for trial, by reason of the accidental absence of witnesses. Chambers v. The Henry Kneeland (D. C. 1844) Fed. Cas. No. 2,581a.

128. —— **Dismissal in order to use party as witness.**—In a joint libel against two or more persons for a marine tort, the court has authority to dismiss the libel as to one of them, even if there be some evidence against him, for the purpose of his being used as a witness, if the purposes of justice require it. Elwell v. Martin (D. C. 1824) Fed. Cas. No. 4,425.

129. —— **Dismissal without prejudice.**—The denial by a court of admiralty of a motion by libelants to dismiss without prejudice, after a hearing and the filing of an opinion directing a decree for respondent, held not an abuse of discretion. The Bainbridge (1912) 199 Fed. 404, 118 C. C. A. 88.

Where a seaman sues for damages for personal injuries to his kneepan, and the mode in which the accident happened is not satisfactorily explained, and the evidence is conflicting, and the claim is not established by a fair preponderance of proof, the libel will be dismissed without prejudice. Pihlag v. The Elsie Fay (D. C. 1892) 48 Fed. 700.

130. —— **Effect on cross-libel.**—On dismissal of a libel, a cross-libel which is not so connected with the subject-matter of the libel as to be maintainable must also be dismissed. Kemp v. Brown (D. C. 1889) 43 Fed. 391.

131. —— **Effect of dismissal of cross-libel.**—In an action for collision, the dismissal of a cross-libel charging that the collision was occasioned by the fault of libelant's vessel does not, on the trial of the original libel, estop respondent to deny the charge in the answer to the cross-libel that the collision was occasioned wholly by the fault of the vessel originally libeled; such dismissal leaving all the issues in the original suit open for consideration. The Dove (1875) 91 U. S. 381, 23 L. Ed. 354.

132. —— **Time of moving to dismiss.**—A motion to dismiss a libel in rem in admiralty may be made although a full hearing has been had on the merits, with testimony and argument. Charles-

ton Bridge Co. v. The John C. Sweeney (D. C. 1893) 55 Fed. 540.

In a suit in admiralty, a motion to dismiss at the close of libelant's case will not be entertained, unless the claimant or respondent also rests. The Persiana (D. C. 1907) 158 Fed. 912.

(C) Parties

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175. —— Intervention after release on stipulation.
176. —— Assertion of claim through agent.
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182. —— Advertisement on intervention.
183. —— Caution by claimant.
184. —— Objections to title of claimant.
185. —— Intervention in petitory or possessory actions.
186. Death of party.
187. —— Continuance or revival of action.

133. Libelants.—In admiralty a party entitled to relief should always be made libelant. Fretz v. Bull (1851) 53 U. S. (12 How.) 466, 13 L. Ed. 1068; Eastfield S. S. Co. v. McKeon (D. C. 1911) 186 Fed. 357, decree reversed (1913) 201 Fed. 465, 120 C. C. A. 249.

134. —— Capacity to sue or be sued in general.—The remedy in personam given by rule 19 "against the party at whose request, and for whose benefit, the salvage services have been performed," is not confined to the legal owner of the property saved, but extends to one who had a direct pecuniary interest in such property. U. S. v. Cornell Steamboat Co. (1906) 26 Sup. Ct. 648, 202 U. S. 184, 50 L. Ed. 987, affirming decrees (1905) 137 Fed. 455, 69 C. C. A. 603, and Cornell Steamboat Co. v. 1883 Bags of Sugar (D. C. 1901) 108 Fed. 277.

A person who, from incapacity of mind or other cause, cannot be made to understand the English language, cannot be a party to a sworn libel. He should sue under the guardianship of a committee, a prochein ami, or a trustee. Sunday v. Gordon (D. C. 1837) Fed. Cas. No. 13,616.

If it appears from the libel that the libelant is not entitled to sue, the respondent may demur; but if the incapacity does not appear, but exists in fact, he must plead in bar. Knight v. The Attila (D. C. 1838) Fed. Cas. No. 7,881.

135. —— Suits by minors.—Admiralty will interpose to protect the rights of a minor suing by his prochein ami against the misconduct of the latter, and will hold the acts of the latter to be of no effect in the case of bad faith or collusion. The Etna (D. C. 1838) Fed. Cas. No. 4,542.

A minor may recover wages as a seaman in his own name when the contract was made personally with him, and it does not appear that he has any parent, guardian, or tutor entitled to receive them. The David Faust (D. C. 1867) Fed. Cas. No. 3,595. And the respondent is not entitled to require the appointment of a guardian ad litem or next friend for the libelant. Wicks v. Ellis (D. C. 1849) Fed. Cas. No. 17,614. He may also recover such wages upon a libel promoted by his father as prochein ami, where the father has agreed that the son may receive his own wages. Davis v. The Seneca (D. C. 1828) Fed. Cas. No. 3,651.

136. —— Suing for use of another.—The practice of instituting a suit in the name of one person for the use of another, to whom the right has been transferred, obtains only in particular

cases. Fretz v. Bull (1851) 53 U. S. (12 How.) 466, 13 L. Ed. 1068; Eastfield S. S. Co. v. McKeon (D. C. 1911) 186 Fed. 357, decree reversed (1913) 201 Fed. 465, 120 C. C. A. 249.

The master and part owner of a vessel, sunk by collision, may enforce against the vessel in fault and her master the insurer's claim on account of loss of the cargo. Newell v. Norton (1865) 70 U. S. (3 Wall.) 257, 18 L. Ed. 271.

In collision cases the mortgagee of the vessel injured may represent the interest of insurers, who have paid part of the loss, if so authorized by them. The Grand Republic (D. C. 1882) 10 Fed. 398.

The actual party in interest being entitled to sue in admiralty, the fact that proceedings were brought in the firm name by the surviving partner is not a valid objection; it appearing that claimants, in dealing with the survivor, knew that, after his copartner's death, he continued to do business in the name of the firm. Byrnes v. The Rockaway (D. C. 1851) Fed. Cas. No. 2,274.

A libel for salvage in the name of a British naval officer and the British consul, joining with him, "for all other interests," where the vessel, rescued by the British naval vessel, was sent home in charge of the officer, held not fatally defective. Robson v. The Huntress (C. C. 1851) Fed. Cas. No. 11,971; The Huntress (D. C. 1850) Fed. Cas. No. 6,912.

Where a husband, with the assent of his wife, filed a libel as owner for injury to a canal boat, wholly owned by her, and she gave material testimony at the trial, held, that she would be estopped from bringing another suit, and the libel could be maintained. The Tillie (C. C. 1876) Fed. Cas. No. 14,049.

137. —— **Action in name of or for benefit of assignor.**—There is no substantial objection to permitting a libelant to maintain a suit in rem in his own name, on a claim assigned to him for that purpose, for the benefit of his assignor, where he also has a cause of action in his own right which he intends to prosecute, arising out of the same facts, and to be tried in part on the same evidence, so that there will be a saving of expense in trying the two cases together. The Prussia (D. C. 1900) 100 Fed. 484.

A suit in the name of an assignor of the bond may be maintained, where the assignee appeared and filed a supplemental libel, which was duly answered. Burke v. The M. P. Rich (C. C. 1859) Fed. Cas. No. 2,161.

Where the seaman obtains a common-law judgment, which he sells, no libel can be maintained thereupon, either by himself or for the benefit of the assignee. The Gate City (D. C. 1872) Fed. Cas. No. 5,267.

138. —— **Assignees.**—In admiralty, suits may be brought by the assignee of a chose in action in his own name. Cobb v. Howard (C. C. 1856) Fed. Cas. No. 2,924; Cohan v. The Rolling Wave (D. C. 1857) Fed. Cas. No. 2,959a; Swett v. Black (D. C. 1861) Fed. Cas. No. 13,690. And see Reynolds v. The Favorite (1865) 10 Minn. 242 (Gil. 190); Morin v. The F. Sigel (1865) 10 Minn. 250 (Gil. 195).

The lien of a materialman is assignable, and, where the assignment is absolute, the assignee may proceed in admiralty in his own name. Cohan v. The Rolling Wave (D. C. 1857) Fed. Cas. No. 2,959a; The Sarah J. Weed (D. C. 1877) Fed. Cas. No. 12,350; Park v. The Hull of the Edgar Baxter (D. C. 1888) 37 Fed. 219. But see Reppert v. Robinson (C. C. 1851) Fed. Cas. No. 11,703, holding that the right to sue in admiralty to enforce a claim for supplies and repairs to a vessel is personal, and cannot be maintained for the benefit of an assignee of a duebill or promissory note given to secure the claim. An action in personam for breach of a contract contained in a passenger ticket may be brought by the transferee of the ticket in his own name. Cobb v. Howard (C. C. 1856) Fed. Cas. No. 2,924; Cobb v. Howard (C. C. 1856) Fed. Cas. No. 2,925.

A purchaser who has been put in possession, though he has no bill of sale, may maintain a possessory suit in admiralty. Thurber v. The Fannie (D. C. 1876) Fed. Cas. No. 14,014. But the assignee of a seaman's claim for wages cannot enforce the same in rem in admiralty. Logan v. The Æolian (D. C. 1859) Fed. Cas. No. 8,465; Patchin v. The A. D. Patchin (D. C. 1850) Fed. Cas. No. 10,794; Rusk v. The Freestone (D. C. 1868) Fed. Cas. No. 12,143. Nor does the assignment of a claim for towage transfer the legal title, and the original owner can sustain a libel in his own name. The Emma L. Coyne (D. C. 1878) Fed. Cas. No. 4,466.

An assignment by a charterer to the shipowners of the right to collect all freights from a subcharterer in payment of the vessel's hire under the charter, held equivalent to an equitable assignment of the freights, carrying with it the right to the shipowners to sue the subcharterer in a court of admiralty for their recovery. Pacific Coast Co. v. Anderson (1901) 107 Fed. 973, 47 C. C. A. 106, affirming decree Anderson v. Pacific Coast Co. (D. C. 1900) 99 Fed. 109.

The judicial sale of a vessel cannot be impeached by the claimant and former owner merely on the ground that the person who prosecuted the libel purchased the claim on which it was brought pending the suit, and continued the action as assignee of the original libelants. Seaver v. The Carroni (D. C. 1858) Fed. Cas. No. 12,593.

A shipwright holding possession of a tug under his lien for repairs assigned

his claim to E., still holding possession as the latter's agent. The owner filed a libel in personam to recover possession, without tender of the debt, and E. filed a libel in rem to enforce his claim. Held that, the contract being maritime, the claim and lien were transferable, and could be enforced in admiralty by the assignee; that the latter was entitled to a decree for the amount due, and the owner to a decree for possession only on payment of that amount. Park v. The Hull of The Edgar Baxter (D. C. 1888) 37 Fed. 219.

139. —— **Agent of nonresident.**—The consignee of goods, although the mere agent of a nonresident owner, can sue in admiralty in his own name for the value of the property lost by the negligence of a steamer. The Nail City (D. C. 1884) 22 Fed. 537.

140. —— **Carrier of cargo.**—A carrier can maintain an action in admiralty for damage done to goods in his care. The St. John (C. C. 1870) Fed. Cas. No. 12,224; The Beaconsfield (1895) 15 Sup. Ct. 860, 861, 158 U. S. 303, 39 L. Ed. 993.

Though the cargo belonged to third parties, the owner of the injured vessel, as bailee, is entitled to recover for its loss. Burton v. The Commander in Chief (C. C. 1861) Fed. Cas. No. 2,216. But see The New Jersey (D. C. 1846) Fed. Cas. No. 10,162, holding that the owner of a vessel whose cargo is damaged by collision cannot sue for the damage in his own name, unless he has paid the same or become liable to pay it.

141. —— **Charterer.**—A charterer may maintain a libel against another vessel for collision. Lake Erie & B. Steamboat Co. v. The Son & Heir (D. C. 1863) Fed. Cas. No. 7,995.

142. —— **Consignees.**—A consignee may sue in admiralty, either in his own name, as agent, or in the name of his principals, as he thinks best. McKinlay v. Morrish (1858) 62 U. S. (21 How.) 343, 16 L. Ed. 100.

Consignees of a cargo may maintain a libel in personam against the owners of a vessel for a loss sustained by collision. Dollner v. Garcia (D. C. 1859) Fed. Cas. No. 3,970.

One whom shipowners have treated as consignee, and who, as such, has made advances on the cargo, may libel the vessel for damages to the cargo. The Water Witch (1861) 66 U. S. (1 Black) 494, 17 L. Ed. 155.

143. —— **Master of vessel.**—An action for freight lies in admiralty in favor of the master of a ship against the consignee of cargo, equally in personam and in rem. Thatcher v. McCulloh (D. C. 1846) Fed. Cas. No. 13,862.

The master has authority as such to sue in his own name for damages to his vessel by collision. The Una (D. C. 1871) Fed. Cas. No. 14,331; The Uncle Abe (D. C. 1878) Fed. Cas. No. 14,334.

The master's right of action, as such, for a collision, is not affected by the fact that underwriters upon the vessel have paid the cost of repairs, which constitutes a part of the claim for damages. The Uncle Abe (D. C. 1878) Fed. Cas. No. 14,334.

144. —— **Mortgagees.**—A mortgagee in possession has a right to file a libel in rem for earnings from towage. Kearney v. A Pile Driver and Stage (D. C. 1880) 3 Fed. 246.

In a collision case, the mortgagee of the vessel injured may represent the interests of insurers who have paid part of the loss, if so authorized by them. The Grand Republic (D. C. 1882) 10 Fed. 398. He is also entitled to come in on petition as colibelant with the owners of the vessel sunk by a collision. Id.

145. —— **Mortgagors.**—The fact that the owners of a vessel in possession have placed the title temporarily in another, to secure moneys borrowed to pay her purchase price, will not prevent their maintaining a libel for collision. Messena v. The Neilson (D. C. 1858) Fed. Cas. No. 9,493a.

146. —— **Insured.**—Where a marine insurance policy was issued to "A. E., upon account of whom it may concern, in case of loss, to be paid to him or order," and the insurance was effected for the benefit of the libelant, the owner at the time, a suit on the policy was rightly brought in the name of the libelant, who was the insured under the policy. Earnmoor v. California Ins. Co. (D. C. 1890) 40 Fed. 847.

147. —— **Persons claiming by subrogation.**—Insurers who pay the claims upon their policies are subrogated to the rights and remedies of the insured, and may proceed in admiralty in their own names. Mutual Safety Ins. Co. v. Cargo of the George (D. C. 1845) Fed. Cas. No. 9,981. And see The Liberty No. 4 (D. C. 1881) 7 Fed. 226, and The Cadiz (C. C. 1884) 20 Fed. 157.

Where goods are injured by collision at sea, and the insurers pay part of the loss, the owner of the goods may file a libel for his own loss unpaid, and for the use of the insurers to the extent of the loss paid by them. The libelant's authority to represent the insurers must appear, to entitle him to recover for their use; but this will not be considered, upon an exception to the general want of power, to maintain a libel for the use of another. The Anchoria (D. C. 1882) 9 Fed. 840. And see Eastfield S. S. Co. v. McKeon (D. C. 1911) 186 Fed. 357, decree reversed (C. C. A. 1912) 201 Fed. 465.

The libelant may sue for himself and for the use of another where both are entitled to recover upon the same state

of facts, and the interest of the latter has arisen from subrogation to part of the right of the former. The Anchoria (D. C. 1882) 9 Fed. 840.

148. —— **Condemnation of prizes.**—See Proceeds of Prizes of War (D. C. 1849) Fed. Cas. No. 11,440.

149. —— **Effect of receiving indemnity from underwriters.**—Libelant is entitled to the full amount of damages, though he has received partial indemnity from underwriters. The Avon (C. C. 1873) Fed. Cas. No. 680.

That a part owner has received insurance as for a total loss is no reason why the entire value of the vessel should not be awarded, on a libel by the owners. The Metis (D. C. 1871) Fed. Cas. No. 9,500.

Payment to a carrier, by an insurance company, of damages to a cargo by a collision, will not prevent the carrier from maintaining a suit against the wrongdoer for the full amount of the damage. Hovey v. The Sarah E. Brown (D. C.) Fed. Cas. No. 6,744.

150. —— **Underwriters.**—Underwriters not having accepted an abandonment are not proper parties. The Boston (C. C. 1833) Fed. Cas. No. 1,673.

Underwriters cannot make any claim for salvage property in the admiralty, unless there has been an abandonment of the property to them, and an acceptance. The Henry Ewbank (C. C. 1833) Fed. Cas. No. 6,376.

151. —— **Joinder in general.**—One of two part owners in a vessel run for their common profit cannot contract with a shipper, without the consent of the other, to apply freight earned on his individual debt. The part owners may jointly maintain a suit in admiralty to recover the freight, notwithstanding such contract. Donovan v. Dymond (C. C. 1878) Fed. Cas. No. 3,993.

Where a thing is defendant, and several persons are asserting rights in it, distinct, but before the same tribunal, the proceedings are, for certain purposes, necessarily to be considered together; i. e., to rank the claims or to proportion the proceeds, and the parties may be joined. The Prinz Georg (C. C. 1884) 23 Fed. 906.

All the privileged creditors may unite in one libel, or, if a libel has been filed by any one separately, then others may come in by petition and make themselves parties to the suit. The Hull of a New Ship (D. C. 1842) Fed. Cas. No. 6,859.

Where two whalers are under a contract of mateship, there is no such joint property in a whale taken by one of them as requires the owners of both to join in an action for its tortious conversion. Taber v. Jenny (D. C. 1856) Fed. Cas. No. 13,720.

A forfeiture incurred by a transfer of an interest in the injured vessel to an alien, but not judicially declared, does not prevent him from joining in the libel. The Nabob (D. C. 1864) Fed. Cas. No. 10,002.

An insurance company, paying the insurance in the cargo of a vessel sunk by collision, may be joined as colibelant with the owners of the vessel, after a decree has been given in their favor against the vessel causing the damage, and an order of reference to a commissioner made to ascertain the amount of damage. The City of Paris (D. C. 1867) Fed. Cas. No. 2,766.

Ten out of thirteen owners, having a majority of the shares in a ship, may bring a suit in the name of all the owners; but the suit will be stayed until the other owners are indemnified for costs. Richmond v. New Bedford Copper Co. (D. C. 1874) Fed. Cas. No. 11,800.

Until a majority in interest in a vessel join in the application, a court will not proceed to dispossess a person who is also a proprietor of such vessel, and whose possession the common law, upon general principles, is inclined to maintain. In re The Eliza B. Emory (D. C. 1880) 3 Fed. 241.

Where, on libel against one as sole owner of a ship, it appears that he owns only 18/64ths, the libel will be dismissed. Card v. Hines (D. C. 1888) 35 Fed. 598.

A libel by a firm of three members against a vessel in which two of them owned an interest cannot be maintained. The Benton (D. C. 1877) Fed. Cas. No. 1,334.

Where goods belonging to different parties are shipped by the same vessel, and are injured by a common disaster caused by the same act of negligence on the carrier's part, the different shippers or their assignees may join in filing a libel in admiralty to recover their damages. Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co. (D. C. 1882) 14 Fed. 699.

When the claims rest upon a charge of voluntary withholding of provisions, etc., the cases necessarily involve a common question, viz. whether an adequate supply of provisions was originally laden on board, and are therefore analogous to cases of salvage or collision in this respect, and for this reason the joinder would be permissible. The Prinz Georg (D. C. 1884) 19 Fed. 653.

There is no rule of admiralty pleading which renders a libel by a vessel owner to recover freight earned subject to exception for multifariousness and misjoinder because it joins the charterer and another, to whom the bill of lading had been transferred, and asks recovery in the alternative against one or the other, alleging that, by reason of certain facts set out, the libelant is unable to say which is liable; and the court has discretion to permit such joinder, where it will conduce to its own convenience in the trial of the claims, and will result in no injustice

to the parties. Neall v. Curran (D. C. 1899) 93 Fed. 831.

Whether or not a multiplicity of persons having claims against a vessel shall be permitted to unite in a single libel, rests in the sound discretion of the court. The Rochester (D. C. 1915) 227 Fed. 203.

A libel in personam, resting upon a common cause of action, may be filed for the libelants and for all others interested, whenever the whole subject-matter can be disposed of in one suit. The American Ins. Co. v. Johnson (D. C. 1827) Fed. Cas. No. 303.

Where several persons have causes of action of a like nature, involving one or more questions common to all against a vessel, all may join in one libel. Salmon Falls Mfg. Co. v. The Tangier (D. C. 1856) Fed. Cas. No. 12,267; The Sam Gaty (D. C. 1870) Fed. Cas. No. 12,276.

In suits in rem in admiralty, all persons having claims of a like nature against the thing may join in a single libel for the purpose of having that question decided, whether the claims arise from tort or contract. The Young Mechanic (D. C. 1856) Fed. Cas. No. 18,182. They may so join, though as between themselves their interests are separate and distinct. The American Ins. Co. v. Johnson (D. C. 1827) Fed. Cas. No. 303. All persons entitled, on the same state of facts, to participate in the same relief, may join as libelants. Fretz v. Bull (1851) 53 U. S. (12 How.) 466, 13 L. Ed. 1068.

152. —— Joinder in salvage proceedings.—It is the duty of salvors, in suing for salvage compensation, to make all their cosalvors parties. Where this is not done, at least in general terms, the libel will be dismissed. The Boston (C. C. 1833) Fed. Cas. No. 1,673; Hessian v. The Edward Howard (D. C. 1855) Fed. Cas. No. 6,436.

According to the prevailing practice in admiralty, the owners of a vessel may maintain a suit for salvage services rendered on their own behalf and on behalf of the master, officers, and crew, and it is not essential that the names of the officers and crew should be stated in the libel, but they may be identified by evidence at any time before the award made is distributed. The Flottbek (1902) 118 Fed. 954, 55 C. C. A. 448, modifying decree (D. C. 1902) 112 Fed. 682.

The owner of a vessel which is employed in a salvage service may recover compensation for such employment out of the salved property, either as cosalvor, by uniting with the officers and crew of the salving vessel in the suit, or by bringing it himself in his own right in case they refuse or neglect to join. Waterbury v. Myrick (D. C. 1828) Fed. Cas. No. 17,253.

Where a number of salvors are engaged in saving wrecked articles, and make a joint agreement with the master or owners of the boat for a specific sum per article, one of the salvors cannot maintain an action for his undivided share against the master or owners, but all must join in the action. Boyd v. The Falcon (Ohio, 1854) 1 Handy, 362.

A suit for salvage may be maintained by the master and owner of the salvor vessel without joining its crew. Gager v. The A. D. Patchin (D. C. 1849) Fed. Cas. No. 5,170. And see The A. D. Patchin (C. C. 1849) Fed. Cas. No. 87.

A libel in the name of a British naval officer and the British consul, joining with him "for all other interests," where the vessel, rescued by a British naval vessel, was sent home in charge of the officer, held not fatally defective. The Huntress (D. C. 1850) Fed. Cas. No. 6,912.

153. —— Joinder in collision suits.—All the owners of a vessel injured by a collision should be joined as libelants. The Richard Doane (D. C. 1868) Fed. Cas. No. 11,765.

Seamen and passengers sustaining injuries by collision may be made colibelants with the owners of the vessel, even after an interlocutory decree; no sufficient reason to the contrary appearing. The Queen (D. C. 1889) 40 Fed. 694.

The owners of a cargo of a vessel sunk in a collision need not be made parties to the suit by the owners of a vessel against the other vessel for damages by the collision, to enable the court to render a decree adjusting the losses. Leonard v. Whitwill (D. C. 1879) Fed. Cas. No. 8,261.

The owners of the vessel may recover for cargo lost without joining the shippers as libelants. The Metis (D. C. 1871) Fed. Cas. No. 9,500.

154. —— Joinder in suits for wages.—In admiralty seamen may sue jointly for their wages, though they cannot at common law. Oliver v. Alexander (1832) 31 U. S. (6 Pet.) 143, 8 L. Ed. 349.

All seamen suing in personam for wages earned on the same voyage are not required to unite in one action, but joint actions in such cases should be encouraged. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

A seaman who claims to recover both for wages and for moneys advanced in the ship's use may join in a libel in rem with a colibelant claiming wages only. The Merchant (D. C. 1847) Fed. Cas. No. 9,434. But not in an action in personam. The Merchant (D. C. 1847) Fed. Cas. No. 9,434.

Where a vessel is liable to two libelants for wages, for which, under the practice of the court in respect to the consolidation of suits, they may be compelled to sue in common, they may join in one action in rem, not only in

suing for the common demands, but also in respect to other claims which are peculiar to each. The Merchant (D. C. 1847) Fed. Cas. No. 9,434. But seamen suing for wages cannot be made colibelants with the holders of a bottomry bond. Jaurekhe v. The S. G. Troop (D. C. 1865) Fed. Cas. No. 7,-231.

155. —— **Compelling joinder.**—The court has no power to require other seamen to come in and join as complainants in a libel for wages by one. Nelson v. The Hercules (D. C. 1841) Fed. Cas. No. 10,108.

156. —— **Libelant joined also as respondent.**—Where repairs were put upon a domestic vessel by a firm of shipbuilders of which one of the part owners was a member, and a libel in personam was instituted by the firm against all the part owners to obtain a decree against them in solido for the repairs, such a libel in personam, in which the same person is one of the libelants and also one of the respondents, could not be maintained. The Brothers (D. C. 1881) 7 Fed. 878.

157. —— **Striking out parties libelant.**—In admiralty, the name of any party who has lost his interest in the suit can, on a proper application, be stricken from the record. The Falcon (C. C. 1859) Fed. Cas. No. 4,618.

A motion by libelants to strike from the record as a party libelant the name of a person who is a mere agent will be granted, where it does not appear that respondent will be deprived of any means of defense thereby. Thompson v. Jachin (D. C. 1862) Fed. Cas. No. 13,959.

Where a part of the owners of a vessel brought an action in the name of all, the nonconsenting owners could not have their names stricken out, but could have the suit stayed until they were indemnified for costs. Richmond v. New Bedford Copper Co. (D. C. 1874) Fed. Cas. No. 11,800.

158. —— **Objections to misjoinder or nonjoinder and waiver thereof.**—An objection to a libel for salvage, that other persons co-operated with libelants in rendering the service, and should be joined in the suit, is in the nature of a plea in abatement, and, if good at all, is waived, unless taken by answer or exception to the libel in the court of original jurisdiction. The Comanche (1869) 75 U. S. (8 Wall.) 448, 476, 19 L. Ed. 397.

An objection that cosalvors were not joined in a libel for salvage comes too late at the final hearing. Staten Island & New York Ferry Co. v. The Thomas Hunt (D. C. 1862) Fed. Cas. No. 13,-326

Misjoinder of parties libelant, when not objected to, will not prevent a decree. Coast Wrecking Co. v. Phœnix Ins. Co. (D. C. 1881) 7 Fed. 236.

159. **Defendants.**—As the admiralty rules are not to be regarded as restrictive, but as enumerative of the more common remedies, a libel for salvage services will lie against one with whom the salvor has deposited the property saved, but who had no other interest therein, though rule 19 prescribes that in suits for salvage the suit may be in rem or in personam against the party at whose request and for whose benefit the salvage service has been performed. Gates v. Johnson (C. C. 1857) Fed. Cas. No. 5,268.

Where a suit has been brought against one of two shipowners, and property attached thereunder released before the name of the other owner is introduced, the suit must be regarded as against the original respondent only. National Board of Marine Underwriters v. Melchers (C. C. 1891) 45 Fed. 643.

Where suit is brought against one owner of a vessel for damages caused by his negligence in managing the vessel, and the vessel is attached, and liberated on the bond of such owner to abide the judgment, another part owner will not be permitted to defend, as the subsequent judgment can only be one in personam against the obligors on the bond. Johnson v. Chicago & P. Elevator Co. (1886) 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447.

160. —— **Joinder and necessary parties in general.**—In an action in rem against a vessel the court cannot take cognizance of collateral equities to enforce them against persons not made parties to the proceedings, where such decree may be prejudicial to their interests. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

The master and owners of a whaling ship are not liable to be sued jointly by a seaman for his lay or share. Matern v. Gibbs (D. C. 1847) Fed. Cas. No. 9,273.

Where a collision is the joint act of two vessels, they may be joined as defendants; but otherwise where distinct acts of collision are charged, without privity. Chase v. Crary (D. C. 1855) Fed. Cas. No. 2,626; Atkinson v. The Hamilton (D. C. 1862) Fed. Cas. No. 611.

On a libel in personam in admiralty against two owners, where it is proved that one of the owners is in fact but a mortgagee of part of a vessel, though registered as an owner, and is not publicly known as owner, and credit for repairs and supplies was not given on the ground of his partnership, and he has no ostensible connection with the vessel, the libel will be dismissed as to that owner. Dugan v. Pentz (D. C. 1869) Fed. Cas. No. 4,121.

On a libel by a tow against her tug

and the colliding vessel, the libelant may recover against the latter alone, where there was independent fault on her part. The Manhasset (D. C. 1873) Fed. Cas. No. 9,019.

Where a libel for breach of charter party alleges that respondent is the sole owner of the ship, and the charter party filed therewith is made by certain agents of the owners, a judgment on demurrer that the libel is not defective for the apparent variance does not preclude respondent from showing by plea the fact that there are other owners, necessary parties. Nor is the respondent precluded from showing in defense that there are other owners by the fact that the certificate of registry, dated April 20, 1879, delivered by the master for entry in the custom house, showed respondent as sole owner; such certificate not being a document of title, and respondent not intending thereby to mislead libelant. Card v. Hines (D. C. 1888) 35 Fed. 598.

Where, on libel against one as sole owner of a ship, it appears that he owns only $^{18}/_{64}$, the libel will be dismissed. Id.

A libel in personam, with attachment of the vessel, may be maintained for breach of a contract made with the agents of her owners, who are all nonresidents, and who, by the law of their country, are each liable in solido under such contract, though but one of the owners is named in the action; the others being unknown to libelant. The object of the suit is not to obtain a personal judgment against any of the owners, but to subject their common property to the satisfaction of their common liability. Card v. Hine (D. C. 1889) 39 Fed. 818.

161. —— Proceedings in rem in general.—In an action in rem, to recover the possession of a derelict vessel wrongfully seized by the wreck-master of a county of the state of New York, under Rev. St. N. Y. pt. 1, c. 20, tit. 12, and sold under order of the county judge, if the purchaser has obtained possession, he is the only necessary party defendant, and it is improper to join the wreck-master. The Margaretta (D. C. 1886) 29 Fed. 324.

In an action in rem against a chartered ship for negligent damage to cargo, the owners in their answer alleged that the tackle which was the cause of the damage was furnished either by the shipper or the charterers under a special agreement between them, and not by the ship, and they moved that the charterers be made codefendants. Held that, on the analogy of The Hudson, 15 F. 162, and of rule 59 in admiralty, to avoid multiplicity of suits, to secure a thorough hearing on all the facts, and to prevent diverse or contradictory decisions on the same subject, the charterers should be made parties. The Alert (D. C. 1889) 40 Fed. 836, decree affirmed (1894) 61 Fed. 113, 9 C. C. A. 390.

162. —— Bringing in new parties at instance of defendant.—In a suit in rem for salvage, the vessel proceeded against may properly be permitted, by analogy to admiralty rule 59, to bring in the vessel or individual whose neglect exposed her to the peril from which the salvors rescued her, and both a vessel and an individual may be so brought in upon proper averments showing their liability. The No. K. 1 (1906) 150 Fed. 111, 80 C. C. A. 65.

Conceding that a court of admiralty had power to grant the petition of a libeled vessel for process to bring in another vessel under admiralty rule 59, not filed until after hearing and decision of the cause, it was within its discretion to deny such petition. The Ruth (1911) 186 Fed. 87, 108 C. C. A. 199, affirming decree (D. C. 1910) 178 Fed. 749.

Under the English judicature act of 1873 it is the constant practice, at the instance of the defendant, to bring in third persons as parties to be bound by the judgment, where they have a common interest in the subject-matter of the litigation, or in the question of liability to be determined. The Hudson (D. C. 1883) 15 Fed. 162.

As under the fifty-ninth admiralty rule the owner of a vessel which has been libeled in rem for collision may, by petition, bring into the suit by process in personam any third parties who are not owners of the vessel libeled, alleged to be liable for the same collision, where the libelant's vessel in landing at a wharf ran upon two vessels recently sunk, which he libeled for the collision, the claimants of the vessel sued could properly bring in the wharfinger as codefendant under said rule, though it was alleged that he caused the vessels to be sunk by negligently mooring and leaving them unprotected, and giving no notice of the danger; and such practice was not forbidden by the fifteenth rule, which, by implication, prohibits only the joinder in a collision cause of a vessel and her owners as codefendants. Joice v. Canal Boats Nos. 1,758 and 1,892 (D. C. 1887) 32 Fed. 553.

In a libel by a third person for injuries to property caused by a collision, if libelant proceeds against one vessel only, it is competent for the court to award its further process in the cause, on the petition of the vessel sued, for the arrest of the other vessel to answer for its share of the damage. The Hudson (D. C. 1883) 15 Fed. 162.

Where a new party defendant is brought into a suit by petition of an original defendant under the fifty-ninth admiralty rule, the libelant should answer the petition, the petitioner should answer the libel, and the new party should answer both libel and petition. New York & N. R. Co. v. The Greenville

and The Scow No. 40 and The Devoe (D. C. 1893) 58 Fed. 805.

A vessel sued for nondelivery of cargo, all of which was received and loaded by the charterer, and for which bills of lading were signed by the master without prejudice under the terms of the charter, upon an allegation of delivery of all cargo received on board, is entitled by analogy to admiralty rule 59 to bring in the charterer, in order to determine in one action all the matters arising out of the loss. The Crown of Castile (D. C. 1906) 148 Fed. 1012.

In a suit in admiralty by a banker who advanced money on bills of lading of a cargo to recover from the vessel for an alleged wrongful or unauthorized delivery of the cargo to persons who sold the same and retained the proceeds, where it appears from the pleadings that, if improper delivery was made, claimant may have a claim over against such persons, he is entitled by analogy to admiralty rule 59 to have them brought in, notwithstanding the fact that an action at law has been brought against them by libelant which is pending. The Cerea (D. C. 1906) 149 Fed. 924.

163. —— Right to proceed against one of two tort-feasors.—Where an injury is due to the fault of two vessels, their liability is not joint, but several, and the injured party may proceed against one alone for the full amount of his damage; it being the privilege of the libeled vessel to bring in the other under admiralty rule 59. The Ruth (D. C. 1910) 178 Fed. 749, decree affirmed (1911) 186 Fed. 87, 108 C. C. A. 199. And see The Franconia (C. C. 1883) 16 Fed. 149; The St. Lawrence (D. C. 1884) 19 Fed. 328.

Since a libelant, entitled to recover damages for an injury against two vessels as joint and several wrongdoers, may elect to proceed against either or both, where he joins both in his libel, his failure to issue process against one does not constitute laches of which the other can complain, though it is compelled by reason of such fact and the consequent intervention of other liens against its co-defendant to bear more than its just proportion of the recovery. The F. W. Vosburgh (D. C. 1899) 93 Fed. 481.

164. —— Right of person to be made defendant.—A person who has no interest, in a legal sense, in the subject-matter of a suit in personam, and who is not a party to it, cannot compel the plaintiff to make him a party defendant. Coleman v. Martin (C. C. 1868) Fed. Cas. No. 2,985.

165. —— Objections to nonjoinder or misjoinder and waiver thereof.—The nonjoinder of proper respondents in an action in personam in admiralty can be taken advantage of only by plea in abatement. Reed v. Hussey (D. C. 1836) Fed. Cas. No. 11,646.

An objection to the right of a person to appear and defend a suit in rem cannot be taken for the first time at the hearing. Thomas v. The Kosciusko (D. C. 1853) Fed. Cas. No. 13,901; The Prindiville (D. C. 1874) Fed. Cas. No. 11,435.

166. Claims to property, and intervention and bringing in new parties.—The rights of claimants of a cargo are not prejudiced by the condemnation of the ship for the want of a claim; nor can one claimant, by his contumacy, prejudice another's claim. The Mary (1815) 13 U. S. (9 Cranch) 126, 3 L. Ed. 678.

If a party attempt to impose upon the court, by knowingly or fraudulently claiming, as his own, property belonging in part to others, he is not entitled to a restitution of that portion which he may ultimately establish as his own. The Dos Hermanos (1817) 15 U. S. (2 Wheat.) 76, 4 L. Ed. 189.

A court of admiralty has power to decide between conflicting claims to property seized by attachment or on execution. Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202.

In an action on a bottomry bond, the owner of the vessel and the mortgagee, thereof having intervened, the court may pass on the validity of the mortgage. The Panama (D. C. 1846) Fed. Cas. No. 10,703.

The owner of a tow may libel both the tug and the vessel with which she collided, and thus compel them to interplead and settle their respective liabilities. The Enterprise (C. C. 1855) Fed. Cas. No. 4,500.

Where a foreign vessel is in the custody of the marshal on a claim made by an American citizen, the court may take jurisdiction of an intervening libel by one of the seamen, though his contract was made and performed in a foreign country, and all the parties are subjects thereof. The Champion (D. C. 1877) Fed. Cas. No. 2,584.

A "claimant" in the admiralty practice, under rule 26, is a person who assumes the position of a defendant and demands the redelivery to himself of the vessel arrested. An "intervener" is one who, without demanding the redelivery of the vessel, seeks only the protection of his interest in her, or the payment of his claim in the ultimate disposition of the case. The Two Marys (D. C. 1882) 12 Fed. 152.

Where, during the pendency of proceedings upon exceptions to the shipwright's right to appear as "claimant," the master, being part owner, also appeared as an adverse "claimant" for the possession of the vessel, and, on application to the court, had received possession upon executing a bond for her value, conditioned for her return to the shipwright or for the payment of his claim, and the determination of the amount due to him became, therefore, involved in the action, held that, on the shipwright's application, his right to ap-

pear as "claimant" having been determined in his favor, he should be allowed to file his petition setting forth the amount and grounds of his claim, and that the libelant, the adverse claimant, or other part owners, should make answer thereto as advised. Id.

Under the English judicature act of 1873 it is the constant practice, at the instance of the defendant, to bring in third persons as parties to be bound by the judgment, where they have a common interest in the subject-matter of the litigation, or in the question of liability to be determined. The Hudson (D. C. 1883) 15 Fed. 162.

Rule 34, providing that one may intervene and be heard in his own interest if he shall propound the matter in suitable allegations, and be admitted by the court, requires the court to pass upon the claim of the intervener to give him a standing in court. The Clara A. McIntyre (D. C. 1899) 94 Fed. 552.

Where the respondent in a suit in admiralty desires to raise a new issue, in addition to those raised by the answer as filed, it should be done either by amendment to the answer or by a proper plea. When the answer was filed by the master of the libeled vessel as agent for the owners, such owners cannot raise a new issue by a petition in intervention, filed without notice to the libelant, or the service of a copy on him. The Alexandra (D. C. 1900) 104 Fed. 904.

The principle of the fifty-ninth admiralty rule, which permits the bringing in of new parties in collision cases on petition of the claimant or respondent, will be applied by analogy in other cases by requiring the appearance of any additional defendant who may be responsible for the claim sued for or a part thereof. Dailey v. City of New York (D. C. 1902) 119 Fed. 1005. One bound to indemnify a party liable in admiralty and against whom such party has a right of action over, although not cognizable in admiralty, may, under the equity of the fifty-ninth rule, be brought into the original suit in admiralty by petition of such party or as an original respondent in order that the rights of all parties may be adjusted in a single suit. Evans v. New York & P. S. S. Co. (D. C. 1908) 163 Fed. 405. In a suit in rem to recover for towage services, claimant is entitled by analogy under admiralty rule 59 to bring in a third party on allegation that the services were rendered on his credit, and not on the credit of the vessel. The Daylight (D. C. 1913) 206 Fed. 864.

A charterer, made respondent in a suit for cargo damage against it and against the vessel in rem, held entitled to bring in the claimants as respondents in personam under rule 15 of the District Court for the Southern District of New York, expressly authorizing such action. The Julia Luckenbach (D. C. 1912) 200 Fed. 976.

Where a libel is filed against a steamer for wages of its hands, and a claim of an interest in the ship is admitted, and pleadings to the merits are put in, it is a waiver of the preliminary oath required, averring in positive terms the interest of the claimant and an admission that he is rightfully in court. Read v. Owen (Ala. 1839) 9 Port. 180.

A claimant of an interest in a ship, or any other thing which is the subject of a proceeding in rem, must put in his claim on oath averring his interest. Read v. Owen (Ala. 1839) 9 Port. 180; The Spark v. Lee Choi Chum (C. C. 1872) Fed. Cas. No. 13,206.

The claim must be filed by the owner, or some authorized agent, and must state the facts in a direct issuable form, and not by way of recitals. The Spark v. Lee Choi Chum (C. C. 1872) Fed. Cas. No. 13,206.

167. —— Title necessary to intervene or to come in as claimant.—An administrator appointed in another state, who has not taken out letters within the jurisdiction of this court, may intervene in behalf of his intestate, in a suit in rem against a vessel which was the property of the intestate at his death. The Boston (D. C. 1832) Fed. Cas. No. 1,669.

No one can intervene and defend in a suit in rem unless it appear by the answer and claim that he has a lien or proprietary interest in the thing seized. The R. W. Skillinger (D. C. 1875) Fed. Cas. No. 12,181.

A petition to intervene and contest a suit in rem should not be granted, where the petitioner shows no interest in the res, but is concerned in the result only in virtue of his having agreed to indemnify the claimants. The interest of a person in a suit, arising solely from his agreement to indemnify respondents against the result of the litigation, is not sufficient to give him the right to intervene in the action. The Idaho (D. C. 1870) Fed. Cas. No. 6,996.

The assignment, by the builders of a vessel, of the moneys to become due on the building contract, invests the assignee with no such proprietary interest as will enable him to appear as claimant and defend. The Revenue Cutter No. 1 (D. C. 1860) Fed. Cas. No. 11,713.

A sheriff who permits an attached vessel to be seized by admiralty process, without opposition, may intervene in the admiralty suit, and claim the proceeds in the registry. Eneas v. The Charlotte Minerva (D. C. 1858) Fed. Cas. No. 4,483.

168. —— Claim by underwriters.—An insurer may intervene in admiralty if he has the equitable right to the whole or any part of the damages claimed. The Monticello v. Mollison (1854) 58 U. S. (17 How.) 152, 15 L. Ed. 68.

Under rule 34, the underwriter, who has accepted an abandonment, which

devests the original claimant of all interest, may be admitted to intervene and become the dominus litis, in a suit in rem. The Ann C. Pratt (C. C. 1853) Fed. Cas. No. 409.

An insurance company which has paid the amount of the insurance on the cargo of a vessel sunk by a collision may be joined as a colibelant with the owners of such vessel, after a decree has been given in their favor against the vessel causing the damage, and an order of reference to a commissioner made to ascertain the amount of damage. The City of Paris (D. C. 1867) Fed. Cas. No. 2,766. And see The City of Paris (D. C. 1867) Fed. Cas. No. 2,767.

Underwriters cannot make any claim for salvage property in admiralty, unless there has been an abandonment of the property to them, and it has been accepted by them. The Henry Ewbank (C. C. 1833) Fed. Cas. No. 6,376.

In a suit in rem on a bottomry bond, underwriters to whom an abandonment is made, which has not been accepted, are not admissible as claimants. The Packet (C. C. 1823) Fed. Cas. No. 10,654.

Marine insurers, who, by payment of a loss resulting from the injury of a vessel in collision, have become entitled by subrogation to a portion of the fund recovered by the owners from the vessel in fault, may intervene, and set up their claim thereto after a decree has been rendered in favor of such owners on a mandate from the appellate court, the issues raised by such intervention relating solely to the distribution of the fund recovered. Mason v. Marine Ins. Co. (1901) 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700.

169. —— Intervention by lien creditors in general.—In proceedings in rem in admiralty to enforce maritime liens on a vessel, any creditor of the claimant desiring to contest the claim of any lien claimant must appear in the cause and do so by answer and on the reference. The Ethelwold (D. C. 1908) 165 Fed. 806.

When a boat is seized under a libel of which the court issuing it has jurisdiction, all persons having liens upon the boat may intervene by petition, without regard to the amount of their claims. George v. Skeates (1851) 19 Ala. 738.

When a vessel is arrested by a lien creditor, and has not been delivered on stipulation, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed. The Young Mechanic (D. C. 1856) Fed. Cas. No. 18,182.

After a lienor has obtained an interlocutory decree against a vessel by default, it is not open to a second lienor to contest the first lien. The only question open is the question of priority. The Aina (D. C. 1889) 40 Fed. 269.

170. —— Claim by prior attaching creditors.—Where one claims under an attachment made in a suit at common law, he must file a caution in court, to hold the proceeds that may remain after satisfying prior claims. The Louisetta (C. C. 1814) Fed. Cas. No. 8,535.

A creditor who has attached the thing before seizure under a libel of forfeiture may intervene as a claimant. The Mary Anne (D. C. 1826) Fed. Cas. No. 9,195.

171. —— Intervention by part owners.—Part owners of a vessel are by construction of law parties to any proceedings in rem against her, and are entitled to intervene actively and contest its liability, the extent of the claims against it, and the validity of its seizure and detention. Mitchell v. Chambers (1880) 5 N. W. 57, 43 Mich. 150, 38 Am. Rep. 167.

172. —— Intervention by mortgagees.—A mortgagee may intervene to contest claims affecting his lien upon the vessel. The Dubuque (D. C. 1870) Fed. Cas. No. 4,110; Elmore v. The Alida (D. C. 1856) Fed. Cas. No. 4,419; Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163; Home Ins. Co. v. Concord (D. C. 1870) Fed. Cas. No. 6,659; The Jenny Lind (C. C. 1856) Fed. Cas. No. 7,287; The Old Concord (D. C. 1870) Fed. Cas. No. 10,482; The Selt (D. C. 1872) Fed. Cas. No. 12,649; Thomas v. The Koscinsko (D. C. 1853) Fed. Cas. No. 13,901.

173. —— Bringing in new parties in suits for damages by collision.—After a vessel libeled for collision had been released on stipulation, the personal representatives of one killed in the collision intervened to recover damages under a state statute. Monition and citation based thereon were duly issued and published, but the ship was not then seized on the theory that the stipulation therefor given stood for her in respect to the claim set up by the intervening petition. A recovery was had in the district court, but on an appeal it was held that the liability of the claimant on the stipulation could not be increased by the subsequent intervention of new claims, and that, when subsequent intervening claims are filed, the vessel must be again arrested. The court therefore reversed the decree, and remanded the cause for further proceedings, but without prejudice to the right of the court below to treat the intervening petition as an independent libel, and issue process thereon. This was accordingly done, and the vessel was again arrested. Held, that the intervening suit was to be deemed commenced from the original filing of the intervening petition so as to stop the running of limitation, and not merely from the date of the issuance of process. Laidlaw v. Oregon Ry. & Nav. Co. (1897) 81 Fed. 876, 26 C. C. A. 665, reversing The Oregon (D. C. 1896) 73 Fed. 846.

The rule of the common law that no contribution can be enforced between tort-feasors is not the rule in admiralty as between two vessels each of which was in fault for a collision by which a third party sustains damage, but, on the contrary, the right of each to require the other to bear an equitable proportion of the loss has always been enforced as a substantial legal right, and it was in recognition of such right that admiralty rule 59 was promulgated, giving the owner of a vessel proceeded against the right to implead any other vessel contributing to the same collision, to enable the court to enter such degree "as to law and justice shall appertain." The Mariska (1901) 107 Fed. 989, 47 C. C. A. 115, reversing decree (D. C. 1900) 100 Fed. 500. Under this rule the owner of a vessel which has been libeled in rem, for collision, may, by petition, bring into the suit, by process in personam, any other parties, who are not owners of the vessel libeled, alleged to be liable for the same collision. Rule 15, by implication, prohibits only the joinder in a collision cause of a vessel and her owners as codefendants. Joice v. Canal Boats Nos. 1,758 and 1,892 (D. C. 1887) 32 Fed. 553.

A proceeding on petition of the owner and claimant of a libeled vessel to call in the charterer to show cause why it should not be condemned for damage resulting from the collision for which the libel is filed is within the power of the court under this rule, as it is clearly within the spirit, though not within the words, of the rule. The Barnstable (1901) 21 S. Ct. 684, 181 U. S. 464, 45 L. Ed. 954, reversing decree (1899) 94 Fed. 213, 36 C. C. A. 199.

The master of a tug is a common-law bailee of a tow and her cargo which are in his charge with a lien thereon for the towage services rendered, and as such he is entitled to maintain an action against another vessel for a collision in which his tow and her cargo are lost, and in such action to recover their full value, holding the amount remaining, after deducting his own loss, in trust for the owner. In such case the owners of the tow and cargo may intervene as co-libelants, if they desire, or the respondent may bring in the tug, by petition showing her to have been in fault, in which case a substitution of the owners of the tow and cargo as libelants is the proper course. The Mercedes (D. C. 1901) 108 Fed. 559.

In a libel by a third person for injuries to property caused by a collision, if libelant proceeds against one vessel only, it is competent for the court to award its further process in the cause, on the petition of the vessel sued, for the arrest of the other vessel to answer for its share of the damage. The Hudson (D. C. 1883) 15 Fed. 162.

A suit to recover for injury to a vessel by striking a drawbridge is within the admiralty jurisdiction, and is a suit for "damage by collision," within the meaning of rule 59. O'Keefe v. Staples Coal Co. (D. C. 1910) 201 Fed. 131.

Where, in an action for collision between a tug W., and a tug T. and tow, where the counsel for the former, under a belief that the tug T. and tow both belonged to the same parties, proceeded only against the tow, both tugs being in fault, held, that the owners of the tow might stipulate to accept half the damages, with costs; or the owners of tug W. would be permitted, under rule 59 in admiralty, to bring in the tug T., and a stay of proceedings would be allowed for that purpose. The Edwin H. Webster (D. C. 1884) 22 Fed. 171. But where the other vessel cannot be brought in, because not within the jurisdiction, such accidental fact cannot change the legal right of the libeled vessel, and, when she is compelled to pay the entire damage, she is subrogated to the rights of the original damage claimant, and may bring an independent suit against the other to establish the latter's liability also, and enforce contribution. The Mariska (1901) 107 Fed. 989, 47 C. C. A. 115, reversing decree (D. C. 1900) 100 Fed. 500.

Where several collisions are caused by the negligence of a tow in fulfilling a contract of towage, and each claimant for damages arrests the vessel at the same time to respond, there is no principle of the maritime law, and no interest of commerce or navigation, which requires that the elder lienor, not guilty of laches, and not having committed any waiver or abandonment, should have his claim postponed to that of the younger lienor. The Frank G. Fowler (C. C. 1883) 17 Fed. 653.

Where one of two part owners, who appeared as claimants by different proctors, a libel in rem for collision having been filed, executed a stipulation for value, with sureties approved by the libelants, for the release of the vessel, and conditioned to pay the amount that might be awarded on final decree, on notice thereof to its proctors, and the other claimant did not unite in the stipulation, and a final decree for damages was thereafter rendered, and the libelants, being unable to collect their decree from the claimant (stipulator) or his sureties, moved that execution issue against the other claimant, held, that the appearance of the other claimant as part owner of the vessel was not an admission of such ownership at the time of the collision, or of personal responsibility for the negligence of those then in charge of her. The contents of the stipulation and its approval showing a clear intent by the libelants to treat the claimant who signed it as the only one for that purpose, they cannot now have the same relief against the other claimant, under the eleventh admiralty rule, as if he

had signed it. The Zodiac (D. C. 1881) 5 Fed. 220.

Where a new party defendant is brought into a suit by petition of an original defendant under the fifty-ninth admiralty rule, the libelant should answer the petition, the petitioner should answer the libel, and the new party should answer both libel and petition. New York & N. R. Co. v. The Greenville and The Scow No. 40 and The Devoe (D. C. 1893) 58 Fed. 805.

The principle of the fifty-ninth admiralty rule, which permits the bringing in of new parties in collision cases on petition of the claimant or respondent, will be applied by analogy in other cases by requiring the appearance of any additional defendant who may be responsible for the claim sued for or a part thereof. Dailey v. City of New York (D. C. 1902) 119 Fed. 1005.

Where a chartered vessel is being operated by the owner on the charterer's business, and she is under the temporary command of a Sandy Hook pilot, provided and paid by the charterer under the agreement, but the navigation of the vessel is under the general control of the owner, in case of collision the latter is not entitled to have the charterer brought in under the fifty-ninth rule to respond for the damages, and if the vessel was negligent while under the charge of the compulsory pilot the vessel was in fault, and the compulsory pilot cannot be deemed the agent either of the owner or of the charterer. The Hathor (D. C. 1908) 167 Fed. 194.

Where a vessel, libeled for collision by the owners of the other vessel on their own behalf and as bailees in behalf of some of their cargo owners, took no steps to bring in libelant's vessel under admiralty rule 59, or to raise the question of her liability by any pleading, and consequently her liability to her cargo owners under the terms of her bills of lading was not adjudicated, upon a finding that both vessels were in fault the respondent is not entitled to recoup a moiety of the cargo damage against the vessel damage adjudged in favor of libelants; and, for still stronger reasons, there can be no such recoupment, on account of cargo damage recovered by intervening libelants, against that recoverable by libelants on behalf of other cargo owners, the effect of which would be to leave such cargo owners unpaid, since, under the pleadings, they cannot be given a decree therefor against libelants or their vessel. The New York (1901) 108 Fed. 102, 47 C. C. A. 232, decree affirmed Union Steamboat Co. v. Erie & W. Transp. Co. (1903) 23 S. Ct. 504, 189 U. S. 363, 47 L. Ed. 854.

174. —— Intervention in proceedings for forfeiture.—Under a libel of forfeiture, any one claiming an interest in the thing may intervene to contest the forfeiture. The Mary Anne (D. C. 1826) Fed. Cas. No. 9,195.

On the arrest of a vessel, the mortgagee may intervene to protect his interest and contest a forfeiture. Home Ins. Co. v. Concord (D. C. 1870) Fed. Cas. No. 6,659.

A person who has acquired a lien on a vessel by attachment may intervene on a subsequent libel of the vessel for a forfeiture and contest the forfeiture. He is not obliged to wait until after decree to file his petition against the proceeds, as a decree against the vessel would annihilate his claim. The Mary Anne (D. C. 1826) Fed. Cas. No. 9,195.

175. —— Intervention after release on stipulation.—Any person may intervene in a suit in admiralty in rem for his interest, and he may do so notwithstanding the res has been delivered to a claimant on a stipulation in a certain sum to abide and perform the decree; the stipulation, as far as it goes, standing for the res. The Oregon (D. C. 1891) 45 Fed. 62, decree reversed (1895) 15 Sup. Ct. 804, 158 U. S. 186, 39 L. Ed. 943.

Rule 34, relating to intervening petitions, applies only to those cases in which the vessel is still in custody, or in which she has been sold, and the proceeds paid into court. The Oregon (1895) 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.

The substitution of a new owner as claimant of a libeled vessel which has been released on stipulation is not the bringing in of a new party, and may be allowed without notice to the surety on the stipulation. The Cerea (D. C. 1906) 149 Fed. 924.

176. —— Assertion of claim through agent.—Where the principal is out of the country, or resides at a great distance from the court, the admission of a claim and test affidavit by his agent is the common course of the admiralty; but, where the principal is within reasonable distance, his claim should be given personally, or at least his suppletory oath as to the facts should be tendered. The Adeline (1815) 13 U. S. (9 Cranch) 244, 3 L. Ed. 719.

A claimant of an interest in a ship, or any other thing which is the subject of a proceeding in rem, must put in his claim on oath averring his interest; and an agent must prove his authority before he can put in his claim. Read v. Owen (Ala. 1839) 9 Port. 180.

177. —— Assertion of claim through or intervention by consul.—The consul of a nation may claim on behalf of its subjects, in the absence of any authorized agent. The London Packet (C. C. 1815) Fed. Cas. No. 8,474.

A consul of a foreign power, though his sovereign is also represented by an ambassador, is entitled to intervene in a suit in admiralty for all subjects of that power interested. Robson v. The

Huntress (C. C. 1851) Fed. Cas. No. 11,971.

178. —— **Substitution of absentee for attorney in fact.**—An absent owner, on coming within the jurisdiction, may be substituted as claimant in place of his attorney in fact, on payment of costs of opposing the motion, and entering new stipulation for costs. The Laurens (D. C. 1848) Fed. Cas. No. 8,121.

179. —— **Separate claims.**—When separate claims are interposed, though the libel be joint against the whole property, each claim is treated as a distinct proceeding, in nature of a several suit, on which there may be an independent hearing, decree, and appeal. Where a libel was filed, for salvage service, against goods saved from a vessel, and owned by a large number of persons, in distinct rights, it was held to be irregular for the owners of part of the goods to interpose a general claim and answer in behalf of all, without naming who, in particular, the owners were, or distinguishing their separate proprietary interests. Stratton v. Jarvis (1834) 33 U. S. (8 Pet.) 4, 8 L. Ed. 846.

180. —— **Amendment of claim as to parties.**—The allowance of an amendment of a claim by substituting a new party as claimant is ineffectual, if such party fails to submit to the jurisdiction. The Eliza Lines (C. C. 1894) 61 Fed. 308.

After trial of the right of a person to appear and claim a vessel as a mortgagee in possession, decided in his favor, leave will be granted to withdraw such claim, and file a new one as owner, where no other party is affected by the proceedings or suffers prejudice. The Archer (D. C. 1878) Fed. Cas. No. 507.

181. —— **Time for making claim or bringing in new parties.**—A person who becomes interested in the subject-matter pending the litigation may come in and protect his interest if application is made within a reasonable time. The Jenny Lind (C. C. 1856) Fed. Cas. No. 7,287.

A claim, to be available, must be interposed on the return day of the process, when proclamation is made. Baxter v. The Dona Fermoas (D. C. 1858) Fed. Cas. No. 1,123a.

An admiralty court has discretionary power to permit the bringing in of new parties under rule 59 after the commencement of trial. Otts v. I. M. Ludington's Sons (D. C. 1914) 229 Fed. 454.

182. —— **Advertisement on intervention.**—Cosalvors omitted from tne original libel may present their claims by suitable allegations without notice or process to the other parties. The Henry Ewbank (C. C. 1833) Fed. Cas. No. 6,376.

When a vessel libeled by a materialman has been taken possession of by the court, and advertisement has been made, other materialmen may intervene by libel praying warrants of arrest in order to detain the property in case security be given for its release, but in such case further advertisement is unnecessary. Butler v. The Julia (D. C. 1893) 57 Fed. 233.

183. —— **Caution by claimant.**—Where a party claims under an attachment he must file a caution in court to hold the proceeds remaining after satisfying prior claims. The Louisetta (C. C. 1814) Fed. Cas No. 8,535.

184. —— **Objections to title of claimant.**—In an action on a bottomry bond, an objection to the right of a mortgagee to interfere and contest the validity of the hypothecation must be put forth in the pleadings and suggested on the argument, or it will be deemed to have been waived. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163.

Objection to the right of a person to intervene as claimant cannot be taken for the first time at the hearing. Thomas v. The Kosciusko (D. C. 1853) Fed. Cas. No. 13,901. It must be raised before hearing upon claim and answer. A motion to strike the claim and answer from the files, upon the ground that the proofs on hearing show that claimant has no interest, cannot be entertained. The right of a party to appear and defend a suit in rem must be put in contestation, if at all, before the hearing, and then only by way of exception, if the disability appear upon the face of the claim, or an exceptive allegation putting the right in issue, if it does not so appear. The Prindiville (D. C. 1874) Fed. Cas. No. 11,435.

An objection to the competency of an administrator to appear as claimant in a suit in rem must be taken on his appearance, and before sale of the property and payment of the proceeds into court. The Boston (D. C. 1832) Fed. Cas. No. 1,669.

185. —— **Intervention in petitory or possessory actions.**—In a petitory or possessory suit materialmen cannot intervene to enforce a lien which they may have upon the vessel. The Taranto (D. C. 1849) Fed. Cas. No. 13,751.

Where a groundless libel is filed by part owners, and seizure of the vessel is procured to be made for the purpose of wresting her from the possession of a shipwright having a possessory lien for repairs, and there is no other bona fide defendant, the lienor should be permitted to defend to procure a dismissal of the fraudulent proceedings, and the restitution of the vessel to his possession. The Two Marys (D. C. 1883) 16 Fed. 697.

186. **Death of party.**—The rule that personal actions die with the person

does not obtain in admiralty. Plummer v. Webb (D. C. 1825) Fed. Cas. No. 11,234; The Sea Gull (C. C. 1865) Fed. Cas. No. 12,578; Penhallow v. Doane (1795) 3 U. S. (3 Dall.) 54, 1 L. Ed. 507. CONTRA, see Crapo v. Allen (D. C. 1849) Fed. Cas. No. 3,-360, holding, also, that a state statute would not enable an administrator to maintain an action in the district court for a personal tort committed on his intestate on the high seas.

A claim in rem for a tort filed against a vessel in admiralty proceedings by the owner for limitation of liability does not abate by the death of the claimant. The James A. Wright (C. C. 1872) Fed. Cas. No. 7,191; The Ticiline (D. C. 1913) 208 Fed. 670.

An action for damages for the loss of a human life, caused by a maritime tort, survives in admiralty. The E. B. Ward (C. C. 1883) 17 Fed. 456.

If a party to an action in admiralty dies pending the suit, and the cause of action survives, no disadvantage accrues therefrom to either party. A suggestion of the fact apud acta removes the technical difficulty. Nevitt v. Clarke (D. C. 1846) Fed. Cas. No. 10,138.

187. —— **Continuance or revival of action.**—The exigency presented by the death of Rear Admiral Sampson pending an appeal from a decree of condemnation in a libel in prize, filed in his own behalf and in behalf of other officers and enlisted men of the United States navy, will be satisfactorily met by the substitution, to carry on the proceedings in the interest of all, of Rear Admiral Taylor, who is among those represented in the litigation by counsel, and is within the jurisdiction of the court. U. S. v. Sampson (1903) 23 Sup. Ct. 216, 187 U. S. 436, 47 L. Ed. 248.

On an appeal from a judgment for libelant entered after the death of the claimant, the court ordered that his death be suggested on the record, and that the judgment be against the sureties. The James A. Wright (C. C. 1872) Fed. Cas. No. 7,191.

The original libelant died during the pendency of the suit, and his widow as executrix was made a party, and swore to the sale and transfer of the claim by the original libelant to the subrogee. Held, that the court properly found that the proper parties were before it, and the subrogée properly subrogated and entitled to judgment. The Cadiz (C. C. 1884) 20 Fed. 157.

A libel in rem, founded on contract, was filed in 1857. In 1858 the claimants took out a commission to examine a witness, and obtained a stay of proceedings. Interrogatories were served on the libelants, but no cross interrogatories were ever filed. The libelant died in 1859, and in 1867 his executors moved to be substituted, and also to have the stay of proceedings vacated. Held, that both parties were equally guilty of laches; that the motion for substitution should be granted; but that for vacating the stay of proceedings denied, claimants being entitled to procure the testimony of the witness. The Norway (D. C. 1867) Fed. Cas. No. 10,357.

An application by executors to be substituted as libelants in a suit in rem in admiralty, made more than eight years after libelant's death, granted, as claimants could have compelled such substitution at any time. The Norway (D. C. 1867) Fed. Cas. No. 10,357.

When process in a collision case was issued against both vessel and owner, and the owner afterwards died, and his executor qualified, and was thereafter discharged, and some 19 years after the collision the libelant moved to revive the suit against the personal defendant by bringing in the executor, the motion should be denied. City of New York v. White (D. C. 1893) 59 Fed. 617.

Act Pa. 1851, § 18 (P. L. 674), declares that no action to recover damages for injury to the person by negligence shall abate by reason of plaintiff's death, but the personal representative of the deceased may be substituted as plaintiff. Section 19 provides that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or, if there be no widow, the personal representatives, may maintain an action and recover damages for the death thus occasioned, and Act Pa. 1855 (P. L. 309) designates the persons who may exercise the right conferred by section 19. Held that, while section 19 created a new right to sue, section 18 merely continued a common-law right of action for personal injury after plaintiff's death, and hence, under such section, where a stevedore in his lifetime filed a libel in admiralty against a ship for injuries sustained in unloading by the ship's alleged negligence, the libel did not abate on libelant's death, but might be properly continued in the name of his personal representative. The City of Belfast (D. C. 1905) 135 Fed. 208.

(D) Process and appearance

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245. — Appearance to cross-libel.
246. — Effect of appearance in proceedings in rem.

188. **Property subject to process.**—Under rule 15, freight money due the vessel's owner cannot be seized, nor the cargo held therefor, in an action in rem to recover damages in a collision case. The Charles C. Lister (D. C. 1908) 161 Fed. 585.

189. —— **Ships.**—Coal barges, which are rough, square-cornered boxes, from 165 to 180 feet long, about 26 feet wide, and 8 to 10 feet deep, and have no motive or propelling power, no master or crew, no tackle, apparel, or furniture, and no name, being generally designated by number, and which are not permitted to be enrolled or licensed under any law of the United States, and have no license, are not "ships," within the language of rule 20, and cannot be made the subject of a possessory suit, therein provided for. Wood v. Two Barges (C. C. 1891) 46 Fed. 204.

190. —— **Goods and chattels.**—Under process authorizing the marshal to attach defendant's goods and chattels, an iron pier was not attachable as coming within the designation of "goods and chattels." Harriman v. Rockaway Beach Pier Co. (D. C. 1880) 5 Fed. 461, 462.

191. —— **Property liable for vessel's debts.**—Apparatus or appliances on board of a vessel engaged in a particular avocation, as whaling or wrecking, indispensable to the proper prosecution of such business, and not a portion of the cargo, are component parts of the tackle, apparel, and furniture of such vessel, and liable for seamen's wages and contracts for supplies, and are subject to attachment. The fact that the ownership of a vessel and its tackle and apparel is separate will not exempt the apparel from liability for a seaman's lien for wages if in fact it was on the vessel by the consent of its owner at the time of such seaman's shipment. The Edwin Post (D. C. 1882) 11 Fed. 602.

The seine boat which accompanies schooners engaged in the mackerel trade may belong to the owners of the vessel or to others. In the latter event, it is sometimes hired by the crew or owners, from outside parties, for the season or trip. It draws a regular share in the catch, which goes to whomsoever furnishes it. When the boat and the vessel have a common ownership, the former, by usage, passes to the buyer of the latter, as appurtenant thereto. If the common ownership be devested by a sale, the subsequent hiring of the boat by the seller cannot serve to make the boat a part of the vessel, and liable to an attachment for the vessel's debts. The Merrimac (D. C. 1886) 29 Fed. 157.

192. —— **Undivided interest.**—Proceedings in rem cannot be instituted against the undivided interest of an owner in the vessel. Manhattan Fire Ins. Co. v. The C. L. Breed (D. C. 1877) Fed. Cas. No. 9,021.

193. —— **Property in custodia legis.**—Where a sheriff's keeper allows the marshal to take actual possession, and subsequently holds for both the marshal and the sheriff, and the marshal makes a sale upon the deck of the vessel without objection, the warrant of arrest will be held duly served, and the

sale valid. The Julia Ann (D. C. 1858) Fed. Cas. No. 7,577.

A sheriff's levy under an attachment is terminated by an order of the state court appointing a receiver of the debtor; and a seizure by the marshal, then in possession, with the sheriff's consent, under admiralty process, becomes legal. The Roslyn (D. C. 1877) Fed. Cas. No. 12,068.

The custody of the law, having been once fixed by the valid levy of an officer duly authorized to seize, continues whether the officer be present or not, unless acts equivalent to a surrender and withdrawal are shown. The Circassian (D. C. 1866, 1867) Fed. Cas. No. 2,721.

Where an arrested vessel in any manner again comes into possession of the owner, he cannot defeat a lien against her, on the ground that the contract out of which it arose was made, and the consideration for it rendered, while the vessel was in the custody of the law. The Witch Queen (D. C. 1874) Fed. Cas. No. 17,915.

Admiralty has jurisdiction to order the sale of a cargo on a libel to recover freight, notwithstanding that the goods were at the time in the possession of the collector, who was served with a copy of the process, such sale being subject to the claims of the United States for duties and expenses. Two Hundred and Fifty Tons of Salt (D. C. 1880) 5 Fed. 216.

194. —— Property of government.— A libel in rem on a bottomry bond against a private vessel and her cargo, the cargo being owned and shipped by the United States, will be sustained as to the vessel, but dismissed as to the cargo. The Othello (C. C. 1866) Fed. Cas. No. 10,611.

Immunity from seizure can only be claimed by the government itself, or by some proved or recognized officer or agent intervening in its behalf. Intervention by a private citizen merely describing himself as agent, without proof, should not be deemed sufficient. But such immunity is by comity extended to the property of a foreign government in the public service, and in possession of its officers. Long v. The Tampico and Progresso (D. C. 1883) 16 Fed. 491.

Where two steam cutters, the P. and the T., designed for the public service of Mexico, were constructed in New York, under a contract with one O., describing himself as agent of the Mexican government, and after completion were delivered to O. at New York, by whom they were turned over to Capts. H. and D., to be taken by them to Vera Cruz, for the sum of $300 each, and there delivered to the Mexican authorities, and on the following day, after being placed in charge of Capts. H. and D., were rescued by the steam tug J. from a fire which broke out near the wharf where they were lying, and the actual authority of O., or his relations to the Mexican government, or his contract with them, if any, did not appear, held, that the two cutters were subject to a lien for salvage, and that the libel against them should be sustained, as it did not appear clearly that the property in the vessels had passed to the Mexican government, and because, if it had passed, they were not at the time of the libel in the public service of that government, nor in possession of any officer thereof. Id.

No suit in rem in admiralty can be sustained, or seizure made by the marshal, under process against property of the government devoted to public uses, and in possession of an officer of the government. Attachment in rem may, however, be enforced by seizure in admiralty against property of the government, if it be not at the time of the seizure in the public service, or in the possession of any officer of the government, but in the hands of a private bailee, for transportation merely; and no greater exemption can be claimed in behalf of the property of a foreign government. Id.

195. —— Property of municipality.— A police boat owned and used by a city for public purposes cannot be subjected to a libel in rem without the consent of the city. The Protector (C. C. 1884) 20 Fed. 207; The Seneca (D. C. 1876) Fed. Cas. No. 12,668.

A steam tug, the property of a municipal corporation, and used exclusively by an executive department of said corporation, as an instrument for performing duties imposed on it by law, is not liable to a suit in rem in admiralty, brought to recover damages for an act committed while engaged in public service. The Fidelity (C. C. 1879) Fed. Cas. No. 4,758.

An ice boat maintained by a city to free the harbor from obstructions, and to aid the commerce of the port, which collided, through her own fault, with a steamer anchored in the harbor, could not be attached in a proceeding in rem. The F. C. Latrobe (1886) 28 Fed. 377.

Vessels owned by the port of Portland, which is a municipal corporation created by the law of Oregon and charged with the duty of improving and maintaining navigation in the harbor of Portland and vicinity, and which are used by it in such work, are devoted to a public use, and are not subject to seizure by the United States or any other libelant in a civil suit in rem against them in a court of admiralty to recover damages for a maritime tort. The John McCraken (D. C. 1906) 145 Fed. 705.

The indirect profit which a city may derive from the use of a vessel by reason of the law requiring masters of vessels to pay the expense of their re-

moval when ordered by the harbor master does not render it subject to attachment as a piece of property earning money for the city. The Protector (C. C. 1884) 20 Fed. 207.

196. —— Claim of exemption.—Property will not be discharged from the custody of the court on motion supported by affidavits, on the ground that it is the property of the United States. This question should be raised by claim and answer. The Othello (C. C. 1866) Fed. Cas. No. 10,611; Cartwright v. The Othello (D. C. 1866) Fed. Cas. No. 2,483.

The question whether the custody by a sheriff of a vessel under a writ alleged to be void is such as to prevent a court of admiralty from acquiring jurisdiction of the vessel cannot be determined on motion. The Circassian (D. C. 1866, 1867) Fed. Cas. No. 2,721.

197. —— Proof of exemption.—In claiming exemption from seizure upon a lien for salvage services, the burden of proof is upon those claiming the exemption, and it should appear clearly that the property had become the property of the government, and in possession of some person proved to be its officer or representative. Long v. The Tampico & Progresso (D. C. 1883) 16 Fed. 491.

198. Process in general.—The proceedings in cases of admiralty and maritime jurisdiction in the federal courts must be according to the modified admiralty practice in the United States and grafted on the British practice, and it is not a sufficient reason for rejecting a particular process which has constantly been used in the admiralty courts of the United States that it has fallen into disuse in England. Manro v. Almeida (1825) 10 Wheat. 473, 488, 6 L. Ed. 369.

Where admiralty has parted with the possession of the property upon bail or stipulation, and it is necessary for the purposes of justice to retake the property into the custody of the court, the proper process against any person not a party to the stipulation, but who is alleged to have the actual or constructive possession, is a monition, and not an execution. The Gran Para (1825) 23 U. S. (10 Wheat.) 497, 6 L. Ed. 375.

199. —— Authority to issue process.—R. S. § 4546, post, § 8335, providing for the issuing of summary process in admiralty, for a seaman's wages, clothes the judge or justice with full power, and this court will not look beyond the certificate of such officer for the authority of the clerk to issue process, provided such certificate complies with the statute, and shows its authority on its face. But said section does not authorize a state magistrate or United States commissioner to issue such certificate, except when the judge is absent, or resides more than three miles from the place. If such fact does not appear by the certificate, the writ will be quashed. Kief v. The London (D. C. 1854) Fed. Cas. No. 7,759. And it has been held, in view of a treaty between the United States and the kingdom of Italy, stipulating that "consuls general, consuls, vice consuls, and consular agents shall have exclusive charge, * * * and shall alone take cognizance of questions, of whatever kind, that may arise, both at sea and in port, between the captain, officers, and seamen, without exception, and especially of those relating to wages, and the fulfillment of agreements reciprocally made," that a justice of the peace had no power to compel a clerk of a United States district court upon a rule of court to issue admiralty process against a vessel for seamen's wages, although said section and section 4547, R. S., section 8336, post, empower justices to certify to such clerk whenever facts exist justifying the issue of such process, who thereupon is required to issue such writ. The Salomoni (D. C. 1886) 29 Fed. 534.

A warrant of arrest for seaman's wages, issued by the clerk in the absence of the judge, contrary to the provision of a rule of court, is void. Deas v. The Berkeley (D. C. 1893) 58 Fed. 920.

200. —— Curing defects.—On appeal from district to circuit court defective process cannot be cured by amendment. The City of Lincoln (C. C. 1883) 19 Fed. 460.

201. —— Waiver of defects.—The defect of beginning a former proceeding in admiralty by warrant of arrest against the vessel, instead of summons, is waived by the concurrence of the other party in new proceedings on the same cause of action. Reed v. The Fanny (D. C. 1858) Fed. Cas. No. 11,645a.

The giving of a stipulation of value to obtain the release of a vessel waives all defects in the service of process. The Acadia (D. C. 1859) Fed. Cas. No. 24.

The omission of the summons to the master of the vessel to show cause, etc., is an error of practice which may be waived by claimant by delay in taking advantage of it. Robinson v. The Lillie Mills (D. C. 1859) Fed. Cas. No. 11,958.

202. —— Service in general.—Process in admiralty may be served by a person deputized by the marshal by memorandum indorsed thereon. The E. W. Gorgas (D. C. 1879) Fed. Cas. No. 4,585.

203. —— Service on allowing amendment.—If a petition by a shipowner, does not state a case within the admiralty and maritime jurisdiction of the

United States, and nevertheless a monition issues, and on the return of the monition the petitioner amends his petition by adding allegations bringing the case within the jurisdiction, it seems that the court should not proceed to a decree, to be operative upon parties who have not appeared without issuing an alias monition upon the amended petition. In re Petition of Long Island North Shore Passenger & Freight Transp. Co. (D. C. 1881) 5 Fed. 599.

Where a libel for an alleged breach of a charter party, made by the owners of a certain steamship, was brought against respondent under the allegation that he was the sole owner, and, respondent not being within the jurisdiction of the court, the ship was attached, upon which respondent's proctors put in a general appearance for him, filed security, and obtained release of the vessel, and a plea in abatement for defect of parties was sustained, and libelant was allowed to amend his libel by inserting the fact that other persons besides respondent were owners with him, and that they were without the reach of process, the order to amend was an interlocutory order in the attachment suit, to abide which respondent bound himself by his general appearance, and it was not necessary to serve him in person with a copy of the order. Card v. Hines (D. C. 1888) 36 Fed. 573.

204. —— Service in general.—A citation in admiralty in a suit in personam should be personally served on the defendant, or, if he cannot be found, by an attachment of his property, in accordance with rule 2. Service by leaving a copy of the citation with a servant at defendant's residence is not sufficient. Walker v. Hughes (D. C. 1904) 132 Fed. 885.

Service may be made on an agent of a nonresident defendant, in conformity with a state statute authorizing such mode of service in actions at law or in equity. Doe v. Springfield Boiler & Mfg. Co., 104 Fed. 684, 44 C. C. A. 128; Insurance Co. of North America v. Frederick Leyland & Co. (D. C. 1905) 139 Fed. 67. And see Christie v. Davis Coal & Coke Co. (D. C. 1899) 92 Fed. 3.

In a suit for salvage against a derelict vessel, her cargo and freight, the master claimed the vessel and cargo, and prayed for delivery of both, on stipulation. The owners of the cargo intervened, and prayed for delivery of the cargo to them without payment of freight, and also filed their libel for delivery thereof, in response to which the master filed a claim to the cargo, and an answer. He afterwards filed a libel against the cargo and its owners for payment of freight and general average, setting out the proceedings on the previous libels. Held that, as this libel was a cross-libel to each of the prior suits, the court had power to order the monition thereon served on the proctors of the owners of the cargo, they being nonresidents, and on such service to proceed to judgment against them personally in all matters covered by the cross-libel; and a subsequent dismissal of their own libel, on their motion, did not affect the jurisdiction so obtained. The Eliza Lines (C. C. 1894) 61 Fed. 308.

In an action by the United States against the steamship company to recover damages for breach of contract for the use of a steamship, service of process on the parties who represented the owner of the vessel in her chartering to the government and in the prosecution of a claim against it was sufficient. United States v. Bedouin S. S. Co. (D. C. 1908) 167 Fed. 863.

205. Process in proceedings in personam—Arrest of person in general.—Since the promulgation of the supreme court rule of 1850 (rule 47) abolishing arrests on admiralty process, where, by the state laws imprisonment for debt has been abolished, a warrant of arrest sued out without the special order of the judge is nugatory and void. Van Stratton v. Borbock (D. C. 1857) Fed. Cas. No. 16,876a. See, also, § 1636, and notes.

206. —— Requiring security on arrest of person.—On libel against the master and two mates of a vessel for an assault and battery on libelant by the two mates, who are not in the jurisdiction, where there is no evidence that the master knew of the mates' intention to assault libelant, or could have prevented it, an order of arrest will not be issued without the security usually required in such cases. Cole v. Tollison (D. C. 1889) 40 Fed. 303.

207. —— Effect on right to arrest of local statutes abolishing imprisonment for debt.—See, also, § 1636, and notes thereunder.

Prior to the amendment of admiralty rule 47, whereby imprisonment for debt on process issuing out of the admiralty court was abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, upon similar or analogous process, issuing from a state court, it was held that R. S. § 990, post, § 1636, providing that no person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished, did not prohibit arrests upon process issued out of maritime courts. Gardner v. Isaacson (D. C. 1848) Fed. Cas. No. 5,230; Gaines v. Travis (D. C. 1849) Fed. Cas. No. 5,-180; Hodge v. Bemis (D. C. 1849) Fed. Cas. No. 6,557; Marshall v. Bazin (D. C. 1849) Fed. Cas. No. 9,125; Hanson v. Fowle (D. C. 1871) Fed. Cas. No. 6,041. Since said amendment it seems

to be the rule that no process for arrest can issue in admiralty where, in a like case, such process could not issue from the state courts in the state in which such process is sought. The Kentucky (C. C. 1860) Fed. Cas. No. 7,717; Louisiana Ins. Co. v. Nickerson (D. C. 1874) Fed. Cas. No. 8,539; The Carolina (D. C. 1876) 14 Fed. 424; Chiesa v. Conover (D. C. 1888) 36 Fed. 334. And a person arrested subsequent to such amendment, but prior to its publication, has been held to be entitled to be discharged. Bell v. Nelson (D. C. 1851) Fed. Cas. No. 1,257. But it has been held that said amended rules and said section 990 do not affect the power of the federal court, sitting in admiralty, to issue a warrant of arrest as process to compel defendant to respond to a claim for damages for personal injury and cruelty inflicted on a seaman. Bolden v. Jensen (D. C. 1895) 69 Fed. 745, disapproving The Carolina (D. C. 1876) 14 Fed. 424, Chiesa v. Conover (D. C. 1888) 36 Fed. 334, and The Bremena v. Card (D. C. 1889) 38 Fed. 144.

Under admiralty rule 47 and R. S. §§ 990, 991, post, §§ 1636, 1637, where the master and mate of a ship are arrested in the state of Oregon on a libel for damages for injuries inflicted on the high seas, they are entitled to discharge on giving bond conditioned at all times to "render themselves amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment," as provided by the laws of Oregon, and cannot be required to give a bond conditioned for the payment of the money awarded by the final decree. Stone v. Murphy (D. C. 1898) 86 Fed. 158.

208. —— Custody on arrest of person.—Under rule 3, a respondent arrested must remain in custody until he gives bond or stipulation to satisfy any decree made against him. Gardner v. Isaacson (D. C. 1848) Fed. Cas. No. 5,230.

209. —— Discharge from arrest.—A motion to discharge respondent from arrest on the ground that libelant has no legal cause of action will not be granted where the affidavits read upon the motion in behalf of the respective parties are contradictory as to the merits. Wicks v. Ellis (D. C. 1849) Fed. Cas. No. 17,614.

Where a libelant procured the arrest of respondent in a suit brought in a district different from that in which they both resided, upon a stale demand, of small amount, and which was already in litigation between the parties in the courts of the state in which they dwelt, the respondent ought to be discharged from the arrest. Martin v. Walker (D. C. 1850) Fed. Cas. No. 9,170.

210. —— Arrest of person and attachment of property.—Where the marshal arrests the respondent, and also attaches his property on a warrant in the alternative, the attachment must be set aside. Grace v. Evans (D. C. 1869) Fed. Cas. No. 5,650.

211. —— Attachment of property to enforce appearance.—Courts of admiralty and maritime jurisdiction have power to issue the process of attachment to compel appearance, both in cases of maritime torts and contracts. Manro v. Almeida (1825) 23 U. S. (10 Wheat.) 473, 6 L. Ed. 369; Bouysson v. Miller (D. C. 1802) Fed. Cas. No. 1,709. They have authority to issue a warrant of arrest with a clause that, if defendants cannot be found, their goods and chattels, or their credits and effects, in the hands of parties named, shall be attached. Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202; Smith v. Miln (D. C. 1848) Fed. Cas. No. 13,081; Trask v. Pelletier (D. C. 1853) Fed. Cas. No. 14,146.

This writ may issue in the case of a respondent who is not an inhabitant of the United States. Cushing v. Laird (D. C. 1870) Fed. Cas. No. 3,508.

Under a rule in the district of Massachusetts it was held that a warrant to attach the goods and chattels, or, in default, the credits, of defendant, might be granted in cases in which an arrest could not legally be made. This rule was within the power of the court. Louisiana Ins. Co. v. Nickerson (D. C. 1874) Fed. Cas. No. 8,539.

An attachment, under an ordinary process in personam, will not be vacated upon the ground that the marshal attached the property without having made any proper effort to serve the defendant, where the marshal returned that he made a reasonable effort to serve the defendant before making the attachment. Harriman v. Rockaway Beach Pier Co. (D. C. 1880) 5 Fed. 461.

The clause in rule 2, providing that in admiralty suits in personam the mesne process may be by a simple warrant of arrest of the defendant in the nature of a capias, or with a clause therein "that, if he cannot be found," to attach his goods, taken in conjunction with rule 47 abolishing imprisonment for debt on admiralty process in all cases where, by the law of the state where the court is held, imprisonment for debt has been abolished in similar cases, does not mean "found for the purpose of arrest," so as to justify an attachment in a case where defendant is actually within, and a resident of the district, but cannot be arrested because of the state law. The Bremena v. Card (D. C. 1889) 38 Fed. 144.

For a marshal to attach goods without any endeavor to find and serve personally the defendants when they are to be found within the district, is

an abuse of the process of the court, and the attachment cannot be sustained. International Grain Ceiling Co. v. Dill (D. C. 1878) Fed. Cas. No. 7,053.

This process by attachment may issue wherever defendant has concealed himself or absconded from the country and the goods sought to be attached are within the jurisdiction of admiralty. Manro v. Almeida (1825) 10 Wheat. 473, 488, 6 L. Ed. 369.

A district court of the United States, when acting as a court of admiralty, can obtain jurisdiction to proceed in personam against an inhabitant of the United States, not residing within the district (within which terms a corporation incorporated by a state not within the district is meant to be included), by attachment of the goods or property of such inhabitant found within the district. Atkins v. Disintegrating Co. (1873) 85 U. S. (18 Wall.) 272, 21 L. Ed. 841, reversing Atkins v. Fibre Disintegrating Co. (C. C. 1870) Fed. Cas. No. 602.

If defendant fails to appear, the attached property will be held until final decision, when it may be proceeded against by execution. But on the appearance of defendant the attachment must be discharged. Essler v. Worth (D. C.) Fed. Cas. No. 4,533a.

A warrant of arrest, with a clause that, if defendants cannot be found, their goods and chattels, credits and effects, in the hands of parties named, shall be attached, will be set aside as to parties served who are not named therein. Trask v. Pelletier (D. C. 1853) Fed. Cas. No. 14,146.

212. —— **Foreign attachment and garnishment in general.**—Although the process of foreign attachment in admiralty is not borrowed from the custom of London, yet admiralty courts may recur to the practice of the latter courts for explications of the methods by which the common design may be best effected. Smith v. Miln (D. C. 1848) Fed. Cas. No. 13,081.

R. S. § 739 (now section 51, Judicial Code, and section 1033, this compilation), providing that no person shall be arrested in one district for trial in another in any civil action before a district court, and no civil suit shall be brought before said court in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, held to apply to suits in admiralty; and that therefore jurisdiction could not be obtained on a libel in personam in admiralty by process of foreign attachment, where respondent, being a nonresident was not found within the district. Wilson v. Pierce (D. C. 1852) Fed. Cas. No. 17,826.

In a suit in admiralty in personam, where the court has jurisdiction of the subject-matter and the respondent cannot be served within the district, the court may direct process in the nature of a foreign attachment to be levied on any property of respondent found in the district. Bjolstad v. Pacific Coast S. S. Co. (D. C. 1914) 221 Fed. 692.

Admiralty has jurisdiction in cases of maritime torts, where the thing or the person is within the territory, and may issue a foreign attachment to arrest the choses in action of the offending party. The Invincible (C. C. 1814) Fed. Cas. No. 7,054.

Where, in a suit in personam, a respondent cannot be arrested, a foreign attachment may issue against his property in the hands of a third person to compel his appearance.—Reed v. Hussey (D. C. 1836) Fed. Cas. No. 11,646.

213. —— **Actions in which foreign attachment or garnishment may be used.**—Foreign attachment in admiralty lies in cases of tort. Barnes v. Steamship Co. (C. C. 1868) Fed. Cas. No. 1,021. Also in the case of a piratical capture. Manro v. Almeida (1825) 10 Wheat. 473, 495, 6 L. Ed. 369.

214. —— **Property subject to foreign attachment or garnishment.**—The process by attachment in cases of admiralty and maritime jurisdiction in the federal courts may issue against defendant's goods and chattels and against his credits and effects in the hands of third persons. Where defendant has absconded or concealed himself, such process applies, where the same goods are liable to the process of foreign attachment issuing from the courts of common law. Manro v. Almeida (1825) 10 Wheat. 473, 488, 6 L. Ed. 369.

Foreign attachment may be directed against goods or rights and credits of the debtor, and be carried into operation by actual arrest of goods, when they can be found, or by notice of the object of the proceedings to those who have either or both in their possession. Smith v. Miln (D. C. 1848) Fed. Cas. No. 13,081.

Property purchased bona fide by the holder of it is not subject to a foreign attachment. Reed v. Hussey (D. C. 1836) Fed. Cas. No. 11,646.

The district courts of the United States, as courts of admiralty, may award attachments against the property of foreign corporations found within their local jurisdiction. Clarke v. New Jersey Steam Nav. Co. (C. C. 1841) Fed. Cas. No. 2,859.

Attachment of property in a suit in personam in admiralty, where respondent, although a foreign corporation, maintained an office in the district in charge of one of its officers, held invalid under a rule of the court. Birdsall v. Germain Co. (D. C. 1915) 227 Fed. 953.

Ships and other tangible property are "effects," within the meaning of the second general admiralty rule, and may be reached by a writ of garnishment when in the hands of a third person. The Alpena (D. C. 1881) 7 Fed. 361.

215. —— **Amount in controversy as affecting right to foreign attachment or garnishment.**—Rule 28 of the district court is not rescinded by supreme court rule 7, prohibiting employment of the writ of foreign attachment in aid of demands exceeding $500 without authority of the judge. A writ of foreign attachment in aid of a libel in personam to recover less than $500, issued without direct sanction of the court, is irregular, and will be discharged, under rule 28.—Van Stratton v. Borbock (D. C. 1857) Fed. Cas. No. 16,876a.

216. —— **Issue of foreign attachment or garnishment.**—It seems that an attachment cannot issue in cases of admiralty and maritime jurisdiction in the federal courts without an express order of the judge, but the attachment may be issued simultaneous with the monition. Manro v. Almeida (1825) 10 Wheat. 473, 495, 6 L. Ed. 369.

It is not necessary that the property to be attached in cases of admiralty and maritime jurisdiction in the federal courts should be specified in the libel. Id.

217. —— **Return of foreign attachment or garnishment.**—Third persons claiming ownership of a vessel seized on process of foreign attachment may move to amend the marshal's false return of "not found," though they have given bond for release. International Grain Ceiling Co. v. Dill (D. C. 1878) Fed. Cas. No. 7,053.

218. —— **Effect of foreign attachment or garnishment.**—Where a defendant is not found, a foreign attachment remains in full force against all his property found within the district; and, to discharge it, defendant must furnish a bond to satisfy the full decree. Bell v. Nelson (D. C. 1851) Fed. Cas. No. 1,257.

219. —— **Custody and disposition of property seized under foreign attachment.**—The property attached in cases of admiralty and maritime jurisdiction in the federal courts may, in case of default, be condemned to answer the demand of the libelant. Manro v. Almeida (1825) 10 Wheat. 473, 493, 6 L. Ed. 369.

The master of a vessel attached in an action against the master individually, without the knowledge or authority of the owner, removed it to another state. Held that, the attachment having been illegal, the vessel was never in custodia legis, and the sheriff was not entitled to the possession as against the owner, who was not chargeable with the quasi criminal act of the master in removing the vessel. The Bonnie Doon (D. C. 1888) 36 Fed. 770.

220. —— **Scire facias against garnishee.**—When a foreign attachment proceeding is for the purpose of bringing defendant into court, and he makes default on proclamation, a scire facias issues against the garnishee. Smith v. Miln (D. C. 1848) Cas. No. 13,081.

221. —— **Notice to garnishee or defendant.**—In foreign attachment, garnishment, or trustee proceedings, the garnishee or trustee must be brought into court with notice of the claim upon him, and be given full opportunity to oppose the demand. Rule 29, requiring a garnishee on the attachment of the goods of a debtor in his hands to file his affidavit, giving a full statement of the property in his hands or to pay it into court, does not authorize the service of process in foreign attachment without a notice or citation to the garnishee as part of the process. Nor does rule 37, providing that if defendant cannot be found the officer may attach his goods, or if such property cannot be found his credits and effects in the hands of garnishees may be attached, give such authority. The warrant for process served upon the garnishee in a suit prosecuted by foreign attachment must contain a notice of the claim, citing him to appear and answer, to authorize the proceeding to be carried on against him personally. When the service of a foreign attachment in admiralty is by notice to the garnishee, and not by actual levy upon the goods, it must necessarily be shown to the court, before any order can be taken against the garnishee, that he has been warned of the remedy which the process demands, and for what cause, and the time and place he must appear before the court. Smith v. Miln (D. C. 1848) Fed. Cas. No. 13,081.

Personal service on the garnishees of a process, containing a clause of foreign attachment, and a notice of what the process demanded, and for what cause, and of the time and place when the garnishees must appear and answer, is a sufficient attachment of any credits and effects of the respondent in their hands. Cushing v. Laird (D. C. 1870) Fed. Cas. No. 3,508.

In admiralty, stocks and credits are attached by notice to the debtor or holder without aid of any statute. Page v. U. S. (1870) 11 Wall. 268, 298, 20 L. Ed. 135.

222. —— **Disclosure or answer by garnishee in general.**—The duty of a garnishee on appearance is to discharge himself of the effect of the citation by showing that he holds nothing belonging to the debtor, or by specifying exactly what it is, and submitting himself in respect thereto to the court; or he may contest the justness or amount of the libelant's demand. Smith v. Miln (D. C. 1848) Fed. Cas. No. 13,081.

It is the right and duty of a garnishee in admiralty to put in an answer, which libelant has no right to contest. Shorey v. Rennell (D. C. 1858) Fed. Cas. No. 12,807.

223. —— **Default of garnishee.**—On default of one summoned as garnishee,

libelant is not entitled to execution in personam against him. Rule 37 provides for compulsory process only to compel the garnishee to answer. McDonald v. Rennel (D. C. 1858) Fed. Cas. No. 8,765. And see Shorey v. Rennell (D. C. 1858) Fed. Cas. No. 12,807.

On the default of a garnishee in admiralty, the libelant may have compulsory process to obtain an answer. But if he needs no disclosure, and can show by affidavits that the garnishee has effects or credits in his hands, execution may issue against them without requiring an answer. Shorey v. Rennell (D. C. 1858) Fed. Cas. No. 12,807.

Where a warrant of arrest contains a foreign attachment clause, but gives no direction to bring the garnishee before the court, nor any citation to him to answer the libel, the primary purpose of the attachment is to effect the appearance of the defendant in the action, and not that of the garnishee, and therefore a default entered against the garnishee for nonappearance on the return of the process is irregular. Smith v. Miln (D. C. 1848) Fed. Cas. No. 13,-081.

224. —— **Answer by garnishee after default.**—After default, the garnishee is not entitled as of right to put in an answer, except to state facts which have occurred since the default. McDonald v. Rennel (D. C. 1858) Fed. Cas. No. 8,765.

On default the court has discretion to allow him to answer upon terms. Shorey v. Rennell (D. C. 1858) Fed. Cas. No. 12.807.

Such answer may be allowed in the discretion of the court, and in this case was so allowed, on condition that the libelant might take issue upon it, and that the garnishee should stipulate with sureties to pay whatever the court should allow. McDonald v. Rennel (D. C. 1858) Fed. Cas. No. 8,765. But after execution against effects or credits in the hands of a garnishee in admiralty, and a refusal by him to pay, he cannot then discharge himself by putting in an answer. Shorey v. Rennell (D. C. 1858) Fed. Cas. No. 12,807.

225. —— **Set-off by garnishee.**—A garnishee under a foreign attachment in admiralty may set off a claim in his favor against the respondent, notwithstanding the fact that it is one not cognizable in admiralty. Wilhelmsens Dampskibaktiesselskab v. Canadian Venezuelan Ore Co. (1915) 224 Fed. 881, 140 C. C. A. 303.

226. **Process in proceedings in rem.**—Where the court of admiralty has parted with the possession of the property on bail or stipulation and it is necessary to retake the same, the proper process against any person not a party to the stipulation, but who has the actual or constructive possession, is a monition, and not execution in the first instance. The Gran Para (1825) 10 Wheat. 497, 498, 6 L. Ed. 375.

The proper proceeding by a shipowner to enforce the lien given by a provision of a charter party that the owners shall have a lien on all subfreight for charter money due under such charter is by a libel in conformity to admiralty rule 38 against the subfreight alone, with process requiring the holder of the bill of lading or the owner of the cargo to bring the amount of the freight into court, and if not so brought in a summary process may issue against the owner of the cargo or against the cargo. A proceeding against the cargo is not justified until after an order to pay in the freight; but if a warrant of arrest has prematurely issued, and it is afterwards ascertained that there is a contest which would probably have ultimately resulted in its issuance, the arrest will be retained, and compensation made in costs for the fact that it was premature. American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (1902) 115 Fed. 669, 53 C. C. A. 301, reversing decree American Steel Barge Co. v. Cargo of Coal ex The City of Everett (D. C. 1901) 107 Fed. 964.

227. —— **Necessity of monition or notice.**—A proceeding in rem will bind the res, in the absence of any personal notice to the party interested. The Globe (C. C. 1852) Fed. Cas. No. 5,-483, reversing (D. C. 1850) Fed. Cas. No. 5,484. And see Bierne v. The Triumph (1841) 2 Ala. 738; Williamson v. Brooks (1841) 3 Ala. 32.

A warrant directing a United States marshal to attach a vessel should not be issued unless preceded by or accompanied with a summons to the person in whose possession the property is found. Bowler v. Eldridge (1846) 18 Conn. 1.

228. —— **Sufficiency of monition.**—An objection that the monition did not sufficiently describe the property to be attached is insufficient where the marshal has not been thereby misled, and attached the wrong property. Lands v. A Cargo of Coal (D. C. 1880) 4 Fed. 478.

229. —— **Sufficiency of warrant.**—Under Act May 8, 1892, requiring that all writs and processes issuing from a district court shall bear test in the name of the judge of such court, and shall be under the seal of such court, and signed by the clerk thereof, a warrant authorizing a marshal to take possession of a vessel, merely signed by the judge, is insufficient, and therefore is no justification to an action of trespass for taking the vessel. But a warrant authorizing a United States marshal to take possession of a vessel is not exceptionable because it came from the judge in contradistinction to the court. Bowler v. Eldridge (1846) 18 Conn. 1.

The order of a United States district judge directing process to issue against

a vessel lying at Philadelphia, on a libel filed to recover damages for nondelivery of goods at a port of a foreign state, is a sufficient justification for the seizure and detention of the vessel, where the libel was afterwards dismissed on the ground of want of jurisdiction. Thompson v. Lyle (Pa. 1842) 3 Watts & S. 166.

230. —— **Right to arrest in general.**—The proper proceeding by a shipowner to enforce the lien given by a provision of a charter party that the owners shall have a lien on all subfreight for charter money due under such charter is by a libel in conformity to rule 38 against the subfreight alone, with process requiring the holder of the bill of lading or the owner of the cargo to bring the amount of the freight into court, and if not so brought in a summary process may issue against the owner of the cargo or against the cargo. A proceeding against the cargo is not justified until after an order to pay in the freight; but if a warrant of arrest has prematurely issued, and it is afterwards ascertained that there is a contest which would probably have ultimately resulted in its issuance, the arrest will he retained, and compensation made in costs for the fact that it was premature. American Steel Barge Co. v. Chesapeake & O. Coal Agency Co. (1902) 115 Fed. 669, 53 C. C. A. 301, reversing decree American Steel Barge Co. v. Cargo of Coal ex The City of Everett (D. C. 1901) 107 Fed. 964.

Where a libelant, in a suit in personam, waited for more than a year after filing the libel before issuing process thereon, although the respondent might readily have been found within the district during that time, the case is not one for security before judgment, and an attachment then made under rule 9 will be vacated. Shewan v. Hallenbeck (D. C. 1906) 150 Fed. 231.

231. —— **Second arrest.**—The owner of a vessel, in case of injury to the vessel and cargo, may maintain an action for damage to both against another vessel causing the injury; and after the latter has been once arrested, and given bail for the whole damage, if the owner of the cargo afterwards cause all claim on his account to be withdrawn from the suit, he cannot, ordinarily, again maintain an action against the same vessel in rem, and arrest her a second time for the same damage. The Wm. Murtagh (D. C. 1883) 17 Fed. 259.

A vessel which, after being seized upon a libel, is released, on giving a bond to secure the demand of the libelant, and the case is subsequently dismissed without prejudice, cannot be arrested a second time for the same cause of action, unless her discharge was obtained through fraud or mistake, even where the libel is dismissed without prejudice. The Cleveland (D. C. 1899) 98 Fed. 631.

232. —— **Levy of attachment.**—It is immaterial that the vessel, if attached within the district, was out of the jurisdiction when the libel was filed, as the time of service of process is the commencement of the suit. Kelsey v. The William Kallahan (D. C. 1852) Fed. Cas. No. 7,680.

Where a cargo libeled for freight is in the custody of the collector, the service of the monition on him by the marshal, by exhibiting the original process and leaving a copy thereof, is a sufficient caption of the res to give the court jurisdiction to order a sale thereof, subject to the claims of the United States for duties and expenses. Two Hundred and Fifty Tons of Salt (D. C. 1880) 5 Fed. 216.

A suit on a bottomry bond, except in certain cases, must be by proceedings in rem against the property hypothecated or the proceeds, as prescribed by rule 18, and a libel in rem may be a proceeding against the property by arrest or attachment; but it does not follow that an attachment can only be made by actually taking possession of the property; service may be made either by notice or by actual levy on the goods. Service by notice and monition is analogous to the process of garnishment, and a good attachment of the proceeds in whatever form they may exist. Snow v. One Hundred & Eighty and Three-Fourths Tons of Scrap Iron (D. C. 1882) 11 Fed. 517.

233. —— **Levy on property already in custody.**—The court does not acquire jurisdiction where the marshal makes return to a process in rem that he was prevented from making service by the adverse possession of a sheriff; the practice in such case is to wait until the sheriff's custody has ceased. The Julia Ann (D. C. 1858) Fed. Cas. No. 7,577.

Where a cargo libeled for freight is in the custody of the collector, the service of the monition on him by the marshal, by exhibiting the original process and leaving a copy thereof, is a sufficient caption of the res to give the court jurisdiction to order a sale thereof, subject to the claims of the United States for duties and expenses. Two Hundred and Fifty Tons of Salt (D. C. 1880) 5 Fed. 216.

Where a vessel is in the custody of the marshal, his receipt of a warrant of arrest in another suit, with intent to levy it, is a constructive levy, notwithstanding that he returns the warrant "withheld." Kodiak Packing Co. v. The Haytian Republic (D. C. 1894) 60 Fed. 292.

A marshal's return stating a seizure of a vessel, but that at such time the vessel was in the custody of a state sheriff, does not imply such seizure as

to give the court jurisdiction. The Circassian (D. C. 1866, 1867) Fed. Cas. No. 2,721.

A warrant directing a United States marshal to take from the custody of an officer of this state a vessel which he held under duly executed process of law, without any proof of the facts alleged except the oath of the applicants, and without giving the state officer an opportunity to be heard, is insufficient, and no justification to an action of trespass for taking the property. Bowler v. Eldridge (1846) 18 Conn. 1.

234. —— **Vacation of attachment.**—Under rule 51, which provides that new facts alleged in an answer shall be considered as denied by the libelant without replication, the truth of such allegations cannot be assumed for the purposes of a summary motion on the pleadings to vacate the attachment of a vessel for "manifest want of equity," filed pursuant to rule 35 of the District Court of the District of Washington, and such a motion cannot properly be sustained where the libel states a cause of action against the libeled vessel. The Celtic Monarch (1905) 138 Fed. 711, 71 C. C. A. 127.

235. —— **Sufficiency of return.**—A marshal who had process against a vessel made return that he had attached her, but that previous to his attachment she was in the custody of a state sheriff. It appeared that, of the warrants under which the sheriff held the vessel, all that were in his hands at the time of the alleged attachment by the marshal were afterwards declared void for want of jurisdiction, and the libelant thereupon applied for an order to compel the marshal to amend his return by striking out all reference to the custody of the sheriff. Held, that the marshal was responsible for the execution of the process put into his hands, and should be left free to state what he did with it subject to that responsibility, and that the court, therefore, would not interfere. The Circassian (D. C. 1866, 1867) Fed. Cas. No. 2,721.

Sundays are not excluded in the 14 days required before the return of process in rem, in admiralty. The E. W. Gorgas (D. C. 1879) Fed. Cas. No. 4,585.

To process issued in a suit in rem in admiralty, the marshal made return: "November 3, 1875, attached the steam tug Anna P. Dorr, her tackle, etc., by serving a copy of this writ, personally, on John Carse, part owner of same, and by serving, November 5, 1875, a copy of this writ at residence of Capt. E. F. Christian on wife." Held, that the return did not import a seizure of the tug. Brennan v. The Anna P. Dorr (D. C. 1880) 4 Fed. 459.

236. —— **Effect of return.**—The life of a process in rem in admiralty does not end with its return, and if, at any time before the marshal is discharged, his custody becomes legal, the jurisdiction of the court becomes complete from that time. The Roslyn (D. C. 1877) Fed. Cas. No. 12,068.

237. —— **Conclusiveness of return.**—An unnecessary statement in the marshal's return as to the place of seizure of a vessel under a monition in a suit in rem is not conclusive of the court's jurisdiction over the res, and it may be shown by testimony under a plea to the jurisdiction that the seizure was in fact made outside the territorial jurisdiction of the court. Inman v. The Lindrup (D. C. 1895) 70 Fed. 718.

238. —— **Publication.**—In proceedings in rem against a vessel, personal service on the owner dispenses with the usual publication. Henning v. The St. Helena (1850) 5 La. Ann. 349.

239. —— **Process against proceeds of property.**—When property has been sold or otherwise disposed of, so that it cannot be reached in specie by the process of a court of admiralty, the process may be enforced against the proceeds. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

240. —— **Defects and waiver thereof.**—The defect of beginning a former proceeding in admiralty by warrant of arrest against the vessel, instead of summons, is waived by the concurrence of the other party in new proceedings on the same cause of action. Reed v. The Fanny (D. C. 1858) Fed. Cas. No. 11,645a.

241. —— **Damages for wrongful arrest or attachment.**—The arrest and detention of a vessel by legal process in a suit in rem, which, although unfounded, is not mala fides, does not entitle the owner to damages, beyond the taxable costs. The Oriole (D. C. 1844) Fed. Cas. No. 10,573; The Adolph (D. C. 1880) 5 Fed. 114; Kemp v. Brown (D. C. 1889) 43 Fed. 391; Portland Shipping Co. v. The Alex Gibson (D. C. 1890) 44 Fed. 371; The Alex Gibson (D. C. 1890) 44 Fed. 374; Mellquist v. The Wasco (D. C. 1892) 53 Fed. 546; Gow v. William W. Brauer S. S. Co. (D. C. 1902) 113 Fed. 672; The Alcalde (D. C. 1904) 132 Fed. 576. But when the libelant proceeds without an honest belief that he is using a rightful remedy, and his action is in the nature of a malicious prosecution, he should be held to pay any damages sustained by the owner through his wrongful act. Gow v. William W. Brauer S. S. Co. (D. C. 1902) 113 Fed. 672. And it has been held that a libelant, who procures the seizure and detention of vessels for the purpose of enforcing an alleged lien against them without an order of court, when on the facts stated in his libel he has no lien, is liable in damages to

the owners, even though he acted in good faith, as an attachment issues as of course in such cases on the filing of the libel, and a special order of court is not required. Briggs Excursion Co. v. Fleming (C. C. 1889) 40 Fed. 593.

The order of a United States district judge directing process to issue against a vessel lying at Philadelphia, on a libel filed to recover damages for nondelivery of goods at a port of a foreign state, is a sufficient justification for the seizure and detention of the vessel, where the libel was afterwards dismissed on the ground of want of jurisdiction. Thompson v. Lyle (Pa. 1842) 3 Watts & S. 166.

242. **Appearance.**—Before the defendant can be heard in his defense, or introduce evidence in the cause, he must appear and contest the suit, either by exceptions to the libel or by answering it. If he does neither, the court will hear and adjudge the cause ex parte, upon the evidence offered by the libelant. The David Pratt (D. C. 1839) Fed. Cas. No. 3,597.

243. —— **What constitutes in general.**—Where the record shows that on the return day a certain person "appears for the respondents, and has a week to perfect an appearance and to answer," it will not be regarded as an appearance which operates as a voluntary submission to the jurisdiction, and a waiver of the objection. The Aberfoyle (D. C. 1848) Fed. Cas. No. 16; Atkins v. Fibre Disintegrating Co. (C. C. 1870) Fed. Cas. No. 602.

Where a release bond is given after seizure of a vessel under an invalid warrant of arrest, the claimant being then ignorant of such invalidity, the recital in such bond that the claimant and his surety personally appeared, and submitted themselves to the jurisdiction of the court, is not a waiver of the illegality, and does not operate as an appearance to the suit. Deas v. The Berkeley (D. C. 1893) 58 Fed. 920.

In a suit against partners, if one entitle his plea for all the partners, and the proctor appears for all, it is a sufficient appearance for all. Hills v. Ross (1796) 3 U. S. (3 Dall.) 331, 1 L. Ed. 623.

Under a statute providing that any person interested in a boat that has been attached may appear by himself for defendant boat, the filing by a creditor of the boat of a demurrer to the complaint does not constitute an appearance of defendant boat, if it is alleged in the demurrer that it is the creditor who is demurring for himself. Dietrich v. Steam Dredge & Amalgamator (1894) 14 Mont. 261, 36 Pac. 81.

244. —— **Effect of appearance in action in personam.**—A claimant, who fails to put his objections upon the record, will be deemed to have waived them by appearing and contesting the case upon the merits. The Detroit (C. C. 1874) Fed. Cas. No. 3,832.

One who comes into admiralty, and asserts a claim to and demand due from a third person, which is sought to be subjected to the payment of a judgment in personam against another, is bound by the decision. Whatever other remedies he might have had, he lost them by his appearance. Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202.

Objection to jurisdiction founded on personal privilege of declining the forum must be made before general appearance and answering to the merits. The Bee (D. C. 1836) Fed. Cas. No. 1,219.

After a respondent has appeared generally, and answered upon the merits, it is too late to move for a dismissal because of a misnomer in the libel and monition. Mina v. I. & V. Florio S. S. Co. (D. C. 1885) 23 Fed. 915.

245. —— **Appearance to cross-libel.**—It is in the discretion of an admiralty court to stay proceedings under the libel until libelant, being out of the jurisdiction, shall enter appearance to a cross-libel. Nichols v. Tremlett (D. C. 1857) Fed. Cas. No. 10,247.

246. —— **Effect of appearance in proceedings in rem.**—Where a libel against both the vessel and its owner contains no prayer for monition and personal judgment, and no service of monition or attachment of property was made on the owner, his appearance to answer the libel in rem gives the court no jurisdiction to enter a personal judgment against him. The Ethel (1895) 66 Fed. 340, 13 C. C. A. 504.

Where, in a collision case, a stipulation was executed, with sureties by only one part owner, conditioned to pay the amount that might be awarded on final decree, though another appeared by proctor, and claimed the vessel as part owner, such appearance was not an admission of ownership at the time of the collision or of personal responsibility for the negligence of those then in charge of the vessel, the libelant being unable to enforce his decree against the stipulator and his sureties. The Zodiac (D. C. 1881) 5 Fed. 220.

Where the corporate owners of a steamboat voluntarily appear as claimants, though under the wrong name, they are parties to the suit, and no objection can be taken to the decree for want of process against them. Virginia & M. Steam Nav. Co. v. U. S. (C. C. 1840) Fed. Cas. No. 16,973.

On a libel in rem where want of jurisdiction does not appear on the face of the libel, personal appearance without objections is equivalent to attachment. Jones v. The Richmond (D. C. 1858) Fed. Cas. No. 7,492.

A general appearance in an action in rem is limited by the nature of the action and the property seized. The Monte A. (D. C. 1882) 12 Fed. 331.

The appearance of the foreign owner

of a vessel to claim and release the same when seized in a suit in rem does not constitute a general appearance, such as to give the court jurisdiction to render a personal judgment against him. The Lowlands (D. C. 1906) 147 Fed. 986.

(E) Tender and payment into court

247. In general.
248. Amount.
249. Compelling payment into court.
250. Withdrawal of moneys by libelant.
251. Claims against moneys paid.

247. In general.—On a libel in personam against a subcharterer to recover freight, respondent, on petition, will be allowed to pay the freight moneys into court to abide the decision of a contest between the owner and charterer as to a claim for demurrage in which he is not interested, and the suit against him will be enjoined, though the result will be to turn the proceeding into one in rem against the freight. Copp v. De Castro & Donner Sugar Refining Co. (D. C. 1875) Fed. Cas. No. 3,215.

Money paid into court by a defendant is an absolute admission that so much is due upon the claim of plaintiff, and the opinion seems to be that plaintiff may receive such deposit pending the litigation. In any event, he may prosecute his action for the remainder of his claim, subject to the risk of paying costs if he recover no more than the tender. Ye Seng Co. v. Corbitt (D. C. 1881) 9 Fed. 423.

A vessel and cargo, having been saved from a common peril after considerable jettison, proceeded to their destination where the saved cargo was delivered. On such delivery the consignee deposited a sum of money equal to 20 per cent. of the value of the cargo delivered to him to cover general average, and executed bond for the payment of his proportion of the losses and expenses. Held that, in a suit against the vessel and cargo for salvage, the libelants might elect to treat such deposit as so far a substitute for the cargo delivered, and require the agent of the vessel to bring the same into court to answer the judgment rendered. The Queen of the Pacific (D. C. 1883) 18 Fed. 700.

248. Amount.—Filing a libel in admiralty, and delivery of the writ to the officer, is a commencement of the suit, such that a tender afterwards made must include costs of suit, although the vessel has not been seized. The Sunshine (D. C. 1859) Fed. Cas. No. 13,623. A respondent in a suit in admiralty, who makes a tender and deposit at the time of filing the answer, is not required to include therein a docket fee, which is only taxable, under R. S. § 824, ante, § 1378, when the case is determined on its merits after a hearing. Merritt & Chapman Derrick & Wrecking Co. v. Catskill & N. Y. Steamboat Co. (D. C. 1901) 112 Fed. 442.

249. Compelling payment into court.—Where the master of a vessel had a mortgage upon her, by virtue of which he removed and sold her sails, and the vessel was subsequently libeled by other parties, it was held that he could be compelled to pay the proceeds of the sails into court, there to be subjected to such claims as might be held to be valid liens upon the vessel. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

250. Withdrawal of moneys by libelant.—A libelant may at any time, on order of the court, obtain money tendered and deposited in court, sufficient only being reserved to cover future costs. When respondent serves written notice that he consents to libelants taking an order for the withdrawal of the whole or any specific portion of the sum tendered and deposited in the registry, interest on so much of libelants' claim thereafter ceases. Califano v. MacAndrews (D. C. 1892) 51 Fed. 300, motion to direct district court to pay tender denied (1892) 56 Fed. 300, 4 C. C. A. 4.

On libel for freight, where the claimant pleads a tender, and pays the amount tendered into the registry of the court, the libelant is entitled to an order for the payment of that amount to him before there is any trial of the issue. Higbee v. Ninety-Six Hundred Cases Tomatoes (D. C. 1894) 59 Fed. 783, disapproving Alexandria v. Patten (C. C. 1806) Fed. Cas. No. 186.

Where a fund has been deposited in the registry of a federal District Court, in admiralty, a motion for leave to withdraw a portion of the fund and substitute a bond therefor will not be granted; the practice in such cases being to distribute the fund in the registry in accordance with the provisions of admiralty. Rules 57 and 58. The R. C. Veit (D. C. 1904) 131 Fed. 400.

251. Claims against moneys paid.—On a bill to enforce a lien for wages upon freight money which was paid into the registry as a substitute for the freight attached, other parties claiming an interest in the freight money so paid in should file their claim and set up rights by answer to the libel. The Monadnock (D. C. 1871) Fed. Cas. No. 9,704.

(F) Custody and disposition of property pending suit or at termination thereof

252. In general.
253. Motion by stipulation to remand vessel to custody.
254. Disposition of property or dissolution of attachment.
255. Power of court after discontinuance of suit.
256. Detention of vessel pending appeal from dismissal of libel.

257. Sale of perishable property.
258. Destruction of property.
259. —— Salvaged property.

252. In general.—The district court, by virtue of its admiralty jurisdiction, has the power to order the restoration of property, the right to the possession of which is in an officer of a court possessing similar powers in an adjoining district. The Joseph Gorham (D. C. 1843) Fed. Cas. No. 7,537.

The custody of the law, having been once fixed by the valid levy of an officer duly authorized to seize, continues whether the officer be present or not, unless acts equivalent to a surrender and withdrawal are shown. Whether custody of a vessel by a sheriff under a writ alleged to be void is such as to prevent a court of admiralty from acquiring jurisdiction should not be determined on motion. The question as to which marshal first seized a vessel in waters over which both districts had jurisdiction should be raised by a petition by the marshal, and not on a plea to the jurisdiction by a party in whose favor the marshal held process. The Circassian (D. C. 1866, 1867) Fed. Cas. No. 2,721.

The officer who has the possession of the property on proceedings in rem is the official keeper of the court, and, if it be taken from him, its redelivery will be enforced by summary process, though in the hands of a person not a party to the cause. The Phebe (D. C. 1837) Fed. Cas. No. 11,066.

Where money had been paid by an order of the district court, under an erroneous construction of an act of congress, before a final order of the circuit court, in which the suit was depending, the circuit court granted a rule on the person who had received the money to return it. The Ariadne (C. C. 1817) Fed. Cas. No. 526.

A court of admiralty has jurisdiction of a suit in rem against freights earned by a vessel which are within the district, and may, on issues properly framed, determine the validity and priority of all liens claimed thereon; and under rule 38 it may on citation, "if no sufficient cause is shown," require the consignee or other person owing the freights to bring the same into court to answer the exigency of the suit. But if they have already been collected under a fair claim of right it is "sufficient cause," and the court will make no order with respect to their possession until the rights of such claimant have been adjudicated. Lathrop v. Freights of the John Ena (D. C. 1914) 212 Fed. 560.

Money or goods in the hands of the marshal by order of this court are subject to any further order of court. Coulter v. L'Esperanza (D. C. 1799) Fed. Cas. No. 3,277.

If any owner do not appear to claim any particular parcel of property, the court of admiralty retains such property, or its proceeds (after deducting salvage), until a claim is made, or a year and a day have elapsed after proceedings instituted. Stratton v. Jarvis (1834) 33 U. S. (8 Pet.) 4, 8 L. Ed. 846.

When property seized for forfeiture is brought into admiralty for adjudication, it is in the custody of the court, and cannot be withdrawn but by some person who shall establish title to receive it. U. S. v. The La Jeune Eugenie (C. C. 1822) Fed. Cas. No. 15,551.

Where the title to a vessel could not be determined pending an accounting between the parties, possession was awarded to the master, who was part owner, on his own stipulation. Coverdale v. The North America (D. C. 1841) Fed. Cas. No. 3,289.

Property will not be discharged from the custody of the court on motion supported by affidavits, on the ground that it is the property of the United States. This question should be raised by claim and answer. Cartwright v. The Othello (D. C. 1866) Fed. Cas. No. 2,483.

The court may order a vessel libeled for wages to be delivered to the general owners, where the charterers, who are entitled to possession, refuse to claim her. The Prometheus (D. C. 1870) Fed. Cas. No. 11,442.

Where an arrested vessel in any manner again comes into possession of the owner, he cannot defeat a lien against her, on the ground that the contract out of which it arose was made, and the consideration for it rendered, while the vessel was in the custody of the law. The Witch Queen (D. C. 1874) Fed. Cas. No. 17,915.

Where petitioner, without order of the court, has obtained possession of property from the marshal, who had seized the same on process in rem, the court will not order the marshal to deliver up possession. The Roslyn (D. C. 1876) Fed. Cas. No. 12,067.

Earnings made by a vessel after her seizure by the marshal on process, and between that date and the date of her sale, under an agreement by which the marshal, with the approval of the court, permitted her use by a charterer in carrying out contracts previously entered into by him, on his giving security for her return, stand on the same footing as though they had been made by the use of the vessel by the marshal himself, and are to be paid into court, to be applied on the claim of the libelant. The C. W. Cowles (D. C. 1903) 124 Fed. 458.

253. Motion by stipulation to remand vessel to custody.—A vessel and cargo were libeled for salvage, and bonded in their full value. Afterwards the owners of the cargo filed a libel against the vessel, claiming to recover the damages occasioned to the cargo by the detention out of which the salvage claim arose to an amount equaling the value of the vessel. Thereupon, before this

process was returned, the stipulators for value in the salvage case applied to have their stipulations canceled and their vessel remanded to custody under the process in the salvage case. Held, that the application was premature, and could not be entertained before the process in the latter suit was returned, and notice published as required by the rules, because till then all parties were not before the court. The Empire (D. C. 1866) Fed. Cas. No. 4,472.

254. Disposition of property on dissolution of attachment.—Whenever property is brought into a court of admiralty for adjudication, upon a seizure for a forfeiture, or other cause cognizable there, the property is, in contemplation of law, in the custody of the court, and cannot be withdrawn from its possession but by some person who shall establish a title to receive it. U. S. v. La Jeune Eugenie (C. C. 1822) Fed. Cas. No. 15,551.

On the dissolution of an attachment against a vessel it should be restored to the person who was in possession at the time when she was taken under process; and in the case of conflicting claims the marshal should not deliver her without the order of the court. The Two Marys (D. C. 1879) Fed. Cas. No. 14,300.

255. Power of court after discontinuance of suit.—Where a vessel seized for forfeiture is sold pending the prosecution, to avoid expenses of keeping, and the libel is subsequently dismissed, the proceeds will be delivered to the claimant, free of all costs. U. S. v. The Lion (D. C. 1858) Fed. Cas. No. 15,607.

Where, upon discontinuance of a suit in rem, the marshal delivers the res to the wrong person, the court cannot make a summary order for its return, because, the suit having been discontinued, the jurisdiction is gone. The remedy of the rightful owner is by action against the marshal. The Jack Jewett (D. C. 1868) Fed. Cas. No. 7,121.

256. Detention of vessel pending appeal from dismissal of libel.—Rule 11, providing that a ship arrested may be given to the claimant upon his giving a stipulation, and that the court may, in the absence of such stipulation, order a sale of such ship, does not authorize the court on dismissing the libel, and before the expiration of the 10 days allowed for appeal, to order that libelant shall give bond to pay such damages as may be sustained by the claimant pending the appeal, or that the appeal be dismissed on his failure to do so, even though the claimant made affidavit that he was unable to give bond for the release of the ship. The Swedish Bark Adolph (D. C. 1880) 5 Fed. 114.

257. Sale of perishable property.—The sale pendente lite, under rules 10 and 11, of a ship which is deteriorating in the hands of a marshal, will not be denied, because the question at issue is the propriety of entertaining an action in rem against the vessel while in the hands of a receiver appointed by the court of another state, which question the receiver intends to have determined in the appellate court. The Willamette Valley (D. C. 1894) 63 Fed. 130.

A prize schooner, in a perishing condition, was ordered to be sold, although one of the parties had not appeared, for the use of the person to whom it was finally decreed. Stoddard v. Read (C. C. 1783) Fed. Cas. No. 13,470.

Where the claimant refuses to make deposit or give stipulation for the vessel's release, and it appears that her machinery is rusting, her woodwork drying and cracking, and every part showing general deterioration and decay, a sale will be ordered, though it appears that a final determination on appeal may be had within six months. The Willamette Valley (D. C. 1894) 63 Fed. 130.

258. Destruction of property.—Where a res is seized by a judicial process in admiralty for a debt, which carries with it a jus in re, as between debtor and creditor, the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. The destruction of the debtor's property under such circumstances operates as a payment up to its value, precisely as would its sale and the application of its proceeds. Unless there was a residuum of value over and above the valid claims rightfully interposed against the res, its destruction worked no injury and gave the owner no right of action. The Flavilla (C. C. 1883) 17 Fed. 399.

259. —— Salvaged property.—Property libeled for salvage service is in the possession of the court, and can only be restored by express order. The Byron (D. C. 1854) Fed. Cas. No. 2,275.

Salvors have a right to the possession of the salved property until their claims are legally adjusted. Hartshorn v. Twenty-Five Cases Silk (D. C. 1841) Fed. Cas. No. 6,168a. They must land the property saved at the nearest port of safety, and see that it is properly cared for. The Sumner (D. C. 1859) Fed. Cas. No. 13,608.

As to the right of salvors to take the vessel into port for adjudication, against the master's protest and offer to pay for services, see The La Bruce (Super. Ct. Fla. 1837) Fed. Cas. No. 7,963.

As to the marshal's duty in relation to the care of the salved property, see The Isaac Allerton (D. C. 1856) Fed. Cas. No. 7,088.

(G) Bonds, stipulations, or other security

See, also, § 1567, and notes thereunder.

260. Bonds and stipulations in general—When authorized and authority to take.
261. —— Examination of sureties.

262. —— Construction of stipulation.
263. —— Waiver of defects in execution.
264. —— Liability of stipulators.
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266. Stipulations in personam in general—Necessity.
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274. —— Surrender of principal by sureties.
275. —— Enforcement.
276. Bail in possessory actions.
277. Security for dissolution of attachment.
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281. —— Liability on.
282. Security for release of vessel or other property in proceeding in rem.
283. Security on cross-libel—Construction of rule requiring in general.
284. —— Suits and proceedings in which security may be given or required.
285. —— Persons who must or may give security.
286. —— Motion for security and proceedings thereon.
287. —— Refusal to give.
288. Stipulations by interveners.

260. Bonds and stipulations in general—When authorized and authority to take.—The admiralty court will not order a defendant to give a stipulation in the action under pain of imprisonment in a case in which he is not liable to arrest. Louisiana Ins. Co. v. Nickerson (D. C. 1874) Fed. Cas. No. 8,539.

Though a court of admiralty cannot take a recognizance, it can take a stipulation for appearance, or to perform a decree, in the nature of a recognizance. Respublica v. Lacaze (Pa. 1791) 2 Dall. 118; Id., 1 Yeates, 55.

261. —— Examination of sureties.—Sureties in stipulations are not required to appear before the court for examination concerning their property after final decree. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

262. —— Construction of stipulation.—Stipulations taken for the purpose of sustaining and rendering effectual the court's jurisdiction are to be construed by the intention of the court which required them, and not of the parties bound by them. Lane v. Townsend (D. C. 1835) Fed. Cas. No. 8,054. A stipulation directed to be taken in double the amount of the demand will not be construed as a stipulation simply for costs. The Roslyn (D. C. 1877) Fed. Cas. No. 12,068.

263. —— Waiver of defects in execution.—The defective execution of a stipulation must be objected to by the party affected by it within the term of the court next subsequent to its becoming known to him. If not so taken the defective execution will be deemed waived. The Infanta (D. C. 1848) Fed. Cas. No. 7,031.

264. —— Liability of stipulators.—Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety; and, so long as the cause of action remains practically the same, a mere change in the name of the libelant, as by substituting the real party in interest for a nominal party, will not avoid the stipulation as against the sureties. The Beaconsfield (1895) 15 Sup. Ct. 860, 158 U. S. 303, 39 L. Ed. 993.

265. —— Enforcement of stipulation.—The real estate of the sureties in a stipulation in admiralty is subject to execution issued from the admiralty court. The Kentucky (C. C. 1860) Fed. Cas. No. 7,717.

A special notice to the surety, of application for execution against him, is not necessary. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637.

266. Stipulations in personam in general—Necessity.—In suits in personam, in whatever way defendant is brought into court, he must give a stipulation to satisfy the decree before he can be admitted to defend, instead of giving stipulation for costs only. Millard v. Craig (D. C. 1851) Fed. Cas. No. 9,547.

267. —— Extent of liability.—The surety in a suit in personam cannot be compelled to pay more than the sum stated, although the stipulation is conditioned to pay such sum as shall be awarded by the final decree. Brown v. Burrows (C. C. 1851) Fed. Cas. No. 1,996.

268. Bail.—In holding a respondent to bail, admiralty is governed much by equitable considerations. Martin v. Walker (D. C. 1850) Fed. Cas. No. 9,170.

269. —— Right to.—Under rule 47 and R. S. §§ 990, 991, post, §§ 1636, 1637, where the master and mate of a ship are arrested in the state of Oregon on a libel for damages for injuries inflicted on the high seas, they are entitled to discharge on giving bond conditioned at all times to "render themselves amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment," as provided by the laws of Oregon, and cannot be required to give a bond conditioned for the payment of the money awarded by the final decree. Stone v. Murphy (D. C. 1898) 86 Fed. 158.

270. —— Requisites and sufficiency.—The standing rules of the district court relating to bail stipulations to be given on the execution of a warrant in personam, and to the method of enforcing them, are superseded by the supreme court rules of 1845, upon the same subject, and stipulations must now be exacted conformably to the supreme court rules. Gardner v. Isaacson (D. C. 1848) Fed. Cas. No. 5,230.

A respondent, arrested in an admiral-

ty suit, is not entitled, upon the return day of the warrant, to be discharged from arrest, on giving a stipulation for costs, pursuant to the rule of the district court, but he must remain in custody until he gives bond or stipulation to satisfy the decree made against him. Id.

271. —— **Construction and operation in general.**—A bond for appearance to answer a libel is not a bail bond at common law, but a stipulation in admiralty, to be construed accordingly. Lane v. Townsend (D. C. 1835) Fed. Cas. No. 8,054.

The stipulation for discharge from arrest is for the appearance of the party to abide by the decree, and not for the payment of the sum decreed. Grace v. Evans (D. C. 1869) Fed. Cas. No. 5,650.

The principal and surety on the bond or stipulation given upon an arrest in personam stand upon the same footing. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637.

272. —— **Liability on.**—The former practice in the district courts in matters of arrest in suits in personam, whereby on default of respondent his sureties were subjected only to the payment of the costs, is changed by rule 3, making the respondent and his sureties liable for the full amount of the demand. Gardner v. Isaacson (D. C. 1848) Fed. Cas. No. 5,230.

273. —— **Release of bail from bond.**—A party is entitled to be discharged from a bail bond or stipulation in admiralty only on grounds which at law or in equity would avoid a common money bond, or entitle him to be relieved from it. Cure v. Bullus (D. C. 1849) Fed. Cas. No. 3,486.

274. —— **Surrender of principal by sureties.**—Under a stipulation for appearance to answer and abide the court's decision, the sureties are not irrevocably bound by a return of non est inventus; but they may surrender the principal at any time before decree against them on citation to show cause. Lane v. Townsend (D. C. 1835) Fed. Cas. No. 8,054. But see Cure v. Bullus (D. C. 1849) Fed. Cas. No. 3,486, holding that in admiralty the principal cannot be surrendered in exoneration of bail.

275. —— **Enforcement.**—Where the respondent in a suit in personam has gone beyond seas, process may issue against the bail on motion, though no execution against the principal has been returned non est inventus. In re Snow (C. C. 1855) Fed. Cas. No. 13,141.

In the case of a stipulation given on an arrest in personam, a final decree against the principal may be enforced by summary process of execution against both principal and surety, under rule 3. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637; Gaines v. Travis (D. C. 1849) Id. 5,180.

Such rule repeals the former practice, whereby an order to show cause why the stipulator should not fulfill his engagement was served before execution issued. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637.

276. **Bail in possessory actions.**—Where the equal half ownership of a vessel and disagreement alleged in a libel for possession and sale of the vessel are denied, claimants will be allowed to retain possession, pending the hearing, on giving security. Burr v. The St. Thomas (D. C. 1851) Fed. Cas. No. 2,195.

Where, in a possessory action, the disposal of the case upon the merits is not likely to be attended by delay, a motion to bond will not be granted. The property will not be delivered on bail to a claimant having an interest of only one-eighth therein, when the court is sitting, and the case can be heard at once. An application for delivery on bail, by a party who has not yet answered, is premature. Treat v. The Rainbow (D. C. 1866) Fed. Cas. No. 14,161.

277. **Security for dissolution of attachment.**—In giving bond to relieve property taken by a clause of foreign attachment, defendant must pay costs of the motion before he can defend on the merits. Millard v. Craig (D. C. 1851) Fed. Cas. No. 9,547.

278. —— **Necessity.**—To discharge a foreign attachment, where defendant is not found, he must furnish a bond to satisfy the full decree. Bell v. Nelson (D. C. 1851) Fed. Cas. No. 1,257.

279. —— **Conditions of.**—Under rule 4, providing that an attachment may be dissolved on defendant giving bond to abide by all orders of the court, and pay the amount awarded by final decree, attached property cannot be released on bond conditioned for payment of the value of the property released, where the value of such property is less than the debt sued for. Pope v. Seckworth (D. C. 1891) 46 Fed. 858.

280. —— **Effect of giving.**—A respondent in a suit in personam, whose vessel is attached because personal service cannot be made in the district, does not waive his right to plead to the jurisdiction by filing a stipulation to secure the release of the vessel. Manchester v. Hotchkiss (D. C. 1871) Fed. Cas. No. 9,004.

281. —— **Liability on.**—A surety in a stipulation given on the release from attachment of the property of a respondent in a suit in personam cannot, where the stipulation is in a sum certain, be compelled to pay more than that sum, although the stipulation is conditioned to pay such sum as shall be awarded to the libelant by the final

decree in the suit. Brown v. Burrows (C. C. 1851) Fed. Cas. No. 1,996. Where, in a suit in personam to recover for materials furnished to a vessel against the vendees thereof, the marshal returned "Not found" as to said vendees, and that he had attached the ship, and the unpaid vendors gave a bond for the release of the vessel, the giving of the bond did not estop the vendors from moving to amend the return of "Not found," which was false in that particular. International Grain Ceiling Co. v. Dill (D. C. 1878) Fed. Cas. No. 7,053. Where two parties appear and claim to be the owners of a vessel arrested under an admiralty warrant of arrest containing the attachment clause, according to rule 2, and give a joint bond for her release, one of them cannot avoid liability by afterwards pleading that he was not an owner. Gomila v. Culliford (D. C. 1884) 20 Fed. 734, decree reversed Culliford v. Vinet (1888) 9 Sup. Ct. 50, 128 U. S. 135, 32 L. Ed. 381.

Where property was attached upon process issued in an action in personam, the defendant not being found, and the next day the secretary of the corporation defendant appeared and offered to accept service, and, a motion before the court to vacate the attachment being denied, the property seized was afterwards released upon a stipulation for its value voluntarily given by the defendant, and the action was then tried, held, that it was not open to the stipulators to say that the court had not acquired jurisdiction to enter a decree upon the stipulation, and that the libelants were entitled to a decree because the marshal's return showed a regular attachment, and the evidence shows that it was made before the appearance of the defendant and its offer to accept service was made. Harriman v. Rockaway Beach Pier Co. (D. C. 1881) 8 Fed. 94.

282. Security for release of vessel or other property in proceeding in rem.—A stipulation given for the release of a vessel upon the original libel to recover damages done to a vessel with which she collided, although it purports to be "for the benefit of whom it may concern," does not bind the sureties to respond to claims set up by intervening petitions filed subsequently to the release; and hence the court should not entertain jurisdiction of such intervening petitions. Admiralty rule 34, relating to intervening petitions, applies only to those cases in which the vessel is still in custody, or in which she has been sold and the proceeds paid into court. The Oregon (1895) 15 Sup. Ct. 804, 812, 158 U. S. 186, 39 L. Ed. 943.

See notes to § 1567, post.

283. Security on cross-libel—Construction of rule requiring in general.—Rule 53, providing that when a cross-libel is filed, etc., the respondent in the cross-libel shall give security to respond in damages as claimed in such cross-libel, unless the court shall otherwise direct, was intended to compel the appearance and giving of security by a respondent in a cross-libel in personam, in case where it does not appear proper that he should be relieved from giving such security. It was not intended to give jurisdiction on a cross-libel in rem without seizure of the vessel. The Bristol (D. C. 1870) Fed. Cas. No. 1,889. Nor was it intended to require such security where it would be manifestly unjust, as where it appears from the pleadings and proofs that the claim of the cross-libelant is not one upon which he can recover an affirmative judgment. Morse Iron Works & Dry Dock Co. v. Luckenbach (D. C. 1903) 123 Fed. 332.

284. —— Suits and proceedings in which security may be given or required.—Rule 53, requiring security from respondent on the filing of a cross-libel, applies to both actions in rem and in personam. The Bristol (D. C. 1870) Fed. Cas. No. 1,889; The Toledo (D. C. 1873) Fed. Cas. No. 14,077. It applies to a case in which the original libel was in personam, but the vessel to which the suit relates was attached. The proceeding is then in effect in rem. Lochmore S. S. Co. v. Hagar (D. C. 1897) 78 Fed. 642. And see Morse Iron Works & Dry Dock Co. v. Luckenbach (D. C. 1903) 123 Fed. 332.

The fact that suit to recover damages for the sinking of a vessel by collision is instituted by the master, instead of the owners, does not withdraw the case from the application of the rule; nor should the court be influenced, in requiring such security, by the fact that the libelant is individually unable to furnish it. Old Dominion S. S. Co. v. Kufahl (D. C. 1900) 100 Fed. 331.

Under this rule the respondents in a cross-libel should be required to give security where the vessel in the original libel is in custody, as well as where she has been released on bond or stipulation. Empresa Maritima a Vapor v. North & South American Steam Nav. Co. (D. C. 1883) 16 Fed. 502. Where a libel was filed to recover for injuries to a barge from defects in the consignee's dock, and the consignee filed a cross-libel against the barge owner to recover expenses incurred in pumping out the barge and placing her in the dock, in order that her cargo could be discharged, and so that she should not obstruct the dock, such cross-libel was one "arising out of the same cause of action" with the original libel, and security should be required from respondent. Genthner v. Wiley (D. C. 1898) 85 Fed. 797.

Where a libel is filed to recover an alleged deficiency of cargo delivered, and, the payment of freight having been

refused by the libelants on the same ground, a cross-libel is filed to recover the freight on the cargo delivered, and security having been obtained in the first suit through the arrest of the vessel, the respondents should be required to give security. Vianello v. The Credit Lyonnais (D. C. 1883) 15 Fed. 637.

Former owners of tug libeled for negligence may file a cross-libel under the fifty-third rule, and have proceedings stayed until security given. The George H. Parker (D. C. 1876) Fed. Cas. No. 5,334.

In a suit in rem for the price of supplies, the defendant, having given security, is entitled to security from the libelant, upon filing a cross-libel to recover damages for breaches of the same contract on which the libelant sues. Electro-Dynamic Co. v. The Electron (D. C. 1891) 48 Fed. 689.

285. —— **Persons who must or may give security.**—A receiver in bankruptcy as libelant in a suit in admiralty will not be required to give the security provided for by rule 53, on the filing of a cross-libel setting up a counterclaim, under Bankr. Act, § 68a. The Transit (D. C. 1914) 210 Fed. 575.

286. —— **Motion for security and proceedings thereon.**—The cross-libelant must act promptly. A motion for security, made upon the eve of trial, and after the witnesses had been summoned, and case was ready to proceed, comes too late. The George H. Parker (D. C. 1876) Fed. Cas. No. 5,334.

A demand for security on a cross-libel, provided for by rule 53, under pain of staying proceedings on the original libel, should not be granted when made several months after filing the cross libel, and after the original libelants have taken their testimony. And a decision denying a demand for security on a cross-libel, on the ground of inexcusable delay in demanding it, if reviewable at all, should not be reversed unless it clearly appears that the court's action was unwarrantable. Franklin Sugar Refining Co. v. Funch (D. C. 1895) 66 Fed. 342, affirmed (1896) 73 Fed. 844, 20 C. C. A. 61.

An objection by the respondent in a cross suit to giving security under rule 53 in the amount of the claim of the libel, on the ground that he cannot do so "without serious embarrassment to his business, and great expense and sacrifice," is insufficient. Compagnie Universelle du Canal Interoceanique v. Belloni (D. C. 1891) 45 Fed. 587.

287. —— **Refusal to give.**—The respondents in the cross-libel cannot, on refusing to give security, at their option indefinitely retain the vessel in their custody by submitting to a stay of proceedings. The court, after a reasonable time, may discharge the vessel upon claimants' own stipulation, if it be clearly shown that claimants are unable to give security to release her, but not otherwise; or the court may order the vessel to be sold. Empresa Maritima a Vapor v. North & South American Steam Nav. Co. (D. C. 1883) 16 Fed. 502.

288. **Stipulations by interveners.**—Rule 34 relating to intervening petitions, applies only to those cases in which the vessel is still in custody, or in which she has been sold, and the proceeds paid into court. A stipulation given for the release of a vessel upon the original libel to recover damages done to a vessel with which she collided, although it purports to be "for the benefit of whom it may concern," does not bind the sureties to respond to claims set up by intervening petitions filed subsequently to the release; and hence the court should not entertain jurisdiction of such intervening petitions. The Oregon (1895) 15 Sup. Ct. 804, 812, 158 U. S. 186, 39 L. Ed. 943.

Where there was a stipulation that the interveners should pay all costs and expenses which should be awarded against them, and the final decree awarded no costs or expenses against the interveners, notwithstanding there was a deficiency in the proceeds to pay all the costs and expenses, the decree must be reversed. The Orient (C. C. 1881) 12 Fed. 158.

In a suit in admiralty to recover a vessel which has been seized by state officers for violation of a state fishery law, and is held by respondents merely as their custodians, such officers or other representatives of the state may appear and answer without giving the stipulation with sureties for the payment of costs and damages required from interveners by admiralty rule 34. The W. J. Hingston (D. C. 1906) 144 Fed. 560.

(H) Pleading, petitions, and motions

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289. Allegations in pleadings in general.—In admiralty, courts determine causes on equitable principles, and treat as immaterial whether the pleading counts upon contract or tort. Rainey v. New York & P. S. S. Co. (C. C. A. 1914) 216 Fed. 449.

In admiralty the court determines cases on equitable principles, and it is never made a point of pleading whether the case rests on contract or tort. California-Atlantic S. S. Co. v. Central Door & Lumber Co. (1913) 206 Fed. 5, 124 C. C. A. 139.

In admiralty pleadings the court requires that material facts within the knowledge of the parties should be distinctly stated, and a neglect in this respect is to be taken most unfavorably against the vessel omitting it. Poole v. The Washington (D. C. 1851) Fed. Cas. No. 11,271.

A pleader who sets forth a detailed narrative of the movements of his own vessel cannot be required to add thereto averments as to other matters of detail upon which his adversary may wish to have specific averments, but as to which it does not appear that he has knowledge sufficient to enable him to set them forth, nor that he intends to rely upon them at the trial. Virginia Home Ins. Co. v. Sundberg (C. C. 1893) 54 Fed. 389.

An admission in the pleadings that the vessel was in a foreign port is an admission of an apparent necessity for the credit of a vessel for alleged supplies furnished, though the answer avers that the owner was in good credit in such port. The Washington Irving (D. C. 1868) Fed. Cas. No. 17,245.

290. Misnomer in pleadings in general.—Maritime courts will not lay much stress on an objection of misnomer unsupported by evidence that the party was in fact not known by the name ascribed to him. Henry v. Curry (D. C. 1849) Fed. Cas. No. 6,381.

Naming the libelant by the initials of his Christian name does not prejudice the defendant, and is immaterial, though it seems so to name the defendant, in publication under an order of attachment, would vitiate the attachment. Hardy v. Moore (D. C. 1880) 4 Fed. 843.

291. Libel.—The rules of pleading in the admiralty do not require all the technical precision which is required at

common law, but they do require that the cause of action should be clearly set forth, so that a plain and direct issue may be made up on the charge. W. S. Keyser & Co. v. Jurvelius (1903) 122 Fed. 218, 58 C. C. A. 664; Jenks v. Lewis (D. C. 1824) Fed. Cas. No. 7,280; The Havre (D. C. 1867) Fed. Cas. No. 6,232; McWilliams v. The Vim (D. C. 1880) 2 Fed. 874.

A libel should state the subject-matter in articles, with certainty and precision, and with averments admitting of distinct answers. The Boston (C. C. 1833) Fed. Cas. No. 1,673.

An omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant if the court can see there was no design on his part in omitting to state them. The Quickstep (1869) 76 U. S. (9 Wall.) 665, 19 L. Ed. 767.

292. —— **To whom addressed.**—It is immaterial whether a libel in admiralty be addressed to the judge or to the court in which he presides. The Joseph Gorham (D. C. 1843) Fed. Cas. No. 7,-537.

293. —— **Averment of jurisdictional facts.**—In order to bring a cause for the forfeiture of a vessel for the illegal exportation of arms and ammunition within the admiralty jurisdiction, it is sufficient if it appear by reasonable implication that the case is a water transaction, though it be not so stated in express terms; an allegation in the libel that the exportation commenced at Sandy Hook was sufficient. U. S. v. La Vengeance (1796) 3 U. S. (3 Dall.) 297, 1 L. Ed. 610.

As, in cases of seizure, jurisdiction in actions for a violation of the statute as to exhibition of lights depends upon the fact and place of seizure, these must be averred in the libel; and, if not, the libel may be objected to and dismissed at any stage of the proceedings. U. S. v. One Raft (C. C. 1882) 13 Fed. 796.

The failure of a libel to recover for wrongful death to set out the state statute on which the action is based is not jurisdictional, and the defect is waived unless objection is taken by demurrer or exception. Monongahela River Consol. Coal & Coke Co. v. Schinnerer (1912) 196 Fed. 375, 117 C. C. A. 193.

An admiralty court will entertain a libel showing on its face an apparent jurisdiction where there is no opposition. Skidmore v. The Polly (D. C. 1808) Fed. Cas. No. 12,923.

The libel should show jurisdiction. Boon v. The Hornet (D. C. 1841) Fed. Cas. No. 1,640. Admiralty has not jurisdiction over every floating structure on navigable rivers, and the pleadings should contain an averment to show jurisdiction. Jones v. Coal Barges (C. C. 1855) Fed. Cas. No. 7,458.

A libel in rem should state the nationality of the vessel proceeded against, but such allegation is not indispensable when jurisdiction is invoked by a libelant who alleges that he is a citizen of the United States. The Falls of Keltie (D. C. 1902) 114 Fed. 357.

A libel for a tort will be dismissed unless it contain on its face sufficient averments as to place to show that it is within the admiralty jurisdiction. Thomas v. Lane (C. C. 1813) Fed. Cas. No. 13,902.

A libel for assault and battery, alleged to have been committed in the harbor of Havana, is defective, if it does not further allege that the tide ebbs and flows in said harbor. Thomas v. Lane (C. C. 1813) Fed. Cas. No. 13,902. But a court of admiralty is not without jurisdiction of an action in personam to recover for negligent death, based on a collision in the Mississippi, because the libel fails to show in which of two states the wrongful act was committed. Monongahela River Consol. Coal & Coke Co. v. Schinnerer (1912) 196 Fed. 375, 117 C. C. A. 193.

A libel which alleges that libelant sustained an injury, causing pain and suffering, in a collision between respondent vessels on the high seas, through their fault or the fault of one of them, states a cause of action cognizable in any court of admiralty jurisdiction. The Kaiser Wilhelm der Grosse (D. C. 1909) 175 Fed. 215.

Where the maritime law gives the materialman a lien for materials and labor in the building of a vessel, it may be enforced in rem before the vessel is launched. But to give the admiralty court jurisdiction it must appear by the libel and record that the vessel is of the size for maritime employment, and that her business was to be maritime navigation on the Lakes or high seas. Parmlee v. The Charles Mears (D. C. 1856) Fed. Cas. No. 10,766.

In an action in personam to recover for supplies furnished to a vessel it is unnecessary to aver that the vessel is engaged in navigation, or capable of being so employed. The Illinois (D. C. 1874) Fed. Cas. No. 7,004.

The court will take judicial notice in an action to recover freight earned in transporting goods by vessel that the waters on which the contract was performed were navigable, without any allegation of the fact in the libel. Lands v. A Cargo of 227 Tons of Coal (D. C. 1880) 4 Fed. 478.

Rule 23, requiring a libel in rem to state that the property is in the district, does not prevent jurisdiction of a vessel which, being within the district at the time the libel is verified, departs before it is filed, but, returning after the filing, is then seized on alias monition. The Queen of the Pacific (D. C. 1894) 61 Fed. 213; The Queen (D. C. 1896) 78 Fed. 155, affirmed Pacific Coast S. S. Co. v. Bancroft-Whitney

Co. (1899) 94 Fed. 180, 36 C. C. A. 135, reversed The Queen of the Pacific (1901) 21 Sup. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

In an action for wharfage the court will not presume that the vessel was engaged in navigating the high seas so as to make the contract cognizable only in admiralty; if the vessel was so engaged, it must be alleged. People v. The America (1868) 34 Cal. 676.

Allegations in a complaint that the services sued for were rendered on board a vessel, and as members of her crew, do not necessarily imply that the vessel was engaged in commerce, and that the contracts were maritime, since they may refer to a force put on board a vessel to care for it, before the vessel has been enrolled or in commission. Olsen v. Birch (1901) 65 P. 1032, 133 Cal. 479, 85 Am. St. Rep. 215.

294. —— **Averments as to parties.**—A libel for salvage in the name of a British naval officer and the British consul, joining with him "for all other interests," where the vessel, rescued by the British naval vessel, was sent home in charge of the officer, held not fatally defective. Robson v. The Huntress (C. C. 1851) Fed. Cas. No. 11,971; The Huntress (D. C. 1850) Fed. Cas. No. 6,912.

Where a party proceeded against is named in the body of the libel, a decree secundum allegata et probata may be rendered against him, although he is not named in the prayer for relief. Nevitt v. Clarke (D. C. 1846) Fed. Cas. No. 10,138.

Libels in civil actions in rem need not state the occupation and residence of the libelant. The J. R. Hoyle (D. C 1868) Fed. Cas. No. 7,557.

Where parties joined as libelants are corporations, the libel should so aver. Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co. (D. C. 1882) 14 Fed. 699.

When the suit is in personam against the master or owners of the vessel to recover for injuries to goods, they must be charged in the libel as common carriers in order to render them liable as such carriers; but this is not necessary when the suit is in rem. Seller v. The Pacific (1861) 1 Or. 409.

295. —— **Averments as to title of libelants.**—A libel for possession of a vessel should unequivocally state the extent of libelant's interest, and that he was owner at the time of filing the libel. Bradshaw v. The Sylph (D. C. 1841) Fed. Cas. No. 1,791.

A libel, filed to recover damages for collision to a cargo, should contain averments showing unequivocally, and with reasonable certainty, that the libelants had such a special or general right of property in the cargo that by its loss or injury they had suffered damage. Minturn v. Alexandre (D. C. 1880) 5 Fed. 117.

A libel alleging that certain sugars were laden on board a vessel "to be carried thereon to the port of New York, and thence safely delivered to your libelants, and bills of lading therefor duly signed by the master of said vessel, naming the libelants as consignees of such sugars," and averring that "by the collision your libelants have suffered damages in the value of said cargo," etc., does not show that the libelants had any property in the cargo as consignors or otherwise. Minturn v. Alexandre (D. C. 1880) 5 Fed. 117.

296. —— **Averments as to relation of defendant to vessel.**—A libel in personam against the owners of a vessel for damages arising out of a collision is defective when it fails to aver that respondent was the owner of the vessel at the time of the collision. The Corsair (1892) 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.

Although one of the owners of a vessel is sued for a collision jointly with the other general owners in a libel which does not describe him as owner pro hac vice, a decree may be made against him alone upon proof of the proper facts. Thorp v. Hammond (1870) 79 U. S. (12 Wall.) 408, 20 L. Ed. 419.

A libel charged that a tug, through its master, and representing as well himself as the owners of said tug and M. Bros., applied to libelant for the use of libelant's barge, and a contract was made with defendant; that libelant desired to send with his barge her keeper, which was objected to by defendant as useless; and that said barge, while in the custody of defendant, being improperly loaded, sunk, and became a total loss. Held, that on the pleadings M. Bros. could be held liable only as owners or lessees of the tug, and, the the evidence showing that they were not such, no judgment could be given against them. Danace v. The Magnolia (C. C. 1889) 37 Fed. 367.

A libel in admiralty setting out a charter party made in Louisiana, and signed by an individual, whom the libel alleged to be a surety on the contract, is sufficient as against him, since the libelants are not called on to prove the allegations until the issues are made up; and even under the Louisiana law suretyship may be proved as against the face of a written instrument. Downs v. Wall (1910) 176 Fed. 657, 100 C. C. A. 209.

297. —— **Joinder of demands in libel.**—Several demands against the same defendant for breach of the contracts contained in passenger tickets may be united in an action brought by the transferee of such claims in his own name. Cobb v. Howard (C. C. 1856) Fed. Cas. No. 2,924; Id. (D. C. 1852) Fed. Cas. No. 2,925.

It is not allowable to introduce into a libel in rem, and quasi for possession, other matters of an entirely different character,—such as an account of the

ship's earnings, or the claim of a part owner for his advances and wages as master. The Orleans v. Phœbus (1837) 36 U. S. (11 Pet.) 175, 9 L. Ed. 677.

298. —— **Anticipating defenses.**—In libel for the balance of freight due under a charter party, libelant need not allege a tender made by respondents, since the tender is a matter of defense to be set up by respondents. Mott v. Frost (D. C. 1891) 45 Fed. 897.

An allegation that a certain sum loaned by the master on a security of the first earnings of the vessel is still due and unpaid will dispense with an allegation that it has not been paid out of the earnings. Brown v. The Cadmus (C. C.) Fed. Cas. No. 1,997.

299. —— **Aider of libel by answer.**—Where a vessel is libeled for nondelivery of goods, and the answer sets up a necessary jettison, the court will decree in favor of the libelants upon the case admitted by the answer, though it is not stated in the libel. Campbell and Catron, JJ., dissenting. Dupont De Nemours v. Vance (1856) 60 U. S. (19 How.) 162, 15 L. Ed. 584.

Under a libel in rem on a contract of affreightment to recover for cargo destroyed in extinguishing a fire, libelant may be allowed to shift his claim to a demand for a general average, when the facts alleged in the libel and answer are sufficient, taken together, to sustain the same. Deming v. The Rapid Transit (D. C. 1892) 52 Fed. 320, following Dupont De Nemours v. Vance (1856) 60 U. S. (19 How.) 173, 15 L. Ed. 584.

Under rule 51, providing that when the answer alleges new facts these shall be considered as denied, and no replication shall be allowed, where the obligation sued on was entered into by the master, and the answer alleges that it is governed by the laws of England because payable there, that thereunder it is void unless specially authorized by the owners, and that "no such authority was obtained, or even asked for," claimants cannot object to the introduction of the charter party to prove such authorization, even though no such issue was raised by the libel. Moore v. The Robilant (C. C. 1890) 42 Fed. 162.

300. —— **More than one libel.**—There should be but one libel in ordinary salvage cases. The Charles Henry (D. C. 1865) Fed. Cas. No. 2,617.

301. —— **Surplusage.**—A claim by seamen for damages on account of alleged assaults by the master cannot be litigated in a suit in rem, but, where the libel contains other allegations stating a cause of action in rem, those relating to such claim may be disregarded, as surplusage, and the misjoinder will not be fatal. The Falls of Keltie (D. C. 1902) 114 Fed. 357.

302. —— **Averments as to insurable interest.**—The libel should show insurable interest in a vessel at the time the policy purports to take effect. Earnmoor v. California Ins. Co. (D. C. 1890) 40 Fed. 847.

303. —— **Averments as to seaworthiness of vessel.**—In an action on a marine policy, the presumption is in favor of seaworthiness, and the libelant, suing to recover a loss sustained by a peril of the sea covered by his policy, need not allege in his pleading that the implied warranty of seaworthiness was complied with. Guy v. Citizens' Mut. Ins. Co. (D. C. 1887) 30 Fed. 695. And see Earnmoor v. California Ins. Co. (D. C. 1890) 40 Fed. 847.

304. —— **Description of property or goods.**—It is not necessary that the property to be attached in admiralty should be specified in the libel. Manro v. Almeida (1825) 23 U. S. (10 Wheat.) 473, 6 L. Ed. 369.

On exceptions to a libel by the owner of goods injured by a collision at sea, a part of the loss on which the insurer has paid, held, that the libel, for the purpose of a sufficient identification of the goods, must state at least the description of them given by the bills of lading, and the date thereof, and also the essential elements of the contract of insurance upon which the rights and liabilities of the parties may depend. The Anchoria (D. C. 1882) 9 Fed. 840.

305. —— **Setting out contracts and averments relating thereto.**—A libel alleged a delivery of goods to a carrier pursuant to a contract of affreightment; that, notwithstanding the contract, the goods were not redelivered to libelants in like good order as received, "but, on the contrary, said merchandise was returned to said port" of shipment "in a greatly damaged condition, by reason of having been wet with sea water during said voyage, which, by reason of the negligence of" the carrier, "gained access to the interior of said ship, where said merchandise was stowed"; and "that, in consequence of the injury and damage to said merchandise, the libelants have sustained damage," etc. Held, that the action was not founded upon a tort, but upon the contract of affreightment, and that the claim for damages was based upon the failure of the carrier to deliver the merchandise in good condition; the averment as to negligence being merely illustrative of the manner in which the goods were damaged. Pacific Coast S. S. Co. v. Bancroft-Whitney Co. (1899) 94 Fed. 180, 36 C. C. A. 135, affirming decree The Queen (D. C. 1896) 78 Fed. 155.

In a libel to recover for breach of a contract, a general allegation that libelants had at all times performed all that was required of them under such contract is sufficiently specific, without enumerating the several acts required to be done by them, and alleging their

performance. Dennis v. Slyfield (1902) 117 Fed. 474, 54 C. C. A. 520.

Where a railroad company libeled a steamship, alleging that it had delivered to it certain bales of cotton for transportation to Bremen under customary bills of lading, which cotton had been received by libelant at Atlanta under through bills of lading to Bremen, and that the master took the cotton, but refused to deliver to libelant any bill of lading therefor except one containing a provision that it should be subject to the conditions of a charter party to which libelant is not a party, and by which it is not bound, and also refused to redeliver the cotton, the action is in no sense founded on the through bill of lading under which libelant first received the cotton, and the libel was not insufficient because it failed to set it out. Nor can the libelant be required to set out the terms of bills of lading expressed to be subjected to the conditions of the charter party, which were tendered by the libelee, since it had not received and could not be expected to know their provisions. The through bills of lading under which libelant took the cotton provided that it should be delivered to the libelee steamship for transportation to Bremen under "customary bills of lading." Held, by this language it was intended to designate not a particular instrument, but a class of instruments whose tenor is susceptible of proof, and that it is no objection to the libel that it failed to set out such bill of lading, or have a copy thereof annexed. Chamberlain v. The Torgorm (D. C. 1891) 46 Fed. 202.

A general allegation in a libel against a vessel to recover for a personal injury that libelant when injured was going on board pursuant to a contract of employment to serve on the vessel is insufficient to show a contract relation affording a basis for recovery, where the libel does not allege the terms of the contract nor that shipping articles had been signed. The Albion (D. C. 1903) 123 Fed. 189.

Where a libel states facts which warrant a recovery, and the real issues are tried, a recovery will not be denied because the libel counts on the breach of a charter which is not binding on respondent. W. S. Keyser & Co. v. Jurvelius (1903) 122 Fed. 218, 58 C. C. A. 664.

Where a libel in admiralty sets out a charter party, upon which it seeks recovery, signed by the respondent corporation, the presumption is that the signature is for a purpose, and, since the corporation cannot be a witness, the libel is sufficient to show a cause of action against it either as principal or surety. Downs v. Wall (1910) 176 Fed. 657, 100 C. C. A. 209.

Notwithstanding Civ. Code La., art. 2278, providing that parol evidence shall not be received to prove any promise to pay the debt of a third person, and article 3039 providing that suretyship cannot be presumed, but should be expressed and restrained within the limits intended by the contract, and R. S. § 858, ante, § 1464, providing that witnesses shall not be incompetent for certain causes, but that in other respects their competency is determined by the law of the state, a libel in admiralty setting out a charter party made in Louisiana, and signed by an individual, whom the libel alleged to be a surety on the contract, is sufficient as against him, since the libelants are not called on to prove the allegations until the issues are made up; and even under the Louisiana law suretyship may be proved as against the face of a written instrument. Id.

Where the cause of action set forth in a libel has arisen from the violation of a written contract of affreightment, the libel should so state, and the contract should be annexed to the libel, or a legal excuse for its absence given. Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co. (D. C. 1882) 14 Fed. 699.

In libel for demurrage libelant need not allege of which party the charter party or bill of lading makes it the duty to discharge the vessel, since the matter properly comes up in the evidence. Mott v. Frost (D. C. 1891) 45 Fed. 897.

A master of a vessel, as libelant, cannot recover damages for loss to the owners from the cancellation of a charter party, where the libel does not claim damages therefor, or mention the charter party. Harrison v. Hughes (D. C. 1903) 119 Fed. 997.

A general allegation in a libel against a vessel to recover for a personal injury that libelant when injured was going on board pursuant to a contract of employment to serve on the vessel is insufficient to show a contract relation affording a basis for recovery, where the libel does not allege the terms of the contract nor that shipping articles had been signed. The Albion (D. C. 1903) 123 Fed. 189.

306. —— **Allegations as to injuries and damages.**—Damages may be given, in a suit in admiralty, under a prayer for general relief. Penhallow v. Doane (1795) 3 U. S. (3 Dall.) 54, 1 L. Ed. 507.

While the burden rests upon a libelant—alleging, in a suit against a ship, that he was injured through the inexperience and incompetence of a man who was operating a steam winch, to which duty he was assigned by the master—to prove that the master failed to exercise proper care and diligence to ascertain the qualifications of the man for the work, or failed to remove him after his incompetency was known to some officer of the ship, an allegation in the libel that the master relieved a competent man from the work, and put in his place an ordinary laborer, who was unacquainted with the operation of the winch, and who was not even con-

nected with the ship, is a sufficient allegation of negligence on the part of the master, where the libel was not excepted to, and was met by an allegation in the answer that the man was competent. The Anaces (1899) 93 Fed. 240, 34 C. C. A. 558, reversing decree (D. C. 1898) 87 Fed. 565.

A libel to recover for damage to goods shipped from Philadelphia to Portland, Or., by way of the Isthmus of Panama, held not to state a cause of action within the admiralty jurisdiction. California-Atlantic S. S. Co. v. Central Door & Lumber Co. (1913) 206 Fed. 5, 124 C. C. A. 139.

In causes of damage, the libel should state each distinct act of injury in a distinct article, with reasonable certainty of time and place. Treadwell v. Joseph (C. C. 1833) Fed. Cas. No. 14,-157.

In a libel for a marine tort libelant must set forth in distinct allegations each separate and distinct wrong for which he claims damages. Pettingill v. Dinsmore (D. C. 1843) Fed. Cas. No. 11,045.

A libel against a tug to recover damages for the abandonment of a contract to tow a barge during an entire season should point out the manner in which the alleged damages arose. The Oscoda (D. C. 1895) 66 Fed. 347.

General ill treatment and oppression on the part of a master, relied on in aggravation of damages in a suit by a seaman for assault, must be propounded in a distinct allegation. Pettingill v. Dinsmore (D. C. 1843) Fed. Cas. No. 11,045.

A libel in rem for breach of a charter party, demanding a stated sum in damages, is sufficient to hold the res to bail, although specific breaches showing a specific amount of damages are not alleged. Peru v. The North America (D. C. 1853) Fed. Cas. No. 11,017a.

A libel alleging with reasonable certainty the essential facts showing a legal duty, a default therein, and a resultant injury, of which it is the proximate cause, is sufficient. Jolivet v. City of Seattle (D. C. 1915) 226 Fed. 963.

Libel against a city, alleging that its port warden removed libelant's barge from a safe mooring to the vicinity of a barge which he knew contained dynamite, by the explosion of which libelant's cargo was lost, held to state a cause of action. Id.

307. —— **Libel for collision.**—Further as to libel for collision, see The Suffolk County (1869) 76 U. S. (9 Wall.) 651, 19 L. Ed. 753; The L. P. Dayton (1887) 120 U. S. 337, 7 Sup. Ct. 568, 30 L. Ed. 669 (affirming [C. C. 1880] 4 Fed. 834); Dodge v. The John Stuart (D. C.) Fed. Cas. No. 3,952a; Wells v. The Anne Caroline (D. C. 1856) Fed. Cas. No. 17,389a; Williams v. The Vanderbilt and The Collins (D. C. 1863) Fed. Cas. No. 17,744; Potts v. The William A. Burden (D. C. 1864) Fed. Cas. No. 11,349; Chapin v. The Hattie Ross (D. C. 1866) Fed. Cas. No. 2,598; The Morning Star, Id. 9,817; Quinn v. The Transport, Id. 11,516; The Havre (D. C. 1867) Fed. Cas. No. 6,232; The H. P. Baldwin (D. C. 1870) Fed. Cas. No. 6,811; The John H. Abeel, Id. 7,349; The A. R. Wetmore (D. C. 1871) Fed. Cas. No. 569; The Coleman, etc. (D. C. 1873) Fed. Cas. No. 2,981; The M. M. Hamilton, Id. 9,685; The Starlight (D. C. 1874) Fed. Cas. No. 13,310; The Celestial Empire (D. C. 1882) 11 Fed. 761; Jacobsen v. Dalles, P. & A. Nav. Co. (D. C. 1899) 93 Fed. 975; The Farmer v. McCraw (1855) 26 Ala. 189, 72 Am. Dec. 718; Spaulding v. Harvey (1856) 7 Ind. 429; Duffy v. Gleason (1900) 26 Ind. App. 180, 58 N. E. 729; Parker v. Providence & S. S. S. Co. (1891) 17 R. I. 376, 22 Atl. 284, 14 L. R. A. 414, 33 Am. St. Rep. 869.

Technical inaccuracies in the statement of facts in a libel for collision are not ordinarily regarded, where they do not affect the rights of the parties. The Metamora (1906) 144 Fed. 936, 75 C. C. A. 576.

The practice under rule 23 requires a plain statement of the movements of the two vessels as they approached each other, their courses, and the mode in which they were handled, and the circumstances of wind and tide, when bearing on the case, and a distinct statement of the acts of negligence, or faults of navigation, which are claimed to have caused the disaster, and of the circumstances, that the connection between the alleged facts and the collision, as cause and effect, can be plainly understood. McWilliams v. The Vim (D. C. 1880) 2 Fed. 874.

A libel, filed to recover damages for collision to a cargo, should contain averments showing unequivocally, and with reasonable certainty, that the libelants had such a special or general right of property in the cargo that by its loss or injury they had suffered damage. Where the libel averred that certain sugars were laden on board the British bark H., "to be carried thereon to the port of New York, and thence safely delivered to your libelants, and bills of lading therefor duly signed by the master of said bark, naming the libelants as consignees of said sugars," and also averred "that by the collision your libelants have suffered damage in the value of said cargo $25,000," an exception having been filed to the libel that it did not aver what, if any, interest the libelants, as consignors, had in the property, held, that the averments of the libel did not necessarily import that the libelants had any interest in the goods, and that the exception to the libel must be sustained. Minturn v. Alexandre (D. C. 1880) 5 Fed. 117.

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averments showing unequivocally, and with reasonable certainty, that the libelants had such a special or general right of property in the cargo that by its loss or injury they had suffered damage. Id.

A libel alleging that certain sugars were laden on board a vessel "to be carried thereon to the port of New York, and thence safely delivered to your libelants, and bills of lading therefor duly signed by the master of said vessel, naming the libelants as consignees of such sugars," and averring that "by the collision your libelants have suffered damages in the value of said cargo," etc., does not show that the libelants had any property in the cargo as consignors or otherwise. Id.

On exceptions to a libel by the owner of goods injured by a collision at sea, a part of the loss on which the insurer has paid, held, that the libel, for the purpose of a sufficient identification of the goods, must state at least the description of them given by the bills of lading, and the date thereof, and also the essential elements of the contract of insurance upon which the rights and liabilities of the parties may depend. The Anchoria (D. C. 1882) 9 Fed. 840.

308. —— **Libel or information to enforce penalty or forfeiture.**—In a libel under Act March 2, 1799, for unlading goods without a permit, it is not necessary to state the time and place of importation nor the vessel in which it was made; an allegation that they were unknown being sufficient. Locke v. U. S. (1813) 11 U. S. (7 Cranch) 339, 3 L. Ed. 364.

Technical niceties of the common law, that are not in themselves important, and that stand only on precedents, are not regarded in admiralty informations. A libel is sufficient if the offense be so set forth that, if true, the case is within the statute. The Hoppet (1813) 11 U. S. (7 Cranch) 389, 3 L. Ed. 380; The Samuel (1816) 14 U. S. (1 Wheat.) 9, 4 L. Ed. 23; The Emiley & The Caroline (1824) 22 U. S. (9 Wheat.) 381, 6 L. Ed. 116; The Merino (1824) 22 U. S. (9 Wheat.) 391, 6 L. Ed. 118; The Palmyra (1827) 25 U. S. (12 Wheat.) 13, 6 L. Ed. 531.

A libel of information is sufficient if it pursues the words of the law. The Emily & The Caroline (1824) 22 U. S. (9 Wheat.) 381, 6 L. Ed. 116; The Merino (1824) 22 U. S. (9 Wheat.) 391, 6 L. Ed. 118; U. S. v. The Neurea (1856) 60 U. S. (19 How.) 92, 15 L. Ed. 531. But the libel should substantially agree with the terms of the statute. The Betsy (C. C. 1818) Fed. Cas. No. 1,365.

It is sufficient if an information set forth the offense so as clearly to bring it within the statute on which the information is founded, without concluding "against the form of the statute." The Merino (1824) 22 U. S. (9 Wheat.) 391, 6 L. Ed. 118.

It is not necessary, in a libel of information in admiralty to recover a forfeiture or penalty, to allege therein that the act or omission on account of which the seizure is made was done or omitted contrary to the form of the statute in such case made and provided, but it is sufficient that such act or omission is described in the words of the statute under which the proceeding takes place. The Idaho (D. C. 1886) 29 Fed. 187.

An information for a statute forfeiture should conclude against the form of the statute, or at least refer to some subsisting statute authorizing the forfeiture. A mere conclusion of an information against the form of a statute will not cure the defects of material averments to show that a forfeiture has accrued. The Nancy (C. C. 1812) Fed. Cas. No. 10,008.

Stating a charge in the alternative is good, if each alternative constitutes an offense for which the thing is forfeited, and if supported by proof of the offense charged in either alternative. The Caroline v. U. S. (1813) 11 U. S. (7 Cranch) 496, 3 L. Ed. 417, and note in errata; The Emily & The Caroline (1824) 22 U. S. (9 Wheat.) 381, 6 L. Ed. 116.

A libel on a seizure in the admiralty is, in its terms and essence, an information. The word "information" is not exclusively applicable to common-law proceedings. The Samuel (1816) 14 U. S. (1 Wheat.) 9, 4 L. Ed. 23. In such a libel it is not necessary to state any fact that constitutes the claimant's defense, or a ground of exception to the operation of the law on which the libel is founded. The Aurora v. U. S. (1813) 11 U. S. (7 Cranch) 382, 3 L. Ed. 378.

In an information under Act 1796, c. 128, § 67, against goods on account of their differing in description from the contents of the entry, held not necessary that it should allege an intention to defraud the revenue. Two Hundred Chests of Tea (1824) 22 U. S. (9 Wheat.) 430, 6 L. Ed. 128.

A libel under Act Feb. 28, 1793, providing for the forfeiture of a licensed vessel employed in any other trade than that for which she is licensed, need not specify the particular trade in which the vessel was engaged at the time of the seizure. U. S. v. The Paryntha Davis (C. C. 1860) Fed. Cas. No. 16,-003.

A libel against a vessel for violating the embargo laws must contain a substantial statement of the offense, and it must be made with reasonable precision. But it need not set forth the particular character of the vessel. U. S. v. The Little Charles (C. C. 1818) Fed. Cas. No. 15,612.

A libel in rem for a forfeiture must

allege that the property has been seized. The Silver Spring (D. C. 1854) Fed. Cas. No. 12,858. It must aver that she has been seized for the offense, and that the seizure still subsists. The Washington (C. C. 1857) Fed. Cas. No. 17,221. It must also state in distinct allegations the matters relied on as ground for forfeiture. Eighteen Thousand Gallons of Distilled Spirits (D. C. 1871) Fed. Cas. No. 4,-317.

In a libel by the United States against a vessel for breach of the revenue laws, an allegation that her master attempted to land Chinese laborers at a port of the United States does not charge a crime. U. S. v. The Haytian Republic (D. C. 1893) 57 Fed. 508, decree affirmed (1893) 59 Fed. 476, 8 C. C. A. 182.

309. —— **Libel for seaman's wages.**—In a libel for seamen's wages the allegations of hiring, voyage, etc., should be drawn with accuracy and reasonable certainty, or exception may be taken. The facts should be stated in distinct articles, according to the usual course in admiralty proceedings. Orne v. Townsend (C. C. 1827) Fed. Cas. No. 10,583.

A libel for wages is sufficient if it state the contract and service performed, without the annexation of an account stating the rate of wages, and the precise balance due. Pratt v. Thomas (D. C. 1837) Fed. Cas. No. 11,377.

310. —— **Libel for supplies furnished or repairs to vessel and to enforce lien therefor.**—A libel to enforce a lien upon a vessel or its proceeds for premiums due upon marine policies should aver their amounts and dates, the names of the insured, and the extent and character of their interests, and that the policies covered the vessel during the season of navigation. The Dolphin (C. C. 1876) Fed. Cas. No. 3,974; Id. (D. C. 1876) Fed. Cas. No. 3,973.

A libel to enforce a lien on a vessel must distinctly state the facts or law under which it arises or is claimed. Parmlee v. The Charles Mears (D. C. 1856) Fed. Cas. No. 10,766.

A libel for supplies furnished to a foreign vessel must allege that the owner had no funds or credit with which to procure the supplies. Brown v. The Albany (D. C. 1858) Fed. Cas. No. 1.987.

A libel to enforce an alleged lien for necessary materials and supplies furnished to the master in a foreign port, where no funds of the owner were available, need not specify the particulars and amounts which make up the claim, and the evidence by which they are to be proved. Whitlock v. The Thales (D. C. 1860) Fed. Cas. No. 17,-578.

The libel must show that the lien was filed within the time required by the law giving it. The Antelope (D. C. 1868) Fed. Cas. No. 482.

A libel by employés of a contractor, which fails to allege that the contractor had authority to make the repairs or to employ libelants, is insufficient. The Augusta (D. C. 1872) Fed. Cas. No. 647.

A complaint framed under Dakota territorial laws, giving a right of action in rem for supplies furnished a vessel, held sufficient to give jurisdiction to admiralty, though requiring amendments to conform it to the practice. Comings v. The Ida Stockdale (Dak. T. Ct. 1874) Fed. Cas. No. 3,-052.

311. —— **Libel in cases arising on lakes.**—A libel sufficient under the general maritime law is sufficient in cases arising upon the lakes, and no averment is required to bring it within the act of 1845. The Illinois (D. C. 1874) Fed. Cas. No. 7,004.

312. —— **Defects and objections thereto, and waiver thereof.**—Where no exceptions are taken to a libel in which separate claims for salvage and towage services against different defendants are joined, objection to the misjoinder is waived. Merritt & Chapman Derrick & Wrecking Co. v. Chubb (1901) 113 Fed. 173, 51 C. C. A. 119.

Objections to defects of form in a libel in admiralty should be raised by special exception under Rule 24. If the exceptions in an answer are not insisted upon at the opening of the trial, they will be considered as waived. White v. The Cynthia (C. C. 1880) Fed. Cas. No. 17,546a.

Facts will be assumed as broad as the libel will warrant, where it is not objected to for lack of precision and certainty. Essler v. Worth (D. C.) Fed. Cas. No. 4,533a.

The objection that a suit joins a libel in personam with a libel in rem should be made by exception to the libel before answer. The City of Carlisle (D. C. 1889) 39 Fed. 807, 5 L. R. A. 52.

On a libel for the nondelivery of goods the want of averment of ownership in the libelant is waived where the point is not raised in any way in the answer. The Ville De Paris (D. C. 1876) Fed. Cas. No. 16,942.

313. **Answer.**—Pleas must set forth the matter in dispute in perspicuous and definite terms, and it is not necessary that they should embody the formalities required in pleading at common law or in chancery. The Navarro (D. C. 1845) Fed. Cas. No. 10,059.

The answer should set out clearly and explicitly the facts relied on. The Havre (D. C. 1867) Fed. Cas. No. 6,232.

An answer to a libel in a prize case need only contain a brief assertion that the property seized is not liable to con-

demnation and forfeiture. The Lynchburg (D. C. 1861) Fed. Cas. No. 8,637a.

An averment in an answer in an action for salvage that "other insurance companies" were insurers of property saved is insufficient, in the absence of an averment that their names are unknown. Morgan L. & T. S. S. Co. v. De Arrotegui (D. C. 1885) 25 Fed. 624.

An averment that coal was furnished with "the intention, expectation, and anticipation" that the price therefor should be deducted from certain freights is not equivalent to an allegation that such was the mutual agreement of the parties. Anderson v. Pacific Coast Co. (D. C. 1900) 99 Fed. 109.

Matters in connection with the subject of a libel can, under analogy of the fifty-ninth rule, be litigated in one action; but the rule cannot be extended to bring in matters not connected with the original controversy, though arising under the same charter party. McCaldin Bros. Co. v. Donald S. S. Co. (D. C. 1907) 169 Fed. 992.

An answer to a petition filed by respondent in an admiralty suit under rule 59 (29 Sup. Ct. xlvi) must either admit or deny all material allegations of the petition, unless it is stated that the answering respondents are ignorant as to the truth of such allegations. O'Keefe v. Staples Coal Co. (D. C. 1910) 201 Fed. 135.

Where a bill of lading provided that in case of loss the carrier should have the benefit of insurance, on a libel for such loss, claimant's answer that he was entitled to disclosure as to the provisions of insurance contracts covering the goods, and the amount, if any, collected, was not subject to exception. The Windber (D. C. 1913) 209 Fed. 131.

314. —— **Necessity for answer in general.**—An agreement for a reference before answer filed suspends the necessity of answer. If the reference is set aside, claimant may answer without terms. The Nineveh (C. C. 1869) Fed. Cas. No. 10,276.

On a libel for wages the court may hear the respondent's defense, though no written answer was filed. Barron v. Locke (D. C.) Fed. Cas. No. 1,054.

315. —— **Privilege from answering.**—Under rule 31, providing "that defendant may object by his answer to answer any allegation in the libel which shall expose him to any punishment or for any penalty or for any forfeiture of his property," an answer to a libel to recover penalties for carrying a greater number of passengers than the certificate of inspection permits, which neither admits nor denies the allegation of the libel as to the number of passengers taken on board in excess of the number allowed is sufficient. Pollock v. The Sea Bird (D. C. 1880) 3 Fed. 573; Same v. The Laura (D. C. 1880) 5 Fed. 133, decree affirmed Same v. Bridgeport Steamboat Co. (1885) 5 Sup. Ct. 881, 114 U. S. 411. 29 L. Ed. 147.

316. —— **Responsiveness to averments of libel.**—The answer should meet each material allegation of the libel with an admission and denial or a defense. The Boston (C. C. 1833) Fed. Cas. No. 1,673; Virginia Home Ins. Co. v. Sundberg (C. C. 1893) 54 Fed. 389; The Dictator (D. C. 1887) 30 Fed. 699. It should be full, explicit, and distinct. Commander in Chief (1863) 68 U. S. (1 Wall.) 43, 17 L. Ed. 609.

An answer which neither admits nor denies a material averment in the libel, is insufficient, and may be excepted to on that ground. The Elizabeth v. Rickers (C. C. 1831) Fed. Cas. No. 4,353; The Elizabeth Frith (D. C. 1831) Fed. Cas. No. 4,361.

An answer is insufficient which admits some of the averments of the libel, but concludes: "He denies the other allegations of the fourth article as therein alleged, and refers to the allegations of the eighth article of the answer;" such eighth article being a narrative somewhat different from the libelant's. Virginia Home Ins. Co. v. Sundberg (C. C. 1893) 54 Fed. 389.

An answer to a libel for information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts. The Sun (D. C. 1861) Fed. Cas. No. 13,612.

Where, to a libel for damage, a defense is put in by way of justification, it must admit the facts; and if the act complained of be relied on as a punishment, it must be so pleaded. Treadwell v. Joseph (C. C. 1833) Fed. Cas. No. 14,157.

The libelant is entitled to an admission or denial of each separate averment in his libel separately, and an answer is insufficient which admits some of the averments of the libel, but concludes: "He denies the other allegations of the fourth article as therein alleged, and refers to the allegations of the eighth article of the answer;" such eighth article being a narrative somewhat different from the libelant's. Virginia Home Ins. Co. v. Sundberg (C. C. 1893) 54 Fed. 389.

Whether supplies furnished to a vessel are necessary is a conclusion of law, and the claimant, in answer to a libel by a materialman, is not required to either admit or deny that the articles furnished were necessaries. The Gustavia (D. C. 1830) Fed. Cas. No. 5,876.

If the answer admits, to a reasonable intendment, facts stated in the libel, it will be sufficient, though loose and informal as a pleading. Where a libel alleges a particular agreement was made, and a written instrument was executed, and the instrument embodies the substance of such agreement, an admission by the answer of the execution of the instrument is substantially an ad-

mission of its contents. The Aldebaran (D. C. 1845) Fed. Cas. No. 150.

Mere narrative statements in a libel, which allege no damages, and claim no particular remedy, need not be replied to specifically by answer. Id.

Where an answer is made without oath, as authorized by rule 87, it should still respond fully and particularly to every material averment of the libel. Id.

An allegation that the respondent is "ignorant" of a matter alleged in the libel, it seems, is sufficient. The City of Salem (D. C. 1882) 10 Fed. 843.

317. —— **Effect of failure to deny.**—Act July 20, 1790, c. 56 (1 Story's Laws, 105; 1 Stat. 133, c. 29) § 6, relative to seamen's liens, provides that process shall not be sued out against the vessel until 10 days after she has discharged her cargo, but that process may be sued out within that time in case the vessel shall be about to proceed to sea before the expiration of the 10 days. Held, that where the libel alleged that the vessel was about to proceed to sea before the end of the 10 days, respondent cannot be permitted to deny the truth of the allegation, the objection not having been taken by a dilatory plea, nor the allegation denied in the answer. The William Harris (D. C. 1837) Fed. Cas. No. 17,695.

On a libel for the nondelivery of goods the want of averment of ownership in the libelant is waived where the point is not raised in any way in the answer. The Ville De Paris (D. C. 1876) Fed. Cas. No. 16,942.

An answer must admit or deny each allegation of the libel, in order that the libelant may know what issues he must meet. The omission to notice an allegation in the libel does not, as in code pleading, admit it. The Dictator (D. C. 1887) 30 Fed. 699.

Allegations in a libel, neither admitted nor denied by the claimant, are not to be taken as true, but must be proved. Clarke v. The Dodge Healy (C. C. 1827) Fed. Cas. No. 2,849.

The fact that the answer in a collision case, when put in, did not deny the averment of the libel that the tack was properly beat out, is to be considered on a conflict of testimony on that point, even though the answer was allowed to be amended on the hearing by inserting such a denial. The Empire State (D. C. 1866) Fed. Cas. No. 17,586.

318. —— **Statement of defenses.**—Semble, that a defense to a libel for collision, which sets forth that the injured vessel "lay in an improper manner, and in an improper place," without showing in any respect wherein the manner, or why the place, was improper, is insufficient, as being too indefinite. The Commander in Chief (1863) 68 U. S. (1 Wall.) 43, 17 L. Ed. 609.

An answer in a collision case, which sets up facts constituting negligence, is sufficient though no fault be formally charged. The Pilot (C. C. 1857) Fed. Cas. No. 11,168.

A general allegation of negligence on the part of libelant's vessel is insufficient to constitute a defense. Killam v. The Erie (C. C. 1871) Fed. Cas. No. 7,765.

An averment in the answer to a libel that the persons for whose benefit this action is prosecuted "had full notice and knowledge of and participated in the prosecution" of a former action, does not sufficiently advise the libelant whether evidence of some specific written notice in addition to a general knowledge is to be introduced, but such defect may be cured by amendment. Virginia Home Ins. Co. v. Sundberg (C. C. 1893) 54 Fed. 389.

When the respondent wishes to avail himself of any particular matter of defense, he must present it with proper averments in his answer or by plea. The William Harris (D. C. 1837) Fed. Cas. No. 17,695.

The objection that the vessel for which supplies or repairs are furnished is not one fitted for navigation on the high seas must be taken by answer. Reppert v. Robinson (C. C. 1851) Fed. Cas. No. 11,703.

An allegation, in an answer to a libel for seamen's wages, of misconduct on the part of libelant, as a cause of forfeiture of wages, must state the particular acts of misconduct relied on, with circumstances of time and place. Orne v. Townsend (C. C. 1827) Fed. Cas. No. 10,583; The Pioneer (D. C. 1864) Fed. Cas. No. 11,176.

Where, to a libel for damage, a defense is put in by way of justification, it must admit the facts; and if the act complained of be relied on as a punishment, it must be so pleaded. Treadwell v. Joseph (C. C. 1833) Fed. Cas. No. 14,157.

The defense of stale claim must be set up in the answer. The Melissa (D. C. 1874) Fed. Cas. No. 9,400. Such defense must be supported by a statement of facts showing that it is inequitable to enforce the claim. Jay v. Allen (D. C. 1846) Fed. Cas. No. 7,235.

The defense that a lien has been lost by laches, if not pleaded, must be excluded. The Shady Side (D. C. 1884) 23 Fed. 731, modifying the decision in The Francesca T. (D. C. 1877) Fed. Cas. No. 5,030.

Where the answer to a libel for seaman's wages sets up payment in full, and a release under seal, the particulars of the release need not be set out, as it is only evidence. The Western Metropolis (D. C. 1868) Fed. Cas. No. 17,438.

319. —— **Mingling of responsive with defensive matter.**—Matter intended as a

defensive allegation should not be blended with the response or answer to an allegation of the libel. The California (D. C. 1871) Fed. Cas. No. 2,312; The Whistler (D. C. 1882) 13 Fed. 295.

320. —— **Setting up matter in abatement.**—Matter of abatement may be set up in the answer in admiralty, but the answer must, in such case, demand the same judgment, and be subject to the same rules, as if a formal dilatory plea had been employed. Reed v. Hussey (D. C. 1836) Fed. Cas. No. 11,646. It is proper practice in admiralty to embrace a plea to the jurisdiction with an answer to the merits. Inman v. The Lindrup (D. C. 1895) 70 Fed. 718.

321. —— **General issue.**—The general issue cannot be pleaded to a libel, information, or libel of information for a forfeiture in the federal courts. U. S. v. Twenty-Five Barrels of Alcohol (D. C. 1868) Fed. Cas. No. 16,562.

322. —— **Construction of answer in general.**—A denial of an anticipatory averment in a libel is equivalent to an averment to the contrary. Burrill v. Crossman (1895) 69 Fed. 747, 16 C. C. A. 381, 35 U. S. App. 608.

An averment that coal was furnished with "the intention, expectation, and anticipation" that the price therefor should be deducted from certain freights is not equivalent to an allegation that such was the mutual agreement of the parties. Anderson v. Pacific Coast Co. (D. C. 1900) 99 Fed. 109, affirmed Pacific Coast Co. v. Anderson (1901) 107 Fed. 973, 47 C. C. A. 106.

323. —— **Inconsistent averments.**—Where several averments in an answer to a libel on a vessel are inconsistent, and are not excepted to, the court will adopt that one which operates most strongly against the claimant. The Olbers (D. C. 1869) Fed. Cas. No. 10,477.

324. —— **Exceptions to answer.**—Where the answer in admiralty is not full, explicit, and distinct as to each separate allegation of the libel, exceptions for insufficiency will lie to compel a further and better answer; but, if the answer is responsive, no exceptions will lie to it on the ground that it is not a defense to the suit whether the matter be impertinent or not. The California (D. C. 1871) Fed. Cas. No. 2,312.

After a vessel was attached in a suit by a journeyman for injuries sustained, one C., without filing any formal claim, entered stipulation on behalf of the owners, and received the vessel, but the owners were not named in the stipulation. Afterwards C. filed an answer, by which it appeared that he was merely a consignee. Afterwards one J. filed an answer, alleging that before the attachment he had, as agent for one D., received a bill of sale of the vessel, and that he adopted C.'s answer. Held, upon exceptions to these answers, that under a rule providing that an answer must be made by the party, or by an attorney in fact specially instructed, these answers were insufficient. Todd v. The Tulchen (D. C. 1880) 2 Fed. 600.

325. —— **Impertinence.**—Impertinent and irrelevant allegations in an answer will be stricken out on motion. The Gustavia (D. C. 1830) Fed. Cas. No. 5,876.

The claimant in an answer to a libel for engineer's wages alleged that, prior to the commencement of the suit, it had commenced an action against libelant in another court to recover damages for injuries to the steamboat on which libelant was employed, caused by the misconduct of libelant, and caused a garnishee process to be served on the master and sometime owner of the boat, during the period that libelant was employed as engineer. Held, that the answer was impertinent, as it did not appear that the court in the alleged pending suit had acquired jurisdiction of the libelant. The Pioneer (D. C. 1864) Fed. Cas. No. 11,176.

326. —— **Argumentative averments.**—Statements in answers in a suit in admiralty held improper, and subject to exception on the ground that they were argument only. O'Keefe v. Staples Coal Co. (D. C. 1911) 201 Fed. 135.

327. —— **Sham or frivolous answer.**—Where an answer to a libel in admiralty to recover for goods lost denied all negligence on the part of the ship, and concluded by propounding to the libelant certain interrogatories with reference to the amount of goods loaded, their value, and the amount lost, etc., as authorized by rule 32, it was error for the court to hold such answer sham and frivolous, and grant plaintiff's motion for judgment on the pleadings while such interrogatories remained wholly unanswered. The Oregon (1902) 116 Fed. 482, 53 C. C. A. 650.

328. —— **Answer after plea overruled.**—In a libel on a bottomry bond, the overruling of a plea alleging the disability of libelants to sue, on the ground that at the time the suit was brought and the plea was filed they were alien enemies, does not prevent respondents from pleading in bar that at the time the contract was entered into libelants were alien enemies, and for that reason the contract was void. Crawford v. The William Penn (C. C. 1819) Fed. Cas. No. 3,373.

A plea to a libel, which sets up no matter in defense is substantially a demurrer. And, when such plea is overruled, it is in the discretion of the court to allow an answer to be filed, or to enter a decree at once for the damages

claimed. The Sea Gull (C. C. 1865) Fed. Cas. No. 12,578.

329. —— **Conclusion.**—The conclusion in an answer should not be to the country, but a simple prayer for restitution. U. S. v. Twenty-Five Barrels of Alcohol (D. C. 1868) Fed. Cas. No. 16,-562.

330. —— **Waiver of objections by failure to object.**—Admiralty will not entertain defenses inadequately pleaded and set up for the first time by formal objection at the trial. Cohan v. The Rolling Wave (D. C. 1857) Fed. Cas. No. 2,959a.

Where no exceptions are taken to an answer which is not as full and explicit and distinct as required by rule 27, the reading of testimony cannot be objected to on the ground of its insufficiency. The Rocket (D. C. 1860) Fed. Cas. No. 11,975.

331. **Cross-libel.**—In cases where the respondents in a pending libel desire to recover damages against the libelants, they should file a cross-libel for that purpose. An agreement in writing between counsel that the answer in the libel shall have the effect of a cross-libel, is not good practice. Ward v. Chamberlain (1858) 62 U. S. (21 How.) 572, 16 L. Ed. 219. But in collision cases, where both vessels are in fault, a formal cross-libel may not always be necessary, in order to enable the owners of the vessel libeled to set off or recoup the damages sustained by such vessel. The Sapphire (1873) 85 U. S. (18 Wall.) 51, 21 L. Ed. 814.

Respondents in a suit to enforce maritime liens are required to file cross-libels, to take out process, and have it served in the usual way, if they have liens which they wish to enforce, and cannot obtain such relief by merely pleading their claims in their answers. Hawgood & Avery Transit Co. v. Dingman (1899) 94 Fed. 1011, 36 C. C. A. 627.

Service of a cross-libel for damages under an independent stipulation, upon the proctor of the original libelant, who is out of the jurisdiction, is ineffectual. Nichols v. Tremlett (D. C. 1857) Fed. Cas. No. 10,247.

Where, in a suit for salvage against a derelict vessel, her cargo and freight, the master claimed the vessel and cargo, and prayed for delivery of both, on stipulation, and the owners of the cargo intervened, and prayed for delivery of the cargo to them without payment of freight, and also filed their libel for delivery thereof, in response to which the master filed a claim to the cargo, and an answer, and he afterwards filed a libel against the cargo and its owners for payment of freight and general average, setting out the proceedings on the previous libels, such libel was a cross-libel to each of the prior suits, and the court had power to order the monition thereon served on the proctors of the owners of the cargo, they being nonresidents, and on such service to proceed to judgment against them personally in all matters covered by the cross-libel; and a subsequent dismissal of their own libel, on their motion, did not affect the jurisdiction so obtained. The Eliza Lines (C. C. 1894) 61 Fed. 308.

It is no defense to a libel for failure to deliver goods that no credit is given for freight earned. Such claims should be set up by cross-libel. Maxwell v. The Powell (C. C. 1870) Fed. Cas. No. 9,324.

Where defendants in a collision suit are not in fault, they may, by cross-libel, set up the damages they have sustained, and have a decree in their favor. Ward v. The Ogdensburgh (D. C. 1853) Fed. Cas. No. 17,158.

In a suit for collision, brought by the owner of one of the vessels, which was sunk, and the owners of her cargo, against the other vessel, in which the two vessels were held equally in fault, and the recovery of the libelant vessel owner restricted to one-half his loss, but full recovery was decreed against the respondent vessel for the losses sustained by innocent cargo owners, where all the parties in interest were before the court, and participated in all the controversies arising in the suit, the failure of the libeled vessel to file a cross-libel, and have process thereon issued and served as permitted by rule 59, will not preclude it from recouping from the amount awarded against it in favor of the vessel one-half the loss of the innocent cargo owners, which it is required to pay in full. The Livingstone (D. C. 1900) 104 Fed. 918, decree modified (1902) 113 Fed. 879, 51 C. C. A. 560.

A separate suit, filed by the owner of a steamer against a dredge to recover for towage and for services rendered in raising the dredge after she had sunk, cannot be treated as a cross-libel in a pending suit by the dredge owner against the steamer for injury to the dredge through alleged negligent towing. The Leader (D. C. 1910) 181 Fed. 743, decree reversed (1911) 187 Fed. 807, 109 C. C. A. 567.

332. **Reply.**—A special replication by the libelant under oath is not admissible, unless it be demanded by respondent, or ordered by the court, and then it is in the nature of a cross bill or reconventio of the civil law. Coffin v. Jenkins (C. C. 1844) Fed. Cas. No. 2,948.

A party cannot be allowed, after receiving a pleading and replying to it, to treat it, upon any ground of defect afterwards discovered, as a nullity, and proceed as if none had been served. Gaines v. Travis (D. C. 1848) Fed. Cas. No. 5,179.

333. —— **Necessity.**—New facts must be presented by an amendment to the libel or answer, and not by way of rep-

lication and rejoinder. The Sarah Ann (C. C. 1835) Fed. Cas. No. 12,342.

In the absence of a specific rule, a replication is necessary to put in issue facts set up by sworn answer; if none be filed, such facts will be taken as admitted. The Mary Jane (D. C. 1833) Fed. Cas. No. 9,215. CONTRA, Gladding v. Constant (D. C. 1844) Fed. Cas. No. 5,468. But where a sworn answer is not demanded by the libel, libelant may contradict its allegations by proofs, without filing a replication thereto, or notice of such proof. The Infanta (D. C. 1848) Fed. Cas. No. 7,030.

A replication merely denying the truth of the answer is not required in the district of Massachusetts. Taber v. Jenny (D. C. 1856) Fed. Cas. No. 13,-720.

Mere narrative statements need no specific reply. The Aldebaran (D. C. 1845) Fed. Cas. No. 150.

334. —— **Failure to file.**—Advantage must be taken of the failure to file a replication when evidence is offered at the hearing, or it will be held to be waived. Thomas v. Gray (D. C. 1836) Fed. Cas. No. 13,898.

335. **Interrogatories—Right to propound.**—Each party has a right to require the personal answers of the other, under oath, to any interrogatories touching the matter in issue. The David Pratt (D. C. 1839) Fed. Cas. No. 3,-597.

In a suit for seamen's wages, libelant may compel the adverse party to answer special interrogatories. Gammell v. Skinner (C. C. 1814) Fed. Cas. No. 5,210.

Under rule 23 the libelant in a suit against a corporation may attach to his libel interrogatories to be answered by an officer of the corporation named therein. Bock v. International Nav. Co. (D. C. 1903) 124 Fed. 711.

336. —— **Scope and extent.**—Rule 32, which authorizes interrogatories in an answer "touching any matters charged in the libel or touching any matter of defense set up in the answer," permits very comprehensive questions for the purpose of narrowing the issues. The extent to which the process of interrogation may properly be carried will necessarily vary according to the circumstances of each case, and must be regulated, when in dispute, by the court in its discretion. The Baker Palmer (D. C. 1908) 172 Fed. 154; Erie & Western Transp. Co. v. Great Lakes Towing Co. (D. C. 1910) 184 Fed. 349.

Where, in a suit to recover possession of vessels of which libelant claims to be the owner, the answer alleges ownership in respondent, and that libelant is claiming under fraudulent bills of sale, thus raising a distinct issue of fraud, respondent is entitled to attach interrogatories to the answer bearing a wide range in relation to the transaction by which the bills of sale were obtained and its good faith. Chirurg v. Knickerbocker Steam Towage Co. (D. C. 1910) 177 Fed. 943.

It is not ground for exception to interrogatories in the answer of a respondent in admiralty, propounded under rule 32, that they call for detailed information, which will involve considerable labor and time, or that incidentally information may be elicited which the respondent would not be entitled to call for, if the main information sought is proper under the rule, and to obtain it is the only purpose of the interrogatories. Erie & Western Transp. Co. v. Great Lakes Towing Co. (D. C. 1910) 184 Fed. 349.

In a suit for damage to cargo, where the libel set up merely a contract by bill of lading to deliver in good order and condition, and a failing to do so (being evidently designed to avoid stating the particulars of the claim), and the answer set up numerous exceptions in the bill of lading, relied on Harter Act Feb. 13, 1893, and averred that the loss happened from failure to close the valve of one of the ballast tanks on the voyage, defendant should be allowed to annex to the answer interrogatories under rule 32, calling for specific charges of negligence, unseaworthiness, or lack of diligence in equipping the ship. Stoffregan v. The Mexican Prince (D. C. 1895) 70 Fed. 246.

Officers of a corporation respondent may be interrogated as to matters relevant to the issues, whether within their personal knowledge, or known to them only through information received in their official capacity; the right being limited, however, to questions which do not unduly pry into the defense upon which respondent relies, and which are concerned with issuable facts. Bock v. International Nav. Co. (D. C. 1903) 124 Fed. 711.

337. —— **Procuring production of papers.**—Under rule 23 in admiralty, interrogatories annexed to the libel are confined to issuable matter, and only the defendant's oath is required in response thereto. Inspection of copies of letters or documents not in issue cannot be obtained by that means. Held, in a libel for damage to cargo, that interrogatories calling for the production of letters between the defendants and their agents for the purpose of proving the fact of damage, and how it occurred, should be stricken out. Havermeyers & E. S. R. Co. v. Compania Transatlantica Espanola (D. C. 1890) 43 Fed. 90.

338. —— **Time and manner of propounding.**—Rule 99 of the United States district court of New York, which permitted interrogatories to be propounded, "by either party to the other, within four days of the putting in of the claim or answer or other pleading," is superseded by rule 23 of the supreme court, requiring libelant's interrogatories to be propounded "at the close of

the libel." The Edwin Baxter (D. C. 1887) 32 Fed. 296.

Under rule 23, requiring libelant's interrogatories to be propounded at the close of the libel, libelant may not propound interrogatories to the claimant after the filing of the answer. Said rule 23 superseded rule 99 of the southern New York district court. The Edwin Baxter (D. C. 1887) 32 Fed. 296. As to Eastern district of New York, see Scobel v. Giles (D. C. 1883) 19 Fed. 224.

Libelant's proper practice is to apply to the court for leave to amend his libel, and to add at the close of the amended libel the desired interrogatories. The Edwin Baxter (D. C. 1887) 32 Fed. 296.

339. **Exceptions to pleadings.**—Exceptions to an answer for insufficiency and impertinence are taken for entirely different causes, and therefore they ought not to be taken to the same matter, either conjunctively or disjunctively. The Whistler (D. C. 1882) 13 Fed. 295.

Exceptions should not be general. They should briefly, but clearly, specify by line and page the points excepted to. The Dictator (D. C. 1887) 30 Fed. 699.

Exceptions to pleadings in collision cases are permitted only when made in good faith, for the sole purpose of obtaining the full statement of facts which the law requires. The Intrepid (D. C. 1890) 42 Fed. 185.

According to the course of admiralty practice, exceptions are never allowed unless they are raised on specific allegations. Witherspoon v. Wallis (1841) 2 Ala. 667.

340. —— **Persons entitled.**—Where a libel in admiralty was filed against a boat and barge for breach of a maritime contract, parties other than the intervening claimant were not entitled to file exceptions thereto. Florence Cotton Oil Co. v. Alabama Towboat Co. (1904) 128 Fed. 915, 63 C. C. A. 641.

341. —— **Nature and effect in general.**—Exceptions to a pleading in admiralty have the effect of a demurrer, and also that of a motion to make the pleading more definite and certain. Quinn v. The Transport (D. C. 1866) Fed. Cas. No. 11,516.

A so-called exception to a libel to recover damages for breach of a maritime contract on the ground that it does not "set forth any facts showing wherein this exceptor failed, neglected, or refused to carry out and perform the terms of said alleged contract," is in fact a demurrer, which goes to the whole libel, and which is therefore bad if any breach is well pleaded. Dennis v. Slyfield (1902) 117 Fed. 474, 54 C. C. A. 520.

342. —— **Grounds.**—No exceptions will lie to an answer responsive to the libel, on the ground that it is not a defense to the suit, whether the matter is impertinent or not. The California (D. C. 1871) Fed. Cas. No. 2,312.

An exception for irrelevancy taken to a pleading which is not irrelevant, but is only insufficient, will be overruled. The Elizabeth Frith (D. C. 1831) Fed. Cas. No. 4,361.

Where allegations in an answer in admiralty are unnecessary and not required by the rules of pleading, they are not subject to exception for insufficiency. The Teaser (D. C. 1910) 188 Fed. 721.

Exceptions to an answer in admiralty will be overruled when they strike only at errors of form or style, or where, if not so construed, they involve the entire controversy, which the court cannot properly determine without evidence. New Haven Towing Co. v. City and Town of New Haven (D. C. 1902) 116 Fed. 762.

Objections to a libel for want of specific allegations of fault should be taken by exceptions, and, if taken at the hearing, an amendment will be permitted. The Coleman, etc. (D. C. 1873) Fed. Cas. No. 2,981.

If the response in a general answer is not full, explicit, and distinct, exceptions for insufficiency lie to compel a sufficient answer. The California (D. C. 1871) Fed. Cas. No. 2,312.

Exceptions being filed to a libel claiming a lien upon a vessel for repairs and supplies in the port of New York, under the statute of the state, alleging that no facts were stated sufficient to constitute a cause of action, that no lien existed, and that the cause of action was not one of admiralty and maritime jurisdiction, held, that the exceptions were not well taken; that the filing of specifications was not a necessary averment where it appeared that the vessel had not left the port; and that the statement of the libel that the work was done on a domestic vessel, in her home port, at the request of the owner, and the claim was sought to be enforced within a month, were sufficient to create a lien under the statute of the state of New York, which may be enforced in the admiralty. The Julia Sherwood (D. C. 1881) 8 Fed. 366.

Facts judicially known to the court, which do not appear in the libel, may be brought before the court in an exceptive allegation attached to exceptions. The Seminole (D. C. 1890) 42 Fed. 924.

343. —— **Time for making.**—Where, in a suit in rem for wages, an answer is filed to the merits, and issue is joined, and the case is brought to a hearing, and proofs are taken on both sides, this is a waiver by the claimant of any right of exception to the regularity of the proceedings of the libelant as to the time of instituting his suit. The Edward (D. C. 1832) Fed. Cas. No. 4,289.

After joining issue upon a libel in

admiralty in rem, and filing a cross bill asking for affirmative relief against the libelants in personam, an exception or plea of the want of an admiralty lien comes too late. The Fifeshire (D. C. 1882) 11 Fed. 743.

An objection that other persons should join in a suit for salvage is in the nature of a plea in abatement, and, if good at all, is waived unless taken by answer or exception in the court of original jurisdiction. The Comanche (1869) 75 U. S. (8 Wall.) 448, 476, 19 L. Ed. 397.

Exceptions, dilatory or declinatory, should be interposed on the return day of process, or at the day appointed for answering the libel. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163.

The objection that a suit joins a libel in personam with a libel in rem should be made by exception to the libel before answer. The City of Carlisle (D. C. 1889) 39 Fed. 807, 5 L. R. A. 52.

344. —— **Scope and sufficiency.**—Exceptions in admiralty need not embody the formalities required in pleading at common law or in equity, but they must set forth the matter in dispute in perspicuous and definite terms. The Navarro (D. C. 1845) Fed. Cas. No. 10,059. They should not be general. They should briefly, but clearly, specify, by line and page, the points excepted to. The Dictator (D. C. 1887) 30 Fed. 699.

An exception that a libel does not state facts sufficient to constitute a cause of suit or forfeiture is too general; it should state in what particular the facts are insufficient. The Active (D. C. 1866) Fed. Cas. No. 33.

345. —— **Hearing and determination.**—Exceptions in an answer to a libel will be deemed waived if not determined before proof taken at the trial. Aumach v. The Queen of the South (D. C. 1864) Fed. Cas. No. 657a.

A hearing on an exception to a libel must be determined on the pleadings, and an affidavit on behalf of respondents cannot be considered. Prince Steam-Shipping Co. v. Lehman (D. C. 1889) 39 Fed. 704, 5 L. R. A. 464.

When exceptions to an answer are drawn with several specifications, the failure to sustain any specification is fatal to the exception. The Intrepid (D. C. 1890) 42 Fed. 185.

Where, after the argument of exceptions to a libel, a brief is filed, in which, for the first time, the point is made that the facts set up in the exceptions cannot be thus raised, but are available only by answer, the court will consider the questions presented upon the assumption, made by both parties in the argument, that such facts were properly presented. U. S. v. The Haytian Republic (D. C. 1893) 57 Fed. 508, decree affirmed (1893) 59 Fed. 476, 8 C. C. A. 182.

346. **Exceptions to interrogatories.**—Exceptions to interrogatories propounded to a party in an admiralty suit in their purpose and effect correspond to special demurrers and pleas in bar at common law, and the objectionable part of each interrogatory should be specifically pointed out that a clear and definite issue may be presented. Exceptions to a large number of interrogatories "for the reason that they are each and all open to one or more of the following objections," followed by a statement of a number of objections, do not produce a single issue and are bad. Erie & Western Transp. Co. v. Great Lakes Towing Co. (D. C. 1910) 184 Fed. 349.

347. **Demurrers.**—In a libel on a bottomry bond, a demurrer to the replication alleging that the libeled vessel was employed as a cartel, and sailed under the protection of a flag of truce, is not such an admission as to prevent respondent from afterwards controverting it. Crawford v. The William Penn (C. C. 1819) Fed. Cas. No. 3,373.

A demurrer does not prevent the party demurring from controverting the facts confessed, and compelling the other party to prove them. Id.

The objection that the suit was prematurely commenced must be raised by plea in abatement or demurrer, to be available where the right of action is perfected before final hearing. The Isaac Newton (D. C. 1847) Fed. Cas. No. 7,089.

348. **Special pleas in bar.**—In a libel on a bottomry bond, the overruling of a plea alleging the disability of libelants to sue, on the ground that at the time the suit was brought and the plea was filed they were alien enemies, does not prevent respondents from pleading in bar that at the time the contract was entered into, libelants were alien enemies, and for that reason the contract was void. Crawford v. The William Penn (C. C. 1819) Fed. Cas. No. 3,373.

The objection of staleness of claim, or any other defense that does not go to the merits, must be propounded by special plea. The Platina (D. C. 1858) Fed. Cas. No. 11,210.

349. **Amendment of pleadings in general.**—Admiralty having no written rules relative to amendments of substance, the court will deduce from its own decisions such rules as are applicable to the case at bar. Lamb v. Parkman (C. C.) Fed. Cas. No. 8,019.

New facts must be presented by an amendment to the libel or answer, and not by way of replication and rejoinder. The Sarah Ann (C. C. 1835) Fed. Cas. No. 12,342.

In an admiralty cause, the court has the right to expect substantial accuracy in the allegations of the pleadings, and, if the parties have reason to suppose that their allegations are not

true and correct, either before or during the trial they should amend. Palmer v. Merchants' & Miners' Transp. Co. (D. C. 1907) 154 Fed. 683.

350. —— **Discretion of court.**—It is in the discretion of a court of admiralty to allow amendments in the pleadings, even with respect to matters of substance, by a party who shows merits. The Imogene M. Terry (D. C. 1884) 19 Fed. 463. And see Brown v. The Cadmus (C. C.) Fed. Cas. No. 1,997; U. S. v. One Hundred and Twenty-Three Casks of Distilled Spirits (D. C. 1870) Fed. Cas. No. 15,943; The Corozal (D. C. 1884) 19 Fed. 655.

Rule 24 is not an arbitrary rule. It does not mean that in every case counts presenting new causes of action may, under all circumstances, be added, but leaves the matter to the discretion of the court, the rule being merely permissive, and the discretion to be exercised upon principles of justice towards the defendant. "Amendments are always limited by due consideration of the rights of the opposite party, and where, by the amendment, he would be prejudiced, it is not allowed." The Corozal (D. C. 1884) 19 Fed. 655.

351. **Amendment of pleadings to conform to proofs.**—Libelant brought suit in personam to recover damages for alleged forcible detention on board a vessel by defendant, where he was induced to go through false pretenses, and for services rendered while so detained. The evidence showed that he went on board under shipping articles which he had voluntarily signed, and by which he was bound, but that he was wrongfully forced by the master to leave the vessel at a distant port, in violation of such articles, and was refused any payment for the services rendered; and also that he suffered other wrongs and mistreatment at the hands of the master which gave him a right of action in personam against the defendant. Held, that he should have been permitted at the close of the case to amend his libel to state his cause of action as disclosed by the evidence. Davis v. Adams (1900) 102 Fed. 520, 42 C. C. A. 493, reversing judgment (D. C. 1899) 93 Fed. 977.

In a libel by a passenger against the ship to recover the value of jewelry stolen by an employé on the voyage, the value of the jewelry was stated at $5,000, and the ship was bonded for that sum. Such statement was based on the cost of the articles several years before. Upon a reference the value of the jewelry was fully gone into, and the commissioner found upon the undisputed testimony of an expert who was familiar with the jewels that their present value was in excess of $7,000. Held, that the court had power to permit an amendment of the libel to conform to the proof, and to render a decree in personam against the claimant for the excess. The Minnetonka (1906) 146 Fed. 509, 77 C. C. A. 217, affirming decree (D. C. 1904) 132 Fed. 52, writ of certiorari denied Atlantic Transport Co. v. Barnes (1906) 27 Sup. Ct. 777, 203 U. S. 589, 51 L. Ed. 330.

Where, on a libel for breach of a charter party, respondents admitted liability, and there was uncontradicted proof of substantial damages, libelants having pleaded a mistaken measure of damages, the court properly exercised its discretion in permitting an amendment of the libel to conform to the proof by inserting a demand for damages occasioned by the loss of profits in respect of the transportation of such cargo as would have been carried on the vessel. Vogeman v. Raeburn (1910) 180 Fed. 97, 103 C. C. A. 595.

Generally when the proofs and the allegations do not correspond, amendments will be allowed. The City of New Orleans (C. C. 1888) 33 Fed. 683; Davis v. Leslie (D. C. 1848) Fed. Cas. No. 3,639; Star v. The White Cloud (D. C. 1858) Fed. Cas. No. 13,306; The Rhode Island (D. C. 1883) 17 Fed. 554.

In the courts of admiralty of the United States there are no technical rules of variance which will prevent a recovery by a libelant who shows a meritorious case, but under the liberal and equitable practice as to amendment he will be allowed to amend his pleading at any stage of the case to conform to the evidence, even to the extent of changing a libel for a tort to one based on contract, where he has mistaken his legal rights, and the allowance of such amendment will work no hardship to the defendant, and is in accordance with the principles of equity and natural justice. Davis v. Adams (1900) 102 Fed. 520, 42 C. C. A. 493, reversing judgment (D. C. 1899) 93 Fed. 977.

Where a cause of collision is fully presented upon the merits, and all the facts have been put in evidence without objection, and there is no question of surprise or desire for further evidence, the cause should be determined upon the merits, as justice requires, and the pleadings be deemed amended to conform to the facts proved. The Maryland (D. C. 1884) 19 Fed. 551. But the allegations of an answer upon a material fact, deliberately pleaded, and under full knowledge of the grounds relied upon by the opposite party, cannot be abandoned; and an amendment will not be allowed, for the purpose of making the allegation correspond with the evidence, on the hearing of the case. The Iola (D. C. 1853) Fed. Cas. No. 7,057.

A person who defends a suit in a certain right, and sets up an agreement consistent only therewith, which he stands by at the trial, will not be allowed, after he has failed in such contention, to set up a claim in a different right, and support the same by proof. McCarthy v. Eggers (D. C. 1879) Fed. Cas. No. 8,681.

Where the facts necessarily known

to the libelant are misstated to his proctor, so that precise faults, as finally determined, are not stated in the libel, though charged in one of the answers, the libel should be deemed amended, and the libelant allowed to recover. The Maryland (D. C. 1884) 19 Fed. 551.

Where, on an issue as to the validity of a release of a judgment, the answer alleged that the release was executed without consideration, but the release showed on its face that a consideration was paid, and the depositions failed to sustain the answer, but tended to show that libelant was coerced into executing the release through fear of imprisonment, the latter would be permitted to amend his answer so as to attack the validity of the release on that ground. Naretti v. Scully (D. C. 1904) 131 Fed. 399.

Where the libel in a suit to recover for injury to a vessel alleged to have been caused by the improper navigation of another vessel correctly states the essential facts by reason of which the injury occurred, even if the failure to give the proper interpretation of such facts, or the correct scientific reason for the result, constitutes a material variance between the allegations and proof, an amendment will be permitted where the case has been tried on the theory stated in the libel. Kelley Island Lime & Transport Co. v. City of Cleveland (D. C. 1906) 144 Fed. 207, decree modified Great Lakes Towing Co. v. Kelley Island Lime & Transport Co. (1910) 176 Fed. 492, 100 C. C. A. 108.

352. **Amendment of pleadings to conform to findings.**—Claimant of a vessel brought into a collision suit by respondent under rule 59 held entitled to amend its pleadings to conform to the findings and to pray for damages against libelant. The Vera (D. C. 1912) 224 Fed. 998, judgment affirmed (C. C. A. 1915) 226 Fed. 369.

353. **Amendment of libel.**—Where exceptions to a libel against a vessel and its owner were sustained on the ground that they could not be sued jointly, it was not error to permit the libel to be so amended as to declare against the vessel alone. The San Rafael (1905) 141 Fed. 270, 72 C. C. A. 388, reversing judgment (D. C. 1904) 134 Fed. 749, writ of certiorari denied North Pacific Coast R. Co. v. Hall (1906) 26 Sup. Ct. 756, 200 U. S. 619, 50 L. Ed. 623.

A libel, which sets out, although obscurely, a cause of action in rem within the jurisdiction of the court, and prays for general relief, should not be dismissed, but directed to be amended. The Gwynedd (C. C. A. 1915) 228 Fed. 177.

On libel for the value of goods shipped on claimants' vessel, claimants answered, admitting the contract and delivery of the goods to the master of the wharf at the place of shipment, but alleging that the goods were accidentally destroyed by fire while on the pier, and before they were actually laden on board, and that the bill of lading exempted them from loss by fire at sea or in port. Libelant filed an amended libel, alleging that claimants agreed to insure the goods for the amount claimed, from the time they came into their possession until laden on board; and, having failed to make the insurance, they were liable. Held, that the amendment was not inconsistent with the original libel. Rosenthal v. The Louisiana (C. C. 1889) 37 Fed. 264.

A libel may be amended on motion by striking out unnecessary and impertinent allegations. American Ins. Co. v. Johnson (D. C. 1827) Fed. Cas. No. 303.

Where it is admitted in argument that the facts are substantially as pleaded, and the cause is submitted and decided thereon, no amendment of the libel will be allowed, where no mistake is shown. Burrill v. Crossman (D. C. 1894) 65 Fed. 104, judgment modified (1895) 69 Fed. 747, 16 C. C. A. 381. And amendment of a libel to increase claim for demurrage should be denied, when the facts were known, and the claim as pleaded has been twice before verified on oath, and the amendment was not asked till after trial and apportionment of damages. New Haven Steamboat Co. v. Mayor, etc. (D. C. 1888) 36 Fed. 716.

Though a libel for possession of a vessel should state the extent of libelant's interest, and that he was owner at the time of filing the libel, where the defect in that particular arises from accidental omission the court will allow an amendment. Bradshaw v. The Sylph (D. C. 1841) Fed. Cas. No. 1,791.

Libelants were permitted to amend and file a supplemental bill for extra compensation as pilots, where their services were held not to constitute a claim for salvage. Dexter v. The Richmond (D. C. 1841) Fed. Cas. No. 3,865.

A libelant may amend his libel in any of the points excepted to by the claimant under rule 24. Town v. The Western Metropolis (D. C. 1865) Fed. Cas. No. 14,114.

The failure to allege a ground of negligence is amendable where there is no surprise. The Alabama (D. C. 1867) Fed. Cas. No. 122.

A libel by the owners of a tow, alleging that it was run upon a sunken pier known to the tug, where the answer denies negligence, may be amended by averring negligence. The Deer (D. C. 1870) Fed. Cas. No. 3,737.

A libel in a proceeding to obtain the benefit of the limitation of liability may be amended so as to show the residence of the libelant. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334.

A libel claiming a lien under the general maritime law may be amended so as to assert a lien under the law of the state. Pittmans v. The Samuel Marshall (D. C. 1892) 49 Fed. 754, decree affirmed Pittman v. The Samuel Mar-

shall (1893) 54 Fed. 396, 4 C. C. A. 385.

Process issued on a libel sworn to by one of the proctors as attorney in fact, but unsigned except by the proctors by their firm name, is not void. The failure of the libelant or his agent to sign is, in such case, a defect amendable, but until amendment has been allowed the libel must be considered as still unsigned, though the proctor who swore to it as attorney in fact afterwards, but without leave of the court, signed the same. After judgment the court is bound to overlook this defect. Hardy v. Moore (D. C. 1880) 4 Fed. 843.

Amendments in form only, in the addition and subtraction of parties, and generally in all matters which do not prejudice the rights of the other side, are liberally allowed, and amendments in matter of substance may be allowed at any time before final decree on such terms as the court shall impose. The George Taulane (D. C. 1885) 22 Fed. 799.

The owner pro hac vice being sued with others as joint owner, an amendment of the libel will be permitted to recover the disbursements for which such owner is liable. Douse v. Sargent (D. C. 1891) 48 Fed. 695.

Where a libel originally sought to excuse performance of a condition of a contract by alleging impossibility, and was held defective, and amended so that a waiver by respondents of the performance was alleged, and an estoppel by their conduct to avail themselves of the breach of the contract, the libel was good. Gans v. Auchincloss (D. C. 1909) 168 Fed. 460.

354. —— **As to amount of damages.**—In an action of tort an amendment may be allowed increasing the damages demanded. McCready v. The Brother Jonathan (D. C. 1853) Fed. Cas. No. 8,732a. An amendment of the libel, as to the amount of damages claimed in a collision case, allowed, to remove a formal difficulty to the way of a just award. The St. John (C. C. 1870) Fed. Cas. No. 12,224.

A consignee who has neglected seasonably to ascertain and give notice of the extent of the damage of goods received should be held to strict proof of the extent of damage, and should not be permitted, after suit brought, to amend his libel so as to include damages which he should have ascertained before. The Columbia (1890) 1 Wash. T. 95.

355. —— **As to parties.**—A libel against a vessel, master, owners, and pilot may be amended by leave of court so as to apply only to the vessel and the master personally. Newell v. Norton (1865) 70 U. S. (3 Wall.) 257, 18 L. Ed. 271.

In a case in admiralty, where the res is the same, and the tort and the contract for which damages are claimed are the same, and where the original libel sets out matter enough by which to amend, a libel may be amended as to parties by changing the character in which the libelant sues, and dismissing as to the parties who have no right to sue. The Manhasset (D. C. 1884) 19 Fed. 430.

In a suit against a vessel and her master jointly to recover a penalty for importing goods not included in the manifest, it is proper to dismiss the suit as to the master, on the ground that he is entitled to a trial by jury and to proceed with it as against the vessel. U. S. v. The Queen (C. C. 1873) Fed. Cas. No. 16,108.

The court has no power to permit a libel to be amended by striking out the name of a sole libelant, and substituting another in its place. The Detroit (C. C. 1874) Fed. Cas. No. 3,832.

356. —— **Changing form of proceeding.**—Where a libel in form ad personam was answered, defended, and decided as such, it was not error for the court to refuse to permit respondent to shift his ground of defense after decision so as to claim that an action in rem was the proper remedy. The Bencliff (1908) 161 Fed. 909, 88 C. C. A. 514.

A libel in rem cannot be amended, so as to change it into a libel in personam. The Young America (D. C. 1874) Fed. Cas. No. 18,178. To permit an amendment in effect making the suit in rem a suit in personam would be a clear violation of the fifteenth admiralty rule, forbidding the joinder of a claim in rem with one in personam in the same suit for collision. The libelants, if they have any claim for damages against the owners personally, must resort to another suit in personam to enforce it, and the libelants' motion must be denied. The Steamship Zodiac (D. C. 1881) 5 Fed. 220. Nor can a possessory libel be amended so as to proceed for damages in personam. Kynoch v. The S. C. Ives (D. C. 1856) Fed. Cas. No. 7,958. A libel in rem may be amended so as to ask a personal judgment against the master and owners of the vessel. The Monte A. (D. C. 1882) 12 Fed. 331.

In cases where actions in rem and actions in personam may be conjoined in the same libel, if the action be improperly brought in rem, the court has jurisdiction of the subject-matter and of the proceeding; and it is competent for the court to permit an amendment of the libel praying process and judgment in personam against the owner after he has appeared and contested the suit in rem upon the merits, there being no change in the subject-matter of the controversy; and the court should permit such an amendment, if desired, where much testimony has been taken upon the merits in the proceeding in rem, when the latter will not lie for want of a lien. The Monte A. (D. C. 1882) 12 Fed. 331.

On a libel against a cargo for freight

and demurrage, where it is in the hands of a purchaser without notice, freed from the lien, and the consignee appears and admits the claim, the court will turn the proceedings into an action in personam. One Hundred and Eighteen Sticks of Timber (D. C. 1878) Fed. Cas. No. 10,519.

When, in proceedings in rem instituted for the breach of an executory maritime contract, the res has been released on bond, and the claimants have appeared only to except to the libel and object to the jurisdiction, and it is conceded that no lien exists, leave to amend by proceeding in personam will not be granted. The General Sedgwick (D. C. 1887) 29 Fed. 606.

A libelant who has attached a foreign vessel on a libel in rem, based on a claim which does not constitute a maritime lien, cannot convert such libel by amendment into one in personam and proceed against the owner thereon, where no monition was served, and the owner has not entered a general appearance. The Lowlands (D. C. 1906) 147 Fed. 986.

Where the only process issued and served in a suit in admiralty was an attachment against the vessel and her owners have not appeared except as claimants, the libel cannot be amended to give the court jurisdiction to render a personal judgment against them. The Nora (D. C. 1910) 181 Fed. 845.

357. —— **Introducing new cause of action.**—A substantially new cause of action cannot be added to a libel in admiralty, under a general leave to amend. The Circassian (D. C. 1868) Fed. Cas. No. 2,723.

If an application to amend a libel proposes to introduce a new cause of action, it is usual to allow the amendment when the new cause of action corresponds in character and is kindred in nature to that presented in the original libel; but if the amendment introduces a new substantive cause of action and a new charge against the defendant, it is disallowed. U. S. v. One Hundred and Twenty-Three Casks of Distilled Spirits (D. C. 1870) Fed. Cas. No. 15,943.

358. —— **Effect on liability of surety.**—Generally an amendment of an information in rem will not be disallowed merely because it may affect the rights of sureties. The Harmony (C. C. 1812) Fed. Cas. No. 6,081. But a court of admiralty has no power to permit a libel to be amended by striking out the name of a sole libelant, and substituting another in its place. Such amendment is virtually the institution of a new suit, and discharges the sureties upon the stipulation. The Detroit (C. C. 1874) Fed. Cas. No. 3,832. On the other hand, the amendment of a libel by adding a colibelant does not discharge the surety on the stipulation. The Maggie Jones (D. C. 1877) Fed. Cas. No. 8,947. So, where a libel was filed against a ship and a person named as owner, a third person appeared, setting up in his answer that he was the true owner, and a release bond was given, signed by the master, as lawful bailee of such third person, and by sureties, the sureties would not be affected by an amendment making the third person a party respondent to the libel, and it may be allowed. Boden v. Demwolf (D. C. 1893) 56 Fed. 846. And the obligations of the sureties of a vessel are not increased by amending the libel against her by increasing the amount claimed. Darrell v. The Alice Gray (D. C. 1865) Fed. Cas. No. 3,579.

The undertaking of stipulators on a libel in rem for the loss of a vessel and cargo by collision is for their value, and in an action for the loss of the vessel and cargo they are not entitled to interfere to prevent the granting of an application to amend by alleging that, though the cargo did not belong to libelants, they were entitled to demand the value of the property, with the restriction that the suit should be carried on in their own right as they existed when the suit was instituted. McCready v. The Brother Jonathan (D. C. 1853) Fed. Cas. No. 8,732a.

359. **Amendment of information to enforce forfeiture.**—An amendment by inserting a new substantive offense will be disallowed where the statute of limitations has run against it. The Harmony (C. C. 1812) Fed. Cas. No. 6,081.

An information against a vessel for smuggling may be amended so as to change the allegations as to the ownership of the vessel. U. S. v. The Queen (D. C. 1870) Fed. Cas. No. 16,107.

The United States, upon finding evidence of violations of the revenue laws committed by a vessel during the same period as those for which she has already been libeled, may avail themselves of such discovery by amending the libel. U. S. v. The Haytian Republic (D. C. 1893) 57 Fed. 508, decree affirmed (1893) 59 Fed. 476, 8 C. C. A. 182.

360. **Amendment of answer.**—There being no admiralty rule relative to amendments in matters of substance, the court, deducing a rule from its previous decisions, will grant leave to amend a sworn answer in a substantial manner with great caution; and where the amendment consists in the denial of a fact previously admitted, or in the allegation of new facts amounting to a new defense, not originally exhibited, the court will require the grounds for the amendment, and the reasons why it has become necessary, and why its necessity was not earlier known, to be shown by affidavit. The court will require that each of the proposed changes in an answer should be exhibited separately, with apt references to the original answer, so that it can be seen how the original answer will be affected by each, and so that each, when allowed, can be incorporated into the original

answer when taken into a new draft as an amended answer. The court will permit an amendment seeking to withdraw an admission of a matter of fact, upon the ground that it was made because the respondent mistook the law, with great caution, and only under extraordinary circumstances, if ever. The court will not allow a defendant to recast his entire answer, if he has discovered from the opinion of the district court how it may successfully be done, so as to shift the burden of proof, or obtain by successful pleading other legal advantages. The court will not permit respondent to require formal proof of written documents, the authenticity of which was admitted by the original answer, without an affidavit denying the signatures, and explaining satisfactorily his former admission, nor permit respondent to require the production of original papers, copies whereof were admitted by the original answer to "be correct," without showing that such originals are under the control of libelant, and can be produced without delay, and that the production thereof is material. Lamb v. Parkman (C. C. 1859) Fed. Cas. No. 8,019. And see The Horace B. Parker (1896) 74 Fed. 640, 20 C. C. A. 572; The Mary C. (D. C. 1873) Fed. Cas. No. 9,201. An answer containing an admission of a contract as stated in the libel may, by leave of the court, be afterwards amended by withdrawing the admission; but this will not relieve the respondent from the effect of his admission as evidence. The Markee (C. C. 1882) 14 Fed. 112; Kenah v. The John Markee Jr. (D. C. 1880) 3 Fed. 45. The answer, in an action on a bill of lading, which fails to allege that the damages claimed accrued from the sweating of the vessel, is amendable. McCullough v. The Echo (D. C. 1858) Fed. Cas. No. 8,740a. A claimant in admiralty will not be allowed, after the hearing has been had on claim and answer, establishing that he had no interest in the res at the time when the claim and answer were filed, to amend by showing that he was formerly the owner, and sold with a covenant to discharge all liens. The Prindiville (D. C. 1874) Fed. Cas. No. 11,435.

After the court has allowed a party to file an amended answer to a libel in admiralty, an exception to it on the ground of repugnancy to the original answer comes too late and will not prevail. The Belfast v. Boon (1867) 41 Ala. 50.

361. Time for amendment of pleadings.—An amendment to the libel, filed after the ship has been released on stipulation, setting up a claim not included in the original libel and not germane to the subjects thereof, cannot be allowed. The Iona (1897) 80 Fed. 933, 26 C. C. A. 261.

It was at least within the discretion of the court to refuse leave to amend a libel against a lighter to recover for loss of cargo on the ground of negligence, after the evidence had been concluded and the argument begun, by adding an allegation that the lighter was a common carrier, thus changing the action from one in tort to one in contract, and creating a new issue, to which the evidence had not been directed. The Wildenfels (1908) 161 Fed. 864, 89 C. C. A. 58, writ of certiorari denied American Mfg. Co. v. The Wildenfels (1909) 30 Sup. Ct. 399, 215 U. S. 597, 54 L. Ed. 342.

In a suit by a charterer against the owner for deceit in making a false representation in the charter party, libelant was not entitled to amend the libel, to charge that the representation was a warranty, on the trial, after a large amount of testimony had been taken on the cause of action originally stated. The Burma (1911) 187 Fed. 94, 110 C. C. A. 330.

The court can, at discretion, allow amendments to the merits in the pleadings at any stage of the cause prior to a final decree. Lamb v. Parkman (C. C. 1859) Fed. Cas. No. 8,019; Nevitt v. Clarke (D. C. 1846) Fed. Cas. No. 10,138; The Meteor (D. C. 1866) Fed. Cas. No. 9,498; The Edwin Post (D. C. 1881) 6 Fed. 206; Comings v. The Ida Stockdale (Dak. T. Ct. 1874) Fed. Cas. No. 3,052.

Where the libel for collision makes no prayer for interest on the amount awarded, such prayer may be made, under Rule 24, by an amended libel filed after all the issues except the amount of damages have been determined. The J. E. Trudeau (1893) 54 Fed. 907, 4 C. C. A. 657.

When objections are made at the hearing to the want of proper form in the pleadings or proceedings, apparent upon their face, the court will permit an amendment to be made therein instanter. Nevitt v. Clarke (D. C. 1846) Fed. Cas. No. 10,138.

Where, in a collision case, the pleadings of both parties are defective, the court may allow proper pleadings after the case is closed on the proofs. Star v. The White Cloud (D. C. 1858) Fed. Cas. No. 13,306.

A claimant in admiralty will not be allowed, after the hearing has been had on claim and answer, establishing that he had no interest in the res at the time when the claim and answer were filed, to amend by showing that he was formerly the owner, and sold with a covenant to discharge all liens. The Prindiville (D. C. 1874) Fed. Cas. No. 11,435.

An amendment of a libel introducing a wholly new ground of claim will not be allowed at the trial, where proper evidence on that subject has not been taken and the defendant's witnesses are gone. The Keystone (D. C. 1886) 31 Fed. 412.

Materialmen, claiming as such in their pleadings and proofs, cannot, on final argument, be allowed to amend so as

to thereby change the entire nature of their claim, if by so doing the rights of other creditors seeking payment from an inadequate fund would be prejudiced. The Alanson Sumner (D. C. 1886) 28 Fed. 670.

Upon a libel for damages through negligence specifying unseaworthiness, leaky decks, want of proper care, and improper stowage, the specifications of negligence are in the nature of a bill of particulars. Evidence of a wholly independent kind of negligence, or new kind of damage, as from coal dust, will not be admitted at the trial, nor an amendment of the libel, when the circumstances make it inequitable,—such as the dispersion of the goods, long lapse of time, and loss of defendant's witnesses,—no satisfactory explanation appearing why the new claim was not made a part of the original libel. The Thomas Melville (D. C. 1887) 31 Fed. 486.

A vessel was chartered to libelant to proceed to Baltimore to take a cargo, but refused to go there, whereupon the libelant sued in rem for damages. The owner appeared, and answered upon the merits, denying the alleged charter party, but did not object to the form of the action. Testimony was taken upon the merits, and after two years, upon the calling of the case for hearing, the objection to the form of the action was first taken; the vessel having been bonded at the commencement of the action. Held, that the libelant should be allowed to amend the libel by inserting a prayer for further process and judgment in personam. The Monte A. (D. C. 1882) 12 Fed. 331.

Amendments to the libel are allowable, in the discretion of the court, until the termination of the cause, even in matters of substance; and, where no answer has been filed and no evidence taken, an amended or supplemental libel may be allowed to stand as an original libel. O'Connell v. One Thousand and Two Bales of Sisal Hemp (D. C. 1896) 75 Fed. 408.

The fact that pending a suit in rem to recover for breach of a contract of affreightment the damages sustained by libelant, with interest and the costs, have increased to a sum in excess of the stipulation given for the release of the vessel, is not such an exceptional circumstance as will authorize the court to permit an amendment of the libel to bring in the shipowner, and add a cause of action against it in personam, after the lapse of nine years from the filing of the libel, and after a new action would be barred applying by analogy the local statute of limitations. In such case the shipowner might have been joined in the first instance, or at any time thereafter within the statutory period, and the effect of the lapse of time on the amount of the damages was apparent. The Southwark (D. C. 1904) 128 Fed. 149.

Where exceptions to a libel in admiralty for want of jurisdiction are sustained, it is proper to grant leave to amend if the case is such that facts may be alleged which will bring the cause within the court's jurisdiction. Graham v. Oregon R. & Nav. Co. (D. C. 1905) 134 Fed. 692.

Amendment of an answer in admiralty will not be allowed after the evidence has been taken, to permit the setting up of a new defense, where the facts must have been known to respondent when the original answer was filed. Brennan v. Peter Hagan & Co. (D. C. 1906) 147 Fed. 290.

An amendment to a libel cannot be allowed after the hearing, where it would substantially change the cause of action and require for its support other and different proof, and especially where such proof would be inconsistent with the evidence given on the hearing. The Ask (D. C. 1907) 156 Fed. 678.

362. —— After appeal.—In admiralty proceedings amendments are made in the appellate court, not only as to form, but as to matters of substance. The Marianna Flora (1826) 11 Wheat. 1, 38, 6 L. Ed. 405.

Where a decree for libelant in a collision case was reversed by the supreme court, which held both vessels to be in fault, claimant, who had failed to allege in his answer that he had sustained any damages by the collision, was allowed to amend his answer in that respect. The Pennsylvania (C. C. 1874) Fed. Cas. No. 10,951.

363. Formalities observed in amending pleadings.—The libelant's proper practice is to apply to the court for leave to amend his libel, and to add at the close of the amended libel the desired interrogatories. The Edwin Baxter (D. C. 1887) 32 Fed. 296.

A writing should be filed containing the matter of amendment as a distinct proceeding in the case, but such writing may extend to a new draft of the libel. Comings v. The Ida Stockdale (Dak. T. Ct. 1874) Fed. Cas. No. 3,052.

364. Conditions imposed on allowing amendment of pleadings.—Where a libel was filed for damages to a cargo of canned fruit, and it did not appear by the libel that the vessel was in the district in which suit was brought, after general appearance, answer, and exception, an amendment should be allowed remedying the defect, only on notice and such terms as the court might impose. The George Taulane (D. C. 1885) 22 Fed. 799.

Permission to amend a libel to enforce a general admiralty lien for supplies, so as to claim a lien under the local statutes, granted on condition that libelant's lien should be postponed to that of others. Hudson Coal Co. v. The Minnie R. Childs (D. C. 1878) Fed. Cas. No. 6,836.

365. —— Costs.—Amendments of mere form, not going to the merits of the

case, and not of such a character as to prejudice the respondent, will not entitle him to costs. Olsen v. The Edwin Post (D. C. 1881) 6 Fed. 314.

366. Process on amendment of pleadings.—If a petition by a shipowner, under the statute, does not state a case within the admiralty and maritime jurisdiction of the United States, and nevertheless a monition issues, and on the return of the monition the petitioner amends his by adding allegations bringing the case within the jurisdiction, it seems that the court should not proceed to a decree, to be operative upon parties who have not appeared, without issuing an alias monition upon the amended petition. In re Long Island North Shore Passenger & Freight Transp. Co. (D. C. 1881) 5 Fed. 599.

A libel for an alleged breach of a charter party, made by the owners of a certain steamship, was brought against respondent under the allegation that he was the sole owner. Respondent not being within the jurisdiction of the court, the ship was attached, upon which respondent's proctors put in a general appearance for him, filed security, and obtained release of the vessel. A plea in abatement for defect of parties was sustained, and libelant was allowed to amend his libel by inserting the fact that other persons besides respondent were owners with him, and that they were without the reach of process. Held, that the order to amend was an interlocutory order in the attachment suit, to abide which respondent bound himself by his general appearance, and it was not necessary to serve him in person with a copy of the order. Card v. Hines (D. C. 1888) 36 Fed. 573.

367. Objections to amendment of pleadings and waiver thereof.—While a court of admiralty has no power to permit a libel to be amended by striking out the name of a sole libelant, and substituting another in its place, the objection to such an amendment is waived by proceeding in the trial without taking objection. The Detroit (C. C. 1874) Fed. Cas. No. 3,832.

368. Supplemental libel.—A supplemental libel, filed before the process is returnable, becomes part of the pleadings, without further notice to respondent, and he is bound to answer it. Thomas v. Gray (D. C. 1836) Fed. Cas. No. 13,898.

Libelants were permitted to amend and file a supplemental bill for extra compensation as pilots, where their services were held not to constitute a claim for salvage. Dexter v. The Richmond (D. C. 1841) Fed. Cas. No. 3,865.

A libel having been filed claiming freight and demurrage under a charter party, the libelant thereafter filed a supplemental libel, setting up the same and additional facts, and claiming the same freight and demurrage and additional demurrage, to which supplemental libel the claimant excepted on the ground that it set forth facts occurring after the suit was commenced. Held that, as it did not appear upon the face of the supplemental libel that any of the facts therein stated occurred subsequent to the commencement of the suit, the exceptions must be overruled. Where it appeared that the original libel was filed and process issued and served on September 22d, and the supplemental libel, claiming an additional amount, was filed October 4th, before the return of process, no claimant having appeared, and on October 6th the claimant appeared and procured a discharge of the property by depositing in court money to the amount claimed in the supplemental libel, semble, that a motion to strike out the supplemental libel on the ground that it set forth facts occurring after the suit was commenced would be denied, on the ground that the claimant would be deprived of no right by allowing it to stand, while to strike it out would increase expense without benefit, and would also deprive the libelant of the security which the claimant had given for the demand made in the supplemental libel. Eight Hundred and Forty-One Tons of Iron Ore (D. C. 1883) 15 Fed. 615.

Demurrage for detention subsequent to the filing of the original libel is recoverable on filing a supplemental libel; only part of the cargo having been seized upon the original libel, and claimant having received cargo under the charter-party set up in the libel subsequent to the filing of the original libel, and having paid into court the freight due. Eight Hundred and Forty-One Tons of Iron Ore (D. C. 1885) 25 Fed. 864.

A libel fatally defective is not helped by a supplemental libel setting up matters subsequent; but a supplemental libel may, for cause, be allowed to stand as an original libel as of that date. Henderson v. Three Hundred Tons of Iron Ore (D. C. 1889) 38 Fed. 36.

369. Supplemental libel in replication.—A supplementary libel alleging new matter and an answer may be filed after appeal, in the discretion of the court. The Boston (C. C. 1833) Fed. Cas. No. 1,673.

A special replication by the libelant, under oath, is not admissible, unless it be demanded by the respondents, or ordered by the court, and then it is in the nature of a cross bill or reconventio of the civil law. Coffin v. Jenkins (C. C. 1844) Fed. Cas. No. 2,948.

A supplemental libel in replication is not necessary where the libelant intends merely to deny the truth of the allegations in the answer. Otherwise where it is sought to avoid them by new facts. Gladding v. Constant (D. C. 1844) Fed. Cas. No. 5,468. Where libelant relies on new matter in avoidance, he should file a supplemental libel,

which respondent should answer. Taber v. Jenny (D. C. 1856) Fed. Cas. No. 13,720.

370. **Signature to and verification of pleadings — Necessity.** — Libelant must verify the debt or cause of action on which his libel is founded by his oath. Hutson v. Jordan (D. C. 1837) Fed. Cas. No. 6,959. CONTRA, Coffin v. Jenkins (C. C. 1844) Fed. Cas. No. 2,948. Admiralty requires a sworn libel as the foundation of process of arrest of person or property. Martin v. Walker (D. C. 1850) Fed. Cas. No. 9,170.

Libels in rem in civil causes in Indiana need not be supported by the affidavit of the libelant. The J. R. Hoyle (D. C. 1868) Fed. Cas. No. 7,557.

The respondent is required to verify his answer by oath. Coffin v. Jenkins (C. C. 1844) Fed. Cas. No. 2,948; Hutson v. Jordan (D. C. 1837) Fed. Cas. No. 6,959.

In causes on the instance side, the answer of the claimant should be verified by oath. Gammell v. Skinner (C. C. 1814) Fed. Cas. No. 5,210. But see Richardson v. Cleaveland (Ala. 1837) 5 Port. 251.

Under rules 3 and 5 of the district court for the Southern district of New York, which were adapted by the district court for the Northern district of California, an amended libel to enforce an alleged lien on the cargo for wages need not be verified, when the cargo has been released on stipulation under the original libel, and libelants are beyond the jurisdiction. The Marion (D. C. 1897) 79 Fed. 104.

371. —— **Sufficiency.**—It may be shown, in opposition to a motion to set aside all proceedings for want of verification of the libel, that the oath was in fact regularly and duly administered, though the clerk's name was not subscribed. Nelson v. Bell (D. C. 1851) Fed. Cas. No. 10,101a.

The belief of the party should be expressed in the form of verification, not in the body of the pleading. U. S. v. Twenty-Five Barrels of Alcohol (D. C. 1868) Fed. Cas. No. 16,562.

The absence of the notarial seal from the jurat of a verification of a libel in admiralty is, at most, but an irregularity, not available, after decree, in a collateral proceeding. The E. W. Gorgas (D. C. 1879) Fed. Cas. No. 4,585.

Process issued on a libel sworn to by one of the proctors as attorney in fact, but unsigned except by the proctors by their firm name, is not void. The failure of the libelant or his agent to sign is, in such case, a defect amendable, but until amendment has been allowed the libel must be considered as still unsigned, though the proctor who swore to it as attorney in fact afterwards, but without leave of the court, signed the same. After judgment, the court is bound to overlook this defect. Hardy v. Moore (D. C. 1880) 4 Fed. 843.

372. —— **Authority to verify.**—While the practice is not, as a rule, to be commended, it is not error for a court of admiralty to permit a libel in which a large number of persons join to be signed and verified by their proctor on behalf of libelants shown to be outside of the jurisdiction, and whose signatures and verification it is impracticable to obtain. The Oregon (1904) 133 Fed. 609, 68 C. C. A. 603.

A mere general employment as proctor to prosecute an admiralty suit does not authorize the verification of a libel as attorney in fact. But one verifying a libel as attorney in fact need not show his authority at the time. It is enough to show it when called in question. Martin v. Walker (D. C. 1850) Fed. Cas. No. 9,170.

373. **Exhibits.**—Where the cause of action arises from the violation of a written contract of affreightment the libel should so state, and the contract should be annexed to the libel, or a legal excuse for its absence given. Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co. (D. C. 1882) 14 Fed. 699.

In an action on a charter party, a copy thereof should be filed with the libel. Card v. Hines (D. C. 1887) 33 Fed. 189.

Where an account for labor done on a vessel and for materials furnished is attached to a libel against the vessel, the court could look to the items of the account to determine whether they constituted a lien on the vessel. The Southron v. O'Riley (1852) 21 Ala. 228.

374. **Issues, proof, and variance.**—The proctor of the libelant, having given notice to the respondent that he should ask only for a decree for costs, cannot at the hearing proceed for damages. Angell v. Bennett (D. C. 1844) Fed. Cas. No. 387.

Where a motion to dismiss a libel is heard without objection, and the charter party is presented to the court and commented on by counsel, no question being raised as to its terms, and is also referred to in the answers to the interrogatories, libelants are not entitled to have the question determined according to the allegations of the libel, rather than the provisions of the charter party. The Serapis (D. C. 1888) 36 Fed. 707.

375. —— **Submission of cause on pleadings.**—Upon the submission of the cause on the pleadings, averments of new matter in the answer, or matters alleged in the libel and denied generally, must be wholly disregarded, as unproved, except in so far as they may be admissions against interest. North American Dredging & Improvement Co. v. The River Mersey (D. C. 1892) 48 Fed. 686.

376. —— **Pleading and proof.**—The proofs of the respective parties in admiralty must conform to the issues ten-

dered by their pleadings. Second Pool Coal Co. v. People's Coal Co. (1911) 188 Fed. 892, 110 C. C. A. 526 (affirming judgment People's Coal Co. v. Second Pool Coal Co. [D. C. 1910] 181 Fed. 609, writ of certiorari denied Second Pool Coal Co. v. People's Coal Co. [1911] 32 Sup. Ct. 526, 223 U. S. 727, 56 L. Ed. 632); Barber v. Lockwood (D. C. 1905) 134 Fed. 985. See, also, Campbell v. The Uncle Sam (C. C. 1856) Fed. Cas. No. 2,372. The court will not assume power to coerce parties into issues not raised in the pleadings filed in the cause. The Oriole (D. C. 1844) Fed. Cas. No. 10,573.

Proof of facts not put in contestation by the pleadings, and allegations of facts not established by proofs, will both be rejected. The Sarah Ann (C. C. 1835) Fed. Cas. No. 12,342; Kramme v. The New England (D. C. 1854) Fed. Cas. No. 7,930.

Allegations in a libel, neither admitted nor denied by the claimant, are not to be taken as true, but must be proved. Clarke v. The Dodge Healy (C. C. 1827) Fed. Cas. No. 2,849. Where, in case of a joint tort, separate answers are put in, each respondent must rely for his defense upon his own answer and the proofs. Gardner v. Bibbins (D. C. 1833) Fed. Cas. No. 5,222.

A steamer was navigating a channel with barges lashed to each side of her, and a schooner was outsailing and passing her. The steamer ported her helm to avoid a shoal, and thus brought one of the barges across the schooner's track. The libel on behalf of the barge did not mention the steamer's change of course, but only the schooner's fault in keeping hers. The answer on behalf of the schooner averred the steamer's porting her helm. Held, that the state of the pleadings did not preclude a recovery by the barge. The Iris (D. C. 1870) Fed. Cas. No. 7,062.

Where a libel alleged only that defendant steamer ported when she should have starboarded, and the evidence for the steamer showed that she was running at too great speed in a fog, and had no lookout forward, libelant could rely on these faults as well as on those which he had alleged. The Cambridge (D. C. 1871) Fed. Cas. No. 2,334.

Where the libel, in a suit by a marine insurance company against carriers for loss of insured goods, charged negligence, and the answer denied it, and averred that the stranding of the boat occurred under such circumstances as negatived the charge of negligence, and no proof was offered by either party on this point, or that there was any fraud or mistake in the settlement, the libelant could not recover on the claim that the loss was not covered by the policy. The Sidney (D. C. 1885) 23 Fed. 88, appeal dismissed The Sydney & William Worden v. Providence Washington Ins. Co. (1891) 11 Sup. Ct. 620, 139 U. S. 331, 35 L. Ed. 177.

Where the defense in the answer, in a cause of collision between a schooner and a steamboat, rested on faults imputed to the schooner in holding her course across the bows of the steamer under circumstances in which it was her duty to have gone about, and the defense set up by the proofs rested upon faults committed on the part of the schooner in an attempt to come about abruptly, and falling off or drifting in the attempt against the steamer, the latter defense was a deviation from the answer, and that, under the pleadings, the claimants were not entitled to the benefit of it. The Washington Irving (D. C. 1848) Fed. Cas. No. 17,243.

In an action in admiralty by the owner of a vessel for damages thereto caused by a bridge built over navigable waters under authority of an act of the legislature, but not in compliance therewith, it must be alleged and proven that the injury was caused by such deviation from the terms of the act. Oregon City Transp. Co. v. Columbia St. Bridge Co. (D. C. 1892) 53 Fed. 549.

A master of a vessel, as libelant, cannot recover damages for loss to the owners from the cancellation of a charter party, where the libel does not claim damages therefor, or mention the charter party. Harrison v. Hughes (D. C. 1903) 119 Fed. 997.

On a libel to recover a balance due for repairs made to a tug under a written contract, a cross claim for damages founded upon the claimed breach of extrinsic oral understandings or agreements cannot be considered, when neither the answer nor the cross libel sets up that the writing did not embody the entire contract. Any evidence which may have crept into the case in respect to such supposed oral agreements is irrelevant and inadmissible. The Bertha (1898) 91 Fed. 272, 33 C. C. A. 509.

377. —— **Evidence admissible under pleadings.**—The rules of pleading in admiralty must be strictly complied with. The evidence must be confined to the points put in issue by the allegations of the libel and denial of the answer. McKinlay v. Morrish (1858) 21 How. 343, 347, 16 L. Ed. 100.

No evidence is properly admissible but what applies to matters in issue between the parties, and nothing is in issue but what is averred on one side and denied by the other. The Boston (C. C. 1833) Fed. Cas. No. 1,673; Campbell v. The Uncle Sam (C. C. 1856) Fed. Cas. No. 2,372; Davis v. Leslie (D. C. 1848) Fed. Cas. No. 3,639; Jenks v. Lewis (D. C. 1824) Fed. Cas. No. 7,280; The Morton (C. C.) Fed. Cas. No. 9,864; Orne v. Townsend (C. C. 1827) Fed. Cas. No. 10,583; The Rhode Island (D. C. 1847)

Fed. Cas. No. 11,745; Soule v. Rodocanachi (D. C. 1855) Fed. Cas. No. 13,178; The Starlight (D. C. 1874) Fed. Cas. No. 13,310; Turner v. The Black Warrior (C. C. 1856) Fed. Cas. No. 14,253; The William Harris (D. C. 1837) Fed. Cas. No. 17,695. But see The Cambridge (D. C. 1871) Fed. Cas. No. 2,334.

On a libel to recover a balance due for repairs made to a tug under a written contract, a cross claim for damages founded upon the claimed breach of extrinsic oral understandings or agreements cannot be considered, when neither the answer nor the cross libel sets up that the writing did not embody the entire contract. Any evidence which may have crept into the case in respect to such supposed oral agreements is irrelevant and inadmissible. The Bertha (1898) 91 Fed. 272, 33 C. C. A. 509.

Rule 51 provides that, when the answer alleges new facts, these shall be considered as denied, and no replication shall be allowed. Where the obligation sued on was entered into by the master, and the answer alleges that it is governed by the laws of England because payable there, that thereunder it is void unless specially authorized by the owners, and that "no such authority was obtained, or even asked for," claimants cannot object to the introduction of the charter party to prove such authorization, even though no such issue was raised by the libel. Moore v. The Robilant (C. C. 1890) 42 Fed. 162.

An allegation of a combination between the master and mate to illtreat and oppress a seaman is not supported by proof that each of them separately assaulted and illtreated him, without some presumptive evidence of concert between them. Jenks v. Lewis (D. C. 1824) Fed. Cas. No. 7,280.

An allegation in the answer that all the parties are foreigners, and the ship is foreign property, must be proved by the respondent or claimant. The Napoleon (D. C. 1845) Fed. Cas. No. 10,015.

In a proceeding in rem for wages for services as engineer of a steam tug, where it appears that the wages were earned, a defense in the nature of a counterclaim, based on evidence that libelant and another undertook to make certain repairs on the boat while laid up, and had been overpaid certain sums beyond the work and materials done and furnished, cannot be sustained if not specially pleaded. White v. The Ranier (D. C. 1891) 45 Fed. 773.

Under a plea that libelant, a pilot, after signaling an offer of services, hauled down the signal and sailed away, respondent could not prove that other pilots offered their services at the same time, and that the vessel would have been seriously inconvenienced by taking libelant. Marshall v. The Earnwell (D. C. 1895) 68 Fed. 228.

A charter party under seal, made out in the name of a person who acted merely as agent for another, without stating that fact, is admissible in evidence on a libel for breach of contract brought by the principal. Talbot v. Wakeman (D. C. 1860) Fed. Cas. Nos. 13,731, 13,731a.

In a suit against a tug to recover for an injury to her tow and the loss of her cargo, where the respondent brought in the owner of a steamer, alleging that the injury was caused by the swell made by such steamer, the petitioner is not limited to proof that the swell was caused by the particular vessel named; but it is sufficient to charge the owner with liability if it is shown that it was caused by one of its vessels, although the particular boat is not identified. The Gladys (1908) 159 Fed. 698, 86 C. C. A. 566.

There is no rigid rule which prevents libelant, alleging one fault, recovering on proof of a different fault. Libelant may rely upon improper speed in fog, shown by defendant's evidence, although he alleged only improper steering. The Cambridge (D. C. 1871) Fed. Cas. No. 2,334.

Where the tow injured in a collision libels both the colliding vessel and her tug, the former may take advantage of the negligence of the tug in not carrying lights, though not set up in her answer. The Pleasant Valley (D. C. 1874) Fed. Cas. No. 11,226.

Where the answer admits that the vessel and cargo "were sunk and lost," libelant may prove value without showing that she could not be raised. The Metis (D. C. 1871) Fed. Cas. No. 9,500.

In the case of a collision between a steamer and sail vessel, fault of the latter in an attempt to come about abruptly, and falling off and drifting against the steamer, is not admissible under an answer alleging fault in holding her course when she should have come about. The Washington Irving (D. C. 1848) Fed. Cas. No. 17,243.

A vessel negligently running into another, which is lying disabled, may be held liable, although the precise manner of the collision is not proved as alleged. The Martin Wyncoop (C. C. 1872) Fed. Cas. No. 9,177.

A steamer was navigating a channel with barges lashed to each side of her, and a schooner was outsailing and passing her. The steamer ported her helm to avoid a shoal, and thus brought one of the barges across the schooner's track. The libel on behalf of the barge did not mention the steamer's change of course, but only the schooner's fault in keeping hers. The answer on behalf of the schooner averred the steamer's porting her helm. Held, that the state of the pleadings did not preclude a re-

covery by the barge. The Iris (D. C. 1870) Fed. Cas. No. 7,062.

The defense that a lien has been lost by laches, if not pleaded, must be excluded. The Shady Side (D. C. 1884) 23 Fed. 731, modifying The Francesca T. (D. C. 1877) Fed. Cas. No. 5,030.

When a penalty is demanded against a steam vessel upon grounds not set out in the libel, the demand will be ignored. The Pope Catlin (D. C. 1887) 31 Fed. 408.

In a libel in rem by laborers claiming a lien upon a vessel for wages, if the libelants claim as mariners they can recover only in that capacity, and a claim against the vessel as salvors or lightermen cnnot be considered. The Sarah E. Kennedy (D. C. 1886) 29 Fed. 264.

Evidence will not be admitted to carry a seaman's claim for wages back of the date named in the libel, unless the libel has been previously amended. Pinkham v. Rutan (D. C. 1887) 31 Fed. 496.

A libel in personam brought solely for an accounting by one of four part owners against only two others (all claiming by an equitable title) cannot be maintained as a suit for wages, though the libelant rendered services on board the vessel as ship's carpenter. Kellum v. Emerson (C. C. 1854) Fed. Cas. No. 7,669.

Evidence will not be admitted to carry a seaman's claim for wages back of the date named in the libel, unless the libel has been previously amended. Pinkham v. Rutan (D. C. 1887) 31 Fed. 496.

378. —— **Matters put in issue by general issue or replication.**—Evidence of special damage may be given under a general allegation. West v. The Uncle Sam (C. C. 1859) Fed. Cas. No. 17,427.

In answer to a libel for wages, the claimants set up a stipulation in the shipping articles in bar of the recovery. The libelant served a replication in the usual form, but contended upon the trial that the stipulation relied upon was void. Held that, so far as the claim to treat the stipulation as void might rest upon any matters of fact outside the stipulation itself, the question was not raised by the general replication; but the libelant ought, either by an amendment of the libel or by a special replication, to have introduced into the pleadings averments contesting or avoiding the apparent bar contained in the stipulation. The question whether the stipulation was not void in point of law, in itself considered, and apart from any extraneous facts, might be raised on the general replication, and should be considered as if it had arisen upon demurrer or exception to the answer. The Atlantic (D. C. 1849) Fed. Cas. No. 620.

379. —— **Variance in general.**—In admiralty, technical variances or departures in pleadings will not be considered. Dupont de Nemours v. Vance (1856) 19 How. 162, 173, 15 L. Ed. 584; The Prudence (1913) 204 Fed. 66, 122 C. C. A. 380 (affirming decree [D. C. 1912] 197 Fed. 479); Crawford v. The William Penn (C. C. 1819) Fed. Cas. No. 3,373; The Clement (C. C. 1855) Fed. Cas. No. 2,879; West v. The Uncle Sam (C. C. 1859) Fed. Cas. No. 17,427; West v. Silver Wire & Skirt Mfg. Co. (C. C. 1867) Fed. Cas. No. 17,425; The Cambridge (D. C. 1871) Fed. Cas. No. 2,334.

Parties to suits in admiralty must be bound by their allegations and proofs, and the former, to be effectual, must be sustained by the latter, or the libel will be dismissed. Kramme v. The New England (D. C. 1854) Fed. Cas. No. 7,930.

Where a libel against the Chicago Sanitary District to recover damages to shipping by reason of respondent's introduction of a current in the Chicago river was predicated on the introduction of any current therein which would render navigation more difficult and expensive than it previously was, libelants were not entitled to recover on account of the rate of the current on the date the damages occurred. Corrigan Transit Co. v. Sanitary Dist. of Chicago (1905) 137 Fed. 851, 70 C. C. A. 381, affirming decree Corrigan Transp. Co. v. Sanitary Dist. of Chicago (D. C. 1903) 125 Fed. 611.

In a suit in admiralty to recover for the loss of a tow by collision with a sunken wreck at night, in which the tug and the owner of the wreck are both made defendants, and charged with fault, the libelant is not precluded from recovering against the tug alone because the libel charges the owner of the wreck with a fault which, if proved, would exonerate the tug, which charge is admitted by the answer of the tug, but is not sustained by the evidence; the practice in admiralty being to bring all parties before the court, and to determine the controversy on the merits as it appears from the proof, regardless of technicalities of pleading. The Volunteer (1906) 149 Fed. 723, 79 C. C. A. 429.

Where the libel in a suit to recover for injury to a vessel alleged to have been caused by the improper navigation of another vessel correctly states the essential facts by reason of which the injury occurred, a failure to give the proper interpretation of such facts, or the correct scientific reason for the result, will not constitute a material variance between the allegations and proofs. Kelley Island Lime & Transport Co. v. City of Cleveland (D. C. 1906) 144 Fed. 207, decree modified Great Lakes Towing Co. v.

Kelley Island Lime and Transport Co. (1910) 176 Fed. 492, 100 C. C. A. 108.

380. —— **Variance in actions on contracts.**—A libel on a bottomry bond claimed the freight as hypothecated contrary to the tenor of the bond. The bond, made part of the libel and referred to as the foundation of the hypothecation, showed that the freight was not hypothecated, and could not be demanded. Held, that the variance was immaterial. Crawford v. The William Penn (C. C. 1819) Fed. Cas. No. 3,373.

Variations between the contract sued on and the pleadings and proofs, although sufficient in law to defeat the action, will not be so regarded in admiralty, in a case where substantial justice can be done. Talbot v. Wakeman (D. C. 1860) Fed. Cas. No. 13,-731a.

When the allegations in an answer are that the owners leased certain boats to a corporation for the term of three years, while the proof disclosed separate charter parties for each year, including the one in question, there is not such a variance as will be regarded. The Gen. Meade (C. C. 1884) 20 Fed. 923.

Where a libel for breach of charter party alleges that respondent is the sole owner of the ship, and the charter party filed therewith is made by certain agents of the owners, a judgment on demurrer that the libel is not defective for the apparent variance does not preclude respondent from showing by plea the fact that there are other owners, necessary parties. The respondent is not precluded from showing in defense that there are other owners by the fact that the certificate of registry, dated April 20, 1879, delivered by the master for entry in the custom house, showed respondent as sole owner; such certificate not being a document of title, and respondent not intending thereby to mislead libelant. Card v. Hines (D. C. 1888) 35 Fed. 598. But a libel which sets up an express contract as the cause of suit is not sustained by proof of a naked tort. Hays v. Pittsburgh, G. & B. Packet Co. (D. C. 1888) 33 Fed. 552.

A stevedore's libel for services in loading a vessel alleged that they were rendered on the master's request, and that, therefore, there became due the sum demanded. There was no allegation that the services were reasonably worth that sum. Held, that this language did not necessarily import an implied contract and a claim on quantum meruit, and there was no variance when the proof showed an express contract. Young v. The Kendal (D. C. 1893) 56 Fed. 237.

381. —— **Variance as to names.**—Shipping articles signed by "William Henderson," as cook and stewart, are admissible on a libel for wages by "William Henry." Henry v. Curry (D. C. 1849) Fed. Cas. No. 6,381.

382. —— **Variance in proceedings to enforce forfeiture.**—A libel charging the seizure to have been made on water, when it was made on land, will not support a verdict and judgment thereon, but must be amended or dismissed. The Sarah (1823) 21 U. S. (8 Wheat.) 394, 5 L. Ed. 644.

When a libel is filed claiming a forfeiture of a vessel, and the facts do not authorize the forfeiture alleged, but show an offense against other provisions of the same law under which the forfeiture is alleged to have accrued, the libel will be dismissed. U. S. v. The Hunter (C. C. 1806) Fed. Cas. No. 15,428.

383. —— **Objections to variance and waiver thereof.**—In order to entitle either party to the benefit of a variance, objection must be taken when the evidence is offered at the trial, and it comes too late if made after the evidence is closed and the cause is under argument. The evidence must be material. Dunstan v. The R. R. Kirkland (D. C. 1879) Fed. Cas. No. 4,-181.

384. —— **Prayer for relief and shaping decree.**—Under a prayer for general relief, it is competent for the admiralty court to pass such decree as may be required by the proof, although not fully and precisely stated in the libel. Sonsmith v. The J. P. Donaldson (C. C. 1884) 21 Fed. 671, certified and determined The J. P. Donaldson (1897) 17 Sup. Ct. 951, 167 U. S. 599, 42 L. Ed. 292.

The court is not limited to the precise amount claimed in the libel, where it appears by the proof that a larger sum is due, but under the prayer for further relief may decree such larger sum if justice requires it. Pratt v. Thomas (D. C. 1837) Fed. Cas. No. 11,377.

Where a specific relief is asked for, even though there be a prayer for general relief, the circuit court cannot grant a relief which is inconsistent with, or entirely different from, that which is prayed. Wilson v. Graham (C. C. 1821) Fed. Cas. No. 17,804.

385. **Motions—Matters determined on motion.**—The name of any party who has lost his interest in the suit can, on a proper application, be stricken from the record. The Falcon (C. C. 1859) Fed. Cas. No. 4,618.

A motion by libelants to strike from the record as a party libelant the name of a person who is a mere agent will be granted where it does not appear that respondent will be deprived of any means of defense thereby. Thompson v. The Jachin (D. C. 1862) Fed. Cas. No. 13,959.

Where part of the owners of a vessel

brought an action in the name of all, held, that the nonconsenting owners could not have their names stricken out, but were entitled to have the suit stayed until they were indemnified for costs. Richmond v. New Bedford Copper Co. (D. C. 1874) Fed. Cas. No. 11,-800.

Impertinent and irrelevant allegations in an answer will be stricken out on motion. The Gustavia (D. C. 1830) Fed. Cas. No. 5,876.

Property will not be discharged from the custody of the court on motion supported by affidavits, on the ground that it is the property of the United States. This question should be raised by claim and answer. Cartwright v. The Othello (D. C. 1866) Fed. Cas. No. 2,483.

The question whether the custody by a sheriff of a vessel under a writ alleged to be void is such as to prevent a court of admiralty from acquiring jurisdiction of the vessel cannot be determined on motion. The Circassian (D. C. 1866, 1867) Fed. Cas. No. 2,721.

Questions as to the validity of bottomry claims will not be entertained on motion and notice. French v. The Superb (D. C. 1851) Fed. Cas. No. 5,103a.

386. —— **Time of making motion.**—A motion to set aside an arrest for irregularity in libelant's proceedings will not be denied of course merely because not made at the earliest practicable day; it not being within rule 25. Martin v. Walker (D. C. 1850) Fed. Cas. No. 9,170.

387. —— **Affidavits.**—The strict rules of the common law are not applicable to admiralty practice. The proctor is, in many cases, in point of fact, dominus litis, clothed with all the authority of the party himself. Without regard to that distinction, courts proceeding according to the civil law admit proctors to exercise all the functions of attorneys at law. Affidavits on motions incidental to a suit, when the facts cannot be supposed to be peculiarly within the knowledge of a party, may be made by his attorneys and proctors. A proctor may make affidavit on motion to file additional security for costs. The Harriet (D. C. 1845) Fed. Cas. 6,096.

A motion to discharge respondent from arrest on the ground that the libelant has no legal cause of action against him will not be granted where the affidavits read upon the motion in behalf of the respective parties are contradictory as to the merits of the cause. Wicks v. Ellis (D. C. 1849) Fed. Cas. No. 17,614.

388. —— **Successive motions.**—A party seeking to set aside proceedings against him must embody all objections presumably known to him at the time in one application. A second application to vacate proceedings upon a libel cannot be sustained on the ground that the libel was not verified by oath, and that no jurat was annexed thereto, the presumption being that these facts were known to counsel, or would have been known to him in the exercise of reasonable diligence at the time of making the first motion. Nelson v. Bell (D. C. 1851) Fed. Cas No. 10,101a.

(I) Evidence, and taking and filing proofs

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389. **Rules of evidence and mode of proof in general—Taking oral testimony.**—Oral testimony in admiralty cases should not be taken down by questions and answers, but in the narrative form. The Syracuse (C. C. 1868) Fed. Cas. No. 13,718.

390. —— **Reception of evidence and taking testimony after judgment.**—On the hearing of a cause, the claimant, a nonresident, failed to appear, and the libelant's evidence was taken, and the case adjourned. On the adjourned day the claimant failed to appear, and his proctor failed to give a reason for his absence, and the case proceeded to judgment for libelant. Held that, where it appeared that claimant was prevented by sickness from attending or advising with his proctor, it was proper to permit him to take evidence pending an appeal. The Glide (1895) 68 Fed. 719, 15 C. C. A. 627, cause remanded for new trial to district court (1896) 72 Fed. 200, 18 C. C. A. 504.

In the trial of an admiralty cause, where the testimony is taken before

the court, all testimony offered, although objected to, should be admitted, subject to the objection for the benefit of the appellate court, unless so utterly irrelevant or immaterial that there can be no question of its inadmissibility. Minnesota S. S. Co. v. Lehigh Valley Transp. Co. (1904) 129 Fed. 22, 63 C. C. A. 672.

Notwithstanding an order of court closing all testimony in a cause after a limited time under a commission, the court will enlarge it upon proof of newly-discovered evidence which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof. The Ruby (C. C. 1830) Fed. Cas. No. 12,103.

The court may receive evidence offered by defendant's counsel, where defendant was absent at the time of hearing, and, through ignorance, failed to answer. The David Pratt (D. C. 1839) Fed. Cas. No. 3,597.

391. —— **Competency of witness.**—An objection that a witness in admiralty is interested cannot be made after the hearing. Nelson v. Woodruff (1861) 66 U. S. (1 Black) 156, 17 L. Ed. 97.

When a witness is examined de bene esse out of court, in an admiralty cause, by the claimants, and is cross-examined by the libelant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness because interested in the cause, and exclude his testimony given in chief for the claimants. The Osceola (D. C. 1846) Fed. Cas. No. 10,602.

The court will receive the testimony of the libelants themselves if the respondent's counsel do not object. Ferrara v. The Talent (D. C. 1838) Fed. Cas. No. 4,745.

The master of a vessel who hypothecated her on bottomry is a competent witness in favor of the holder of the bottomry, particularly if released by him. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163. He is also a competent witness for the owner in a suit in rem for wages by one of the ship's company. Though the master has a contingent interest in the result of the suit, his interest lies in casting the debt upon the boat. The Hudson (D. C. 1846) Fed. Cas. No. 6,831.

The federal courts will, upon motion, and for good cause shown, authorize the name of a party to be stricken from the pleadings; and he can then be examined as a witness, subject to all legal objections. The Osceola (D. C. 1846) Fed. Cas. No. 10,602.

In the admiralty the state laws of evidence are not applied, and interested witnesses are excluded, except in certain cases of necessity. The Australia (D. C. 1859) Fed. Cas. No. 667; The Independence (C. C. 1855) Fed. Cas. No. 7,014; The William Jarvis (D. C. 1859) Fed. Cas. No. 17,697.

392. —— **Production of books and papers.**—A proceeding in rem is not within the statute of 1789, which authorizes an order to produce books and writings on the trial of actions at law. U. S. v. Twenty-Eight Packages of Pins (1833) Fed. Cas. No. 16,561.

393. **Presumptions in general.**—A neglect to state material facts within the knowledge of the party will be taken most unfavorably against him. Poole v. The Washington (D. C. 1851) Fed. Cas. No. 11,271.

In a libel in admiralty to recover for personal injuries, where the evidence is such as to leave the circumstances and cause of the injury so uncertain that the court can give no logical reason for determining the issue in libelant's favor, the presumption that the person charged with the tort is not guilty must be maintained. The Meta (D. C. 1898) 88 Fed. 21.

394. —— **Presumptions in collision cases.**—See Alexandre v. Machan (1893) 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84 (affirming [D. C. 1883] 15 Fed. 624; [C. C. 1888] 35 Fed. 604); The Oregon (1895) 15 Sup. Ct. 804, 158 U. S. 186, 39 L. Ed. 943; The Olympia (1894) 61 Fed. 120, 9 C. C. A. 393; The Chattahoochee (1896) 74 Fed. 899, 21 C. C. A. 162; The D. H. Miller (1896) 76 Fed. 877, 22 C. C. A. 597; The Admiral Schley (1904) 131 Fed. 433, 65 C. C. A. 417 (affirming [D. C. 1902] 115 Fed. 378, affirmed in [1905] 142 Fed. 64, 73 C. C. A. 250); The Old Point Comfort (1911) 187 Fed. 765, 109 C. C. A. 513; Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794; The Bridgeport (C. C. 1870) Fed. Cas. No. 1,861; The Tillie (C. C. 1876) Fed. Cas. No. 14,049 (affirming [D. C. 1874] Fed. Cas. No. 14,048); Clapp v. Young (D. C. 1843) Fed. Cas. No. 2,786; Martinez v. The Anglo-Norman (D. C. 1854) Fed. Cas. No. 9,174; The Ville Du Havre (D. C. 1874) Fed. Cas. No. 16,943; Leonard v. Whitwill (D. C. 1879) Fed. Cas. No. 8,261; Dougherty v. The Franconia (D. C. 1880) 3 Fed. 397; The Sandringham (D. C. 1882) 10 Fed. 556; The Fred. M. Laurence (D. C. 1883) 15 Fed. 635; The Leland (D. C. 1884) 19 Fed. 771; The Sicilian Prince (D. C. 1904) 128 Fed. 133 (affirmed in [1905] 144 Fed. 951, 75 C. C. A. 677); The Eagle Wing (D. C. 1905) 135 Fed. 826; Palmer v. Merchants' & Miners' Transp. Co. (D. C. 1907) 154 Fed. 683; The Europe (D. C. 1909) 175 Fed. 596; The Protector (D. C. 1909) 176 Fed. 171; The Prudence (D. C. 1911) 191 Fed. 993; Blanchard v. New Jersey Steamboat Co. (1874) 59 N. Y. 292; Union S. S. Co. v. Nottingham (Va. 1866) 17 Grat. 115, 91 Am. Dec. 378.

395. **Burden of proof in general.**—Where the burden of proof is thrown on the claimant in a revenue case by a prima facie case on the part of the

prosecutor, and the claimant fails to explain the difficulties of the case by the production of papers and other evidence in his possession or under his control, condemnation follows. The Luminary (1823) 21 U. S. (8 Wheat.) 407, 5 L. Ed. 647.

As to all facts denied in a suit for seaman's wages, the burden of proof is on the plaintiff, except in the case of the shipping paper and log book, as provided for in the statute of July 20, 1790. Orne v. Townsend (C. C. 1827) Fed. Cas. No. 10,583.

As Act Feb. 28, 1803, relative to the discharge of seamen, provides that the application for the discharge shall be made by both the master and mariner, the court cannot, in a libel by a seaman for wages, assume that the assent of the libelant to his discharge was given merely upon the fact of his being left in the hospital in his then maimed condition, nor upon the assertion of the person acting for the consul that the libelant was discharged from the ship in accordance with the laws of the United States. The Atlantic (D. C. 1849) Fed. Cas. No. 620.

An admission, in an answer to a libel for seaman's wages, that the seaman shipped for the voyage and performed the services, will entitle him to recover without evidence, though defenses are set up. The Belle (D. C. 1872) Fed. Cas. No. 1,271.

If, on the termination of a voyage, the master admits verbally that a balance of wages is due a mariner, and when sued therefor alleges in his answer that he has paid the amount in full to him, it devolves upon the respondent to prove the payment. The Napoleon (D. C. 1845) Fed. Cas. No. 10,015.

Where the seaman shows himself entitled to a certain amount of wages, it is for the master to show payment in whole or in part; and where the testimony in conflicting and equally balanced on the question of payments claimed by the master to have been made, but of which there is no corroborative evidence, and nothing to justify rejecting the seaman's evidence, the case must be decided against the party on whom rests the burden of proof and duty of making out his case affirmatively. The Fritheoff (D. C. 1881) 14 Fed. 302.

Where a libel, based on a draft, by which the master undertook to pledge unearned freight for money borrowed in a foreign port, alleges the necessity of the vessel as a basis for the loan, and such necessity is denied by the answer, the burden is on libelant to show the necessity. George W. Bush & Sons Co. v. Fitzpatrick (D. C. 1896) 73 Fed. 501.

On a libel in rem for money due on a contract for repairs, where it is admitted that the labor and materials set forth in the bill of particulars were furnished, and that the job was well done, the agent of the owner having signed certificates as to the correctness of each day's statement, and its conformity with the contract, the burden of proof is on the owner to show any errors in the bill of particulars. Marine Railroad, Shipbuilding & Coal Co. v. The Mattano (1892) 52 Fed. 876, 3 C. C. A. 325, 8 U. S. App. 111.

In cases of tort, if the injury complained of is admitted by the answer, the burden of proof is cast upon the defense to show affirmatively the matters of justification or defense set up. Treadwell v. Joseph (C. C. 1833) Fed. Cas. No. 14,157; The Rhode Island (D. C. 1847) Fed. Cas. No. 11,745.

Where a party seeks to recover for lighterage service upon a contract therefor, the burden of proof is upon him to excuse himself for the want of that dispatch and diligence which he was ordinarily bound to exercise. The Nadia (C. C. 1883) 18 Fed. 729.

The defense of contributory negligence on the part of libelants, when relied upon, must be affirmatively proven by a preponderance of evidence. The Nellie (D. C. 1904) 130 Fed. 213.

396. —— **Burden of proof in collision cases.**—See St. Louis & M. V. T. Co. v. United States (1898) 33 Ct. Cl. 251 (affirmed [1902] 22 Sup. Ct. 359, 184 U. S. 247, 46 L. Ed. 520); Barbour v. Wioma (1893) 55 Fed. 338, 5 C. C. A. 122; The Gypsum Prince (1895) 67 Fed. 612, 14 C. C. A. 573; The Gladiator (1897) 79 Fed. 445, 25 C. C. A. 32; Hawgood Transit Co. v. Mesaba S. S. Co. (1909) 166 Fed. 697, 92 C. C. A. 369; California Navigation & Improvement Co. v. Union Transp. Co. (1910) 176 Fed. 533, 100 C. C. A. 21; The Edmund Moran (1910) 180 Fed. 700, 104 C. C. A. 552, affirming decree (D. C. 1909) 173 Fed. 109; The Ashbourne (1910) 181 Fed. 815, 104 C. C. A. 325; The Charles C. Lister (1910) 182 Fed. 988, 105 C. C. A. 194 (modifying decree [D. C. 1909] 174 Fed. 288); Philadelphia & R. Ry. Co. v. River & Harbor Imp. Co. (1910) 183 Fed. 109, 105 C. C. A. 401 (reversing decree River & Harbor Improvement Co. v. Philadelphia & R. Ry. Co. [D. C. 1910] 180 Fed. 954); The Continental (C. C. 1870) Fed. Cas. No. 3,141; Dowdall v. Pennsylvania R. Co. (C. C. 1876) Fed. Cas. No. 4,038; The Wolverton (C. C. 1882) 13 Fed. 44; The Amanda Powell (C. C. 1882) 14 Fed. 486; Corks v. The Belle (D. C. 1846) Fed. Cas. No. 3,231a; Saunders v. The Hanover (D. C. 1857) Fed. Cas. No. 12,374; The Mayflower (D. C. 1872) Fed. Cas. No. 9,345; Bergen v. The Joseph Stickney (D. C. 1880) 1 Fed. 624; The Bessie Morris (D. C. 1882) 13 Fed. 397; The Maryland (D. C. 1882) 14 Fed. 367; The David Dows (D. C. 1883) 16 Fed. 154; The

Joseph W. Gould (D. C. 1884) 19 Fed. 785; Morten v. Five Canal Boats (D. C. 1885) 24 Fed. 500; The William Churchill (D. C. 1900) 103 Fed. 690; The Lansdowne (D. C. 1900) 105 Fed. 436; The Drumcraig (D. C. 1904) 133 Fed. 804; The Eagle Wing (D. C. 1905) 135 Fed. 826; The Georgetown (D. C. 1905) 135 Fed. 854; The Oregon (D. C. 1910) 180 Fed. 299; The Saratoga (D. C. 1910) 180 Fed. 620; The Haida (D. C. 1911) 191 Fed. 623 (decree affirmed [1912] 196 Fed. 1005, 115 C. C. A. 376); The North Point (D. C. 1913) 205 Fed. 958; Griswold v. Sharpe (1852) 2 Cal. 17; Drew v. The Chesapeake (Mich. 1845) 2 Doug. 33; Riley v. Louisville (La. 1843) 5 Rob. 184.

397. Admissibility of evidence in general.—A court of admiralty, being judge both of the law and fact, is not confined to the strict rules of the common law, in respect to the admission of evidence. Elwell v. Martin (D. C. 1824) Fed. Cas. No. 4,425; The J. F. Spencer (D. C. 1869) Fed. Cas. No. 7,315.

Good faith in the prosecution of claims forbids that vague or loose estimates of damage should be received where proper evidence has been voluntarily parted with by the suitor. Estimates may be received, however, where the proper evidence has been parted with through misapprehension as to the extent of the suitor's rights, though in such cases he should not recover beyond the lowest estimates of the most credible witnesses. Wolff v. The Vaderland (D. C. 1883) 18 Fed. 733.

After a vessel libeled for collision had been released on stipulation, intervening libels were filed, on which a trial was had, and a judgment rendered for interveners, which was reversed on appeal, on the ground that the liability of the claimant on the stipulation could not be increased by the subsequent filing of new claims, and that, as the vessel had been discharged, the court could not adjudicate such claims. Held, that under such decision, which, in effect, determined that the vessel was not a party to the judgment, after new process had been issued on the intervening petitions, and the vessel again taken into custody, the parties were not the same, so as to render testimony taken on the former trial admissible on a second trial. The Oregon (D. C. 1898) 89 Fed. 520.

398. —— Cumulative evidence.—Cumulative testimony for salvors is admissible. Jones v. The Richmond (D. C. 1858) Fed. Cas. No. 7,492.

399. —— Declarations and admissions.—In the admiralty, the declarations of the master concerning the contract of the seamen are admissible in a suit against the owners, though not strictly part of the res gestæ. The Enterprise (C. C. 1855) Fed. Cas. No. 4,497.

Statements made by the master of a vessel, after a collision, as to the manner of its occurrence, are receivable as admissions against the owners in an action against them for the collision. The Severn (D. C. 1902) 113 Fed. 578.

A tender by respondents on libel for services as stewardess of a ship is an admission of ownership of the vessel. Jones v. Crowell (D. C. 1854) Fed. Cas. No. 7,459.

A statement by the advocate of the party, in open court, the day after the hearing, made by authority of the party, may be taken as an admission in contradiction of the evidence submitted by him. The Harry (D. C. 1878) Fed. Cas. No. 6,147.

The admissions of the owner of a boat, made after the boat was placed in the custody of the law, and had been ordered to be sold, are not competent to establish demands made against the proceeds of the sale of the boat. Renshaw v. The Pawnee (1854) 19 Mo. 532.

400. —— Admissibility and proof of documents.—The charges made on the shipping papers of advances to the seamen in the course of the voyage are not evidence until verified by the suppletory oath of the master. The David Pratt (D. C. 1839) Fed. Cas. No. 3,597.

Courts of admiralty, where justice requires it, may take notice of matters not strictly proved according to the rule of the common-law courts, and, where points arise incidentally and unexpectedly upon the trial, the evidence of which is found in commercial documents executed abroad, such documents may be considered without strict proof when the res gestæ afford the highest practical guaranties for their authenticity and correctness. But this practice should not be extended so as to justify any laches in obtaining full proof, the necessity of which could have been reasonably foreseen. The Boskenna Bay (D. C. 1884) 22 Fed. 662.

The official certificate of a notary proves the making of a marine protest, and what it contains. It is competent evidence in a court of admiralty, and the examination of the notary by commission, in order to prove the protest, is not necessary. The Gallego (D. C. 1887) 30 Fed. 271.

An entry made in a vessel's log with full knowledge, or opportunity for ascertaining the truth, must be accepted as the truth when it tells against the party making it. The Newfoundland (D. C. 1898) 89 Fed. 510, reversed (1899) 20 Sup. Ct. 274, 176 U. S. 97, 44 L. Ed. 386.

On a libel charging a vessel with having violated the embargo acts in departing from a port of the United States, and proceeding to Antigua, it appeared that she was at Camden, N. C., in December and January, and was

in the port of Norfolk in April. Held, that the report and manifest of her cargo, with the affidavit made by the captain before the collector at Norfolk, is admissible to show that she took in her cargo at Antigua. U. S. v. The Little Charles (C. C. 1818) Fed. Cas. No. 15,612.

On a prosecution for smuggling, a paper purporting on its face to be the manifest of the steamer was shown to have been produced from the usual place of deposit in the custom house for ships' manifests and it was shown that no other manifest for the voyage was on file, but no other proof of its genuineness was offered. Held, that the paper was admissible in evidence. The Missouri (D. C. 1870) Fed. Cas. No. 9,653.

401. —— **Secondary evidence of documents.**—In a suit upon shipping articles by a seaman to recover wages, if the articles are not produced by the master or owner at the trial, after due requirement by the seaman, his statement of the contents thereof, when disputed, will be prima facie evidence of the same. But a prayer in a libel that "the shipping articles may be produced by the master or owner," is not such notice or requirement as will render his statement proof of their contents. The Osceola (D. C. 1846) Fed. Cas. No. 10,602.

In an action grounded on shipping articles, seamen are not bound to produce them, even where they are on the records of an admiralty court. Where they are in the admiralty court in consequence of the vessel's capture, the plaintiff, after notice to the defendant to produce them, may give parol evidence of their contents. Patten v. Park (N. Y. 1808) Anthon, 46.

In an action on shipping articles for wages, the claimants, on proving a reasonable excuse for not producing the shipping articles on trial, may contradict, by parol evidence, the statement of their contents by the mariner. The Osceola (D. C. 1846) Fed. Cas. No. 10,602.

402. —— **Copies of documents.**—In a suit to enforce a bottomry bond executed in a distant foreign country, though an attested copy thereof is not admissible in evidence, yet, being produced, the court will grant a continuance, that the original may be procured. The Jerusalem (C. C. 1814) Fed. Cas. No. 7,293.

Copies of documents relating to the condemnation and sale of a vessel, certified by the British consul to be copies of official documents on file in his office, and proved by deposition a considerable time before the trial, so that the parties were not taken by surprise, were admissible in evidence. The J. F. Spencer (D. C. 1869) Fed. Cas. No. 7,315.

It seems that where original shipping articles are proved before a commissioner, and redelivered to the vessel, who thereupon pursues her voyage, a copy, certified by the commissioner, is competent evidence upon the hearing. Henry v. Curry (D. C. 1849) Fed. Cas. No. 6,381.

A copy of protest was offered in evidence without proof of its correctness as a copy, but it was shown that a protest was made at the time and place where the copy purported to have been made, and that it was signed by the mate, and the mate, though called as a witness, was not asked in relation to the truth of the copy, and did not dispute it. Held, that the copy was admissible in evidence. The Vivid (D. C. 1870) Fed. Cas. No. 16,978.

A copy of a survey of a vessel, not purporting to have been made by any one connected with her, is not admissible against her, no witness able to prove or disprove its correctness being called or shown to be within reach. The Vivid (D. C. 1870) Fed. Cas. No. 16.978.

The proceedings of a vice admiralty court of a foreign nation held sufficiently verified by proof of the handwriting of the judge, and of the register of the court, to a certificate that the papers were a true copy from the records. Mumford v. Bowne (N. Y. 1808) Anthon, 56.

403. —— **Collision cases.**—See Clark v. Weeks (1882) 106 U. S. 13, 1 Sup. Ct. 90, 27 L. Ed. 96; Charles Morgan v. Kouns (1885) 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. Ed. 316; The Lisbonense (1892) 53 Fed. 293, 3 C. C. A. 539; La Normandie (1893) 58 Fed. 427, 7 C. C. A. 285; The Columbia (1901) 109 Fed. 660, 48 C. C. A. 596; The Henry O. Barrett (1908) 161 Fed. 481, 88 C. C. A. 423 (writ of certiorari denied McCaulley v. American Dredging Co. [1908] 29 S. Ct. 683, 212 U. S. 573, 53 L. Ed. 656); California Navigation & Improvement Co. v. Union Transp. Co. (1910) 176 Fed. 533, 100 C. C. A. 21; The Vicksburg (C. C. 1870) Fed. Cas. No. 16,932; Dowdall v. Pennsylvania R. Co. (C. C. 1876) Fed. Cas. No. 4,038; Orhanovich v. The America (C. C. 1880) 4 Fed. 337; The Roman (C. C. 1882) 14 Fed. 61 (reversing [D. C. 1882] 12 Fed. 219); Ralston v. The State Rights (D. C. 1836) Fed. Cas. No. 11,540; Ward v. The Fashion (D. C. 1854) Fed. Cas. No. 17,154; The Emilie (D. C. 1870) Fed. Cas. No. 4,451; The Transit (D. C. 1870) Fed. Cas. No. 14,138; The Pennsylvania (D. C. 1871) Fed. Cas. No. 10,948; The Colorado (D. C. 1872) Fed. Cas. No. 3,029; The Mayflower (D. C. 1872) Fed. Cas. No. 9,345; Munch v. The Sucker State (D. C. 1872) Fed. Cas. No. 9,921; The Starlight (D. C. 1874) Fed. Cas. No. 13,310; Bunge v. The Utopia (D. C. 1880) 1 Fed. 892; The S. Schaw (D. C. 1881) 6 Fed. 93;

Leonard v. Whitwill (D. C. 1884) 19 Fed. 547; The Frostburg (D. C. 1885) 25 Fed. 451; The Hattie M. Spraker (D. C. 1886) 29 Fed. 457; The Benison (D. C. 1888) 36 Fed. 793; The Kentucky (D. C. 1906) 148 Fed. 500; The Umbria (D. C. 1906) 148 Fed. 283 (decree affirmed [1907] 153 Fed. 851, 83 C. C. A. 33); The Walter B. Chester (1884) 19 Ct. Cl. 681; Otis v. Thom (1853) 23 Ala. 469, 58 Am. Dec. 303; McCabe v. Knapp (1867) 23 Iowa, 308; Myers v. Perry (1846) 1 La. Ann. 372; Gilmore v. Ross (1881) 72 Me. 194; Kelsey v. Barney (1855) 12 N. Y. 425; Blanchard v. New Jersey Steamboat Co. (1874) 59 N. Y. 292; Blanchard v. New Jersey Steamboat Co. (N. Y. 1874) 67 Barb. 101; Case v. Perew (N. Y. 1887) 46 Hun, 57; Bigley v. Williams (1875) 80 Pa. 107; United States Mail Line Co. v. McCracken (Ky. 1895) 33 S. W. 82.

404. Weight and sufficiency of evidence.—In an action upon a bottomry bond, the production and proof of the execution of the bond will not entitle the libelant to a decree in his favor. He must prove to the satisfaction of the court a necessity for the expenditures for which the money was advanced. The libelants should exhibit an account of the items of expenses for repairs, supplies, etc., that the court may judge whether they were necessary for effectuating the objects of the voyage. The Bridgewater (D. C. 1844) Fed. Cas. No. 1,865.

Upon the question of the bona fides of the purchaser of a vessel from one who, as mortgagor, was permitted to retain possession thereof, this court will determine the facts upon the principles which govern trials by jury. The Romp (D. C. 1845) Fed. Cas. No. 12,030.

A foreign master, who understands and speaks English imperfectly will not be charged upon his declarations or admissions in that language, without clear proof that he well understood the meaning of what was addressed to him and that used by him in reply. The Lotty (D. C. 1846) Fed. Cas. No. 8,524.

Positive evidence of persons on different boats in a tug's tow that one of the boats therein struck upon the bottom, and that they heard a grating noise, is not to be overcome, as evidence of negligent towage, by mere negative evidence, such as that other tugs with similar tows passed the same place without striking; and such evidence is not to be accepted as proof that the boat struck an unknown obstruction, so as to relieve the tug from liability. The Florence (D. C. 1898) 88 Fed. 302.

Where there is a direct conflict of evidence between the witnesses for a libelant suing for wages and the captain, the fact that there was another witness, who knew the facts in dispute, and apparently might have been examined by the claimant, will determine the issue in favor of the libelant. The Mary A. Troop (D. C. 1898) 90 Fed. 307.

405. —— Credibility of witnesses.—The testimony of the libelants themselves in an action in rem, the one for the other, although legally admissible, ought to be narrowly scrutinized, and received with caution. Graham v. Hoskins (D. C. 1845) Fed. Cas. No. 5,669.

The testimony of a ship's crew, being joint libelants, each swearing for the other, will be received with great caution. The court will be more inclined to credit the master of the vessel, when the evidence between them is contradictory, and he has no interest in the action. The Swallow (D. C. 1846) Fed. Cas. No. 13,665.

A condemnation and sale as unseaworthy, set up in a discharge of a previous lien for supplies, held not sustained by the testimony of the claimant, who had taken part in the proceedings as surveyor, and was an interested party. The J. F. Spencer (D. C. 1869) Fed. Cas. No. 7,315.

Where the employment of libelants by the owner of a vessel, as testified to by them, is inherently improbable, and the appearance and demeanor of the libelants' witnesses prevent belief in their testimony, a libel for alleged wages will not be sustained. Wheeler v. The Savoy (D. C. 1898) 89 Fed. 97.

406. —— Preponderance of evidence.—Where there is an irreconcilable conflict in the testimony of witnesses, and circumstances of suspicion attach to the credit of them on both sides, the balance of evidence will be regarded in favor of the party having the greatest number. The Napoleon (D. C. 1845) Fed. Cas. No. 10,015.

Where there is a direct conflict of evidence between the witnesses for a libelant suing for wages and the captain, the fact that there was another witness, who knew the facts in dispute, and apparently might have been examined by the claimant, will determine the issue in favor of the libelant. The Mary A. Troop (D. C. 1898) 90 Fed. 307.

407. —— Collision cases.—See The Genesee Chief v. Fitzhugh (1851) 53 U. S. (12 How.) 443, 13 L. Ed. 1058; The Wenona (1873) 86 U. S. (19 Wall.) 41, 22 L. Ed. 52; The Ludvig Holberg (1895) 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620; The Alexander Folsom (1892) 52 Fed. 403, 3 C. C. A. 165, 6 U. S. App. 153; Simpson v. The State of California (1893) 54 Fed. 404, 4 C. C. A. 393, 7 U. S. App. 652; Lowell v. The Joseph Stickney (1893) 56 Fed. 156, 5 C. C. A. 457, 14 U. S. App. 366; Quebec S. S. Co. v. The Minnie Smith (1893) 57 Fed. 251, 6 C. C. A. 324, 14 U. S. App. 513; La Normandie (1893)

58 Fed. 427, 7 C. C. A. 285, 14 U. S. App. 655; The Sammie (1893) 69 Fed. 847, 13 C. C. A. 686, 14 U. S. App. 711; The Philadelphian (1894) 61 Fed. 862, 10 C. C. A. 127, 21 U. S. App. 239; The Charles H. Trickey (1895) 66 Fed. 1020, 14 C. C. A. 225, 33 U. S. App. 35; The Gypsum Prince (1895) 67 Fed. 612, 14 C. C. A. 573, 35 U. S. App. 165; The Horace B. Parker (1896) 71 Fed. 989, 18 C. C. A. 406, 33 U. S. App. 389; Towboat No. 1, Norfolk & Western (1896) 74 Fed. 906, 21 C. C. A. 169, 33 U. S. App. 531; The Natchez (1896) 78 Fed. 183, 24 C. C. A. 49; The W. H. Simpson (1897) 80 Fed. 153, 25 C. C. A. 318; The City of Augusta (1897) 80 Fed. 297, 25 C. C. A. 430; The Mayflower (1897) 80 Fed. 943, 26 C. C. A. 270; The Armonia (1897) 81 Fed. 227, 26 C. C. A. 338; The Minnie (1900) 100 Fed. 128, 40 C. C. A. 312; The Vulcan and the Genevieve (1901) 106 Fed. 989, 46 C. C. A. 87 (affirming decree [D. C. 1899] 96 Fed. 859); The Livingstone (1902) 113 Fed. 879, 51 C. C. A. 560 (reversing decree [D. C. 1900] 104 Fed. 918); The Gertrude (1902) 118 Fed. 130, 55 C. C. A. 80; The Dorchester (1904) 134 Fed. 1023, 68 C. C. A. 518 (affirming judgment [D. C. 1902] 121 Fed. 889); The Jumna (1906) 149 Fed. 171, 79 C. C. A. 119 (affirming decree [D. C. 1905] 140 Fed. 743); The Simon Dumois (1908) 163 Fed. 490, 90 C. C. A. 36; The George W. Peavey (1910) 183 Fed. 571, 106 C. C. A. 117 (affirming decree [D. C. 1909] 173 Fed. 715); The E. A. Packer (1911) 185 Fed. 476, 107 C. C. A. 576; The Elmer A. Keeler (1912) 194 Fed. 339, 114 C. C. A. 331; The Superior (1913) 207 Fed. 546, 125 C. C. A. 142; The Globe (C. C. 1853) Fed. Cas. No. 5,485; The Summit (C. C. 1854) Fed. Cas. No. 13,606; The Clement (C. C. 1855) Fed. Cas. No. 2,879; Larrabee v. The Piedmont (C. C. 1859) Fed. Cas. No. 8,095; The R. L. Maybey (C. C. 1860) Fed. Cas. No. 11,871; The Comet (C. C. 1872) Fed. Cas. No. 3,051; The Manistee (C. C. 1874) Fed. Cas. No. 9,028; The Herbert Manton (C. C. 1876) Fed. Cas. No. 6,399; The Java (C. C. 1878) Fed. Cas. No. 7,233 (affirming [D. C. 1872]) Fed. Cas. No. 7,232; The A. R. Gray (C. C. 1882) 12 Fed. 206; The John M. Chambers (C. C. 1884) 24 Fed. 383; The Grand Isle (C. C. 1888) 34 Fed. 767; The Annex No. 3 (C. C. 1888) 35 Fed. 560; The Newport (C. C. 1888) 36 Fed. 910; The Rabboni (C. C. 1892) 53 Fed. 952; The Argus (D. C. 1846) Fed. Cas. No. 521; Corks v. The Belle (D. C. 1846) Fed. Cas. No. 3,231a; The Narragansett (D. C. 1846) Fed. Cas. No. 10,019; The New Jersey (D. C. 1846) Fed. Cas. No. 10,161; The Neptune (D. C. 1847) Fed. Cas. No. 10,120; The Governor (D. C. 1848) Fed. Cas. No. 5,645; The Falcon (D. C. 1849) Fed. Cas. No. 4,619; The Postboy (D. C. 1851) Fed. Cas. No. 11,303; Ward v. The Fashion (D. C. 1854) Fed. Cas. No. 17,154; Chase v. Crary (D. C. 1855) Fed. Cas. No. 2,626; Dickenson v. The Gore (D. C. 1855) Fed. Cas. No. 3,893; Hall v. The Buffalo (D. C. 1856) Fed. Cas. No. 5,927; The Douglass (D. C. 1863) Fed. Cas. No. 4,031; Klots v. The Red Jacket (D. C. 1863) Fed. Cas. No. 7,871; Fletcher v. The Cubana (D. C. 1864) Fed. Cas. No. 4,863; Laing v. The G. L. Buckman (D. C. 1864) Fed. Cas. No. 7,988; Whitney v. The Empire State (D. C. 1866) Fed. Cas. No. 17,586; The Carroll (D. C. 1867) Fed. Cas. No. 2,451; The D. P. (D. C. 1867) Fed. Cas. No. 4,056; The Stromless (D. C. 1867) Fed. Cas. No. 13,540; The Western Metropolis (D. C. 1868) Fed. Cas. No. 17,439; The Baltic (D. C. 1869) Fed. Cas. No. 824; The Atlas (D. C. 1870) Fed. Cas. No. 633; The Blackstone (D. C. 1870) Fed. Cas. No. 1,473; The Northern Warrior (D. C. 1870) Fed. Cas. No. 10,325; The Sam Gaty (D. C. 1870) Fed. Cas. No. 12,276; The Hammonia (D. C. 1871) Fed. Cas. No. 6,005; The Hansa (D. C. 1872) Fed. Cas. No. 6,037; McNally v. Meyer (D. C. 1871) Fed. Cas. No. 8,909; The Milwaukee (D. C. 1871) Fed. Cas. No. 9,626; The Masten (D. C. 1872) Fed. Cas. No. 9,266; The Mayflower (D. C. 1872) Fed. Cas. No. 9,345; The Anna (D. C. 1873) Fed. Cas. No. 399; The M. M. Chase (D. C. 1878) Fed. Cas. No. 9,684; The Clytie (D. C. 1879) Fed. Cas. No. 2,913; The C. Vanderbilt (D. C. 1879) Fed. Cas. No. 3,524; Gilooley v. Pennsylvania R. Co. (D. C. 1879) Fed. Cas. No. 5,448b; The Jeremiah (D. C. 1879) Fed. Cas. No. 7,289; The Senator Mike Norton (D. C. 1879) Fed. Cas. No. 12,667; The Rebecca v. The America (D. C. 1880) Fed. Cas. No. 11,619a; Wolf v. The Bertie Calkins (D. C. 1880) 2 Fed. 793; Weaver v. The Onmst (D. C. 1880) 2 Fed. 811; The Hope and The Freddie L. Porter (D. C. 1880) 4 Fed. 89; Merchants' S. S. Co. v. The S. C. Tryon (D. C. 1880) 4 Fed. 236; The Leversons (D. C. 1882) 10 Fed. 753; The Florence P. Hall (D. C. 1882) 14 Fed. 408; The City of Chester (D. C. 1883) 18 Fed. 603; Brink v. Lyons (D. C. 1883) 18 Fed. 605; The Lizzie Henderson (D. C. 1884) 20 Fed. 524; The Hunter, No. 2 (D. C. 1885) 22 Fed. 795; The City of New York (D. C. 1885) 23 Fed. 616; The Alberta (D. C. 1885) 23 Fed. 807; The Co. F. Young and The Sarah C. Hagar (D. C. 1885) 24 Fed. 511; The Annie J. Pardee (D. C. 1885) 25 Fed. 155; The Clarion (D. C. 1886) 27 Fed. 128; The Annex No. 3 (D. C. 1886) 27 Fed. 516; The Columbia (D. C. 1886) 27 Fed. 704; The Newport (D. C. 1886) 28 Fed. 658; The S. O. Pierce (D. C. 1889) 40 Fed. 767; The J. D. Peters (D. C. 1890) 42 Fed. 269; Greenwood v. The Fletcher and The Grapeshot (D. C. 1890) 42 Fed. 504; The North Star (D. C. 1890) 44 Fed.

492; Pierce v. The J. R. P. Moore (D. C. 1890) 45 Fed. 267; Reid Towing & Wrecking Co. v. The Athabasca (D. C. 1890) 45 Fed. 651; Lambert v. Freese (D. C. 1890) 46 Fed. 807; Nester v. The City of Cleveland and The John Martin (D. C. 1890) 56 Fed. 729; Roanoke, N. & B. S. S. Co. v. The Lucy (D. C. 1891) 44 Fed. 938; The Havana (D. C. 1893) 54 Fed. 411; Ayer v. The Walleda (D. C. 1894) 64 Fed. 807; Dinniny v. The Sam Sloan (D. C. 1894) 65 Fed. 125; The John Craig (D. C. 1895) 66 Fed. 596; The Mexico (D. C. 1897) 78 Fed. 653 (affirmed [1898] 84 Fed. 504, 28 C. C. A. 472); The Queen Elizabeth (D. C. 1900) 100 Fed. 874 (reversed [1903] 122 Fed. 406, 59 C. C. A. 345); The Itasca (D. C. 1901) 117 Fed. 885; The Captain Sam (D. C. 1902) 115 Fed. 1000; The Bratsberg (D. C. 1904) 127 Fed. 1005; Hall v. North Pac. Coast R. Co. (D. C. 1904) 134 Fed. 309; The Gladys (D. C. 1905) 135 Fed. 601 (reversed [1906] 144 Fed. 653, 75 C. C. A. 455); The Eagle Wing (D. C. 1905) 135 Fed. 826; The Georgetown (D. C. 1905) 135 Fed. 854; The Mauch Chunk (D. C. 1905) 139 Fed. 747 (affirmed [1907] 154 Fed. 182, 83 C. C. A. 276); The Pocomoke (D. C. 1906) 150 Fed. 193; The Ramleh (D. C. 1907) 157 Fed. 769; Pennell v. U. S. (D. C. 1908) 162 Fed. 75; The Erandio (D. C. 1908) 163 Fed. 435; The Dorchester (D. C. 1908) 163 Fed. 779 (decree affirmed [1908] 167 Fed. 124, 92 C. C. A. 576); The J. G. Gilchrist (D. C. 1909) 173 Fed. 666 (decree affirmed [1910] 183 Fed. 105, 105 C. C. A. 397); Société des Voiliers Francais v. Oregon R. & Nav. Co. (D. C. 1910) 178 Fed. 324; The Joseph Vaccaro (D. C. 1910) 180 Fed. 272; The Oregon (D. C. 1910) 180 Fed. 299; The George W. Elder (D. C. 1913) 208 Fed. 523; St. Louis & M. V. T. Co. v. U. S. (1898) 33 Ct. Cl. 251 (affirmed U. S. v. St. Louis & M. V. T. Co. [1902] 22 S. Ct. 350, 184 U. S. 247, 46 L. Ed. 520); Western Marine & Fire Ins. Co. v. Casselly (La. 1844) 7 Rob. 154; Harris v. Uebelhoer (1878) 75 N. Y. 169; Fitzsimmons v. McConnell (1890) 55 Hun, 605, 7 N. Y. Supp. 869; Warn v. Starin (1905) 95 N. Y. S. 550, 48 Misc. Rep. 617.

408. Pleadings as evidence.—Neither party can contradict by proof the averments in his pleading, and the opposite party is entitled to rely thereon as an admission of facts. Totten v. The Pluto (D. C. 1852) Fed. Cas. No. 14,106.

Allegations in pleadings are admissions by the pleader, and need no proof unless denied and put in issue, and, as against the pleader, will be taken as matter conceded. Ward v. The Fashion (D. C. 1854) Fed. Cas. No. 17,154.

409. —— Effect of averments in libel.—The allegations of one of the parties in a libel are not evidence for him unless called for by the other side, and are then to be weighed as they deserve, without requiring, in all cases, more than one witness to overcome them. Jay v. Almy (C. C. 1846) Fed. Cas. No. 7,236.

The statement of the seaman in the libel is incompetent evidence to prove services rendered by him on board the vessel under shipping articles. The Osceola (D. C. 1846) Fed. Cas. No. 10,602.

On libel against a vessel for wages, an affidavit of a person representing himself as her agent, that she is a foreign vessel, will not overcome the oath of the libelant that she is an American vessel, so as to entitle the claimant to a dismissal of the libel. Armstrong v. The Rydesdale (D. C. 1862) Fed. Cas. No. 547.

410. —— Effect of answer.—The equity rule requiring two witnesses, or one witness and corroborating circumstances, to overcome the denial in the answer, is not recognized in admiralty courts. Eads v. The H. D. Bacon (D. C. 1853) Fed. Cas. No. 4,232; Hutson v. Jordan (D. C. 1837) Fed. Cas. No. 6,959; Sherwood v. Hall (C. C. 1837) Fed. Cas. No. 12,777; U. S. v. The Matilda (C. C. 1813) Fed. Cas. No. 15,741.

Such rule does not prevail even when the answer is responsive to interrogatories propounded. Eads v. The H. D. Bacon (D. C. 1853) Fed. Cas. No. 4,232.

The answer, when responsive to the libel, and carefully drawn, stating the case fairly, may be considered as evidence for respondent. Hutson v. Jordan (D. C. 1837) Fed. Cas. No. 6,959. But see The Australia (D. C. 1859) Fed. Cas. No. 667.

The sworn answer of the respondent, though not evidence, may be referred to to explain ambiguities in the testimony, and in aid of presumptions arising from the evidence to supply connecting links in the proof. The Crusader (D. C. 1837) Fed. Cas. No. 3,456.

On a libel against two tugs by the tow of one which came into collision with the tow of the other, the answers of the tugs charging negligence of each other are not evidence against each other, and libelant must offer evidence of negligence to be entitled to recover. The James Bowen (D. C. 1879) Fed. Cas. No. 7,192.

411. —— Admissions in answer.—Admission by answer of execution of agreement particularly set out in libel admits contents. The Aldebaran (D. C. 1845) Fed. Cas. No. 150.

In an action in rem for a collision, the answer of the owners of the colliding vessel, admitting facts to their prejudice, will prevail in favor of the libelants against the testimony of the pilot of the vesel to the contrary. The San-

ta Claus (D. C. 1846) Fed. Cas. No. 12,327.

Libelant in a suit for seamen's wages is entitled to use the admission of the answer as to the date of his service without being bound by its allegation as to the time when the service began. Berry v. The Montezuma (D. C. 1856) Fed. Cas. No. 1,358a.

An answer containing an admission of a contract as stated in the libel may, by leave of the court, be afterwards amended by withdrawing the admission; but this will not relieve the respondent from the effect of his admission as evidence. Kenah v. The John Markee, Jr. (D. C. 1880) 3 Fed. 45.

412. —— **Claim to property.**—A claim to a vessel and cargo filed in an admiralty cause, though sworn to, is not evidence. The Thomas and Henry (C. C. 1818) Fed. Cas. No. 13,919.

413. **Answers to interrogatories.**—Answers to interrogatories annexed to the pleadings stand, as evidence, like the pleadings only. What is admitted needs no further proof; but, as respects matters that still remain at issue, answers to interrogatories are not affirmative evidence in favor of the party making them. The Serapis (D. C. 1889) 37 Fed. 436.

Where, on a libel in admiralty to recover for a shortage of 51 tons in a delivery of pig iron, it was alleged that respondent delivered to other consignees out of the same cargo 91 tons of pig iron more than had been shipped to them, respondent could not object to answering interrogatories calling for the names of the other consignees to whom delivery of pig iron was made out of the same cargo, the number of tons delivered to each, and the amount called for by their respective bills of lading, on the ground that it required respondent to disclose the business of other shippers engaged in the same trade as libelant. Dana & Co. v. Cosmopolitan Shipping Co. (D. C. 1904) 131 Fed. 158.

414. —— **Verification.**—The verification to answers to interrogatories in a suit in admiralty, while not strictly in the form used in such pleadings, held sufficient. In re Knickerbocker Steamboat Co. (D. C. 1905) 139 Fed. 713.

415. —— **Effect of answers.**—Sworn answers to special interrogatories in admiralty are not conclusive as to disputed facts. Their effect at most is to turn the scale when in equilibrio. They are no more evidence for one party than for the other, and will not be conclusive for either if the weight of proof is on the other side, or if, by self-contradiction, suspicion attaches to the answers themselves. The L. B. Goldsmith (D. C. 1856) Fed. Cas. No. 8,152. Answers under oath to special interrogatories are evidence in the cause, as well in favor of, as against, the party answering. The David Pratt (D. C. 1839) Fed. Cas. No. 3,597.

The answer of respondent upon oath in reply to interrogatories does not constitute positive evidence in his own favor. Cushman v. Ryan (C. C. 1840) Fed. Cas. No. 3,515.

Answers to interrogatories annexed to the pleadings stand, as evidence, like the pleadings only. What is admitted needs no further proof; but, as respects matters that still remain at issue, answers to interrogatories are not affirmative evidence in favor of the party making them. The Serapis (D. C. 1889) 37 Fed. 436.

416. —— **Refusal to answer.**—The charge in the libel to which a special interrogatory relates will be taken pro confesso where defendant refuses to answer. The David Pratt (D. C. 1839) Fed. Cas. No. 3,597.

It is not necessary that a party to a suit in admiralty should be personally before the court in order to avail himself of the privilege given him by rules 31 and 32 to refuse to make answer to interrogatories which will expose him to any prosecution or punishment for crime, or for any penalty or any forfeiture of his property for any penal offense; but he is required to state specifically that his answers would have that effect, and a statement in refusing to make answer that the interrogatories were framed in support of allegations, which, if true, would or might tend to expose him to a penalty or forfeiture, is insufficient as a claim of privilege. In re Knickerbocker Steamboat Co. (D. C. 1905) 139 Fed. 713.

417. —— **Compelling answers.**—In a suit for seaman's wages, the libelant may compel the adverse party to answer special interrogatories. Gammell v. Skinner (C. C. 1814) Fed. Cas. No. 5,210.

418. —— **Exceptions to answers.**—Exceptions to the answers to interrogatories propounded in the answer in a suit in admiralty for limitation of liability considered. In re Knickerbocker Steamboat Co. (D. C. 1905) 139 Fed. 713.

419. **Discovery.**—Where a paper has been intrusted to libelant for the benefit of both parties, the court, on motion, will order its production before answer. But a letter addressed to libelant, forming part of a contract, is not such a paper. The Voyageur De La Mer (D. C. 1857) Fed. Cas. No. 17,025.

Rule 38 of the District Court for the Southern District of New York, permitting the examination of parties or their agents or representatives before trial, construed, and held not to entitle the libelant in a collision suit to examine the officers and crew of respondent's vessel. The Sisilina (D. C. 1914) 212 Fed. 1022.

Discovery will not be granted under the admiralty rules as to messages, the original or copies of which are in the movant's possession, to enable the movant to establish the authority of the sender and the receipt of the answers. The Eros (D. C. 1915) 224 Fed. 194.

A defendant in admiralty is not entitled to a discovery before answer, for the purpose of showing that it is not a proper party and avoiding an answer. New York & Bermudez Co. v. Mowinckel (D. C. 1915) 227 Fed. 950.

420. Depositions.—In an admiralty case, no preliminary proof was made of the witness' materiality, the deposition was not sealed up, and no notice of its being filed was given, but it appeared that the commissioner who took it was clerk of the court, and that the objecting proctor knew that it had been taken, and it was thereupon admitted. Nelson v. Woodruff (1861) 66 U. S. (1 Black) 156, 17 L. Ed. 97.

The oral cross-examination of witnesses on a commission abroad may be allowed as a condition of waiving objection of irregularity in the motion for the commission. The Louisiana (D. C. 1867) Fed. Cas. No. 8,536.

Where an application was made for a commission to examine a witness in the East Indies, it appearing that no one was known who could be named as commissioner, except the wife of the witness, she was named as commissioner. The Norway (Super. Ct. Fla. 1840) Fed. Cas. No. 10,356.

An application in the supreme court by appellant for a commission to take testimony of certain witnesses will be refused where no excuse was shown why the witnesses were not examined either by the district or the circuit courts. The Mabey (1871) 80 U. S. (13 Wall.) 738, 20 L. Ed. 473.

The depositions of witnesses for claimant will not be suppressed because taken before answer, where prejudice to libelant does not appear. The Pride of the Ocean (D. C. 1879) Fed. Cas. No. 11,419.

Under rule 40 in admiralty of the district court for the Eastern district of Pennsylvania, which permits parties to attend the examination of witnesses whose testimony is taken on commission, either personally or by their proctors, if the adverse party desires to be represented at such an examination he should furnish the name and address of his representative to the party taking out the commission, or to the commissioner, or file the same with his cross interrogatories, in which case it will be the duty of the commissioner to give such representative notice. The Westminster (D. C. 1899) 96 Fed. 766.

Where admiralty records have been loosely kept, depositions may be read to prove that a certain order was made in the cause. Jones v. Walker (C. C. 1803) Fed. Cas. No. 7,506.

A commission granted to damage claimants in proceedings for limitation of liability to examine orally in a foreign country certain witnesses in the employ of petitioner, and denied as to certain other witnesses presumably disinterested. The Titanic (D. C. 1913) 206 Fed. 500.

421. —— Taking for use on appeal.—A commission to take testimony cannot be issued by the circuit court in an admiralty case, after an appeal has been taken to the supreme court, until after the supreme court, on motion, has decided the question as to the admissibility of the evidence. The Ocean Queen (C. C. 1868) Fed. Cas. No. 10,411.

422. —— Depositions taken in another suit.—In a suit for collision by the master of a vessel in behalf of the cargo owners, libelant cannot read in evidence a deposition taken in behalf of the owners of the vessel in a suit by them for the same collision. The John H. Starin (D. C. 1878) Fed. Cas. No. 7,351.

423. —— Waiver of objections.—When a witness is examined de bene esse out of court in an admiralty cause by the claimants, and is cross-examined by the libelant, who reads the cross-examination in support of his action, he cannot then except to the competency of the witness because interested in the cause, and exclude his testimony given in chief for the claimants. The Osceola (D. C. 1846) Fed. Cas. No. 10,602.

(J) Hearing or trial, and decision

424. Preliminary proceedings.
425. Course and conduct of hearing.
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446. —— Following decisions of foreign or state courts.
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448. Rehearing or new trial.
449. —— Grounds for.
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451. —— Application at subsequent term.

424. Preliminary proceedings.—If libelant's proctor negotiates the post-

ponement of the trial, he cannot thereafter allege ignorance of the fact that the answer was on file. Warner v. The Ralph Post (D. C. 1862) Fed. Cas. No. 17,187.

425. **Course and conduct of hearing.**—A statement by the advocate of the party, in open court, the day after the hearing, made by authority of the party, may be taken as an admission in contradiction of the evidence submitted by him. The Harry (D. C. 1878) Fed. Cas. No. 6,147.

A hearing will be given without proof where the pleadings admit liability. American Dredging Co. v. The Bedowin (D. C. 1879) Fed. Cas. No. 299.

426. —— **Order of hearing causes.**—Libels or petitions against a vessel are heard by a court of admiralty in any order in which they are brought up. The Fanny (D. C. 1876) Fed. Cas. No. 4,638.

427. —— **Continuance to procure proof.**—Where in a suit for seamen's wages libelant refused to admit a payment alleged in the answer, where the evidence offered raised a strong presumption that such payment had been made, respondent was allowed time to procure proof thereof. Ingraham v. Albee (D. C. 1832) Fed. Cas. No. 7,044.

428. —— **Arguments and briefs.**—The practice of submitting a cause in admiralty without argument or brief, and leaving the court to ascertain and determine the issues upon the pleadings and proofs, is not to be encouraged. The Honora Carr (D. C. 1887) 31 Fed. 842.

429. —— **Taking down testimony.**—At the hearing of a cause in admiralty before the court, the testimony should be taken down in full for use in the appellate court in case of appeal. If there is no official stenographer, one should be procured by counsel under the sanction of the court. Neilson v. Coal, Cement & Supply Co. (1903) 122 Fed. 617, 60 C. C. A. 175, affirming decree The Nellie Floyd (D. C. 1902) 116 Fed. 80.

430. —— **Scope of hearing.**—Objections to an action merely formal in their character cannot be taken on final hearing. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163.

Since, in a suit for towage, the defendant, who has a counterclaim for damages for negligent performance of the contract, in excess of the libelant's claim, cannot recover his full damages by answer, but only by cross-libel, and as he cannot split up his cross-demand, but must try it in the cross-suit, he is entitled to have the libel and cross-libel heard together, if brought in the same court. If brought in different courts, judgment on the libel for towage should be stayed until reasonable opportunity had for the trial of the larger counterclaim in the cross-action. The Ciampa Emilia (D. C. 1889) 39 Fed. 126.

In admiralty, as in equity, on final hearing all interlocutory orders relating to the merits are open to revision and under the control of the court. The Dredge A (D. C. 1914) 217 Fed. 617.

431. **Trial by jury.**—Act Feb. 16, 1875, post, §§ 1585, 1586, applies to the district court of Alaska sitting in admiralty. Ex parte Cooper (1892) 12 Sup. Ct. 453, 464, 143 U. S. 472, 36 L. Ed. 232; The Sylvia Handy (1892) 12 Sup. Ct. 464, 465, 143 U. S. 513, 36 L. Ed. 246.

As the seventh amendment to the constitution of the United States preserving the right of trial by jury excludes admiralty jurisdiction over contracts regulated by the common law, no set-off (not otherwise within admiralty jurisdiction) is allowable on a libel for seamen's wages, unless it is a payment on account thereof. Bains v. The James & Catherine (C. C. 1832) Fed. Cas. No. 756.

There is no right in admiralty to a trial by jury unless given by statute. Gillet v. Pierce (D. C. 1875) Fed. Cas. No. 5,437.

An information in rem against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an admiralty proceeding, and does not require a trial by a jury. Clark v. U. S. (C. C. 1811) Fed. Cas. No. 2,837.

Congress did not intend, by the act of 1845, granting admiralty jurisdiction, and saving the right of trial by jury, to grant a new right, but to save one already supposed to exist. Said act, extending the jurisdiction of the federal courts to certain cases arising on the lakes and navigable waters connecting the same, having been passed on the erroneous assumption that admiralty jurisdiction was limited by the act of 1789 to tide waters, is wholly inoperative, and therefore the clause in the act of 1845 saving a right to trial by jury is also inoperative. By R. S. § 566, post, § 1583, however, the law was changed, and the right to a trial by jury was expressly given in the class of cases specified in the act of 1845. Gillet v. Pierce (D. C. 1875) Fed. Cas. No. 5,437.

In admiralty causes of contract or tort arising upon the Lakes, if either vessel concerned in such action be of 20 tons burden and upwards, enrolled and licensed for the coasting trade, and employed in navigation between different states, either party to such action may demand a trial by jury, under R. S. § 566, post, § 1583; but if both vessels be foreign, or engaged in trade between places in the same state, or the action be other than one of contract or tort, it seems that neither party is entitled to a jury trial. The Erie Belle (D. C. 1883) 20 Fed. 63. But section 566, R. S., section 1583, post, does not give a

trial by jury in a cause of admiralty and maritime jurisdiction which concerns a vessel employed in commerce and navigation upon the rivers Monongahela and Ohio. Bigley v. The Venture (D. C. 1884) 21 Fed. 880.

In the act of 1845, purporting to extend the admiralty jurisdiction of the federal courts over the interior lakes and rivers, the provision, now embodied in R. S. § 566, post, § 1583, saving to the parties a right to demand a jury trial of issues of fact in certain cases, is inoperative to do more than make the verdict advisory, and does not change the powers of the admiralty judge, who is still responsible for the decree rendered. The statute, by its terms, does not apply to controversies arising in respect to a vessel plying between ports in the same judicial district, and not engaged in commerce and navigation between places in different states. Sanderson v. The City of Toledo (D. C. 1896) 73 Fed. 220.

A denial, in a case in admiralty, of the allegations of the petition, and concluding to the country, is the tender of an issue to a jury, and cannot be tried by the court. Gayle v. Preston (Ala. 1838) 8 Port. 291.

432. —— **Proceedings to enforce forfeitures and penalties.**—A proceeding for the forfeiture of a foreign vessel illegally fitted out as a privateer in the United States, is a civil cause in the nature of a libel in rem, and does not, therefore, entitle the claimant to a trial by jury. So, also, as to a proceeding for a forfeiture for exportation of arms, etc., against the statute of May 22, 1794. U. S. v. La Vengeance (1796) 3 U. S. (3 Dall.) 297, 1 L. Ed. 610.

Cases of seizure upon waters navigable from the sea by vessels of more than 10 tons burden for breach of the laws of the United States are civil cases of admiralty and maritime jurisdiction, and are to be tried without a jury. Whelan v. U. S. (1812) 11 U. S. (7 Cranch) 112, 3 L. Ed. 286. U. S. v. The Betsey (1808) 8 U. S. (4 Cranch) 443, 2 L. Ed. 673.

In cases of seizures made on land, under the revenue laws, the district court proceeds as a court of common law, according to the course of the exchequer on information in rem, and the trial of facts is by a jury; but in cases of seizures on waters navigable from the sea by vessels of 10 or more tons burden, it proceeds, as an instance court of admiralty, by libel, and the trial is by the court. The Sarah (1823) 21 U. S. (8 Wheat.) 394, 5 L. Ed. 644.

Though the nonimportation law provides that the recovery for forfeitures incurred thereunder shall be by action of debt by indictment or information, the information may be of the nature of a libel in rem, so that the respondent is not entitled to a trial by jury. Clark v. U. S. (C. C. 1811) Fed. Cas. No. 2,837.

Act Dec. 31, 1792, c. 1, relative to the forfeiture of vessels for failure to register transfers, in the proviso to the seventh section enacts that if such vessel shall be owned in part only, and "it shall appear to the jury before whom the trial shall be had" that any other owner was ignorant of the transfer, his share shall not be forfeited. Section 29 declares that all penalties and forfeitures shall be sued for in the manner that penalties are recovered for violations of Act Aug. 4, 1790, c. 35. Act Aug. 4, 1790, c. 35, provides for the prosecution of penalties in the same general terms which are employed in Revenue Act March 2, 1799, c. 128. The judiciary act of 1799 confers jurisdiction of seizures for forfeitures made under laws of impost, navigation, and trade on waters navigable from the sea by vessels of 10 tons burden and upwards, and provides that such cases are to be tried by the court, but that all other seizures are to be tried by jury. Held, that a proceeding under the act of 1792 against a vessel of more than 10 tons engaged in navigable waters should be tried by the court, and proceedings against other seizures only should be tried by jury. The Margaret (1824) 22 U. S. (9 Wheat.) 421, 6 L. Ed. 125.

The right to a jury trial in proceedings for the forfeiture of vessels under Act Dec. 31, 1792, for failure to register a transfer of a ship, should be insisted upon in time by the parties claiming the benefit of it. The Margaret (1824) 22 U. S. (9 Wheat.) 421, 6 L. Ed. 125.

A trial by jury is not necessary on a libel for the penalty imposed by law for the failure of the master of a vessel from a foreign port to report his vessel to the consul, or enter the manifest required by law. The Paolina S. (C. C. 1880) 11 Fed. 171.

433. —— **Necessary averments in pleadings.**—The party demanding a jury must bring himself, by his pleadings, within the provisions of the act. Gillet v. Pierce (D. C. 1875) Fed. Cas. No. 5,437.

434. —— **Effect of verdict.**—A. recovered a personal judgment in admiralty against B., and garnished C., who set up an assignment by B. to D. A. traversed the assignment as fraudulent, and with D.'s consent it was left to a jury, who decided in A.'s favor. Held, that though a court of admiralty has no ower to try causes by jury, yet, as the circuit court would have come to the same conclusion on the evidence, the decree of the district court on the verdict would be affirmed. Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202.

The verdict of a jury in an admiralty cause arising upon the Lakes, and tried by jury pursuant to R. S. § 566, post, § 1583, is merely advisory, and may be disregarded by the court, if, in the opinion of the judge, it fails to do substantial justice. The Empire (D. C. 1884)

19 Fed. 558; Sanderson v. The City of Toledo (D. C. 1896) 73 Fed. 220.

435. —— **Sufficiency of verdict.**—Where the jury, under the territorial act of Florida in relation of salvage, specified the cargo on board the ship, but did not accurately describe the portion saved, which could not conveniently have been done, it was held, that this was not such an irregularity as to avoid the award against a bona fide purchaser. American Ins. Co. v. Fisk (N. Y. 1828) 1 Paige, 90.

The uncertainty of a verdict for libelants on a libel for breach of the revenue laws for "the vessel tackle, apparel, and cargo, except that part of the cargo on which the duties have been paid," cannot be cured by reference to the answer. Richards v. Tabb (Va. 1788) 4 Call, 522.

436. **Decision.**—Courts of admiralty have full jurisdiction, as incidental to proceedings in rem, to decree freight to the shipowner in proper cases. The Nathaniel Hooper (C. C. 1839) Fed. Cas. No. 10,032.

The court may order all charges against the property to be produced before it for determination. Bennett v. The Tevere (D. C. 1855) Fed. Cas. No. 1,325.

On a libel for freight on coal, compensation for carting it to consignee's coal yard, for which there is no lien in admiralty, may be charged against advances made by consignee. Gaughran v. One Hundred and Fifty-One Tons of Coal (D. C. 1858) Fed. Cas. No. 5,273.

Where advances in a foreign port are made in gold, and drafts for the amount on the owners show that the payment to the parties making the advances is to be also in gold, the court may direct that its decree be entered for the amount in like currency. The Emily Souder (1873) 84 U. S. (17 Wall.) 666, 21 L. Ed. 683.

A party colluding with a master to cheat seamen out of a part of their wages, or to induce them to apply their wages in anticipation of payment to any purpose, not shown to be for their own good, will receive no relief in a court of admiralty. Rosenthal v. Die Gartenlaube (1880) 5 Fed. 827.

After suit in rem by master for loss of vessel, cargo, and personal effects, insurers of cargo brought suit in personam for loss of cargo by same proctors. Both vessels being in fault, on recovery of half damages, the vessel lost not receiving enough to make good her own half of cargo, the claimants were adjudged to pay the whole loss of cargo, and one-half of seamen's effects, for benefit of insurers, and, both desiring to appeal, a decree was entered in the suit in rem only, with stay of the suit in personam on all the respondents executing the bond on appeal in the suit in rem. The City of New York (D. C. 1885) 25 Fed. 149.

437. **Action for possession of vessel.**—In a suit to recover possession of a vessel which has been delivered under a contract for its sale, on performance of a condition, and where the condition has been broken, it is not necessary to go into all the equities, but only to ascertain the legal title. The Oriole (D. C. 1842) Fed. Cas. No. 10,574.

On a dispute between the master and owners of a British vessel, the court ordered possession to be delivered to the owners on payment of a sum found due to the master on a suit to be instituted by him within 20 days. Muir v. The Brisk (D. C. 1870) Fed. Cas. No. 9,901.

438. —— **Damages and expenses in general.**—Where a libel is filed by a seaman for damages for personal injuries, and also praying other relief, the admiralty is competent to administer a suitable remedy; and, although the court finds no damages due, it may make a decree for such expenses in healing the libelant as have been already incurred. But it cannot decree for prospective expenses. The Lizzie Frank (D. C. 1887) 31 Fed. 477.

Nominal damages for personal torts are not awarded by courts of admiralty. In re California Nav. & Imp. Co. (D. C. 1901) 110 Fed. 670.

439. —— **Damages for marine trespass.**—In case of marine trespass, the measure of damages is the prime cost or value of the property lost at the time of loss; and in case of injury merely the diminution of value by reason of the injury, with interest on the valuation. If, in case of a wrongful seizure, a cargo be deteriorated by a cause not occasioned by the seizor's fault, damages are not to be allowed therefor. The Amiable Nancy (1818) 16 U. S. (3 Wheat.) 546, 4 L. Ed. 456.

Where the ship and cargo have been sold, the gross amount of the sales, with interest, is allowed, on a decree of restitution; and, if the sale were under disadvantageous circumstances, an addition of 10 per cent. is sometimes made. The Apollon (1824) 22 U. S. (9 Wheat.) 362, 6 L. Ed. 111.

440. —— **Allowance of interest.**—Further as to interest in collision cases, see Barrett v. Williamson (C. C. 1849) Fed. Cas. No. 1,051; The Rhode Island (C. C. 1849) Fed. Cas. No. 11,744; The Ocean Queen (C. C. 1867) Fed. Cas. No. 10,410; Gordon v. The Mary Vaughan (C. C. 1868) Fed. Cas. No. 5,618; The America (C. C. 1874) Fed. Cas. No. 285; Dyer v. National Steam Nav. Co. (C. C. 1878) Fed. Cas. No. 4,225; The Mary Eveline (C. C. 1878) Fed. Cas. No. 9,212; The Rhode Island (D. C. 1848) Fed. Cas. No. 11,740a; Allen v. Mackay (D. C. 1854) Fed. Cas. No. 228; Crane v. The Samson (D. C. 1855) Fed. Cas. No. 3,357; The Harriet Newhall (D. C. 1856) Fed. Cas. No. 6,102; Burton v. The Commander in Chief (D. C. 1860) Fed. Cas.

No. 2,215; North Shore Staten Island Ferry Co. v. The Huguenots (D. C. 1863) Fed. Cas. No. 10,330; The Morning Star (D. C. 1866) Fed. Cas. No. 9,-817; The Ocean Queen (D. C. 1866) Fed. Cas. No. 10,409; Egbert v. Baltimore & O. R. Co. (D. C. 1868) Fed. Cas. No. 4,305; The Baltic (D. C. 1869) Fed. Cas. No. 824; The Empire State (D. C. 1869) Fed. Cas. No. 4,473; Munch v. The Sucker State (D. C. 1872) Fed. Cas. No. 9,921; The Aleppo (D. C. 1874) Fed. Cas. No. 158; The Mary Doane (D. C. 1875) Fed. Cas. No. 9,-205; The Alexandria (D. C. 1878) Fed. Cas. No. 178.

The allowance of interest on an adjustment of conflicting claims in admiralty is discretionary with the court. The Eliza Lines (1904) 132 Fed. 242, 65 C. C. A. 538, modifying judgment on rehearing (1902) 114 Fed. 307, 52 C. C. A. 195, and reversed (1905) 26 Sup. Ct. 8, 199 U. S. 119, 50 L. Ed. 115.

The allowance of interest by way of damages in cases of collision, and other cases of pure damage, is in the discretion of the court. Matthews, Miller, Harlan, and Gray, JJ., dissent. Dyer v. National Steam Nav. Co. (1883) 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153.

Interest is allowed on liquidated demands in admiralty the same as at law, and on seamen's wages from the time they are due. The Swallow (D. C. 1846) Fed. Cas. No. 13,665.

Long delay in enforcing a maritime lien does not affect libelant's right to interest from the time the debt fell due. Enslow v. The Sarah and Abigail (D. C. 1852) Fed. Cas. No. 4,495.

In a suit upon stale claims, not resting upon express contract, the court, in rendering a decree for libelant, may refuse interest. Mitchell v. Kelsey (D. C. 1862) Fed. Cas. No. 9,664.

Where interest is allowed on claims in admiralty, there is no uniform rule requiring the rate to be 6 per cent.; but the modern tendency, and it would seem the better practice, is to conform to the legal rate of the state. The Newaygo (D. C. 1913) 205 Fed. 178.

441. —— **Finding of fact and conclusion of law.**—On an information of forfeiture under the registration laws, where the jury render a special verdict, the court cannot decide a question of law depending upon facts not found. Peterson v. U. S. (C. C. 1807) Fed. Cas. No. 11,036.

Where the amount involved in an admiralty suit is not sufficient to permit a review by the supreme court of the judgment of the circuit court, a general finding of facts and law by the latter court is sufficient, under Act Feb. 16, 1875. One Thousand Two Hundred and Sixty-Five Vitrified Pipes (C. C. 1877) Fed. Cas. No. 10,536.

442. —— **Rule of decision.**—The rule for the decision of the federal courts in admiralty is derived from the general admiralty law. The New York v. Rae (1855) 59 U. S. (18 How.) 223, 15 L. Ed. 359.

Causes in admiralty are to be determined upon equitable principles, and according to the rules of natural justice. Brown v. Burrows (D. C. 1837) Fed. Cas. No. 1,995.

On a libel by the mortgagee of a vessel which was left in possession of the owner, admiralty will determine the bona fides of the sale of the vessel by the owner to a third person upon the principles which govern trials by jury. The Romp (D. C. 1845) Fed. Cas. No. 12,030.

A written contract which appears to be a reasonable one, and, if enforced, will do no injustice to either party, will be so enforced by a court of admiralty, even though it appear that the meaning of the contract may not have been clearly understood by the parties. The L. B. Snow (D. C. 1883) 15 Fed. 282.

443. —— **Derivation of maritime law and conflict of laws.**—Whether the giving of promissory notes for money due under a charter party operated as payment is to be determined in a suit in admiralty in a federal court by the rule prevailing in the state where the transaction took place. Kimball v. The Anna Kimball (C. C. 1861) Fed. Cas. No. 7,-772.

The federal courts are governed, in commercial and maritime cases, by the general, and not by the local, law. Mutual Safety Ins. Co. v. The George (D. C. 1845) Fed. Cas. No. 9,981.

Maritime law is only so far operative in any country as it is adopted by the laws and usages of that country. The Scotland (1881) 105 U. S. 24, 26 L. Ed. 1001.

The district court in admiralty is governed by the maritime code which we possessed before the Revolution, where not altered by law or by a change of circumstance. Thompson v. The Catharina (D. C. 1795) Fed. Cas. No. 13,-949.

An action in a federal court for an assault and battery on a vessel anchored within the limits of a county in Alabama is governed by the maritime law of the United States giving the master the right to inflict reasonable chastisement, and not by the law of Alabama, which prohibits a master from inflicting chastisement on his servant, as the general maritime law was adopted by the constitution of the United States, and no state can have a separate and distinct maritime law by itself. Roberts v. Skolfield (D. C. 1858) Fed. Cas. No. 11,917.

The United States admiralty courts may apply the rule of the general maritime law in regard to the extent of liability of owners of foreign vessels for collisions on the high seas. Churchill v. The British America (D. C. 1878) Fed. Cas. No. 2,715.

The law to be applied to cases of collision arising on the high seas beyond

the jurisdiction of any nation, and between ships of different nationalities, is the general maritime law, as understood and administered in the country in which the case is tried. The Belgenland (1884) 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

Where the British owner of a British ship is proceeded against in an American court by both British and American cargo owners, in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the statutes of the United States, and not those of Great Britain. The State of Virginia (D. C. 1894) 60 Fed. 1018.

In a libel against a vessel for damages to her cargo, the vessel and the bills of lading, being American, are governed by American law. The City of Para (D. C. 1891) 44 Fed. 689.

In case of the stranding of a foreign vessel within the territorial limits of the United States, the shipowners are not entitled to the benefit of the rule of the general maritime law limiting the liability of shipowners to the value of the vessel and freight, but are subject to the United States statute as to such liability. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334.

The case of a French seaman for wages on a French vessel will be determined by the marine law of France. Moran v. Baudin (D. C. 1788) Fed. Cas. No. 9,785.

The provisions of the French marine law which authorize a compulsory sale of a vessel in case of partners disagreeing about the use of her are part of the general law of admiralty binding on the courts of the country. The Seneca (C. C. 1829) Fed. Cas. No. 12,670.

444. —— What law governs in cases of salvage.—In a case of a salvage service performed by a British vessel in rescuing a Dutch vessel, neither the Commercial Code of the Netherlands nor the practice of the English courts furnishes the law for the American courts of admiralty; and those courts, when not fettered by statute, administer the maritime law upon a consideration of those principles which have obtained general recognition among maritime nations, and are justly applicable to all ships that sail the seas. Anderson v. The Edam (D. C. 1882) 13 Fed. 135.

445. —— Effect of municipal regulations.—Municipal ordinances concerning vessels are binding only as police regulations. Beyond that they have no force in the admiralty courts. But they may be read, and the court will determine for itself their application to the subject-matter. The Palmetto (D. C. 1856) Fed. Cas. No. 10,699.

The admiralty courts will enforce municipal regulations which affect the equipment, position, or management of vessels within particular jurisdictions. Vandewater v. Westervelt (D. C. 1851) Fed. Cas. No. 16.846a.

The corporations of the cities and towns on the Mississippi, when authorized by their legislatures, have the right to pass rules and regulations with regard to their landings, and it is the duty of courts of admiralty to respect and uphold them. Culbertson v. The Southern Belle (D. C. 1854) Fed. Cas. No. 3,462.

446. —— Following decisions of foreign or state courts.—The record and opinion of a state district court in a case involving the same facts will not be given authoritative weight in considering the evidence presented in a case in admiralty, or against any conclusion of fact fairly deducible therefrom. The Wolverton (C. C. 1886) 28 Fed. 381.

Our courts of admiralty are not bound by the decision of a foreign court, not of admiralty, based on different principles than those here recognized, and leading to a different result, though professedly deciding according to our law. Lang v. Holbrook (D. C. 1838) Fed. Cas. No. 8,057.

Where, however, a reciprocity of decision in certain cases in admiralty is necessary, the court of one country is often guided by the customs, laws, and decisions of the tribunals of another in similar cases. Thompson v. The Catharina (D. C. 1795) Fed. Cas. No. 13,949.

447. —— Keeping case open and reserving decision.—Where a point is reserved for further argument and consideration after a trial and decree in the case, it must be upon the pleadings and proofs as they stood on the original hearing. Abbey v. The Robert L. Stevens (D. C. 1861) Fed. Cas No. 8.

Where the evidence shows that libelants' scow was old, decayed, and improperly constructed, and that she sank from a blow which would not have injured a staunch and seaworthy craft, and libelants have not had full opportunity to meet this evidence, which would, unexplained, warrant a decree for a moiety, the court will reserve the question of damages and costs until the coming in of the commissioner's report. The Gilson (D. C. 1888) 35 Fed. 333.

Claimant laying stress on the presumption arising from the fact that the hatch cover, which libelant asserted had broken under his weight, and which the proofs showed was in his possession, had not been produced on the trial, it was held that the case should be kept open, with liberty to libelant to produce in court the hatch cover, and with liberty to both sides to take further evidence regarding it. Devine v. The Tiverton (D. C. 1888) 35 Fed. 529.

448. Rehearing or new trial.—A rehearing may be granted in a prize case where the original decree has not been carried into execution. Miller v. The Resolution (1781) 2 U. S. (2 Dall.) 19, 1 L. Ed. 271.

A motion for new trial will be denied,

if the parties are entitled, upon appeal, to a new trial in the circuit court. Mainwaring v. The Carrie Delap (D. C. 1880) 1 Fed. 880.

A motion for a new trial will be refused if the conclusion originally reached is, after the presentation of new facts, still adhered to. Burdett v. Williams (D. C. 1886) 29 Fed. 542.

449. —— **Grounds for.**—After a libel for collision had been determined against libelants, and a stipulation entered into by both parties to dismiss the action, libelants asked a rehearing, on the ground of the newly-discovered evidence of passengers of the libeled steamship. Libelants had a list of these passengers at the trial, but did not know their residences. Their affidavit alleged that they had afterwards learned the residences of these passengers through the Spanish consul. Held, that a rehearing would not be granted, as no excuse was given for failure to find the passengers' residences by the same means before the trial. Nor is it ground for such rehearing that new evidence has become available through some of the steamer's crew, where libelants, before the trial, had a full list of such crew, and knew which of them claimants would not examine as witnesses, but did not call any of them. Nor is it ground for such rehearing that libelants have discovered a witness who was in sight of the steamer the morning after the collision, where information of the whereabouts of such witness was obtained from the diary of a passenger, so that, if the passenger had been found before the trial, the witness might have been found too. Hatch v. The Newport (C. C. 1890) 44 Fed. 300.

A new trial is not ordered in an admiralty suit, on the mere ground of oversight in not putting in evidence which might have been put in. The Francis Wright (D. C. 1874) Fed. Cas. No. 5,044.

A rehearing in a collision case will not be allowed in the district court on the ground that since the trial libelant's witnesses testified differently in another suit, growing out of the same collision, as such evidence is admissible on appeal. The John Cooker (D. C. 1879) Fed. Cas. No. 7,337.

After hearing in an admiralty cause in this court, and a decision rendered upon complicated questions of law and fact, the cause should not be reopened and a new trial had for the introduction of further evidence in this court, where there does not appear to have been any mistake or misapprehension in regard to the evidence taken and the facts proved; such relief should be sought upon appeal to the circuit, where the additional facts may be proved as a matter of right. The Vaderland (D. C. 1883) 19 Fed. 527.

As an appeal from the district court is tried de novo in the circuit court, a new trial will not be granted in the district court for newly-discovered evidence. Mainwaring v. The Bark Carrie Delap (D. C. 1880) 1 Fed. 880.

A rehearing in admiralty cannot be granted to allow a party, after an adverse decision, to introduce further evidence, which was fully known to such party, and might have been introduced on the original hearing, but was not, because of an error of judgment on the part of counsel as to its materiality. Merchants' Banking Co. v. Cargo of The Afton (1905) 134 Fed. 727, 67 C. C. A. 618, reversing decree Merchant Banking Co. v. Cargo of S. S. Afton (D. C. 1903) 125 Fed. 258, and writ of certiorari denied Shewan, Tomes & Co. v. Merchants' Banking Co. (1905) 25 Sup. Ct. 794, 196 U. S. 639, 49 L. Ed. 630.

It was not error to deny an application to reopen a case in admiralty to admit further evidence, where there was no showing that competent evidence would be produced. The Bainbridge (1912) 199 Fed. 404, 118 C. C. A. 88.

The denial of a motion by respondent for a rehearing in an admiralty suit, to permit the introduction of new evidence, is not ground for reversal of the decree, where respondent did not support his motion with a showing of what the evidence would be, nor present it to the appellate court, as might have been done under the admiralty rules. Kenney v. Blake (1903) 125 Fed. 672, 60 C. C. A. 362, affirming decree The Troop (D. C. 1902) 117 Fed. 557.

After both parties have rested in admiralty, and the case has been argued, it will not be reopened to permit the libelant to introduce depositions previously taken by the claimant, which the libelant might, if he had desired, have offered as a part of his own case. The Persiana (D. C. 1907) 158 Fed. 912.

A rehearing of a cause will not be granted after an assessment of damages, upon alleged new evidence that is equally controverted, and involves the reconsideration of all the previous evidence. The remedy is by appeal. The Havilah (D. C. 1889) 39 Fed. 333, decree reversed (1892) 50 Fed. 331, 1 C. C. A. 519.

On a libel for damages from a collision, the case will not be reopened to examine a witness whose statements in an affidavit used on the motion in relation to the character of the blow and its effect on libelant's vessel are in direct contradiction of statements made by him in a former affidavit. The Newport (C. C. 1889) 38 Fed. 669.

Newly-discovered expert evidence as to the distance at which shore lights can be seen, and as to the effect of a change of helm in giving a list to a vessel, is no ground for such rehearing,

erpool Packet (D. C. 1861) Fed. Cas. No. 8,407.

A report of a commissioner as to the amount of libelant's claim is not objectionable, in omitting a detail of the allowances, unless defendant has demanded a specification. Mitchell v. Kelsey (D. C. 1862) Fed. Cas. No. 9,-663.

The report of assessors appointed by the court of admiralty to assess damages ought to state the principles on which it is founded, and not a gross sum, without explanation. Murray v. The Charming Betsy (1804) 6 U. S. (2 Cranch) 64, 2 L. Ed. 208.

On a reference to a commissioner to ascertain the damages in a case of collision found to have been caused by mutual fault, a report of a certain amount as due libelant is erroneous. The proper practice is to report such amount as "the damages sustained by libelant by reason of the collision." The Baltic (D. C. 1869) Fed. Cas. No. 824.

The clerk's report in matters referred to him should state facts and conclusions, and not detail the evidence at length. The Trial (D. C. 1830) Fed. Cas. No. 14,170.

An award in a case of collision which decides the liability, but not the damages, is void because not final. The Nineveh (C. C. 1869) Fed. Cas. No. 10,276.

Findings of fact by a commissioner in admiralty should be made, if practicable, in distinct paragraphs, numbered successively. The Itasca (D. C. 1901) 117 F. 885.

461. —— **Effect and conclusiveness.**—The powers conferred on a commissioner in admiralty causes are analogous to those of matters in chancery, and his findings upon questions of fact depending upon conflicting testimony or upon the credibility of witnesses should not be disturbed unless clearly erroneous. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637; The Narragansett (D. C. 1846) Fed. Cas. No. 10,020; Taber v. Jenny (D. C. 1856) Fed. Cas. No. 13,720; The Elton (1897) 83 Fed. 519, 31 C. C. A. 496; Panama R. Co. v. Napier Shipping Co. (1894) 61 Fed. 408, 9 C. C. A. 553, decree affirmed Panama R. Co. v. Napier Shipping Co. (1897) 17 Sup. Ct. 572, 166 U. S. 280, 41 L. Ed. 1004; The John McDermott (D. C. 1901) 109 Fed. 90; Watts v. U. S. (D. C. 1904) 129 Fed. 222; La Bourgogne (1906) 144 Fed. 781, 75 C. C. A. 647. But the decisions of commissioners to whom a question of fact is submitted, unlike the verdict of a jury, are not conclusive thereon. Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202. And findings on a question of fact will be reversed when clearly erroneous. The Cayuga (1893) 59 Fed. 483, 8 C. C. A. 188, 16 U. S. App. 577. And finding of facts, which are not sustained by the testimony, are not conclusive on the court. The Ida G. Farren (D. C. 1904) 127 Fed. 766.

The decision of experts to which a cause is referred will be adopted by the court unless there is a manifest preponderance of testimony against it. The Isaac Newton (D. C. 1850) Fed. Cas. No. 7,090.

Where, by written consent of the parties, the cause is referred to a commissioner, his findings of fact are entitled to the same weight as the findings of a master in chancery, and will not be disturbed when based on conflicting testimony or the credibility of witnesses, or so far as there is any testimony consistent with the finding. The Elton (1897) 83 Fed. 519, 31 C. C. A. 496.

Commissioners appointed to award a full indemnity for certain losses will be presumed to have fulfilled their duty, and the compensation allowed by them will be presumed to be a full indemnity for a loss. Brown v. Lull (C. C. 1836) Fed. Cas. No. 2,018.

462. —— **Amendment.**—The report of a commissioner in a case of mutual fault of a certain sum as "due to the libelant" will be amended so as to read "as the damages sustained by libelant." The Baltic (D. C. 1869) Fed. Cas. No. 824.

463. **Objections and exceptions to rulings and report—Method of making objection in general.**—In a libel in rem for collision, though the owner of the injured vessel is not entitled to recover the value of the cargo belonging to others where he has not paid for the loss of the same, yet this objection cannot be raised on exception to the report of a commissioner to whom the cause was referred. The remedy of the claimants would be by motion to reject the report as not within the provision of the order of reference, or to allow a rehearing on the merits. The New Jersey (D. C. 1846) Fed. Cas. No. 10,-162.

An objection to the regularity of a commissioner's report cannot be brought forward by exception to the report, but should be raised by motion founded upon the irregularity. The Columbus (D. C. 1847) Fed. Cas. No. 3,041.

Application to the court in the case of improper or irregular proceedings by a commissioner, or to control the proceedings before him, can only be had on a certificate as to his proceedings. The E. C. Scranton (D. C. 1868) Fed. Cas. No. 4,271; Id. (D. C. 1870) Fed. Cas. No. 4,272.

Findings of a commissioner on the merits, when his authority is limited by the order of reference to matters of fact and evidence, cannot be brought up by exceptions to his report. The remedy is a motion to reject the report or for a rehearing on the merits. The

New Jersey (D. C. 1846) Fed. Cas. No. 10,162.

464. —— **Necessity of exception.**—Alleged errors in a commissioner's report will not be considered unless they were clearly excepted to, so as to bring them to the notice of the court below. The Virgin v. Vyfhius (1834) 33 U. S. (8 Pet.) 538, 8 L. Ed. 1036; The Cayuga (1893) 59 Fed. 483, 8 C. C. A. 188, 16 U. S. App. 577.

An appeal from a decree rendered on the report of a commissioner awarding damages cannot be dismissed on motion, but must be heard in the usual way, where appellant appeared before the commissioner, and contested the damages, though he took no exception to the report of the commissioner to whom the cause was referred on appellant's default on the merits. Farrell v. Campbell (C. C. 1870) Fed. Cas. No. 4,682.

Trial in the federal circuit court, on appeal in admiralty cases, being de novo, appellant may object to damages found by a commissioner in the district court, to which no exceptions were filed. Ross v. Southern Cotton-Oil Co. (1890) 41 Fed. 152.

An objection to a clerk's report on a reference to ascertain the amount of damages cannot be taken by argument, but must be by formal exception. Howe v. The Lexington (D. C. 1843) Fed. Cas. No. 6,767b.

Where it does not appear how the commissioner arrived at the sum allowed for freight pending, an exception to the report, as not showing the principle on which it is calculated, is the only way to bring up the question of the amount. The Galatea (D. C. 1872) Fed. Cas. No. 5,185.

465. —— **Sufficiency.**—General exceptions to the findings of a commissioner in admiralty, containing no reference to the pertinent evidence, are not entitled to consideration by the court. The Waiontha (D. C. 1903) 122 Fed. 719.

Parties excepting to a report of a commissioner in admiralty proceedings should state, with reasonable precision, the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is. Thus, if the exception be that the commissioner received "improper and immaterial evidence," the exception should show what the evidence was; if that "he had no evidence to justify his report," it should set forth what evidence he did have; if that "he admitted the evidence of witnesses who were not competent," it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected. The Commander in Chief (1863) 68 U. S. (1 Wall.) 43, 17 L. Ed. 609.

An exception to the method adopted by a commissioner in ascertaining damages is unavailing, unless the report or the exception show what the method was. The Transit (D. C. 1870) Fed. Cas. No. 14,138.

Exceptions of the parties to the findings of fact by a commissioner in admiralty, and the briefs of proctors, should refer by number to the paragraphs of the findings. The Itasca (D. C. 1902) 117 Fed. 885.

Under the rule laid down in The Paquete Habana, 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900, a general exception to the amount of a finding by a commissioner on a reference in admiralty is sufficient where all the evidence is attached to the report. Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co. (D. C. 1904) 132 Fed. 154, reversed (1905) 137 Fed. 780, 70 C. C. A. 356.

466. —— **Effect of exceptions and matters reviewed therein.**—An exception to a commissioner's report draws in question only the reasons upon which the report is founded. The Columbus (D. C. 1847) Fed. Cas. No. 3,041. The legality or propriety of an order of reference cannot be impeached upon exception to the report. The Rhode Island (D. C. 1848) Fed. Cas. No. 11,740a.

A party cannot, by exceptions to the report of a commissioner to compute damages, raise a question on the merits which was previously decided by the court. Hovey v. The Sarah E. Brown (D. C.) Fed. Cas. No. 6,744.

The credibility and reliability of the witnesses on the reference cannot be investigated on exceptions to the report unless the objections rest wholly on questions of law. Burton v. The Commander in Chief (D. C. 1860) Fed. Cas. No. 2,215.

The decree cannot be attacked by exceptions to the commissioner's report thereunder. Waterman v. Morgan (D. C. 1856) Fed. Cas. No. 17,259. The justness of a decree on a libel for collision, in which a reference to a commissioner to ascertain the damage has been directed, cannot be tested on exceptions to the commissioner's report. Burton v. The Commander in Chief (D. C. 1860) Fed. Cas. No. 2,215.

Supposed errors in a decree of the court cannot be reviewed on exceptions to the report of a commissioner appointed to ascertain damages. Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co. (D. C. 1883) 16 Fed. 800.

In a libel in rem for collision, though the owner of the injured vessel is not entitled to recover the value of the cargo belonging to others where he has not paid for the loss of the same, yet this objection cannot be raised on ex-

ception to the report of a commissioner to whom the cause was referred. The remedy of the claimants would be by motion to reject the report as not within the provision of the order of reference, or to allow a rehearing on the merits. The New Jersey (D. C. 1846) Fed. Cas. No. 10,162.

467. —— **Objections to evidence.**—Objections to the admission or exclusion of evidence before a commissioner cannot be raised by exception to his report. The E. C. Scranton (D. C. 1870) Fed. Cas. No. 4,272; The Emilie (D. C. 1870) Fed. Cas. No. 4,451; The Transit (D. C. 1870) Fed. Cas. No. 14,138. But see The Beaver (D. C. 1876) Fed. Cas. No. 1,200, holding that objections to rulings of commissioner on admission of evidence, on reference to ascertain damages, may be brought up on exceptions after report, made, or on certificate pending reference.

A neglect at the trial to object to the competency of evidence waives the right to object to the same evidence on a subsequent reference to the clerk. The Trial (D. C. 1830) Fed. Cas. No. 14,170.

The propriety of the action of a commissioner, to whom it has been referred to ascertain the damages in a collision case, in refusing to allow a person to be sworn to contradict testimony previously given, cannot be raised by an exception to the report, but must be raised by an application to the court before the report is made. The E. C. Scranton (D. C. 1870) Fed. Cas. No. 4,272.

Evidence objected to before a commissioner merely as irrelevant and immaterial will not be rejected by the court, on the ground that the facts testified to should have been shown from the witness' books and the books were not produced. The Bulgaria (D. C. 1897) 83 Fed. 312.

468. —— **Effect of failure to except to report.**—Where the report of the commissioner was not excepted to, it is not necessary that the minutes of his testimony should be brought up. The City of Paris (C. C. 1878) Fed. Cas. No. 2,767.

Where money subject to distribution is in court after the report of an auditor, the decree does not follow the report of the auditor as a matter of course, because no exception has been taken to it. Harper v. New Brig (D. C. 1835) Fed. Cas. No. 6,090.

469. **Confirmation or recommittal of report.**—An award will not be recommitted because libelant's counsel omitted to call the attention of the referee to a matter which might have influenced him to increase the amount of salvage. The Liverpool Packet (D. C. 1861) Fed. Cas. No. 8,407.

The commissioner's report of the amount of damages will be adopted in the absence of palpable errors or inadvertencies or preponderating evidence. The Narragansett (D. C. 1846) Fed. Cas. No. 10,020; The Mayflower (D. C. 1872) Id. 9,345; Egbert v. Baltimore & O. R. Co. (D. C. 1868) Id. 4,305.

The court will not hear questions arising on a reference to a commissioner to compute damages at the instance of the parties, unless they have submitted them to the commissioner, and he has decided them, or declined to do so. The E. C. Scranton (D. C. 1868) Fed. Cas. No. 4,271.

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470. Rendition, form, and requisites in general—Interlocutory or final decree.—A decree final in other respects is not converted into an interlocutory one because it directs a taxation of costs. Craig v. The Hartford (C. C. 1856) Fed. Cas. No. 3,333.

471. —— Conformity to pleadings.—The rule obtains in admiralty that the decree must conform to the pleadings. Ward v. The Fashion (D. C. 1854) Fed. Cas. No. 17,154; Ward v. The Fashion (D. C. 1854) Fed. Cas. No. 17,155; Second Pool Coal Co. v. People's Coal Co. (C. C. 1911) 188 Fed. 892, 110 C. C. A. 526, affirming (D. C. 1910) 181 Fed. 609, certiorari denied in (1911) 32 Sup. Ct. 526, 223 U. S. 727, 56 L. Ed. 632.

The opinion of the court on collateral matters should not be incorporated in the decree. Ward v. The Fashion (D. C. 1854) Fed. Cas. Nos. 17,154, 17,155. Hence, in a libel for collision, where the issue formed by the pleadings was whether the collision was caused by the negligence and want of skill of the respondents, and the court was of opinion that the proof showed the collision to have been the result of inevitable accident, and the decree was "that, the libelants having failed to establish fault in the respondents, the libel must be dismissed," it was held that this opinion with regard to the collision being inevitable accident could not be incorporated into the decree in order to enable the libelant to plead res adjudicata to a libel pending against him in another court. Ward v. The Fashion (D. C. 1854) Fed. Cas. No. 17,155. But a decree may be made against a defendant named in the body of the libel though he is not named in the prayer for relief. Nevitt v. Clarke (D. C. 1846) Fed. Cas. No. 10,138.

472. —— Judgment in personam.—A judgment in personam cannot ordinarily be entered in a suit in rem except upon amendment and the issue of new

process in personam, or the general appearance of the owner in personam. The Monte A. (D. C. 1882) 12 Fed. 331.

Rule 21 does not authorize a personal judgment against the claimants in an action in rem except against such as have signed the stipulation given in lieu of the vessel seized. Atlantic Mut. Ins. Co. v. Alexandre (D. C. 1883) 16 Fed. 279.

473. —— **Actions in personam aided by attachment.**—In a suit in personam, the defendants not being within the district, but their property being attached, and no appearance entered, the decree will not be against the defendants personally, but only against the property attached. If that property consist of specific articles, the court will order a sale. Such sale will be only of the right of the debtor. Boyd v. Urquhart (D. C. 1858) Fed. Cas. No. 1,750.

474. —— **On recovery by several libelants.**—Where several libelants, having distinct damage interests, recover in a cause of collision, the decree may be in form for recovery by all of the aggregate sum, and directing a distribution to each of the sums respectively adjudicated to them. The City of Alexandria (D. C. 1890) 44 Fed. 361.

A decree for damages for collision in favor of several libelants should be for the gross sum, so as to bring it within the jurisdictional amount for appeal. Avery v. The Wanata (C. C.) Fed. Cas. No. 677.

475. —— **On recovery against several defendants.**—In case of a joint admiralty suit against several, the court may, if equity require it, pass a decree apportioning the damages among the respondents, instead of passing a decree against them jointly. Penhallow v. Doane (1795) 3 U. S. (3 Dall.) 54, 1 L. Ed. 507.

476. —— **Adjustment of rights as between co-defendants.**—Where, after a decree in admiralty against two vessels for damages which does not apportion the same or settle the equities between their claimants, it is shown that the claimants of one vessel and their sureties stand in the relation of sureties for the claimants of the other and their sureties, the court, on application of the former, will stay proceedings against them until after return of execution first issued against the latter. The Helen R. Cooper (C. C. 1872) Fed. Cas. No. 6,335.

Where the owner of the steamship A., which had been libeled by a cargo owner, caused a steamship company to be made co-defendant under the fifty-ninth rule, and the evidence upon the trial showed clearly that the libelant was entitled to recover against the A., though it did not clear up the dispute between the co-defendants, the libelant can take a decree against the A., and the case should be continued as between the two defendants. Ceballos v. The Alert (D. C. 1890) 44 Fed. 685.

Where it is doubtful whether the tug or the vessel with which the tow collided was in fault, on a libel by the owner of the tow against the tug, a decree will be given the tow, leaving the tug to recover the whole or a portion of the damages from the other vessel. The Enterprise (C. C. 1855) Fed. Cas. No. 4,500.

Where the negligence of one of two vessels jointly liable is proven the decree may be against her alone. Chase v. Crary (D. C. 1855) Fed. Cas. No. 2,626.

Where coal is furnished to two or more vessels, and the evidence shows the amount of coal used on each, the amounts will be fairly apportioned between the vessels. McRae v. Bowers Dredging Co. (C. C. 1898) 86 Fed. 344.

Under a libel charging a collision to have been caused by the joint negligence of two vessels, a decree may be rendered against one found to have been solely in fault. The E. C. Scranton (D. C. 1867) Fed. Cas. No. 4,270.

477. —— **Time for rendition.**—In Alabama it has been held that under Code Ala. § 2698, judgment on a libel in admiralty could be rendered at the first term, unless the boat had been seized 20 days prior thereto. Gwin v. Whitaker (1866) 40 Ala. 294.

478. —— **Enrollment.**—All decrees in admiralty are deemed to be enrolled as of the term in which they are made. The New England (C. C. 1839) Fed. Cas. No. 10,151.

479. **Decree by default or pro confesso—Nature of decree pro confesso.**—A decree pro confesso in admiralty is not final, and merely authorizes the court to hear the case ex parte, either directly, or by reference to a commissioner to ascertain and report the amount due. Phipps v. The Lopez (D. C. 1890) 43 Fed. 95.

480. —— **Requisites and validity in general.**—In a suit in rem for collision, where the vessel attached had been released on stipulation, on the insolvency of claimant's sureties an order was made pursuant to a rule of court requiring the claimant to furnish additional security, and, on a failure to comply with such order, the claimant's answer was stricken out, and a decree entered pro confesso for an amount of damages ascertained on a reference by a commissioner. Held, that the striking out of the answer and entry of the decree could not be deemed a punishment of the claimant for failure to obey the court's order, but was a proper procedure to bring to an end a proceeding in rem in which, through the fault of the claimant, the libelant had neither the res nor security. The Fred

M. Lawrence (1899) 94 Fed. 1017, 36 C. C. A. 631.

In cases of default, proclamation to appear should be made, and a decree entered for default and contumacy; and on reading the libel and proceedings thereon, with or without proof, as the court may direct, such a decree will be made as the case may require. U. S. v. The Mollie (C. C. 1876) Fed. Cas. No. 15,795.

The filing of a claim in admiralty proceedings does not stay proceedings ex parte by the libelant unless it is interposed on the return day of the process when the proclamation is made; and, when no one appears on the return day, it is proper to enter interlocutory and final decree in favor of libelant as upon default, although the claimant had theretofore filed his claim. Baxter v. The Dona Fermoas (D. C. 1858) Fed. Cas. No. 1,123a.

In admiralty, if the stipulators do not appear, a decree pro confesso may be taken against them; and if such decree is not entered pro forma, and the court proceeds to hear the cause ex parte, and renders the proper decree, they cannot complain on error that the evidence in the cause is not set out in the record. Meaher v. Tindal (1867) 41 Ala. 385.

481. —— **Taking proofs.**—After a decree pro confesso on a bill in admiralty, as in equity, the amount of damages must be determined by the court from the evidence, and not from the allegations of the libel. Cape Fear Towing & Transportation Co. v. Pearsall (1898) 90 Fed. 435, 33 C. C. A. 161.

In a case of seizure for violation of the steamboat insp ction law, the court, in case of default, will exercise a discretion, according to R. S. § 923, post, § 1549, whether to require proofs or not. U. S. v. The Mollie (C. C. 1876) Fed. Cas. No. 15,795.

Before the defendant can be heard in his defense, or introduce evidence in the cause, he must appear and contest the suit, either by exceptions to the libel or by answering it. If he does neither, the court will hear and adjudge the cause ex parte, upon the evidence offered by the libelant. But where it appears that the defendant has neglected to put in an answer through ignorance of the practice of the court, and is at the time of the hearing absent, the court is not precluded from receiving any evidence which his counsel may offer as amicus curiæ. The David Pratt (D. C. 1839) Fed. Cas. No. 3,597.

Where, on a libel for wages, no one appears for the vessel, the amount claimed must be legally ascertained before the vessel will be sold. Sanders v. The Sea Fowl (D. C. 1863) Fed. Cas. No. 12,296a.

Where, on the filing of a libel in rem and the issuance of attachment, the vessel has been seized and the usual notice duly published, and no person appears as owner or claimant, either formally on the record or by notice to the proctors for the libelant, the default itself may be treated as sufficient basis for a formal decree of condemnation and sale without further proofs. The Ethel J. (D. C. 1911) 190 Fed. 50.

On a libel of forfeiture for violation of the law relating to fishing bounties, in cases of default there must be some hearing before decree of forfeiture. U. S. v. The Lion (D. C. 1858) Fed. Cas. No. 15,607. This may be by merely examining the libel and the return of the marshal, with evidence that the owners had actual notice, and willfully made default, with knowledge of the material facts. Id.

482. —— **Effect of default.**—Where a libel has been filed against a vessel, and on the return day of the monition the owner of the vessel did not appear, and his default was duly entered in the cause, such default amounts to a formal admission by him of the truth of the allegations of the libel, and a lien in favor of the libelants attaches to the proceeds of the vessel, which has been sold in the meantime under a decree in a prior suit for seamen's wages. Rostron v. The Water Witch (C. C. 1890) 44 Fed. 95.

483. **Opening or setting aside decree by default or pro confesso.**—Irregularities in entering default are waived by the voluntary appearance of respondent before the commissioner without objection, but such default will be set aside to permit a real defense. Gaines v. Spann (C. C. 1823) Fed. Cas. No. 5,178; Same v. Travis (D. C. 1848) Fed. Cas. No. 5,179.

Default decrees in admiralty, founded upon valid claims, held should not be set aside. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

The court will not, on mere motion at a subsequent term, set aside a decree made at the hearing. The Oriental (D. C. 1876) Fed. Cas. No. 10,569a.

Any person interested in a ship or thing proceeded against in admiralty may come within a year from the time of a decree rendered by default, and, on giving security, and paying all the costs, and showing sufficient cause for his previous default, be admitted to defend. Read v. Owen (Ala. 1839) 9 Port. 180.

484. —— **Proceedings which may be opened or set aside.**—Rules 29 and 40 apply as well to suits in rem as to those in personam. The Duiveland (D. C. 1866) Fed. Cas. No. 4,122.

485. —— **Grounds.**—Where a seaman libeled a vessel, and obtained a decree by default, it will be set aside, where claimant shows that libelant had contracted personally with the master, who was navigating the vessel on a lay. The Caroline Casey (D. C. 1858) Fed. Cas. No. 2,421a.

A default decree in favor of the master was opened where his lien was dis-

puted and it did not clearly appear that the sum claimed was due. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

Where the proceeds on a sale under a default decree are not sufficient to pay the lien, the default will not be set aside on petition of one alleging an inferior lien. The Grapeshot (D. C. 1868) Fed. Cas. No. 5,702.

The want of notice by publication will furnish ground for opening the decree, but does not render the proceedings void. Daily v. Doe (D. C. 1880) 3 Fed. 903.

486. —— **Time for motion in general.**—Default for want of an answer will not be set aside after a decree from which an appeal might be taken. Rule 29. The Duiveland (D. C. 1866) Fed. Cas. No. 4,122.

A motion to open a decree entered by default must be made within 10 days after entry; otherwise it must be denied. Northrop v. Gregory (D. C. 1870) Fed. Cas. No. 10,327.

487. —— **Accounting for laches and showing meritorious defense.**—Where a libel for a collision was filed in September, the vessel attached in October, and default entered in November, and motion was made to set aside the default on a question of jurisdiction, argued and denied on the 4th of February, and it appeared that respondents were a foreign transportation company, and the proctor was not apprised of the facts until March, when another motion to set aside was made, such facts sufficiently accounted for the laches. But where the collision was admitted, a statement that it was not caused by respondent's negligence, but was an unavoidable accident, is merely an expression of opinion, and does not disclose a meritorious defense. Scott v. The Young America (D. C. 1856) Fed. Cas. No. 12,550.

Upon a motion to vacate an order pro confesso, and for leave to answer, respondent must satisfactorily account for his laches, and exhibit by answer or affidavit a meritorious defense. Scott v. The Young America (D. C. 1856) Fed. Cas. No. 12,550.

If libelant's proctor negotiates the postponement of the trial, he cannot thereafter allege ignorance of the fact that the answer was on file. Warner v. The Ralph Post (D. C. 1862) Fed. Cas. No. 17,187.

488. —— **Requisites of motion.**—The motion to open a default decree must be accompanied by the proposed answer or a statement of the ground of defense, to enable the court to judge of its merits. Northrop v. Gregory (D. C. 1870) Fed. Cas. No. 10,327.

489. —— **Imposing conditions.**—Where the marshal, without authority of the court, has discharged attached property from custody, and subsequently served defendants personally, the court will require them to give security as a condition of opening their default. Van Winkle v. Jarvis (D. C. 1869) Fed. Cas. No. 16,883.

Where the claimant of a vessel which is libeled for the services of a shipkeeper is guilty of laches, in that he fails to intervene until after judgment pro confesso and order of sale, he will be required to pay the libelant's costs, as a condition of opening the decree. Jepson v. The America (D. C. 1893) 56 Fed. 1021.

490. **Amendment, opening, or vacating decree.**—A court of admiralty has power, on seasonable application, to reopen a decree entered under a misapprehension of the facts or on improper evidence. The Eva D. Rose (1908) 166 Fed. 101, 92 C. C. A. 85, affirming decree (D. C. 1907) 153 Fed. 912. And see Snow v. Edwards (D. C. 1873) Fed. Cas. No. 13,145.

491. —— **Grounds.**—A court of admiralty has no general power—at least, after expiration of the term—to set aside a final decree on the ground of oversight, inadvertence, or mistake. The Illinois (D. C. 1857) Fed. Cas. No. 7,003.

A decree of the district court will not be opened, and an amended answer allowed to be filed, on the ground of the subsequent discovery of a prior decision of the circuit court in conflict therewith. Thomassen v. Whitwell (D. C. 1878) Fed. Cas. No. 13,930.

After a decision for libelants in rem for freight and demurrage, it cannot be objected that freight has been found due libelants in a pending suit in personam. Brookman v. Sixty Barrels of Molasses (D. C. 1862) Fed. Cas. No. 1,941a.

It is no impeachment of a decree of sale of a vessel that the claim on which the libel was brought was purchased pending the suit. Seaver v. The Carroni (D. C. 1858) Fed. Cas. No. 12,593.

Where libel by master of a vessel does not claim damages for loss to owners from cancellation of charter party, the court may allow an amendment of the interlocutory decree, and refer the case to a commissioner to deal with the subject-matter of the amendment. Harrison v. Hughes (D. C. 1903) 119 Fed. 997.

When several libels are filed against the same vessel, to pay which the proceeds turn out to be insufficient, the decrees may be opened upon motion of one libelant, for the purpose of showing that a claim conflicting with his own is not justly due. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

Where libel by master of a vessel does not claim damages for loss to owners from cancellation of charter party, the court may allow an amendment of the interlocutory decree, and refer the case to a commissioner to deal with the sub-

ject-matter of the amendment. Harrison v. Hughes (D. C. 1903) 119 Fed. 997.

492. —— **Time within which decree may be opened.**—A court of admiralty has no power to amend a final decree on petition or motion for a rehearing filed after the expiration of the term at which the decree was enrolled, even though error in its findings is shown. Pettit v. One Steel Lighter (D. C. 1900) 104 Fed. 1002. And see The Illinois (D. C. 1857) Fed. Cas. No. 7,003; The Major Barbour (D. C. 1863) Fed. Cas. No. 8,984; The Oriental (D. C. 1876) Fed. Cas. No. 10,569a; Seaver v. The Carroni (D. C. 1858) Fed. Cas. No. 12,-593; Lyles v. Steamship Santiago de Cuba (D. C. 1880) 2 Fed. 271. But see The Madgie (D. C. 1887) 31 Fed. 926, holding that a decree in admiralty may be reopened at the same term on motion, and at a subsequent term corresponding relief may be granted on petition.

493. —— **Requisites of application.**—A party seeking to set aside proceedings against him must embody all objections presumably known to him at the time in one application. Nelson v. Bell (D. C. 1851) Fed. Cas. No. 10,101a.

494. **Libel or bill for review.**—Quære, whether a libel of review in the nature of a bill of review in equity will lie in admiralty. The New England (C. C. 1839) Fed. Cas. No. 10,151; The Enterprise (C. C. 1855) Fed. Cas. No. 4,497.

495. —— **Persons entitled.**—The claimants of an informer's share, after condemnation and sale of forfeited property, may seek a review of a judgment or decree of distribution made by the district court. Wheaton v. U. S. (C. C. 1871) Fed. Cas. No. 17,487.

496. —— **Time of taking proceedings.**—The rule that a cause may not be reheard after the term in which it was originally decided, except upon a showing of fraud, applies only to a direct proceeding in the same cause, and does not affect a proceeding to review the original suit. Jackson v. Munks (1893) 58 Fed. 596, judgment affirmed Munks v. Jackson (1895) 66 Fed. 571, 13 C. C. A. 641.

The district court has discretion to entertain a libel of review, filed after the term, by a surety on a release bond, against whom decree was entered when absent from the state, the libelant having delayed the hearing until the principal's death, and then represented certain depositions to be lost, which, being afterwards produced, showed facts sufficient to have constrained the court to find against libelant. Munks v. Jackson (1895) 66 Fed. 571, 13 C. C. A. 641 affirming Jackson v. Munks (C. C. 1893) 58 Fed. 596.

A court of admiralty may entertain a libel of review to correct its decree after the expiration of the term; where the petitioner is shown to be free from fraud or negligence in the matter, and the entering of the decree shows such fraud, or its equivalent, in effect, upon the rights of the petitioner, as to require the remedial action of the court upon principles of justice. Hall v. Chisholm (1902) 117 Fed. 807, 55 C. C. A. 31. And see Northwestern Car Co. v. Hopkins (C. C. 1865) Fed. Cas. No. 10,334. After the term has passed in ordinary cases, and after 10 days in defaulted cases, the court can entertain a libel of review. Snow v. Edwards (D. C. 1873) Fed. Cas. No. 13,-145; Janvrin v. Smith (D. C. 1842) Fed. Cas. No. 7,220.

A motion will not lie to review a decree after writ of error lodged. McGrath v. Candalero (D. C. 1794) Fed. Cas. No. 8,810.

497. —— **Grounds.**—Where a decree dismissing a libel was inadvertently entered by the clerk, no order having been made by the judge, although he had indicated his intention to dismiss, and the fact of the entry was not known to the judge or counsel until after the close of the term and the expiration of the time for appeal, the court properly entertained a libel of review to set such decree aside, with a view of re-entering the same as of a later date, to preserve libelant's right of appeal. Hall v. Chisholm (1902) 117 Fed. 807, 55 C. C. A. 31.

A libel of review in admiralty will lie in favor of a surety on the release bond of a vessel, who was absent from the state at the time of the decree, and knew nothing thereof until after the expiration of the time for appeal; it appearing that the libelant had delayed the hearing for eight years, during which the claimant died insolvent, and the testimony originally taken was lost; that the decree was rendered on testimony of the libelant alone; and that the lost depositions, being subsequently found, showed a state of facts which, if presented to the court, would have constrained it to find against the libelant's claim. Jackson v. Munks (C. C. 1893) 58 Fed. 596, affirmed in Munks v. Jackson (1895) 66 Fed. 571, 13 C. C. A. 641.

A court of admiralty may entertain a bill of review, where, through fraud, its powers and process have been abused, and used to effect a tortious purpose, as where, through collusion between the owner of a small interest in a vessel and others, a decree has been obtained, and the vessel subjected to sale for the payment of an illegal claim, and for an inadequate price, without the knowledge of the other owners; and in such case no technical limitation will be applied to defeat an application for the correction of its decree, or such other relief as it is within the power of

the court to afford. The Columbia (D. C. 1900) 100 Fed. 890.

498. —— **Contradicting officer's return.**—In a libel for review by defendant in a defaulted action, he can contradict the officer's return in the action. Snow v. Edwards (D. C. 1873) Fed. Cas. No. 13,145.

499. **Operation and effect of decree.**—Where a cause of action was different from a personam suit, and the judgment in the latter suit was recovered before the decree in the admiralty suit was entered, it cannot operate as res adjudicata. Gray v. National S. S. Co. (C. C. 1881) 7 Fed. 273, decree affirmed (1884) 5 Sup. Ct. 1166, 115 U. S. 116, 29 L. Ed. 309.

Where a libel for breach of charter party alleges that respondent is the sole owner of the ship, and the charter party filed therewith is made by certain agents of the owners, a judgment on demurrer that the libel is not defective for the apparent variance does not preclude respondent from showing by plea the fact that there are other owners, necessary parties. Card v. Hines (D. C. 1888) 35 Fed. 598.

The owner of a vessel, in case of injury to the vessel and cargo, may maintain an action for damage to both against another vessel causing the injury; and after the latter has been once arrested, and given bail for the whole damage, if the owner of the cargo afterwards cause all claim on his account to be withdrawn from the suit, he cannot, ordinarily, again maintain an action against the same vessel in rem, and arrest her a second time for the same damage. The Wm. Murtagh (D. C. 1883) 17 Fed. 259.

In a libel on a bottomry bond, the overruling of a plea alleging the disability of libelants to sue, on the ground that at the time the suit was brought and the plea was filed they were alien enemies, does not prevent respondents from pleading in bar that at the time the contract was entered into libelants were alien enemies, and for that reason the contract was void. Crawford v. The William Penn (C. C. 1819) Fed. Cas. No. 3,373.

A marshal seizing a tug under monition in a suit in rem in the district court of Minnesota returned that the seizure was made "in the open waters of Lake Superior, about 3,000 feet from the pier at Sault Ste. Marie, Michigan." A motion was made to discharge the vessel for want of jurisdiction to make the seizure at the place where it was made. The court overruled the motion, for the reason that the seizure was made in the open waters of Lake Superior, without referring to the further return that it was made 3,000 feet from the pier at Sault Ste. Marie. Held, that the question whether the place stated, namely, 3.000 feet from the pier at Sault Ste. Marie, was within the territorial limits of the jurisdiction of the court, was not res judicata, and that the same might afterwards be raised by a plea to the jurisdiction. Inman v. The Lindrup (D. C. 1895) 70 Fed. 718.

500. —— **Parties and privies.**—The master of a vessel is not in privity with her owner, within the rule that binds privies as well as parties to the estoppel of a judgment. Bailey v. Sundberg (1892) 49 Fed. 583, 1 C. C. A. 387, reversing (D. C. 1891) 44 Fed. 807, and certiorari denied Baily v. Same (1892) 12 Sup. Ct. 239, 145 U. S. 628, 36 L. Ed. 855, and (1894) 14 Sup. Ct. 1142, 154 U. S. 494, 38 L. Ed. 1078.

In a suit in admiralty for collision, where all of the parties in interest are in court and all of the facts are before the court, it is its duty to determine absolutely as among all of the parties their relative rights and where two vessels are both held in fault for a collision between one of them and a third vessel, and each of them adjudged to pay half the damages, the decree is conclusive as between them, and one cannot subsequently maintain a second suit against the other to recover the amount it was so required to pay. Rhodes v. Interlake Transp. Co. (D. C. 1906) 144 Fed. 205.

Where a vessel was seized and sold in a proceeding in admiralty for unlawful sealing, and due notice of the proceedings was given by the marshal, the proceedings being in rem, the decree, affirmatively showing that the court adjudicated all matters litigated by all parties appearing, adjudged nonappearing parties in default, and condemned the vessel as forfeited to the United States, was res judicata as against a nonappearing lien claimant for supplies, so as to preclude him from claiming a lien on the proceeds of the sale of the vessel. The James G. Swan (D. C. 1901) 106 Fed. 94.

In an action by a cargo owner against an insurer to recover for loss of the cargo, the record in a suit in which the vessel and cargo were sold for salvage was admissible in evidence; the decree being binding on all parties in interest, and it was immaterial that the final decree of distribution in the salvage suit had not been entered at the time the insurance action was commenced. Standard Marine Ins. Co., Limited, of London, Eng., v. Nome Beach Lighterage & Transp. Co. (1909) 167 Fed. 119, 92 C. C. A. 571, affirming judgment Nome Beach Lighterage & Transp. Co. v. Standard Marine Ins. Co., Limited, of Liverpool, Eng. (C. C. 1907) 156 Fed. 484.

A verdict and judgment against the owners of a vessel in a suit to charge them personally with the penalties incurred, under R. S. § 4465, post, § 8229, for carrying a greater number of passengers than was stated in the certifi-

cate of inspection, is not conclusive against their vendees in a subsequent suit in rem in admiralty to enforce against the vessel the lien of the penalties, under R. S. § 4469, post, § 8239. The title of a vessel not being involved in an action against her owners to charge them personally with penalties incurred under R. S. § 4465, post, § 8229, the owners are not privies to the suit, and in a subsequent suit in rem in admiralty to enforce against the vessel the lien of the penalties, under R. S. § 4469, post, § 8239, they may show that the number of passengers illegally carried was less than the number found by the jury in the first suit. The Boston (C. C. 1881) 8 Fed. 628.

501. —— Decree against one libelant.—Though seamen may join in admiralty, in a suit for wages, a decree against one does not affect the claims of the rest. Oliver v. Alexander (1832) 31 U. S. (6 Pet.) 143, 8 L. Ed. 349.

502. —— Effect on persons not parties.—Where, on a libel in rem for collision, the master of the libelee, though not a formal party, takes an active part in the defense, a dismissal on the merits renders the question res judicata, as against a subsequent libel in personam against him. The owner of a vessel which was sunk by collision with a steamer brought a libel in rem, and the steamer was attached, but no notice was given or publication made as required by rule 9. Subsequently the steamer was released on her owner's giving bond to the libelant for less than her value. Held, that a decree dismissing the libel was binding on the libelant only, and would not prevent a new libel by the owner of the cargo. Bailey v. Sundberg (1892) 49 Fed. 583, 1 C. C. A. 387, reversing (D. C. 1891) 49 Fed. 807, and certiorari denied Baily v. Same (1892) 12 S. Ct. 239, 145 U. S. 628, 36 L. Ed. 855, and (1894) 14 S. Ct. 1142, 154 U. S. 494, 38 L. Ed. 1078.

A decree in a proceeding in rem in admiralty against a ship for collision, in which no arrest of the vessel was made and advertised, but her owners appeared voluntarily, is not binding upon her cargo owners, who were not parties, and is therefore not admissible in their behalf to establish the fault of the ship in an action subsequently brought by them against her. The Harrogate (1901) 112 Fed. 1019, 50 C. C. A. 665, writ of certiorari denied President, etc., of Insurance Co. of North America v. The Harrogate (1902) 22 Sup. Ct. 937, 184 U. S. 698, 46 L. Ed. 764.

Owners of cargo must be made parties to the suit before they can avail themselves of the operation of the decree. Jones v. The Hanover (D. C. 1851) Fed. Cas. No. 7,466.

In an action for repairs of a steamboat, a decree in admiralty against the boat, and the papers in the proceeding, are inadmissible to prove plaintiff's ownership, where he made no appearance in the proceeding. Moynihan v. Drobaz (1899) 56 P. 1026, 124 Cal. 212, 71 Am. St. Rep. 46.

503. —— Effect on persons having liens.—A materialman's lien is not affected by a decree in such suit. The Taranto (D. C. 1849) Fed. Cas. No. 13,751.

In a suit in rem for damages caused by collision, all persons having a lien on the res, growing out of such collision, are deemed parties to the suit, and are bound by the decree. Bailey v. Sundberg (D. C. 1890) 43 Fed. 81.

504. —— Identity of causes of action in general.—Under the American rule the identity of the causes of action in two suits cannot be tested by inquiring whether the same matters might have been proved under the pleadings, but the second suit will be barred if the parties and relief sought are the same and the matters essential to sustain the cause of action alleged might have been proved in the former action under appropriate pleadings. A decree on the merits dismissing an intervening petition to establish a general maritime lien on a Maine vessel for supplies furnished in Boston is a bar to a second petition to establish a lien for the same supplies, under the statute of Massachusetts, on the ground that she was a domestic vessel because enrolled in Boston, since the subject-matter of the two petitions is the same and the causes of action substantially identical, and under the liberal rules of practice in admiralty both grounds for relief might have been alleged in the first petition in the alternative. The New Brunswick (D. C. 1903) 125 Fed. 567, decree affirmed (1904) 129 Fed. 893, 64 C. C. 325.

505. —— Issues raised and determined.—A decree dismissing a libel in rem against a vessel to recover for repairs does not constitute an adjudication of the nonliability of the owners, who, under rule 12, could not be joined as defendants in such suit, and did not intervene therein, unless it clearly appears from the record that such issue was not only raised, but decided, since its determination was not necessarily involved. Where the opinion of the court shows that the decree was based on a finding that the contract was not made with the master as alleged, but with the owners, under circumstances which did not entitle libelants to a lien, an expression of opinion therein that libelants agreed to wait for payment from the earnings of the vessel, which was a question not material to the decision, does not render the decree conclusive upon that question when pleaded in bar of a subsequent suit against the owners, or offered in evidence as an estoppel. Morris v. Bartlett (1901) 108 Fed.

675, 47 C. C. A. 578, reversing decree (D. C. 1900) 99 Fed. 786.

A decree entered after trial, dismissing a libel brought by the owner of a sailing vessel against tugs to recover for damage to such vessel from capsizing, alleged to have been due to the negligence of the tugs in towing, is an adjudication that the tugs were not in fault for the capsizing, which is conclusive between the parties; but an expression of opinion by the court that the capsizing should be ascribed to sea perils was not upon a matter directly in issue, and is not conclusive in a second suit by the owner of the tugs to charge the tow with negligence. Williamson v. McCaldin Bros. Co. (1903) 122 Fed. 63, 58 C. C. A. 399, affirming decree (D. C. 1902) La Escoesso, 116 Fed. 400.

A cross action cannot be maintained which seeks a retrial of matters already adjudicated between the parties. Nor is this rule varied when the subject-matter is the same, although one action be in rem and the other in personam; the thing sued being regarded in admiralty as substituted for its owner, and, when subject to his responsibilities, entitled at the same time to his immunities. The Navarro (D. C. 1845) Fed. Cas. No. 10,059.

In a libel for collision, the issue formed by the pleadings was whether the collision was caused by the negligence and want of skill of the respondents. The court was of opinion that the proof showed the collision to have been the result of inevitable accident, and the decree was "that, the libelants having failed to establish fault in the respondents, the libel must be dismissed." It was held that this opinion with regard to the collision being inevitable accident could not be incorporated into the decree in order to enable the libelant to plead res adjudicata to a libel pending against him in another court. Ward v. The Fashion (D. C. 1854) Fed. Cas. No. 17,155.

In admiralty, if a former judgment is relied on as a defense, the record should show that the matter in question was actually set up and passed upon; not merely that it might have been. The Vincennes (D. C. 1858) Fed. Cas. No. 16,945; Duncan v. Stokes (1873) 47 Ga. 593.

506. —— **Effect of decree in libel in rem on libel in personam.**—Where the insurers of a cargo of grain which was destroyed have paid the loss and become subrogated to the rights of the insured, and obtained a decree in rem in the United States circuit court charging the boat with liability for the loss, such decision is conclusive of a libel in personam in the district court whereby the insurers seek to charge the owners of the boat with liability as common carriers. Providence Washington Ins. Co. v. Morse (D. C. 1888) 35 Fed. 363.

A judgment in a proceeding in rem in the admiralty court, that a contract for repairs on a vessel did not bind the vessel or her owners, but that it was agreed that payment should be had out of her earnings, is a bar to a personal action against the owners to recover for such repairs. Morris v. Bartlett (D. C. 1900) 99 Fed. 786, reversed (1901) 108 Fed. 675, 47 C. C. A. 578.

507. —— **Decree in actions to enforce forfeitures.**—Whether a seizure for a forfeiture under the laws of the United States be rightful or not is a question to be decided exclusively by the admiralty courts, and their decrees thereon are final. Slocum v. Mayberry (1817) 15 U. S. (2 Wheat.) 1, 4 L. Ed. 169; Gelston v. Hoyt (1818) 16 U. S. (3 Wheat.) 246, 4 L. Ed. 381; Buchannan v. Biggs (Pa. 1797) 2 Yeates, 232.

The decree of a court of admiralty on a proceeding in rem, for a forfeiture, is conclusive on all persons claiming an interest in the thing. The Mary Anne (D. C. 1826) Fed. Cas. No. 9,-195.

508. —— **Effect of decree of another or foreign court of admiralty.**—On a libel to carry into effect the decree of another admiralty court, the grounds of the decree cannot be inquired into; such decree, in rem, being conclusive on all the world. Penhallow v. Doane (1795) 3 U. S. (3 Dall.) 54, 1 L. Ed. 507; Ocean Ins. Co. v. Francis (N. Y. 1828) 2 Wend. 64, 19 Am. Dec. 549.

The sentence of a foreign court, of competent jurisdiction, acting in rem, is conclusive in respect to the matter on which it directly decides. Peters v. Warren Ins. Co. (C. C. 1838) Fed. Cas. No. 11.035; Blanque v. Peytavin (1816) 4 Mart. (O. S.) La. 458, 6 Am. Dec. 705. And see Cucullu v. Louisiana Ins. Co. (1827) 5 Mart. (N. S.) 464, 16 Am. Dec. 199; Cucullu v. Orleans Ins. Co. (1827) 6 Mart. (N. S.) 14; Zeno v. Louisiana Ins. Co. (1831) 2 La. 533. Such a decree cannot be impeached in this country, until regularly set aside in the country where it was passed. Stewart v. Warner (Conn. 1803) 1 Day, 142, 2 Am. Dec. 61.

A decree of the maritime court of Ontario is entitled to the same respect as that of any foreign admiralty or vice admiralty court. The Garland (D. C. 1883) 16 Fed. 283.

A decree of an English court of admiralty, determining the fault for a collision between the two vessels involved, is conclusive of such question as between such vessels in a subsequent suit against both in a court of admiralty of the United States to recover damages sustained by libelant in such collision. The Kaiser Wilhelm der Grosse (D. C. 1909) 175 Fed. 215.

The decree of an admiralty court in a sister state, condemning a ship, on a survey had, as unseaworthy, is not res judicata in the courts of Louisiana as to seaworthiness. Marks v. Nashville

Marine & Fire Ins. Co. (1851) 6 La. Ann. 126.

A sentence of condemnation, in a foreign court of admiralty, is prima facie evidence that the causes of condemnation mentioned in it exist, and of the authority of the court to pronounce the sentence, and of the regularity of the proceedings, but it may be impeached. Francis v. Ocean Ins. Co. (N. Y. 1826) 6 Cow. 404.

If a decree of a foreign court of admiralty condemn a ship or cargo, without assigning any reasons, the law of nations will presume they have gone upon just and proper grounds; and it is conclusive and binding on all the world, and never after can be called in question by the parties interested. Campbell v. Williamson (S. C. 1800) 2 Bay, 237.

A sentence of a foreign tribunal, condemning neutral property under an edict unjust in itself, contrary to the law of nations, and in violation of neutral rights, and which has been so declared by the legislative and executive department of the United States, nevertheless changes the property of the thing condemned; and a sale, by authority of the captors, before sentence of condemnation, is affirmed by such sentence, and is good ab initio. Williams v. Armroyd (1813) 11 U. S. (7 Cranch) 424, 3 L. Ed. 392.

A condemnation by a foreign court of admiralty is not conclusive if appealed from; and, until the appeal be decided, no decision will be had here between the insured and insurer. Zino v. Louisiana Ins. Co. (La. 1827) 6 Mart. (N. S.) 63.

509. —— **Manner of setting up res judicata.**—A prior decree on the same cause of action, as a defense in an admiralty cause in favor of the party for whom it was rendered, should be given in evidence, and not set up by summary motion to prevent further hearing or to try the fact upon affidavits. Reed v. The Fanny (D. C. 1858) Fed. Cas. No. 11,645a.

510. **Collateral attack on decree.**—Where a court has jurisdiction of the res in a proceeding in rem, the record of its decree cannot be collaterally attacked for errors and irregularities appearing therein. Otis v. The Rio Grande (C. C. 1872) Fed. Cas. No. 10,613.

A defect of pleading a jurisdictional fact in a libel in admiralty does not render void the judgment, so that another court may declare it a nullity in a collateral action. Kelsey v. Beers (N. Y. 1863) 16 Abb. Prac. 228.

The decree cannot be attacked by exceptions to the commissioner's report thereunder. Waterman v. Morgan (D. C. 1856) Fed. Cas. No. 17,259; Burton v. The Commander in Chief (D. C. 1860) Fed. Cas. No. 2,215.

511. **Lien of decree.**—A decree for the payment of money, in an admiralty suit in personam, stands as a lien, on the same footing as a decree in equity. Ward v. Chamberlain (1862) 67 U. S. (2 Black) 430, 17 L. Ed. 319.

Where judgments and decrees in equity of state courts are, by state laws, liens upon land, decrees in admiralty by United States courts stand on the same basis, and are equally binding. The Potomac (1862) 67 U. S. (2 Black) 581, 17 L. Ed. 263.

An admiralty decree is not a lien on the land, and has never been treated as a lien on land in either England or this country. Ward v. Chamberlin (C. C. 1860) Fed. Cas. No. 17,152.

The real estate of a surety is subject to an execution in admiralty, the lien of the decree being regulated by Act July 4, 1840. The Kentucky (C. C. 1860) Fed. Cas. No. 7,717.

512. **Payment of decree.**—The title will pass to the defendant, in a suit for collision, who pays the full value on a decree against him, as against underwriters to whom the owner has previously abandoned the vessel. Fox v. The Lucy A. Blossom (D. C. 1854) Fed. Cas. No. 5,013.

513. **Release of decree.**—Evidence held insufficient to impeach the validity of a release of a decree on the ground that it was without consideration, or that it was procured by collusion and fraud. Naretti v. Scully (1905) 139 Fed. 118, 71 C. C. A. 206.

514. **Restraining enforcement of decree.**—The district court, sitting in equity, has power to restrain the enforcement of a decree made by the same court sitting in admiralty. Dutcher v. Woodhull (D. C. 1874) Fed. Cas. No. 4,204.

515. **Execution in general.**—Admiralty decrees can only be enforced in the federal courts in the mode and by the process properly ordained by acts of congress and rules of court for their execution. Such decrees can only be enforced by an attachment or a capias against the person of the defendant, or a fieri facias against his goods and chattels. The admiralty court has no power to issue an execution against his lands. Ward v. Chamberlin (C. C. 1860) Fed. Cas. No. 17,152.

A final decree for payment of money in a suit in rem is enforced, as prescribed by rule 21, by execution. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

Taking out a fieri facias in the first instance without success does not prevent resorting to process of capias ad satisfaciendum, or to an attachment under rule 21, providing that on a decree for the payment of money libelant may have, at his election, an attachment to compel defendant to perform the decree, or an execution against the property, or, for want thereof, against his body. The Delaware (D. C. 1846) Fed. Cas. No. 3,762.

Where, after a decree in admiralty

against two vessels for damages which does not apportion the same or settle the equities between their claimants, it is shown that the claimants of one vessel and their sureties stand in the relation of sureties for the claimants of the other and their sureties, the court, on application of the former, will stay proceedings against them until after return of execution first issued against the latter. The Helen R. Cooper (C. C. 1872) Fed. Cas. No. 6,335.

When property has been sold or otherwise disposed of, so that it cannot be reached in specie by the process of a court of admiralty, the process may be enforced against the proceeds. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

The execution of the sentence of a superior court can only be by a court of admiralty, having the thing which is ordered to be restored within its power. Carson v. Jennings (C. C. 1804) Fed. Cas. No. 2,464, affirmed (1807) 8 U. S. (4 Cranch) 2, 2 L. Ed. 531.

516. —— **Garnishment.**—A debt due respondent from a third person may be attached in admiralty to satisfy a decree in personam. Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202.

517. —— **Enforcement against nonparty to stipulation.**—The failure of a successful libelant to enforce his decree against a part owner (and his sureties), who alone had given a stipulation conditioned to pay the amount that might be awarded on final decree, does not authorize execution to issue against the other part owner, who was no party to the stipulation accepted by libelant. The Zodiac (D. C. 1881) 5 Fed. 220.

518. —— **Notice.**—No notice need be given the opposite party of a final decree before proceedings to enforce it. Gaines v. Travis (D. C. 1849) Fed. Cas. No. 5,180.

A decree from which an appeal may be taken cannot be executed within 10 days after it has been rendered; but the delay is for no other purpose than to favor the right of appeal, and the mere entry of the decree is notice to all parties. Id.

519. —— **Decree of another court.**—A court of admiralty may execute the decree of another court of admiralty. Penhallow v. Doane (1795) 3 U. S. (3 Dall.) 54, 1 L. Ed. 507; The Centurion (D. C. 1839) Fed. Cas. No. 2,554; Ocean Ins. Co. v. Francis (N. Y. 1828) 2 Wend. 64, 19 Am. Dec. 549.

A court of admiralty may, at the instance of a party and without letters of request, enforce a decree in personam for the payment of costs rendered by an admiralty court in another district. Pennsylvania R. Co. v. Gilhooley (D. C. 1881) 9 Fed. 618.

The federal admiralty courts will carry into effect the sentences and decrees of foreign admiralty courts. Otis v. The Rio Grande (C. C. 1872) Fed. Cas. No. 10,613.

An admiralty court will not carry into effect the decrees of foreign admiralty courts any further than a court of common law will carry into effect the judgments of other tribunals. Bowler v. Eldredge (1846) 18 Conn. 1.

520. **Enforcement against property in court.**—If the property attached in a suit in personam against defendants not being within the district be money in the registry, the decree will be satisfied therefrom. Boyd v. Urquhart (D. C. 1858) Fed. Cas. No. 1,750.

521. **Enforcement against sureties or stipulators—Method of enforcing stipulation.**—A court of admiralty has no power to enforce a decree against sureties in a stipulation for value by sequestration of their property. Under rule 21, providing that when a decree is for the payment of money libelant may have an attachment to compel defendant to perform the decree, or an execution against the property, on default of stipulators for costs an order for decree may be obtained on which execution may issue against the entire estate of the parties, as under the rules of the district court a stipulation for costs includes a consent that execution shall issue against all the estate of the parties in case the stipulators do not perform their engagement. The Delaware (D. C. 1846) Fed. Cas. No. 3,762. Nor can the liability of such sureties be enforced by an attachment to compel them to comply with its stipulations. Nor can such sureties be compelled to appear before the court for examination concerning their property according to the laws and practice of the state of New York. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

522. —— **Punishment for contempt.**—A court of admiralty has no power to punish sureties on a stipulation for value for contempt in failing to comply with the provisions of the decree. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

523. —— **Notice of execution.**—The award which grants execution upon a final decree authorizes it against all parties embraced in the decree, and there is no necessity of special notice to the surety of respondent of an application for an execution against him. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637.

524. —— **Summary execution against bail.**—As rule 3 places the principal and his surety on bond or stipulation given on an arrest in personam upon the same footing, in a suit in personam for wages, where the stipulation is that the principal shall appear in the suit, and abide by all the orders of the court made in the cause, a final decree against the principal may be enforced

by summary process of execution against both the principal and stipulator. Such rule repeals the former practice, whereby an order to show cause why the stipulator should not fulfill his engagement was served before execution issued. A special notice to the surety, of application for execution against him, is not necessary. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637.

Execution issues against stipulators summarily upon the decree rendered against the principal. Gaines v. Travis (D. C. 1849) Fed. Cas. No. 5,180.

Where the respondent in a suit in personam has gone beyond seas, process may issue against the bail on motion, though no execution against the principal has been returned non est inventus. In re Snow (C. C. 1855) Fed. Cas. No. 13,141.

525. **Summary execution against stipulators for release of vessel.**—Under the rules promulgated by the supreme court, execution properly issues against stipulators summarily upon the decree rendered against their principals; the giving the stipulation being regarded as a submission by the stipulator to such decree as may be rendered against the party for whom he is bound. Gaines v. Travis (D. C. 1849) Fed. Cas. No. 5,-180.

In an attachment case against a steamboat under Act Ala. 1844, p. 98, the defendant entered into a replevin bond, with sureties conditioned that the stipulators should pay and satisfy such judgment as might be rendered in the attachment proceeding against them. Held, that under the statute the recovery of judgment by plaintiff in such action gives a lien on the steamboat, and also authorizes an execution against the stipulators in the bond. Hunter v. McCraw (1858) 32 Ala. 518.

526. **Sale or other disposition of property.**—Where a libel in rem to recover freight was filed against a cargo of salt which the consignee had refused to accept, and the collector of customs had taken it into his custody to secure payment of duties, and while in his possession the monition was served on him by the marshal by exhibiting to him the original process, leaving with him a copy and delivering a notice of attachment to the keeper of the United States public store where part of the salt was, and whither the rest was in course of removal from the vessel, and the marshal made return of the monition that he "was unable to take said property into his custody otherwise than as aforesaid for the reason of the custody of said collector," and an interlocutory decree on default having been entered, and the amount of the libelant's claim and lien for freight ascertained, the libelant applied for a final decree and order that a writ vend. ex. issue for the sale of the salt, subject to the payment of the duties and expenses due the United States. Held, ex parte, that the court acquired jurisdiction over the property by the service of the process as made, and could order the goods sold, subject to the claims of the United States for duties and expenses. Two Hundred and Fifty Tons of Salt (D. C. 1880) 5 Fed. 216.

527. —— **Right to sale in general.**—Where a libelant, in a suit in rem in the admiralty, establishes a clear legal right to a condemnation and sale, there is no discretionary power in the court to refuse or postpone an order of sale. Davis v. New Brig (D. C. 1834) Fed. Cas. No. 3,643.

Where moiety owners of a vessel disagree as to her use and employment, admiralty has power to decree a sale. The Annie H. Smith (D. C. 1878) Fed. Cas. No. 420; Burr v. The St. Thomas (D. C. 1851) Fed. Cas. No. 2,194a; Burr v. The St. Thomas (D. C. 1851) Fed. Cas. No. 2,195; The Ocean Belle (D. C. 1872) Fed. Cas. No. 10,402; The Seneca (C. C. 1829) Fed. Cas. No. 12,670 (reversing Davis v. The Seneca [D. C. 1828] Fed. Cas. No. 3,650); Coyne v. Caples (D. C. 1881) 8 Fed. 638. But admiralty has no jurisdiction to decree a sale at the instance of minority owners, but should require a stipulation of the majority for the protection of the minority interest. Lewis v. Kinney (C. C. 1879) Fed. Cas. No. 8,325; The Ocean Belle (D. C. 1872) Fed. Cas. No. 10,402; Coyne v. Caples (D. C. 1881) 8 Fed. 638.

Admiralty courts have jurisdiction to order a survey and decree a condemnation and sale of the ship, but the judge should be satisfied that the application is made in good faith, and that the vessel is so damaged that no prudent man would think of repairing her. Walter v. The Montgomery (D. C. 1840) Fed. Cas. No. 17,120. Farther as to sale in salvage proceedings, see Bennett v. The Tevere (D. C. 1855) Fed. Cas. No. 1,325; Cross v. The Dolphin (D. C. 1800) Fed. Cas. No. 3,432; Edwards v. Thirty-Five Boxes of Gold Dust, Saved from Wreck of the Union (D. C. 1851) Fed. Cas. No. 4,299a; The Kristrel (D. C. 1848) Fed. Cas. No. 7,935; The Lexington (Super. Ct. Fla. 1835) Fed. Cas. No. 8,336.

528. —— **What property may be sold.**—In a suit in personam, defendants not being within the district, and not appearing, the decree will go only against the property attached, and a sale ordered where it consists only of specific articles. Such sale will be only of the right of the debtor. Boyd v. Urquhart (D. C. 1858) Fed. Cas. No. 1,750.

529. —— **Conditions precedent to sale.**—Where, on a libel for wages, no one appears for the vessel, the amount claimed must be legally ascertained before the vessel will be sold. Sanders v.

The Sea Fowl (D. C. 1863) Fed. Cas. No. 12,296a.

Where a steamer is libeled for wages, it is the proper practice before a sale on default to require security of the libelant to answer for the sum received to any person claiming a right or presenting his interest within a year. Read v. Owen (Ala. 1839) 9 Port. 180.

530. —— **Time for making sale.**—A sale of a libeled vessel may be ordered before final decree, on the claimant's motion, when libelant does not object after due notice, and especially when the claimant is financially responsible and personally liable for all lawful demands against it growing out of the collision in question. O'Meara v. The Nevada and The Portia (D. C. 1898) 85 Fed. 681.

531. —— **Notice of sale.**—Under rules 47 and 48 of the district court, notice of sale under venditioni exponas (except on condemnation of property on seizure by the United States) must be published for six days, and the sale will be set aside if this full number of publications is not made. Under Act March 2, 1799, c. 22, § 90, 1 Stat. 696, the notice of sale, in cases of condemnation under the act, must be published every day for 15 days in the newspapers directed by the act. The Hornet (D. C. 1847) Fed. Cas. No. 6,704.

In a proceeding to enforce the sale of a vessel to discharge a maritime lien, though the want of notice by publication may furnish grounds for opening the decree, yet it does not render the proceedings void. Daily v. Doe (D. C. 1880) 3 Fed. 903.

Where the property of libelant was condemned to sale in a proceeding to which he was not a party, and which was not a proceeding in rem, nor a proceeding against the vessel in any form, the order of sale is a nullity. The J. W. French (D. C. 1882) 13 Fed. 916.

532. —— **Conduct of sale in general.**—A foreign consul has no right to fees for attending a sale where interests of subjects of his government are not involved. Bennett v. The Tevere (D. C. 1855) Fed. Cas. No. 1,325.

Under the forty-first rule of practice in the courts of the United States, in causes of admiralty and marine jurisdiction on the instance side of the court, the marshal, in the sale of property condemned, acts immediately under the decree and order of the court. Smith v. Armistead (1850) 17 Ala. 282.

533. —— **Private sale.**—A court of admiralty which has ordered the sale of a libeled vessel by the marshal at public auction is without authority to accept in open court, or to authorize the marshal to accept a private bid therefor. Lambert's Point Towboat Co. v. U. S. (1910) 182 Fed. 388, 104 C. C. A. 598.

534. —— **Place of sale.**—Where a sheriff's keeper allows the marshal to take actual possession, and subsequently holds for both the marshal and the sheriff, and the marshal makes a sale upon the deck of the vessel without objection, the warrant of arrest will be held duly served, and the sale valid. The Julia Ann (D. C. 1858) Fed. Cas. No. 7,577.

At a sale in admiralty proceedings, advertised to take place at the front entrance to the custom house, the officer stood in the open door of the front entrance part of the time, so that persons inside the hallway, and outside the building, could hear him cry the sale. Many, if not all, the persons at the sale were in the hall. The front door was closed part of the time. About 30 persons attended, and there were several bids, commencing at $300, the highest bid being $600, which was much below the value of the property. Held, that these facts did not show the sale to have been irregular, so as to require it to be set aside. The Ruby (D. C. 1889) 38 Fed. 622.

535. —— **Purchasers at sale.**—A proctor bidding at a sale is personally liable where his agency is not known to the marshal. The fact that the bidder at a judicial sale of a tug was acting as agent for another person, and that the marshal might have inferred this from his being an attorney at law, is no defense to a motion for an attachment for contempt for refusing to pay in the purchase price in obedience to an order of court. The Kate Williams (D. C. 1877) Fed. Cas. No. 7,623.

The master of a tug whose tow is lost, through his negligence, is not bound to defend the tug against a valid claim for such loss, nor notify other persons having liens thereon, and he may purchase the same at a sale under a decree therefor. The E. W. Gorgas (D. C. 1879) Fed. Cas. No. 4,585.

536. —— **Fraud or misrepresentation.**—Claims amounting to $62,710.16 were filed against the owner of vessels, of which $54,310.16 represented claims for which maritime or state liens were asserted. A receiver's sale of the vessels subject to such liens was ordered. Prior to the sale certain lien claims had been rejected or withdrawn, leaving only $34,226.33 outstanding so far as was known. The auctioneer by inadvertence gave notice to proposing bidders that the amount of liens claimed against the vessels was between $55,000 and $60,000. Held, that the bidders were entitled to rely upon the representations of the auctioneer as the mouthpiece of the receiver; the receivership having been in existence for six months, and a special master having been appointed to consider

claims, and the sale should not have been confirmed on account of the misrepresentation. Hudson v. New York & Albany Transp. Co. (1910) 180 Fed. 973, 104 C. C. A. 129.

A sale will be set aside for fraud of the purchaser, or of the officer who conducted it, or for fraudulent negligence or misconduct in any other person connected with it. The Sparkle (D. C. 1874) Fed. Cas. No. 13,207.

537. —— **Inadequacy of price.**—The sale of a vessel under a default decree will not be set aside where it brought full value. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

A court of admiralty will not set aside the judicial sale of a vessel which has been sold without her sails for a sum insufficient to satisfy all claims against her, when it appears that a full price, excluding the value of the sails, was obtained. The George Prescott (D. C. 1865) Fed. Cas. No. 5,339.

Evidence held sufficient to warrant a court of admiralty, in the exercise of its discretion, in setting aside a sale of a vessel made under its order in a proceeding by the owner for limitation of liability on the ground of inadequacy of price. Lambert's Point Towboat Co. v. U. S. (1910) 182 Fed. 388, 104 C. C. A. 598.

A sale of a libeled vessel in admiralty, made by consent, but which has not been finally confirmed, will be set aside, and a new sale ordered, on an offer of a materially increased bid; and it is no ground of objection to such action that the first bidder has deposited the amount of his bid, or incurred expense on account of his supposed purchase, since he could acquire no rights or standing in the case until confirmation. The Sue (D. C. 1905) 137 Fed. 133.

A sale in admiralty was set aside where there was a combination between the persons in possession of the vessel and libelant, and the price was grossly inadequate, and petitioner was allowed to intervene and defend. The Sparkle (D. C. 1874) Fed. Cas. No. 13,207.

538. —— **Warranties on sale.**—On a sale by the marshal, under an order of court, no warranty is implied, neither the marshal nor his agent having any authority to warrant the article sold. The Monte Allegre (1824) 22 U. S. (9 Wheat.) 616, 6 L. Ed. 174.

There is no warranty of a complete outfit on the sale of a vessel "as she lies," though the published notice read "her boats, tackle, apparel, and furniture." The Kate Williams (D. C. 1877) Fed. Cas. No. 7,623.

539. —— **Effect of sale as devesting other claims.**—A sale under an admiralty decree, obtained without fraud, cuts off all claims of the builders of the boat, her owners and creditors. Stewart v. Fagan (C. C. 1876) Fed. Cas. No. 13,426.

Where a vessel has been sold pursuant to a decree entered after due notice requiring all claimants to appear, and has been delivered to the purchaser, and the proceeds applied to the discharge of the debts allowed, the sale will not be set aside to permit another claimant to then intervene and prove his lien. The Dode (D. C. 1900) 100 Fed. 478.

Where mortgagees of a vessel decline to appear as claimants in a suit against a vessel by material men, and the vessel is sold in satisfaction of the material men's claim, the mortgagees appearing at the sale, and giving notice to the bidders of their lien, the lien of the mortgage is not affected by the sale, the mortgagees not having submitted their interest to the jurisdiction of the court. Schuchardt v. The Angeleque (D. C. 1853) Fed. Cas. No. 12,483a.

On a sale of a vessel on a final decree in a proceeding in rem, all liens and incumbrances are transferred from the vessel to the proceeds. The Syracuse (D. C. 1878) Fed. Cas. No. 13,716.

A sale of a vessel by order of a court of admiralty is conclusive upon all persons, and devests all liens. Phegley v. David Tatum (1863) 33 Mo. 461, 84 Am. Dec. 57.

A sale in admiralty passes the property devested of all prior liens where the proceedings are strictly in rem; but where the judgment is against a party, such as would support an action against him, "with the privilege on the" specific property, it is otherwise, and a sale does not devest a prior lien in favor of those who have furnished supplies, etc. Ritter v. The Jamestown (1856) 23 Mo. 348. But where mortgagees of a vessel decline to appear as claimants in a suit in admiralty to enforce a maritime lien, their lien is not affected by a sale under the decree. Schuchardt v. The Angeleque (D. C. 1853) Fed. Cas. Nos. 12,483a, 12,483b. CONTRA, see Schuchardt v. The Angelique (C. C. 1855) Fed. Cas. No. 12,483c.

Under 2 Rev. St. N. Y. p. 499, § 42, which provided that no proceeding to enforce liens against vessels should be had against vessels under seizure by virtue of process issued by any United States court of admiralty jurisdiction, or against any vessel sold by order of such court, except for debts contracted after such sale, a sale pursuant to the judgment of a United States court cuts off all liens prior thereto. Kelsey v. Beers (N. Y. 1863) 16 Abb. Prac. 228.

540. —— **Objections to sale.**—The regularity of proceedings under which a vessel was sold cannot be inquired into in trover in another district court for her possession. Barker v. Par-

kenhorn (C. C. 1808) Fed. Cas. No. 993.

When the record shows that the boat was actually sold under the order of the court, and that the proceeds were in the hands of the sheriff, it is too late to raise the objection for the first time that the court did not have the possession or control of the vessel. George v. Skeates (1851) 19 Ala. 738.

541. —— **Liability for wrongful sale.**—One who acted as agent for a party in obtaining an erroneous judgment directing the sale of a cargo, but who was not a party to the record, and had no personal interest in the suit, cannot be held liable in damages as a tort feasor on account of the sale. The Eliza Lines (1904) 132 Fed. 242, 65 C. C. A. 538, modifying decree on rehearing (1902) 114 Fed. 307, 52 C. C. A. 195, and decree reversed (1905) 26 Sup. Ct. 8, 199 U. S. 119, 50 L. Ed. 115, 4 Ann. Cas. 406.

A salvor not guilty of an intentional tort in selling salved property is liable to the owner only for salvage received. The payment of money to the purchaser of property under an unauthorized sale for salvage, with a reservation of all rights, does not prevent an action for wrongful sale. American Ins. Co. v. Johnson (D. C. 1827) Fed. Cas. No. 303.

The owners of the cargo were allowed interest on the proceeds after deducting salvage from the date of a wrongful sale by the master to the claimants. The Richmond (C. C. 1857) Fed. Cas. No. 11,797.

542. **Setting aside sale.**—The court, after decreeing salvage, may refuse to restore the ship and cargo to the master, if the interests of the owners and consignees seem to call for such refusal. The Montserat (D. C. 1858) Fed. Cas. No. 9,740. And see The Byron (D. C. 1854) Fed. Cas. No. 2,275. But the vessel must be restored after the payment of salvage to those in possession when she was relieved. Booth v. L'Esperanza (D. C. 1798) Fed. Cas. No. 1,647.

Restitution, upon payment of salvage, will be adjudged in all cases, if the original owners can be found. British Consul v. Twenty-Two Pipes and Ten Hogsheads of Wine (D. C. 1801) Fed. Cas. No. 1,900.

A court of admiralty has discretionary power, like a court of equity, to set aside or refuse to confirm a sale of property made under its process, but, where such sale was fairly made, after due advertisement, and there was a considerable attendance of persons having knowledge of the property, it should not be set aside on objection of other parties interested, who had opportunity to protect themselves by offer of an increased price. The Planter (D. C. 1908) 163 Fed. 667.

A court of admiralty in a proceeding in rem ordered a vessel sold at private sale, and confirmed the sale when made. The purchasers resold the vessel to persons outside of the district who removed it therefrom. Subsequently an appeal was taken, without supersedeas, and the order of sale was reversed on the ground that the court had no power to authorize a private sale. Held that, conceding that a suit to recover the vessel might be successful, the court should not order it where it would then be necessary to resell the vessel, and in all probability the amount realized after paying costs would not be as much as was paid by the first purchaser, and the result would be a loss to the fund. The John Twohy, Jr. (D. C. 1911) 189 Fed. 965.

Motion to set aside a decree and sale of a vessel thereunder, because notice of the suit was not published in accordance with rules, and because the sale was not made in the county where the vessel was located, denied, where the claimant had actual notice, and did not move until the rights of third persons had intervened. The Earl K (D. C. 1914) 215 Fed. 613.

543. —— **Proceedings to set aside.**—A motion to set aside a sale will not be granted where the party has been guilty of inexcusable laches. Where a mortgagee of a vessel knew of the institution of a suit against her in time to intervene and protect his interest, and knew of the sale before its confirmation, but suffered six months to elapse before making application to set the sale aside, it was held that his inexcusable laches would alone preclude him from any relief. Pease v. The Napoleon (D. C. 1854) Fed. Cas. No. 10,883.

An application to set aside a sale of a vessel, regularly made, denied in the case of a delay of three months, where the parties could not be put back to their original position. U. S. v. The Austin (D. C. 1878) Fed. Cas. No. 14,479.

A delay of six months after knowledge of the sale is inexcusable laches. Pease v. The Napoleon (D. C. 1854) Fed. Cas. No. 10,883.

A decree against a vessel will not be opened, and the sale under it set aside, where the shipowners, with full notice of the proceedings, did not make application until after they were all perfected. Seaver v. The Carroni (D. C. 1858) Fed. Cas. No. 12,593.

An application will not lie to set aside a sale by default in admiralty, where it is not entitled in the same cause, and it does not appear that the promovents were parties or privies to that action. Freeman v. The Albany (D. C. 1857) Fed. Cas. No. 5,083a.

A simple allegation of fraud in a petition to set aside a sale, without setting forth the facts which constitute the fraud, is insufficient. The Kaloolah (D. C. 1861) Fed. Cas. No. 7,602.

Where, on motion of a libelant in rem, the court makes an order setting aside a sale of the libeled vessel under a decree entered at the same term in another suit, unless a bond is given by the claimant and he furnishes an ordinary claimant's bond, such bond is available to the libelant in case of his recovery. The New York (D. C. 1899) 93 Fed. 495.

544. **Rights and liabilities of purchasers at sale.**—Where the proceeds of sales are brought into court, in a proceeding in rem, they are not liable to make good a loss of the purchaser, sustained by a defect found in the article sold. The Monte Allegre (1824) 22 U. S. (9 Wheat.) 648, 6 L. Ed. 174.

The purchasers of property under a decree in admiralty take subject to the power of the court to vacate the sale, when such action is necessary to promote the ends of justice. The Sparkle (D. C. 1874) Fed. Cas. No. 13,207.

Where the purchaser of a vessel at a judicial sale, not confirmed by the court, obtained possession of her without authority, and expended labor upon her, and a resale was afterwards ordered, he was not entitled to maintain a libel for his services. The New Hampshire (D. C. 1877) Fed. Cas. No. 10,160.

545. —— **Claimant as purchaser.**—Where the claimant became the purchaser of a vessel while she was in the custody of the marshal for the very bill of supplies in controversy in this case, furnished at a foreign port on her credit, to render her seaworthy and competent to proceed on her voyage, he is not entitled to the protection sometimes accorded to a purchaser for value and without notice of maritime liens thereon. The Morning Star (C. C. 1882) 14 Fed. 866.

Where the claimant purchased the vessel under execution from a state court in a proceeding to enforce his own claim, the amount which he bid must be applied on his debt, and the balance may be proved as a claim. The Skylark (D. C. 1870) Fed. Cas. No. 12,928.

546. —— **Enforcing payment of price or completion of purchase.**—A court of admiralty may compel a purchaser at a judicial sale to complete his purchase. The order need not be directed to any particular person, service of it upon the defaulting purchaser being sufficient. The Kate Williams (D. C. 1877) Fed. Cas. No. 7,623.

Where the purchaser on a marshal's sale takes possession without paying the price, the court will enforce by summary process either a redelivery of the property in specie or the payment of the purchase money. The Phebe (D. C. 1837) Fed. Cas. No. 11,066.

On a motion for an attachment for contempt in refusing to comply with an order of court requiring the purchaser at a judicial sale of a tug to pay in the purchase money, the failure of the marshal to return the writ of venditioni exponas, and file a report of sale, is cured by an order of confirmation. The Kate Williams (D. C. 1877) Fed. Cas. No. 7,623.

547. —— **Excuses for refusal to complete purchase.**—On a motion for an attachment for contempt in refusing to pay in the purchase price of a tug purchased at a judicial sale thereof, it is no defense that the purchaser did not get all the property that formerly belonged to the vessel, where it was announced at the sale that the vessel was sold "as she is," although the published notices designated the vessel, "her boats, tackle, apparel, furniture, and appurtenances." The fact that the bidder was acting as agent for another person, and that the marshal might have inferred this from his being an attorney at law, is no defense. The Kate Williams (D. C. 1877) Fed. Cas. No. 7,623.

As an auctioneer is not required by law to be employed by the marshal in sales under process or decree in admiralty, the purchaser under such decree may lawfully refuse to pay the auctioneer's fees, and, having refused to pay the purchase price with the fees included, he cannot be held liable for a deficiency arising on a resale. As R. S. § 829, ante, § 1386, provides a certain percentage for a compensation of the marshal for the sales of vessels, and that the marshal shall be entitled to one dollar for executing a deed "prepared by the party or his attorney," and as R. S. § 823, ante, § 1375, provides that no other compensation shall be allowed, etc., the refusal of an auctioneer employed by the marshal, without authority, to allow the purchaser to take the vessel, unless he pay $25 auctioneer's fees and $5 for a bill of sale, will relieve the purchaser from his obligation to perfect the sale, so that he will not be liable for a deficiency resulting on the resale. The John E. Mulford (D. C. 1883) 18 Fed. 456.

548. —— **Title of purchaser.**—All persons are bound by a decree in admiralty on the point then in controversy. But those who become interested by a purchase, under orders and proceedings of a court of admiralty, are not bound by a decree as to right of property between libelants and claimants. Jones v. Walker (C. C. 1803) Fed. Cas. No. 7,506.

Where the claimant became the purchaser of a vessel while she was in the custody of the marshal for the very bill of supplies in controversy in this case, furnished at a foreign port on her credit, to render her seaworthy and competent to proceed on her voyage, he is not entitled to the protection sometimes accorded to a purchaser for value and without notice of maritime liens thereon. The Morning Star (C. C. 1882) 14 Fed. 866.

To invalidate the sale of a vessel under a decree of a court of admiralty

on the ground of fraud, it must appear that the proceedings were both collusive and fraudulent, and that the purchaser was cognizant of the fraud. Hence, where a vessel subject to a mortgage, and also to liens for loss of lives, was taken from Detroit to Canada at the instance of her owner for the purpose of freeing her of these liens, and there seized and sold upon a small but valid claim for necessaries, and was bought in for her appraised value by the mortgagee, who had no knowledge that the proceedings had been taken with the approval of the owner, it was held that the sale was valid, and the mortgagee took an unincumbered title. The Garland (D. C. 1883) 16 Fed. 283.

Foreign attachments are not proceedings in rem, and the sale of a vessel on adjudication therein will not give the purchaser a title superior to that of a prior mortgagee. Cole v. The Brandt (D. C. 1841) Fed. Cas. No. 2,978.

The sale of a vessel by proceedings in rem in a court of competent jurisdiction extinguishes all liens upon her, and vests a clear and indefeasible title in the purchaser. The Trenton (D. C. 1880) 4 Fed. 657.

A purchaser in good faith under a marshal's sale, upon a decree of a court of admiralty, will be protected in his title if the court had jurisdiction to decree the sale. In the sale of a vessel to enforce a maritime lien, jurisdiction over the vessel is acquired by its seizure by the marshal under the process of the court, and this seizure and possession by the marshal are notice to all persons interested of the pendency of the proceedings and of their right to intervene and protect their interests, and therefore a bona fide purchaser at such sale will be protected as against one who failed to appear and assert his rights in such proceeding. Daily v. Doe (D. C. 1880) 3 Fed. 903.

Ordinarily, to proceedings in rem in admiralty all the world are parties, and a sale of a vessel in such proceedings conveys a perfect title to the purchaser. But if the owner fraudulently and collusively procure his vessel to be sold under the forms of law, and himself become the purchaser, for the purpose of cutting off just claims against her, such sale is void as against creditors. Thompson v. The J. D. Morton (1858) 8 Ohio St. 222.

A court of admiralty in a proceeding in rem ordered a vessel sold at private sale, and confirmed the sale when made. The purchasers resold the vessel to persons outside of the district who removed it therefrom. Subsequently an appeal was taken, without supersedeas, and the order of sale was reversed on the ground that the court had no power to authorize a private sale. Held that, notwithstanding such reversal, the vessel could not be recovered from the second purchasers, who were not parties to the litigation, but bought in good faith in reliance on the title given by the court. The John Twohy, Jr. (D. C. 1911) 189 Fed. 965.

549. —— Enforcing right of purchaser to possession.—Sales in admiralty must be confirmed by the court before the purchaser takes the property. The New Hampshire (D. C. 1877) Fed. Cas. No. 10,160.

Where a purchaser at an execution sale of a vessel who has been put in possession is afterwards dispossessed by the master and part owner, the court should not proceed to render a further judgment ordering the possession of the vessel to be given to the purchaser, as the process of the court was completely executed when the purchaser was put into possession, and from that time the authority of the court and the power of the sheriff ceased; the remedy of the purchaser is the same as against any wrongdoer. Loring v. Illsley (1850) 1 Cal. 24.

550. Disposition of proceeds or remnants.—In an action by a seaman to recover wages, the court cannot compel the seaman to apply towards his wages a sum in his hands as acting captain which remained after the sale of part of the cargo belonging to claimants, as, in an action against a vessel, the court cannot take cognizance of collateral equities to enforce them against the parties personally. The Leonidas (D. C. 1843) Fed. Cas. No. 8,262.

Whatever mode of procedure is pursued, a party proved to be a mortgagee, after admitting in his answer to the original action that the bottomry security is valid, and consenting to a decree of sale of the ship under it, cannot set up a title to the ship in himself as absolute owner, and not mortgagee, in bar of the claim of the bottomry borrower to a share in the remnants remaining in court. The Panama (D. C. 1846) Fed. Cas. No. 10,703.

Where mortgagees of a vessel decline to appear as claimants in a suit in admiralty to enforce a maritime lien, their lien is not affected by a sale under the decree. Schuchardt v. The Angeleque (D. C. 1853) Fed. Cas. No. 12,483a.

551. —— Payment of proceeds into registry.—Where property has been ordered to be sold on process in rem, the gross proceeds of the sale, deducting only the expenses of the sale, are paid into the registry. The Phebe (D. C. 1837) Fed. Cas. No. 11,065.

552. Retaining jurisdiction to dispose of proceeds.—The jurisdiction of a court of admiralty, in a proceeding in rem against a vessel to enforce liens thereon, is founded upon the maritime nature of the liens sought to be enforced; although, as to any surplus, having acquired jurisdiction, it will proceed upon principles of equity to dispose of the entire fund, awarding it to the owners, or those who may have succeeded to their rights. The Guiding Star (C. C.

1883) 18 Fed. 263. See, further, Andrews v. Wall (1845) 44 U. S. (3 How.) 568, 11 L. Ed. 729; The L. B. Goldsmith (D. C. 1856) Fed. Cas. No. 8,152; Covert v. The Wexford (D. C. 1880) 3 Fed. 577; In re Goodrich Transp. Co. (D. C. 1886) 26 Fed. 713.

Where parties who were partners in the vessel which has been sold make claims against such surplus, it would be unjust to pay over the whole to the managing owner, and to leave the rest to their remedy in equity. The L. B. Goldsmith (D. C. 1856) Fed. Cas. No. 8,152.

553. —— **Necessity of adjudication before distribution of proceeds.**—Surplus moneys in the registry will not be distributed until conflicting claims thereto are properly adjudicated. The Fanny (D. C. 1841) Fed. Cas. No. 4,637; The Fanny (D. C. 1876) Fed. Cas. No. 4,638. Except to those who have an undoubted priority, such as seamen and salvors; and this not without notice to all others. The Fanny (D. C. 1876) Fed. Cas. No. 4,638.

A claimant of funds in the hands of the admiralty court arising from the sale of a vessel, and remaining after the satisfaction of a claim on a bottomry bond, is not entitled to be paid where there are adverse interests vested in third parties, whose rights have not been inquired into. Price v. Frankel (1858) 1 Wash. T. 43.

554. —— **Necessity of order of court for distribution of proceeds.**—It is grossly irregular for the marshal to keep the property, or the proceeds of it, in his own hands, or to distribute it among the parties entitled, unless he has a special order from the court; but, if there be no mala fides, the assent and ratification of all the parties will cure the irregularity. The Collector (1821) 19 U. S. (6 Wheat.) 194, 5 L. Ed. 239. And see Keane v. Gloucester (1782) 2 U. S. (2 Dall.) 36, 1 L. Ed. 278.

555. —— **Right to interest on proceeds.**—The owners of a vessel, sold pending a suit for collision, which made it necessary to deposit the proceeds in court, on a decree exonerating her from fault, are entitled to interest on the amount of such deposit from the vessel adjudged in fault. The Marie Palmer (D. C. 1909) 173 Fed. 569.

556. —— **Claims entitled to share in remnants in general.**—A surplus fund in a court of admiralty arising from the sale of a vessel is subject to the same trusts and liens as the vessel itself was subject to. Gardner v. The New Jersey (D. C. 1806) Fed. Cas. No. 5,233; Remnants in Court (D. C. 1846) Fed. Cas. No. 11,697; The Syracuse (D. C. 1878) Fed. Cas. No. 13,716.

The right to proceed against the surplus proceeds of a vessel in court holds good where a party has a right to proceed in admiralty in personam, though not in rem. The Stephen Allen (D. C. 1830) Fed. Cas. No. 13,361.

Uncontroverted claims which are within the jurisdiction of the court, although clothed with no privilege, and not reduced to judgment, may be satisfied out of surplus proceeds in the registry. The Fanny (D. C. 1841) Fed. Cas. No. 4,637.

Many persons were killed and others injured by the collision of a river steamboat with a railroad bridge, in Georgia. The boat was libeled by persons injured, and, on petition of the owner, under the limited liability act, the representatives of the persons killed were made parties, and enjoined from suing elsewhere. Held, that by this action the owner was estopped from denying the right of such representatives to share in the fund realized from the sale of the boat, if negligence was found, though the Georgia statute giving a right of action for wrongful death, creates no lien therefor. Jones v. The St. Nicholas (D. C. 1891) 49 Fed. 671.

Where a yacht was sold by the United States marshal, and a surplus remained, it should be divided to the seller of the yacht to the extent of the amount of the price unpaid, and the balance awarded to the buyer. The Duchess (D. C. 1912) 201 Fed. 783.

557. —— **Rights of general nonlien creditors.**—Where a court has sold a vessel in proceedings in rem, any surplus after lien claims have been paid belongs to the owner, and the court cannot distribute the same to general creditors having no liens. The Wyoming (D. C. 1889) 37 Fed. 543; In re Surplus Proceeds of Tug Balize (C. C. 1887) 52 Fed. 414; Bouker Contracting Co. v. Proceeds of Sale of Dredging Mach. (D. C. 1909) 168 Fed. 428.

General creditors without liens are not entitled to the surplus because the mortgagees were members of the firm which owned the vessel when the debts were contracted, and the other member insisted on payment out of the proceeds, where the latter became sole owner, and the firm was dissolved before seizure. The Wyoming (D. C. 1889) 37 Fed. 543.

558. —— **Claim of execution creditor.**—The holder of a judgment of a state court cannot, by issuance of execution, acquire a lien on a vessel then in the marshal's hands, so as to become entitled to payment out of surplus proceeds upon a sale to satisfy liens. The Willamette Valley (D. C. 1896) 76 Fed. 838.

559. —— **Rights of intervener.**—An intervener in a suit to enforce liens against a vessel, who claims ownership of a part of the property libeled, and obtains its release on appraisal and

bond, cannot, by subsequently setting up a claim to a lien in his own behalf, become entitled to share in the proceeds of the bond and the remaining property. Hawgood & Avery Transit Co. v. Dingman (1899) 94 Fed. 1011, 36 C. C. A. 627.

560. —— **Claims for repairs and supplies to vessel.**—Where there are funds in the registry from the sale of a vessel in a possessory suit, the court has power to pay therefrom claims for repairs and supplies furnished to the vessel. Bode v. The Templar (D. C. 1893) 59 Fed. 203.

561. —— **Wages of and disbursements by master.**—After the liens upon a libeled vessel are satisfied out of the proceeds of her sale, the surplus funds remaining in court are subject, as against the owner, to the master's claim for wages and for disbursements on account of the vessel up to the time of her seizure, but not for wages or disbursements after such time. The Santa Anna (D. C. 1829) Fed. Cas. No. 12,325.

A master who has a right to sue in personam for wages may proceed by summary petition against surplus proceeds in court. The Stephen Allen (D. C. 1830) Fed. Cas. No. 13,361.

A loan to the master to enable him to discharge a lien for seaman's wages, and relieve the boat from arrest, may be satisfied out of the surplus in the registry. But not so with moneys advanced to purchase fuel to enable the vessel to continue her trip, or to pay expenses of bonding her. The Fanny (D. C. 1841) Fed. Cas. No. 4,637.

562. —— **Wages of seamen.**—Mariners have a claim to their wages out of the proceeds of the sale of the ship directed to be sold by the court of admiralty. Fairclough v. Gatewood (Va. 1790) 4 Call. 158.

563. —— **Compensation to attorneys.**—In cases in which a common interest has been promoted by services of counsel which a mere selfish consideration of his client's interest would not have induced him to render, a part or even the whole of his compensation may occasionally be allowed from the general fund arising from the sale of the vessel. The Wreath (D. C. 1872) Fed. Cas. No. 18,061.

564. —— **Fees of officers.**—As an auctioneer is not required by law to be employed by the marshal in sales under process or decree in admiralty, the purchaser under such decree may lawfully refuse to pay the auctioneer's fees, and, having refused to pay the purchase price with the fees included, he cannot be held liable for a deficiency arising on a resale. The John E. Mulford (D. C. 1883) 18 Fed. 455.

Under R. S. § 857, ante, § 1463, providing that the fees of officers, except those to be paid out of the treasury, shall be recovered in like manner as the fees of state officers for like services, a marshal who has incurred large expenses in caring for and preserving a vessel in his custody is entitled to reimbursement thereof out of the proceeds of her sale in the registry, without awaiting the final decree in the cause. In re The Allegheny (D. C. 1897) 85 Fed. 463.

565. —— **Rights of receiver of state court.**—Where a state court has obtained legal possession of a vessel in foreclosure proceedings against the owner thereof, and a receiver has been appointed, the seizure and sale of such vessel by the district court to pay maritime liens merely suspend the action of the state court as to the surplus arising from such sale, and such surplus will be paid over to the receiver, as the officer of the state court, for distribution. Chandler v. The Willamette Valley (D. C. 1896) 76 Fed. 838.

566. —— **Recognizing defective liens.**—Where a mortgage lien appears, though informal on its face, the court, in distributing proceeds of sale of a vessel, will equitably allow payment as between the owner and the mortgagee. Town v. The American Banner (D. C. 1855) Fed. Cas. No. 14,112a.

567. —— **Recognizing claim after loss of lien.**—As between a lien claimant and the owner, though the lien has been lost by lapse of time, if originally founded upon a maritime claim, the court will order it to be paid out of the proceeds in the registry. Town v. The American Banner (D. C. 1855) Fed. Cas. No. 14,112a.

Where the fund would otherwise be paid over to a foreign owner, persons who could not sustain an original action in rem, by reason of an implied waiver of the lien, may, on petition, be paid out of a surplus remaining in court. The Boston (D. C. 1832) Fed. Cas. No. 1,669.

A materialman whose lien is discharged by the giving of credit is still entitled, upon petition, to be paid out of remnants and surplus remaining in the registry. Zane v. The President (C. C. 1824) Fed. Cas. No. 18,201.

A right of action in rem by a materialman for supplies furnished a vessel in her home port, which is lost by neglect to prosecute within the time limited by the local statute, may still be enforced against the surplus proceeds of the vessel in court. The Stephen Allen (D. C. 1830) Fed. Cas. No. 13,361.

A libelant who consents to the release of a vessel libeled and seized under process waives his priority of claim as against subsequent libelants under whose libels the vessel is condemned and sold. The A. R. Gray (D. C. 1874) Fed. Cas. No. 519.

A libelant, which proved its claim and took a decree in personam only against

the owner of the vessel, making no opposition to the claims of intervening libelants, as against them, waived its right to assert a lien on the fund in court and elected to look to the owner alone, and such election also bound an insurer entitled to succeed to libelant's rights by subrogation. The Ethelwold (D. C. 1903) 165 Fed. 806.

568. —— **Recognizing nonmaritime or statutory liens or claims.**—The district courts in admiralty exercise equity powers in the distribution of a surplus arising under a sale, whether the parties have maritime liens or not. The Skylark (D. C. 1870) Fed. Cas. No. 12,928.

A court of admiralty has jurisdiction to determine the validity and rank of claims against a fund remaining in its registry after the payment of maritime liens for which a vessel has been sold, although they are not maritime in character. The Atlantic City (C. C. A. 1915) 220 Fed. 281.

Where a vessel has been attached and sold under a libel, and there is a surplus fund after payment of the claim in the registry of the court, it has power to distribute such surplus fund to all those who can show a vested interest therein, in the order of their several priorities, no matter how their claims originated. The E. V. Mundy (1884) 22 Fed. 173. But see The Lottawanna (1873) 87 U. S. (20 Wall.) 201, 22 L. Ed. 259, holding that, where claims on the proceeds in the registry of a vessel sold are not maritime liens, the district court cannot distribute those proceeds in payment of the claims if the owners of the vessel oppose such distribution. And see The Panama (D. C. 1846) Fed. Cas. No. 10,703; Remnants in Court (D. C. 1846) Fed. Cas. No. 11,697.

Where a surplus remains in court from the proceeds of a sale made for the benefit of a lien creditor, it may be appropriated in payment of other liens upon the original property, but not of debts arising on contracts merely personal. Brackett v. The Hercules (D. C. 1830) Fed. Cas. No. 1,762.

When a vessel has been sold in a suit to establish maritime liens, after the payment of such liens the court will direct the payment from the fund of such nonmaritime liens as have been proved, but cannot pay claims not supported by liens. The Rupert City (D. C. 1914) 213 Fed. 263.

Any person having an interest in a fund in the registry of a court of admiralty may apply by petition to have his claim satisfied out of the fund, although he may not be entitled to prosecute a suit in admiralty to enforce his claim. Petrie v. The Coal Bluff No. 2 (1880) 3 Fed. 531. CONTRA, see The Fanny (D. C. 1841) Fed. Cas. No. 4,637; Gardner v. The New Jersey (D. C. 1806) Fed. Cas. No. 5,233.

As against the owner petitioning for payment of the residue of proceeds to him, the court cannot distribute the same in payment of claims not maritime liens. The Lydia A. Harvey (D. C. 1898) 84 Fed. 1000.

One who purchased materials on his personal responsibility, and then delivered them to the owner of a ship, to be used in the construction thereof, and who afterwards received from the owner a bill of sale of the ship to secure him for such materials and for money advances, though having no right to enforce his claim as a preferred lien in admiralty, is entitled to a surplus remaining in court after the sale of the vessel by a proceeding in rem in admiralty on libels by others. Harper v. New Brig (D. C. 1835) Fed. Cas. No. 6,090.

A contract between a passenger and the master of a vessel is a personal contract not cognizable in admiralty, so that, on a libel by seamen for salvage services rendered by them in saving goods from the wreck of a vessel on which they had shipped, the master of another vessel, which carried the seamen and the property to port, is not entitled to payment for libelant's passage out of the proceeds of the property saved. Brackett v. The Hercules (D. C. 1830) Fed. Cas. No. 1,762.

The mortgagor of a vessel gave the mortgagee an absolute bill of sale upon condition that the latter should pay off the outstanding indebtedness, and that the mortgagor retain the use and control of the vessel for a year, within which time he might sell it, and pay the mortgage debt and interest. The mortgagee failed to pay the debts, and the vessel was sold under maritime liens, leaving a surplus in the registry. Both mortgagor and mortgagee intervened pro interesse suo, each claiming the surplus. Held, that the right of the mortgagor was in no sense a jus in re in respect of the surplus, but was simply a claim for damages against the mortgagee for failing to pay the vessel's indebtedness, of which admiralty has no jurisdiction, even under rule 41, authorizing a distribution of a surplus upon a summary hearing, and, in accordance with the principles of equity, the fund must be awarded to the mortgagee, leaving the owner to his action at law. Miller v. The Peerless (C. C. 1891) 45 Fed. 491.

Though a lien given by a state law against a vessel cannot be enforced in admiralty, the admiralty court may, where the same is valid, pay it out of the fund in the registry. The Island City (D. C. 1869) Fed. Cas. No. 7,109.

A contract for materials and supplies furnished in the construction of a vessel is a maritime contract, and, while the lien given therefor by the local laws cannot be enforced under rule 12, the preference given thereto by the local laws will be enforced in admiralty as against surplus proceeds remaining in

the registry after the satisfaction of maritime liens in preference to a mortgagee of the vessel. The provisions of Prac. Act Cal. c. 6, declaring vessels subject to liens for repairs or supplies furnished for their construction, repair, or equipment, and directing that demands secured by such liens shall have preference in order of payment over other demands, is valid in its application to a domestic vessel supplied in her home port; and, although it is invalid so far as it authorizes a proceeding in rem, the holder of a demand within the statute is entitled to payment out of the surplus proceeds remaining in the registry after the satisfaction of maritime liens, in preference to a mortgagee of the vessel. Francis v. The Harrison (D. C. 1870) Fed. Cas. No. 5,038.

Where the part owner of a ship has a statutory lien for advances (Civ. Code Cal. § 3055), as against a co-owner, he may be paid out of surplus proceeds remaining in the registry of the court. Topfer v. The Mary Zephyr (D. C. 1880) 2 Fed. 824.

569. —— **Recognizing mortgages.**—Where a vessel has been libeled and sold in admiralty, and the proceeds are in the registry of the court, a mortgagee cannot file a libel against the proceeds. Schuchardt v. The Angelique (1856) 60 U. S. (19 How.) 239, 15 L. Ed. 625.

Though a court of admiralty has not jurisdiction to foreclose mortgages on vessels, yet, when it has a fund to dispose of, it may entertain claims based on mortgages. Bartlette v. The Viola (D. C. 1871) Fed. Cas. No. 1,083; Leland v. The Medora (C. C. 1846) Fed. Cas. No. 8,237; Remnants in Court (D. C. 1846) Fed. Cas. No. 11,697; United Hydraulic Cotton-Press Co. v. The Alexander McNeil (D. C. 1874) Fed. Cas. No. 14,404; The Lottawanna, 88 U. S. (21 Wall.) 558, 22 L. Ed. 654; The Katie O'Neil (D. C. 1894) 65 Fed. 111; The Gordon Campbell (D. C. 1904) 131 Fed. 963. But a person having an agreement for a mortgage upon a vessel has no such interest in the thing as will entitle him to claim the proceeds of her sale in the registry of the court. The Favorite (D. C. 1875) Fed. Cas. No. 4,699.

The fact that the purchaser of a vessel in a proceeding in rem is also the owner of a mortgage thereon does not extinguish the mortgage, but the same becomes a charge upon the proceeds of the vessel, and the purchaser thereof may, upon petition, obtain payment of the amount due upon the mortgage out of such proceeds, all other claims against the vessel having been satisfied. The Syracuse (D. C. 1878) Fed. Cas. No. 13,716.

570. —— **In salvage cases.**—The proceeds will be withheld from the master where he has been guilty of fraud, embezzlement, or reckless conduct. The North America (Ct. App. Fla. 1843) Fed. Cas. No. 10,313.

Unclaimed proceeds, remaining in the registry many years after awarding salvage without claim of ownership, will not be paid to the salvors, but will be paid into the treasury of the United States. Peabody v. Proceeds of Twenty-Eight Bags of Cotton (D. C. 1829) Fed. Cas. No. 10,869.

In the southern district of Florida, the residue of a derelict, in the absence of any claimant, is delivered to the salvors after the lapse of a year and a day. Russell v. Forty Bales Cotton (D. C. 1872) Fed. Cas. No. 12,154.

Under the admiralty rules, a salvage suit must be brought against the thing saved, or the person at whose request and for whose benefit the service was performed; and a proceeding by a salvor against a fund in court already decreed to another salvor, to secure contribution thereof under an alleged contract, cannot be maintained in admiralty. Sheldrake v. The Chatfield (D. C. 1892) 52 Fed. 495.

In salvage cases, the district court has jurisdiction to determine the right to a balance of proceeds as between adverse claimants; and this notwithstanding that it involves an adjudication upon the validity of a capture at sea, and the effect of a subsequent abandonment. The Mary Ford (D. C. & C. C. 1796) Fed. Cas. No. 9,212a.

The surplus proceeds after paying salvage awards will be retained a reasonable time to permit owners or underwriters to file claims. The Osteonthe (D. C. 1858) Fed. Cas. No. 10,608a.

In a case of extraordinary merit, where a salvor failed to present his claim until after salvage was decreed and paid, he was allowed compensation out of the proceeds remaining in the marshal's hands, reserved for the owners. Ryan v. The Cato (D. C. 1807) Fed. Cas. No. 12,184.

Import duties upon wrecked property are to be paid out of the gross proceeds, before deducting salvage, and are not to be charged exclusively on the owner's share of the salvage. The Waterloo (D. C. 1830) Fed. Cas. No. 17,257.

A salvor has no claim against the proceeds of goods saved from a wreck for the passage money of the crew carried by him to port under personal contracts. Brackett v. The Hercules (D. C. 1830) Fed. Cas. No. 1,762.

571. —— **In seizure cases.**—In an admiralty seizure cause, the court cannot award a proportion of the proceeds of the property condemned to informers, unless the case be within some statute provision; but it will allow compensation for expenses incurred in securing and preserving the property. The Langdon Chéeves (C. C. 1820) Fed. Cas. No. 8,064.

572. —— **Share belonging to persons not parties.**—The owner of a vessel who brings a libel for salvage "in behalf of all entitled" thereto is not required to pay to cosalvors any portion of the sum he receives in settlement of the action, where such cosalvors did not become parties thereto. McConnochie v. Kerr (D. C. 1881) 9 Fed. 50. But see Montgomery v. The T. P. Leathers (D. C. 1852) Fed. Cas. No. 9,736, holding that if the evidence shows that certain parties not before the court were actual salvors, and entitled to compensation as such, it would be the duty of the court to retain their proportion in the registry subject to their order. In no event would such amount inure to the benefit of the claimants of the vessel.

573. —— **Rights of assignee of one entitled.**—Rule 19, providing that salvage suits may be in rem against the property saved or the proceeds thereof, or in personam against the party at whose request or for whose benefit salvage service was rendered, does not authorize a proceeding by petition against a sum in court awarded from the proceeds of the sale of a vessel to one who rendered salvage services, such petition having been filed by a third person, alleging a promise, by the party to whom the salvage compensation was so awarded, to pay one-half of the amount thereof to the petitioner. Rule 43, providing that any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceeding, to intervene pro interesse suo for a delivery thereof to him, does not authorize a proceeding by petition against a sum in court awarded from the proceeds of the sale of a vessel to one who rendered salvage services, such petition having been filed by a third person, alleging a promise by the party to whom the salvage compensation was so awarded to pay one-half of the amount thereof to the petitioner. Such rule applies only to persons having an interest in the vessel libeled to come into the main suit, and get the remnants left after satisfying the libelant. Sheldrake v. The Chatfield (D. C. 1892) 52 Fed. 495.

The mortgagee of a vessel, who takes possession and in good faith pays off arrears of wages due to the crew to prevent libels being filed therefor, on distribution of the proceeds of the vessel in proceedings instituted by other lien claimants, is entitled to enforce the preferred lien of the seamen for the amount of such wages. The Pauline (D. C. 1905) 136 Fed. 815.

574. —— **Rights of creditors of libelant.**—A creditor of libelant to whom money in court has been decreed to be paid cannot compel its appropriation to his debts. Brackett v. The Hercules (D. C. 1830) Fed. Cas. No. 1,762.

575. —— **Order of payment of claims in general.**—In the disposition of the proceeds of a vessel, different claims are marshaled as follows: (1) Seamen, suing for wages; (2) materialmen; (3) a consignee, for money advanced for towage, pilotage, light money, and port duties,—each claim carrying with it its own costs. The Rodney (D. C. 1831) Fed. Cas. No. 11,993.

The proceeds of a vessel sold on a libel for wages, distributed in the following order: Wages and costs; recorded mortgages; clerk's, marshal's, and proctor's fees; supplies at the home port. The Kate Hinchman (D. C. 1875) Fed. Cas. No. 7,620.

Maritime liens arising out of contracts of affreightment, and liens not resting upon the necessities of the ship, or the hazards of navigation, are subordinate to the claims of materialmen, bottomry bond holders, salvors, and collision claimants. The America (D. C. 1853) Fed. Cas. No. 288.

The surplus in the registry after payment of the allowed claim will be applied pro rata to the payment of other claimants. Logan v. The Æolian (D. C. 1859) Fed. Cas. No. 8,465.

In determining the order of priority among claimants, the first classification is into liens, maritime and nonmaritime; the latter being postponed until after the satisfaction of the former. The Guiding Star (C. C. 1883) 18 Fed. 263.

On a judicial sale of a boat to satisfy a lien, the proceeds will be distributed according to the priority of liens. The Raritan v. Smith (1847) 10 Mo. 527.

Where a vessel is sold and the proceeds paid into the registry, the shares of the different owners of the surplus are equitably liable pro rata for the payment of any additional liens upon it. In re Wright (D. C. 1883) 16 Fed. 482.

Maritime liens of the same class, upon a ship sold under order of a court of admiralty, should be paid out of the proceeds in the inverse order of the dates of the creation of such liens. The America (D. C. 1853) Fed. Cas. No. 288.

Claims not in decree at the time of making report classifying claims are not to be postponed to those then in decree, but when the final order for distribution is made the clerk should disregard all claims not then in decree. Where a vessel is sold pendente lite, the date of the sale determines nothing as to the order in which claims should be paid. Where a libel is not filed until after the report of the clerk classifying claims is made, it should be postponed until after all other claims are paid. The City of Tawas (D. C. 1880) 3 Fed. 170.

When a domestic vessel is libeled for supplies furnished her, and is sold before the expiration of the 30 days within which the state law requires specifications to be filed, and no specifications are filed at any time, held, that the pro-

ceeds in court should be distributed according to the liens upon her at the time the libels were filed. The Niagara (D. C. 1887) 31 Fed. 163.

576. —— **Priorities of claims in cases arising upon the lakes.**—Claims against the proceeds of sales, in cases arising upon the lakes, are usually paid in the following order: (1) Costs of sale, and those incident to the custody of the vessel; (2) seamen's wages, unless there be subsequent salvage; (3) claims for towage and necessaries furnished in a foreign port; (4) claims for supplies and materials furnished in the home port, for which a lien is given by the state law; (5) mortgages. The City of Tawas (D. C. 1880) 3 Fed. 170.

577. —— **Priority of claims for advances.**—The special agents of a foreign vessel made advances for the vessel's account on various charges which were liens; also other advances, to the owners, of moneys which were not liens, but were advanced on the credit of the freight moneys to be collected by them, as shown by the correspondence between the parties. All the debits and credits were put in one running account. Held, that the intention of the parties controls the application of payments; and that the intention here was that the freight moneys should be applied upon all lawful charges alike, and that such credits should accordingly be applied by the court to the debits chronologically, and that an attempted application by the creditor to nonlien charges, while preparing for suit, was too late. The vessel having been sold in prior proceedings, the agents upon their libel in rem are entitled, as against the mortgagee. to claim out of the remnants and surplus such items of their unpaid account (after applying the credits chronologically) as were liens on the ship only, excluding advances to seamen made contrary to law, and their own commissions. The Mary K. Campbell (D. C. 1889) 40 Fed. 906.

On distribution of the proceeds of a vessel sold in admiralty, one who advanced money to pay off a lien for salvage on said vessel, under an agreement that he should be subrogated to such lien, held entitled to priority of payment over claims based on prior personal judgments against the owners. The Dredge No. 1 (D. C. 1905) 137 Fed. 110.

578. —— **Priority of claims for repairs.**—Where libelant had procured a decree pro confesso on default for necessary repairs to a vessel, ordered by the master while in a foreign port, for which the libelant had a lien, it was entitled to have the amount thereof allowed in full as a preferred claim out of the proceeds of the sale of the vessel. The H. A. Baxter (D. C. 1909) 172 Fed. 260, decree affirmed (1910) 179 Fed. 1018, 102 C. C. A. 663.

579. —— **Priority of claims for salvage.**—In marshaling claims for payment from the proceeds of sale, salvage is entitled to be paid in preference to prior claims for seamen's wages. The Athenian (D. C. 1877) 3 Fed. 248.

A claim for salvage services rendered to a vessel injured in collision is entitled to a preference in the distribution of the proceeds of such vessel or the fund paid into court or secured in proceedings for limitation of liability, over claims of passengers for personal injuries or loss of baggage, or for damages sustained by the other vessels in the collision. In re California Nav. & Imp. Co. (D. C. 1901) 110 Fed. 678.

580. —— **Priority of claim of surety in stipulation.**—The right of a surety in a stipulation to be paid out of the proceeds of the boat, which has been sold under his execution, is subordinate to the claims of those who have established liens thereon. Carroll v. The Leathers (D. C. 1853) Fed. Cas. No. 2,455.

581. —— **Priority of claims for towage and necessaries.**—In the distribution of proceeds of sale, claims for towage and necessaries are entitled to rank those for breaches of contract of affreightment. The Unadilla (D. C. 1877) Fed. Cas. No. 14,-333.

582. **Priority of claims for wages and preferred fees.**—In a suit for wages entitled to be first paid in full, under which, also, the vessel was seized and sold, the costs should also be paid in full. The Grapeshot (D. C. 1884) 22 Fed. 123.

In disposing of the proceeds of the sale of a steam tug plying in New York harbor, against which decrees, exceeding such proceeds in amount, have been rendered in favor of different parties for seamen's wages, damages for collision, repairs, supplies, and wharfage, the claims of the latter classes being secured by liens under state law, the claims for wages should be first paid, then the liens under state law, excluding cases in which monthly bills had not been rendered 40 days before the collision for which damages were recovered then the claim for such damages, and, lastly, liens contracted subsequent to the incurring of the liability for damages. The Glen Iris (D. C. 1897) 78 Fed. 511.

Where a vessel is seized and sold under a libel, seamen's wages and preferred fees and costs are entitled to be first paid out of the proceeds. The H. A. Baxter (D. C. 1909) 172 Fed. 260, decree affirmed (1910) 179 Fed. 1018, 102 C. C. A. 663.

583. —— **Priority of purchaser under execution sale.**—The purchaser of a vessel under execution from a state court has no superior rights as against the decree of an admiralty court en-

forcing a maritime lien. The Skylark (D. C. 1870) Fed. Cas. No. 12,928.

584. —— **Priority of mortgages.**—Mortgage liens in admiralty have no superiority over subsequently created maritime liens. Schuchardt v. The Angelique (C. C. 1855) Fed. Cas. No. 12,483c.

Where the proceeds are not sufficient to satisfy either of two mortgagees, a materialman whose lien is subsequent only to that of the junior mortgagee cannot object to the application of the proceeds as between the mortgagees. The John T. Moore (C. C. 1877) Fed. Cas. No. 7,430.

Claims for insurance premiums and moneys advanced to disburse ships in a foreign port, in so far as they are not maritime liens, cannot be paid out of surplus moneys in the registry arising from the sale of the vessels in priority to the claims of a mortgagee of the vessels. London Assur. Co. v. Proceeds of The Allianca (D. C. 1895) 65 Fed. 245.

585. —— **Priority between hypothecations and mortgages.**—On the sale of a vessel in a suit in rem, two persons claiming by hypothecations made by the master to secure loans for necessary repairs and supplies are entitled to be paid out of the proceeds in court before a prior mortgagee, and, as between the two hypothecations, the later one is entitled to priority. Furniss v. The Magoun (D. C. 1844) Fed. Cas. No. 5,163.

586. —— **Rights of factor.**—Factors entitled to a certain sum as commissions are not entitled to the proceeds of sale of a cargo as against bona fide possessors thereof, but the court will decide upon the equities of all concerned, and decree the amount of the lien to the factors, and the residue to the other claimants. The Packet (C. C. 1824) Fed. Cas. No. 10,655.

587. —— **Rights of sureties claiming by subrogation.**—Sureties for the claimants, who are compelled to pay a salvage decree, are not entitled to priority over valid mortgages which antedated the salvage services. Roberts v. The Huntsville (C. C. 1877) Fed. Cas. No. 11,904.

Sureties for the release of a vessel belonging to a corporation in the hands of a receiver, who are compelled to pay the decrees against the vessel, have no claim against the surplus arising from her sale to satisfy liens but only a personal claim against the receiver. The Willamette Valley (D. C. 1896) 76 Fed. 838.

588. —— **Right of party first instituting proceedings.**—A person injured by a collision instituted proceedings against the vessel in fault and at his own expense prosecuted the suit to condemnation. Held, that another person injured, who took no part in the suit, could not share in the proceeds of the sale of the vessel until the claim of the first party had been satisfied. Woodworth v. Insurance Co. (1866) 72 U. S. (5 Wall.) 87, 18 L. Ed. 517.

Until all libels and petitions have been heard, the proceeds are not distributed, except to those who have an undoubted priority, such as seamen and salvors, and this not without notice to all others. One who obtains the first decree has no priority over others whose liens are in themselves of equal degree with his. The Fanny (D. C. 1876) Fed. Cas. No. 4,638.

As between different lienors a priority in proceedings against a vessel to enforce a claim does not give a corresponding priority in the distribution of proceeds in the registry. The Arcturus (D. C. 1883) 18 Fed. 743; The J. W. Tucker (D. C. 1884) 20 Fed. 129; The Lady Boone (D. C. 1884) 21 Fed. 731. CONTRA, see The America (D. C. 1853) Fed. Cas. No. 288; The Globe (C. C. 1852) Fed. Cas. No. 5,483; People v. New York Mayor's Court (1828) 1 Wend. (N. Y.) 39. But, when the time fixed by the rules of court for making defense has elapsed, and the libel has been taken for confessed, but the formal decree of condemnation and sale has not been entered, on account of the absence of the judge, any maritime claimant who comes in afterwards by petition does so subject to the libel, and cannot be paid till the libelant is paid in full, though his claim was originally prior to the libel. The Sea Lark (1888) 34 Fed. 52.

589. —— **Rights accruing under state laws or process of state courts.**—An ordinary common-law chattel mortgage on a vessel, though given for the purchase money, and filed and recorded as required by the law of the state to which the vessel belongs and the law of the United States, does not entitle the mortgagee to claim the surplus of the proceeds of a ship, sold under the process and decree of a court of admiralty, in preference to a privileged creditor who has a maritime lien. The Hendrik Hudson (D. C. 1855) Fed. Cas. No. 6,358.

A sheriff who, after attaching a vessel in a suit by a creditor against her owner, permits, without opposition, her seizure by the marshal under admiralty process, is a competent party to intervene in the admiralty suit, and claim the proceeds in the registry. Eneas v. The Charlotte Minerva (D. C. 1858) Fed. Cas. No. 4,483.

The federal courts, in distributing the proceeds of a sale made to satisfy a maritime lien, will distribute them to the parties entitled under the law, state or federal; and parties who might have perfected their liens under the state law, had not the issue come into the admiralty court, are entitled to priority

out of the proceeds. The Lady Franklin (D. C. 1869) Fed. Cas. No. 7,983.

In distributing the surplus, after the payment of claims of a maritime nature, the court acts as a court of equity, and not of admiralty, and will follow the local statutes as construed by the state courts. The Guiding Star (C. C. 1883) 18 Fed. 263.

After seizure of a steamboat by the marshal on process in admiralty, but before sale, a writ of fi. fa. out of the state court on a judgment against one of the part owners of the vessel was put in the hands of the sheriff. Held that, as against defendant in the execution, plaintiff therein acquired a lien as soon as his writ reached the sheriff's hands, and that, after satisfaction of all admiralty liens and liens of domestic creditors for supplies, etc., under the local statute, the execution creditor was entitled to defendant's remaining share of the surplus. The Daniel Kaine (D. C. 1888) 35 Fed. 785.

A judgment of a state court constitutes no claim upon the proceeds of the sale of a vessel belonging to the defendant in the registry of the United States district court. In re Forsyth (D. C. 1897) 78 Fed. 296.

Where a vessel has been sold to pay maritime liens, the district court will not adjudge the surplus to or apportion it between the holders of receiver's certificates issued by the receiver of the owner of such vessel, appointed by a state court of another state, even though such court has decreed that the certificates shall be first liens upon the vessel, and paramount to other liens upon the property of the owner. Chandler v. The Willamette Valley (D. C. 1896) 76 Fed. 838.

A creditor by judgment in a state court, of the owners of the vessel, even though he have a decree in personam, also in the admiralty against them cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty. The Lottawanna (1873) 87 U. S. (20 Wall.) 201, 22 L. Ed. 259.

An attachment proceeding in the state court, not followed by a decree, does not give the attaching creditor any priority over a creditor subsequently filing a libel in the admiralty court. Schmidt v. The Superb (D. C. 1852) Fed. Cas. No. 12,467.

The statute of Ohio, as construed by the supreme court of that state, gives precedence to construction claims over a mortgage. No lien being given by the Ohio statute for money advanced to build the boat, and for its general purposes, such claims are not entitled to share in the distribution. The Guiding Star (C. C. 1883) 18 Fed. 263.

590. —— **Marshaling assets.**—Admiralty can marshal the fund in its registry only between lienholders and owners. The Edith (1876) 94 U. S. 518, 24 L. Ed. 167.

The principle that where one creditor has two funds to resort to, while another has security on only one of such funds, the former will be compelled to resort to the other fund, will not be applied in admiralty at the instance of a mere mortgagee. The Sailor Prince (D. C. 1867) Fed. Cas. No. 12,219.

Admiralty courts held authorized to marshal assets, and give priority to one class of claims over another, and to deny priority where not asserted within 40 days. The Samuel Little (1915) 221 Fed. 308, 137 C. C. A. 136.

A Swedish bark being in custody of the marshal under libel for collision filed by a French insurance company who had insured the cargo of the colliding vessel, and an appeal having been taken from a decree dismissing the libel, the owners were informed by the master of the vessel of the facts, and he was instructed by them not to bond the vessel, but to look to her for payment of the crew. The master and seamen thereupon libeled her for wages, a portion of the crew having been discharged upon their own consent. The company, as interveners, opposed the claim of the master and seamen. Held, that admiralty would not exercise its discretion to marshal the assets by declining jurisdiction of the seamen's claims for wages, thus limiting them to a suit against the owners in their own court. The Adolph (D. C. 1881) 7 Fed. 501.

In a suit for seamen's wages, the district court ordered the decree therefor to be satisfied out of the proceeds of the vessel and freight. A mortgagee claiming a lien on the vessel petitioned to have the sailors paid out of the freight in order to protect his claim. A creditor of the owner of the vessel, having a subsequent lien on the freight by attachment issuing out of the state court against the owner, asked to have the seamen first paid out of the ship in order to protect his lien. Held, on motion to dismiss the petition of the attaching creditor, that he, having parted with no value for his lien on the freight, which attached after that of the mortgagee on the vessel, had no greater equity against the mortgagee to have the assets marshaled in his favor than the debtor himself would have had at the time his attachment was laid; therefore the mortgagee had the better equity to have the assets marshaled, and will be entitled, on proving his mortgage, to have the seamen first paid out of the freight, so far as that will go, the whole fund being insufficient to pay his claim and that of the seamen. The Olivia A. Carrigan (D. C. 1881) 7 Fed. 507.

After a libel had been filed against a vessel and freight for seamen's wages, process issuing against the vessel only, other libels were filed, on which the freight was attached, and the proceeds

of the vessel and freight were paid into the registry. A mortgagee claiming possession petitioned to be paid out of the freight as well as out of the proceeds of the vessel. Held, that the voluntary omission of the seamen in not attaching the freight did not prevent the admiralty court from marshaling the assets; and that both funds being in court, and all the parties heard, it was unnecessary to compel the seamen to file a petition against the freight in order to effect such marshaling of the assets. The Wexford (D. C. 1881) 7 Fed. 674.

591. —— Method of proceeding to enforce rights in proceeds.—Where, in a case of civil salvage, the cargo has been sold by order of court, after the claim for salvage has been determined, the shipowners, if they have a claim against the proceeds for general average or freight, may apply to the court, by libel, etc., and have their claim adjudicated, and the proceeds held liable therefor. The Sibyl (1819) 17 U. S. (4 Wheat.) 98, 4 L. Ed. 522.

Rule 43 which provides for an intervening petition, and a summary proceeding to determine the right of the petitioner to a fund in the registry of the court, does not authorize such a petition by the claimant of a vessel sold in a salvage suit before any proceeding for distribution of the fund by the clerk or commissioner has been taken under rules 57 and 58 to have such fund paid over to him on substitution of a bond. The Chief (1905) 142 Fed. 349, 73 C. C. A. 459.

A foreign consul may appear for citizens of his country to protect proceeds of sale of property for salvage. The Adolph (C. C. 1851) Fed. Cas. No. 86.

Where proctors, who filed a libel 30 years before, apply for the proceeds of the vessel deposited in the registry of the district court, assuming to act under their original authority, and it is shown that the sole survivor of the libelants, when last heard from, several years before, was an old man, and "very much of a floater," somewhere in Brazil, the proceeds will not be paid over without a further application, by which it may be shown that there is some person in existence who is legally entitled to receive them. Rostron v. The Water Witch (C. C. 1890) 44 Fed. 95.

The decree of distribution does not follow the report of the auditor, as matter of course, because no exception has been taken thereto. Harper v. New Brig (D. C. 1835) Fed. Cas. No. 6,090.

The claims of officers of the court for fees and expenses upon proceeds in the registry must be presented to the court for allowance. The Phebe (D. C. 1837) Fed. Cas. No. 11,065.

Parties may have in the admiralty court the same remedies against the proceeds of property subject to its jurisdiction that they are entitled to against the property itself, in whose hands soever the proceeds may be found. Mutual Safety Ins. Co. v. Cargo of the George (D. C. 1845) Fed. Cas. No. 9,981.

On a libel by a bottomry holder, where both the mortgagee and owner appear and claim the proceeds, the court may decree distribution between the claimants, or require them to formally litigate their claims. In such proceeding the owner may set up in defense to the claim of the mortgagee that the mortgage is void for usury. When the owner and mortgagee of a ship both appear and file answers to the libel of a bottomry holder, it is competent for each to claim in his answer, or by a separate petition, that the proceeds of the vessel, after satisfaction of the bottomry security, be paid to him. On such mode of proceeding the court may, at its discretion, adjudge prospectively between the contestants the method of distribution of the avails of the ship, or may defer the decision until her proceeds are paid into the registry; and may also, if the case is difficult or important, direct the parties to litigate their claims to the fund by formal suit. The Panama (D. C. 1846) Fed. Cas. No. 10,703.

Where the proceeds of a vessel sold in proceedings to enforce liens are insufficient to pay all claims, one lien claimant may be permitted to answer and defend against the claim of another, even after an interlocutory decree has been entered, where newly discovered evidence justifies such relief. The Samuel Little (D. C. 1913) 206 Fed. 686.

To impound a fund in admiralty until a decision can be had upon the validity of a contested claim, the creditor must have sued out attachment or pleaded his lien to an antecedent action. French v. The Superb (D. C. 1851) Fed. Cas. No. 5,103a.

Creditors having obtained decrees against the proceeds of a vessel, where bottomry creditors come in and arrest the fund, may make themselves parties and contest the bottomry claims. French v. The Superb, Id.

By the forty-third rule, the party entitled to the remnant or surplus in court after a sale can only obtain it by petition or motion. Any person having an interest has a right to intervene pro interesse suo on due notice to adverse parties, whether his application may or may not involve the settlement of partnership accounts. The L. B. Goldsmith (D. C. 1856) Fed. Cas. No. 8,152.

Any person having a specific lien on, or a vested right in, a surplus fund in court, may apply by petition for the protection of his interest under Rule 43. The Lottawanna (1874) 88 U. S. (21 Wall.) 558, 22 L. Ed. 654.

A proceeding by petition against the proceeds of property charged with a

maritime lien is a proper method of invoking the admiralty jurisdiction. Justi Pon v. The Arbustci (D. C. 1857) Fed. Cas. No. 7,589.

A master, who has a right to sue in personam for wages, may proceed by summary petition against surplus proceeds in the registry. The Stephen Allen (D. C. 1830) Fed. Cas. No. 13,361.

Admiralty may entertain a supplemental petition filed by one alleging an agreement of consortship with another, whereby petitioner claimed to be entitled to part of the sum decreed to respondent as compensation for salvage services rendered by a vessel owned by respondent. Andrews v. Wall, 44 U. S. (3 How.) 568, 11 L. Ed. 729.

Admiralty has jurisdiction of a petition for a surplus in the registry, though the application involves the settlement of partnership accounts. The L. B. Goldsmith (D. C. 1856) Fed. Cas. No. 8,152.

In disposing of a fund in its registry it is competent for a court of admiralty to require proof of the right of the claimant to any part of the same. Dent v. Radmann (D. C. 1880) 1 Fed. 882.

Where the proceeds of sale of a vessel are paid into court, claims against the fund will be barred after order for the payment of the money out of the registry. The J. W. Tucker (D. C. 1884) 20 Fed. 129.

592. —— **Unauthorized withdrawal of funds from registry.**—The power of the district court in admiralty over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the causes in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. Osborn v. U. S. (1875) 91 U. S. 474, 23 L. Ed. 388.

Where proceeds are prematurely ordered to be paid over, a rule to return will be granted. The Ariadne (C. C. 1817) Fed. Cas. No. 526.

593. —— **Paying out fund pending appeal or right of appeal.**—A libel for salvage and for damage to goods was dismissed, and decrees were rendered in favor of certain furnishers of supplies in the home port, on a lien created by the state law, each decree being for less than $50, and therefore not subject to appeal. Libelant appealed to the circuit court, and, pending his appeal, the decrees for supplies were paid in full out of the fund in court, though the proceeds of the vessel were insufficient to pay both classes of claims. Held, that the payment was improvidently made, as the question of priority was carried up by the libelant's appeal. The Lillie Laurie (1880) 50 Fed. 219.

A decree directing payment of various amounts out of a fund in court was entered, omitting the words, "unless an appeal be taken within ten days," and the money was paid out four days afterwards. A claimant who had not appeared or objected on the settlement of the decree, although notified, thereupon made a motion for the repayment into court of the money, on the ground that the payment was made before the time for appeal had expired. Held, that as to sums directed to be paid to seamen for wages less than $50 there was no right of appeal; and as to other sums the parties must be deemed to have assented to immediate payment, and to have relied on their right to recover them in case of reversal on appeal, or to have acted on the belief that no appeal existed. The Francesco Feliz (1885) 25 Fed. 669.

(M) Appeal

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594. Appellate jurisdiction.—Before Act March 3, 1863, allowing appeals in prize cases directly from the district court to the supreme court, a prize case carried by appeal from a district court into a circuit court was properly brought to the supreme court on appeal from the circuit court. The Admiral v. U. S. (1865) 70 U. S. (3 Wall.) 609, 18 L. Ed. 58.

The court of appeals established by congress under the articles of confederation had full power to re-examine and reverse or affirm the sentences of the courts of admiralty established by the different states, though founded upon the verdicts of juries. U. S. v. Bright (C. C. 1809) Fed. Cas. No. 14,647.

A petition by an informer to be paid his proportion out of the proceeds in the registry after condemnation is an original suit in admiralty, and from the decree therein an appeal held to lie to the circuit court. Westcot v. Bradford (C. C. 1824) Fed. Cas. No. 17,429.

595. Appeal or writ of error.—The circuit court of Massachusetts had no cognizance of causes of admiralty and maritime jurisdiction from the district court of Maine, except by appeal, and a writ of error thereon would be quashed. McLellan v. U. S. (C. C. 1812) Fed. Cas. No. 8,895.

Causes arising upon the Lakes, and tried by jury pursuant to statute, are not reviewable upon writ of error, but may be re-examined upon appeal. Boyd v. Clark (C. C. 1882) 13 Fed. 908.

A seizure case triable by jury in the district court can be reviewed in the circuit court only on writ of error. U. S. v. Fifteen Hogsheads of Brandy (C. C. 1862) Fed. Cas. No. 15,090.

596. Decisions reviewable.—The ruling of a court of admiralty disallowing a claim filed against the proceeds of a vessel sold in a suit between other parties involves a separate issue, and is not reviewable, except on an appeal by the claimant. Henderson v. Kanawha Dock Co. (1911) 185 Fed. 781, 107 C. C. A. 651.

An appeal will not lie from a decree pro forma in admiralty. Hindley v. The Wellington (C. C. 1874) Fed. Cas. No. 6,513. CONTRA, see The Oregon v. Rocca (1855) 59 U. S. (18 How.) 570, 15 L. Ed. 515.

The action of the district court in refusing to consider damage to a cargo, because not properly pleaded, is subject to review on appeal to the circuit court. The Thomas Melville (C. C. 1888) 34 Fed. 350.

An appeal lies from a decree of the district court refusing an order for the sale of a vessel on an application by one of two equal part owners. Davis v. The Seneca (D. C. 1828) Fed. Cas. No. 3,651.

597. — Salvage cases generally.—Appeals in salvage cases will not be encouraged except in a case of plain, clear, and determinate mistake of law

or fact in the court below, to show which appellant has the burden. Bearse v. Three Hundred and Forty Pigs of Copper (C. C. 1840) Fed. Cas. No. 1,193.

598. —— **Interlocutory decrees.**—A party may appeal from an interlocutory decree, having the effect of a final decree; or he may, at his election, wait until the final decree is positively entered, and then may enter an appeal. The New England (C. C. 1839) Fed. Cas. No. 10,151. But no appeal lay from the old court of admiralty in Virginia, on an interlocutory decree. Dawson v. Graves (Va. 1787) 4 Call, 127.

A decree in admiralty in proceedings for limitation of liability adjudging the rights of the parties and referring the cause to a commissioner to take testimony on claims for damages is reviewable on an appeal taken after the entry of a final decree on the commissioners' report, although the time for taking an appeal from the first decree had expired, such decree being in its nature interlocutory. La Bourgogne (1905) 139 Fed. 433, 71 C. C. A. 489, reversing decree (D. C. 1902) 117 Fed. 261.

A decree final in other respects is not converted into an interlocutory one because it directs a taxation of costs. Craig v. The Hartford (C. C. 1856) Fed. Cas. No. 3,333.

599. —— **Finality of judgment in general.**—In the following cases the decrees were held not final and hence not appealable: A decree of the district court reciting that a sum of money was due, but that, as the amount to be paid was dependent on other claims that might be established, no order for the payment of the money would be made until the court was further advised. Montgomery v. Anderson (1858) 62 U. S. (21 How.) 386, 16 L. Ed. 160. A decree in a suit in rem on a bottomry bond, referring the case to a commissioner to ascertain the amount and report to the court, with liberty to either party to move to frame the decree thereon. The Yuba (C. C. 1859) Fed. Cas. No. 18,192. A decree, on a libel for condemnation of merchandise and gold coin, directing that the coin should be deposited in the registry to await further orders. U. S. v. Canoe (C. C. 1867) Fed. Cas. No. 14,718. An order of the circuit court, merely affirming a decree of the district court, but not awarding a sum to be paid, or otherwise determining the rights of the parties. The Lucille (1873) 86 U. S. (19 Wall.) 73, 22 L. Ed. 64. A decree against a person served with process of foreign attachment, requiring him to pay the money into court as property of the respondent. Cushing v. Laird (C. C. 1878) Fed. Cas. No. 3,510. An order by the district court denying the motion of a stipulator, claiming to have been incapable by reason of coverture from entering into a valid stipulation, praying that the executions under which the marshal was proceeding to sell her property be quashed, set aside, and satisfied, and all proceedings therein be stayed, a final order, and no appeal will lie therefrom to the circuit court. The Elmira (1882) 16 Fed. 133. A decree for condemnation of a vessel, where the libel claimed the condemnation of the cargo as well, and the cargo had been delivered to the respondents at an appraised value, and the money deposited, with the register. Dayton v. U. S. (1866) 131 U. S. (Appendix) lxxx, 18 L. Ed. 169. The refusal to order, after a vessel has been sold under an order of court, and the proceeds of the sale brought into court for distribution, the proceeds to be paid to the claimant of the boat. George v. Saunders (1851) 19 Ala. 744. An order, after a purchaser at execution has been put into possession by the sheriff, and has been disposed by a former owner, directing the sheriff to again put the purchaser into possession. Loring v. Illsley (1850) 1 Cal. 24. The overruling of a motion for judgment on a stipulation bond, where a prize vessel had been condemned, upon which the money had been paid out of the registry of the court. Moore v. The Anna Maria (1854) 11 Tex. 655. Refusal of court in proceeding by libel against a steamboat, after the vessel has been sold under an order of court and the proceeds of the sale brought into court for distribution, to order the proceeds to be paid to the claimant of the boat. George v. Saunders (1851) 19 Ala. 744.

In the following cases the decrees were held to be final and hence appealable: Decree refusing an order for the sale of a vessel, on an application by one of two part owners, who have an equal interest. Davis v. The Seneca (D. C. 1828) Fed. Cas. No. 3,651. An order of a prize court dismissing, with costs, a claim to property libeled as prize of war, and directing execution to issue for the costs, although no disposition was made of the libel or the property. Withenbury v. U. S. (1866) 72 U. S. (5 Wall.) 819, 18 L. Ed. 613. Where a ship was libeled for loss of freight shipped under contract with her charterer, and the owners filed a petition alleging that the charterer was alone responsible for the loss, and the charterer answered both the libel and petition, and, after hearing, the court entered a decree for the full amount against the ship, but, as the question of responsibility as between owners and charterer had not been cleared up by the evidence, retained the cause as between them for further proceedings, as between libelants and the ship. The Alert (1894) 61 Fed. 113, 9 C. C. A. 390. A decree awarding libelants a

definite sum, adjudging that a maritime lien exists therefor, and directing the sale of the vessel and payment of the proceeds into the registry to await the further order of the court. The Eugene (1898) 87 Fed. 1001, 31 C. C. A. 345.

A decree in admiralty may be final, and therefore appealable, although there is an omission to decree costs. The Leonede v. U. S. (1861) 1 Wash. T. 153.

A case in admiralty taken by appeal from the district court before a final decree of that court is not within the jurisdiction of the circuit court. Mordecai v. Lindsay (1856) 60 U. S. (19 How.) 199, 15 L. Ed. 624.

600. —— **Finality of judgment in salvage cases.**—To make a decree in a salvage case positively final, all the charges and expenses should be ascertained, and the salvage apportioned, and the rights of each salvor definitely fixed, so that he may appeal therefrom, if he chooses. A decree awarding a certain rate of salvage of the proceeds, after deducting charges and expenses and fees of court, is not a final decree, but, at most, is only an interlocutory decree in the nature of a final decree. The New England (C. C. 1839) Fed. Cas. No. 10,151.

601. —— **Finality of judgment of dismissal.**—Where a decree in admiralty sustains exceptions to the libel, and gives permission to amend within 10 days otherwise the libel to stand dismissed, the prosecution of an appeal within that time is an election to waive the right to amend, so that the decree takes effect immediately, and becomes a final, appealable decree. The Three Friends (1897) 17 Sup. Ct. 495, 166 U. S. 1, 41 L. Ed. 897, reversing decree (D. C. 1897) 78 Fed. 175, which was affirmed (1898) 89 Fed. 207, 32 C. C. A. 191.

A decree of a district court of the United States dismissing a cross libel in a suit in admiralty to recover damages sustained by one vessel in a collision with another is not a final judgment, and therefore cannot be reviewed by the supreme court under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, on the theory that the jurisdiction of the lower court was in issue. Bowker v. U. S. (1902) 22 S. Ct. 802, 186 U. S. 135, 46 L. Ed. 1090, dismissing appeal (D. C. 1900) 105 Fed. 398.

A proceeding in rem by the United States against a vessel, under R. S. § 4499, post, § 8275, for the enforcement of a penalty for violation of a statutory provision, held one in admiralty, and not a criminal proceeding, and a decree dismissing the libel is appealable. The Ben R. (1904) 134 Fed. 784, 67 C. C. A. 290.

An order of the District Court in admiralty dismissing a petition filed by the claimant of a vessel libeled in a suit for salvage, and which had been sold in such proceedings, which petition asked that claimant's right to the fund in the registry of the court be summarily determined under rule 43, and the claimant be allowed to withdraw the same on substituting a bond, is not a final decision in the cause from which an appeal will lie to the Circuit Court of Appeals. The Chief (1905) 142 Fed. 349, 73 C. C. A. 459.

No appeal lies to the United States circuit court from a decree of a district court in admiralty dismissing a libel in rem for want of prosecution. As such a decree is not final or conclusive of the subject-matter of the litigation between the parties, the remedy of the aggrieved party is to bring a fresh suit. The Merchant (C. C. 1857) Fed. Cas. No. 9,436; The Delaware (C. C. 1887) 33 Fed. 589.

602. —— **Appeal before acting on report of commissioners.**—No appeal lies from a decree of restitution, etc., until the report of the commissioners to ascertain the damages has been acted on by the court. The Palmyra (1825) 23 U. S. (10 Wheat.) 502, 6 L. Ed. 375; Chace v. Vasquez (1826) 24 U. S. (11 Wheat.) 429, 6 L. Ed. 511.

603. —— **Appeal on questions arising subsequent to trial.**—A new question arising in the trial court in proceedings subsequent to the mandate of an appellate court, and not included therein, may be the subject of another appeal. Laidlaw v. Oregon Ry. & Nav. Co. (1897) 81 Fed. 876, 26 C. C. A. 665.

604. —— **Jurisdictional amount.**—Said act March 3, 1803, c. 40, § 2, 2 Stat. 244, contained a further provision to the effect that an appeal could be taken from all final judgments or decrees rendered in a circuit court, or district court acting as a circuit court, to the Supreme Court, in all cases of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeded $2,000. Under this provision it has been held: That where, on a libel to recover damages against shipowners, a decree passed against them for over $2,000, with leave to set off a sum due them for freight, which would reduce the amount decreed against them to less than $2,000, and the party elected to make the set-off, saving his right to appeal to this court, the reduced decree was the final decree, and the party could not save a right of appeal where it was not allowed by act of congress. Sampson v. Welsh (1860) 65 U. S. (24 How.) 207, 16 L. Ed. 632. That, where libelant recovered in the district court a decree for $500, which, upon appeal by the adverse party, was reversed by the circuit court and the libel dismissed, and the libelant thereupon appealed to the supreme court, the amount in controversy in the circuit court and in the supreme court being

but $500, the appeal must be dismissed. The D. R. Martin (1875) 91 U. S. 365, 23 L. Ed. 439. And see The Connemara (1880) 103 U. S. 754, 26 L. Ed. 322.

Where the only question in dispute is the recovery of a sum of money, the record must show the amount to give jurisdiction to the circuit court on appeal in admiralty. Agnew v. Dorman (C. C. 1838) Fed. Cas. No. 100.

Under the provision of Act March 3, 1803, c. 40, § 2, 2 Stat. 244, providing that from all final judgments or decrees in any of the district courts of the United States an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court, it has been held: That appeals were allowable to the circuit court from decrees in admiralty in all cases where the sum in dispute exceeded $50. Ayer v. The Glaucus (C. C. 1870) Fed. Cas. No. 683. That no appeal would lie by any party from a decree of the district court, unless on his part the matter in dispute exceeds the sum or value of $50. Shirley v. Titus (C. C. 1833) Fed. Cas. No. 12,796. That where a libel claimed $300 damages, and a decree was given for the libelant for $40 in which he acquiesced, the respondent could not appeal to the circuit court. Greigg v. Reade (D. C. 1836) Fed. Cas. No. 5,804. That in a suit for an assault and battery on the high seas, no appeal could be sustained from a decree of the district court unless there was an ad damnum laid in the libel exceeding $50. Jenks v. Lewis (C. C. 1825) Fed. Cas. No. 7,279. That if libelant in his libel claimed a sum exceeding $50, and, pending the hearing, admitted that an amount less than that sum was all that is due him, and claimed to recover only such lesser sum, the case was not appealable to the circuit court. McGinnis v. Carlton (D. C. 1849) Fed. Cas. No. 8,799. That, though the jurisdiction of the circuit court was limited to cases involving more than $50, respondent might appeal from a judgment for no more than the sum tendered and paid into court by him, which libelants refused to accept, since the tender was not an admission so as to reduce the amount in controversy below the jurisdictional limit. Lubker v. The A. H. Quinby (C. C. 1879) Fed. Cas. No. 8,586. That an appeal would lie to the circuit court in admiralty where the amount of the claim, with interest, was more than $50 when the decree was entered. Godfrey v. Gilmartin (C. C. 1851) Fed. Cas. No. 5,-498. That where on the sale of a vessel on a decree for wages amounting to more than $50, the proceeds after paying charges, were less than $50, the owner was entitled to appeal, the wages being the matter in dispute. The Enterprise (C. C. 1855) Fed. Cas. No. 4,-497.

605. Right of review.—Though seamen may join in admiralty, in a suit for wages, a decree against one does not affect the claims of the rest. Oliver v. Alexander (1832) 31 U. S. (6 Pet.) 143, 8 L. Ed. 349.

In prize cases, claimants who were not parties to proceedings in the district court cannot be heard in the supreme court on appeal. The William Bagaley (1866) 72 U. S. (5 Wall.) 377, 18 L. Ed. 583.

The master of a libeled vessel who enters a claim stating that he is the lawful bailee of the owner named in the claim, and who gives a release bond with surety, may alone appeal from the decree of the trial court, and thereby bring the whole case before the appellate court, though the owner and surety both appear of record, and may join in the appeal if they wish. Aiken v. Smith (1892) 54 Fed. 894, 4 C. C. A. 652, distinguishing Hardee v. Wilson (1892) 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933. The claimants of an informer's share after condemnation and sale of forfeited property may seek a review of a judgment or decree of distribution made by the district court. Wheaton v. U. S. (C. C. 1871) Fed. Cas. No. 17,487.

606. Presentation and reservation in lower court of grounds of review.—In reviewing the action of the court below in overruling a motion to retax costs, the circuit court of appeals will not consider an objection which was not specified in such motion. The State of Missouri (1896) 76 Fed. 376, 22 C. C. A. 239.

A draft of a decree presented to a district court by a respondent in a suit for collision, to be entered under a mandate from the supreme court, and which was properly refused because it permitted respondent to recoup a portion of the cargo damage awarded in favor of interveners in a manner which made such recoupment, in effect, at the expense of other cargo owners, and for that reason, did not conform to the mandate, which required a decree against respondent for all cargo damage, cannot be brought into the record on appeal from the decree entered, to be considered by the appellate court as an application for recoupment presented to the district court on its merits, as a matter arising subsequent to the mandate; and, where no question of respondent's right to recoupment in any manner and to any extent was in any other manner presented to the court, there is no basis in the record for an assignment of error because the court failed to provide for any recoupment. The New York (1901) 108 Fed. 102, 47 C. C. A. 232, reversed Union Steamboat Co. v. Erie & W. Transp. Co. (1903) 23 Sup. Ct. 504, 189 U. S. 363, 47 L. Ed. 854.

Where, in a suit in admiralty in

personam for injuries to a seaman, he testified at the trial that he was under 21 years of age, but over 20, at which age Civil Laws Hawaii, § 2144, declares all male persons shall be regarded as of legal age, and defendant made no objection at the trial that by reason of plaintiff's minority he was not entitled to sue alone, such objection could not be first raised by defendant on appeal. Paauhau Sugar Plantation Co. v. Palapala (1904) 127 Fed. 920, 62 C. C. A. 552.

Practice on a hearing before a commissioner in admiralty is analogous to that before a master in chancery, and objections to computations made by the commissioner should be taken by exception to his report, and, if not so taken, or at least urged on the hearing before the court on such report, they will be treated as waived, and will not be considered when raised for the first time by assignments of error in the appellate court. But where a computation contains a plain error, which was called to the attention of the court, it may be corrected in the appellate court, although no formal exception was taken on that ground to the commissioner's report. The Eliza Lines (1904) 132 Fed. 242, 65 C. C. A. 538, modifying judgment on rehearing (1902) 114 Fed. 307, 52 C. C. A. 195, and judgment reversed (1905) 26 Sup. Ct. 8, 199 U. S. 119, 50 L. Ed. 115.

Defects in a libel not objected to, and which on objection might have been amended, are not ground for reversal of a decree. Pioneer S. S. Co. v. McCann (1909) 170 Fed. 873, 96 C. C. A. 49.

A bill of exceptions, to present for review, upon appeal to the supreme court, the rulings of the circuit court, must be based on exceptions taken to such rulings at the time the rulings were made. Richardson v. The Havre (C. C. 1880) 4 Fed. 748.

On a libel for an illegal seizure on the seas, if damages be awarded in the circuit court, on an account there taken, which is fair on its face, and to which counsel do not there object, the supreme court will not receive objections to it. Little v. Barreme (1804) 6 U. S. (2 Cranch) 170, 2 L. Ed. 243.

The claimant can contest the amount of a libelant's claim for repairs of a vessel in this court only upon specific objection shown by the record to have been taken in the court below. The Potomac (1862) 67 U. S. (2 Black) 581, 17 L. Ed. 263.

An objection that certain repairs for which a lien was enforced in the district court were made in the home port cannot be set up for the first time in the circuit court on appeal, especially when not averred in the pleadings. Meagher v. The Lizzie (C. C. 1876) Fed. Cas. No. 9,377.

If it were necessary to set out in the record the evidence on which a decree on default was based, a reversal would not follow a failure to do so when the question was not raised in the court below. Meaher v. Tindal (1867) 41 Ala. 385.

The rejection of evidence on the subject of damages by the commissioner, when not raised in the district court, is not available on appeal. The Vicksburg (C. C. 1870) Fed. Cas. No. 16,932.

Where the amount due for supplies to a vessel is determined by report of commissioner before libelant's right to recover is established, no objection to allowances can be made on appeal which were not raised in the court below. Harris v. Wheeler (C. C. 1870) Fed. Cas. No. 6,129.

The objection that the district court has not jurisdiction of a cause of seizure, under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the circuit court, notwithstanding it was not taken in the district court. The Fideliter (C. C. 1870) Fed. Cas. No. 4,755.

607. Parties.—An admiralty appeal should be dismissed as to certain of the appellants when there is nothing in the record to show that they are privy to the suit except a statement in their unsworn petition for appeal that they are owners of interests in the vessel, but such dismissal should not affect the appeal so far as proper parties thereto are concerned. Aiken v. Smith (1892) 54 Fed. 894, 4 C. C. A. 652.

After the decision of the circuit court on appeal in a collision case is announced, an insurer of the cargo lost by the collision, who has paid the amount in full, may be admitted as a party to settle its rights to a share of the recovery as against the libelants. The City of Paris (C. C. 1878) Fed. Cas. No. 2,767.

608. —— Joinder and severance.—The sureties in a stipulation for the release of a vessel are not parties to the cause, though they are bound by the decree. Hence, where the decree is adverse to the stipulators, the claimant may appeal alone without any proceedings to effect a severance. The Glide (1896) 72 Fed. 200, 18 C. C. A. 504.

The sureties in a stipulation for the release of a vessel are not parties to the cause though they are bound by the decree. Hence, where the decree is adverse to the stipulators, the claimant may appeal alone without any proceeding to effect a severance. The Glide (1896) 72 Fed. 200, 18 C. C. A. 504, remanding cause for new trial to district court (1895) 68 Fed. 719, 15

C. C. A. 627. They do not become parties to the suit in such sense as to require that they be joined in an appeal by the claimant from the decree entered therein, although such decree is joint in form against the claimant and stipulators, unless some extraneous question has arisen in the suit involving their rights or obligations. The New York (1900) 104 Fed. 561, 44 C. C. A. 38; Perriam v. Pacific Coast Co. (1904) 133 Fed. 140, 66 C. C. A. 206.

Where one of two defendants, against both of whom a decree for damages has been entered by a court of admiralty, does not join in an appeal therefrom, and he is not served with summons and notice of severance before the time for appeal has expired, he cannot thereafter be brought in, or by his voluntary appearance confer jurisdiction on the appellate court. Consumers' Cotton Oil Co. v. Nichol (1903) 120 Fed. 818, 57 C. C. A. 321.

On a joint decree against respondents for a maritime tort, there may be separate appeals where respondents have severed in their pleadings, or jointly pleaded a general denial. Thomas v. Lane (C. C. 1813) Fed. Cas. No. 13,902.

609. —— Appeal in name of vessel.—A writ of error or appeal cannot be sustained in the name of a steamboat, or any other than a human being, or some corporate or associated aggregation of persons. The Burns (1869) 76 U. S. (9 Wall.) 237, 19 L. Ed. 620; The Spark v. Lee Choi Chum (C. C. 1872) Fed. Cas. No. 13,206.

610. —— Amendment.—An amendment as to parties will not be allowed on appeal from the district to the circuit court. Mason v. Ervine (C. C. 1885) 27 Fed. 240.

611. Taking and perfecting appeal.—Where an appeal from the district court sitting in admiralty was taken to the next term of the circuit court as required by law, held, that the jurisdiction of the circuit court at once attached notwithstanding the appeal was allowed by the district court without conformity to its rule that the appeal should be in writing. The S. S. Osborne (1881) 105 U. S. 447, 26 L. Ed. 1065.

Where notice of appeal in an admiralty case is given in open court upon the rendition of the decree, and written notice thereof filed with the clerk, and the penalty of the appeal bond fixed by the court, and an appeal bond in the penalty as fixed is filed and approved by the clerk before the close of the term at which the decree appealed from is rendered, the appeal is well taken, though neither the term docket nor minutes of the district court contain any evidence of the appeal. Otis v. The Rio Grande (C. C. 1870) Fed. Cas. No. 10,614.

Where the motion and order for appeal were not taken against any of the numerous libelants by name, and where no bond was given in favor of any other than one of the libelants, the appeal can only hold as to him, and must be dismissed as to the others. Mason v. Ervine (C. C. 1885) 27 Fed. 240.

612. —— Appeals by both parties.—Opposing appeals in admiralty do not create two causes in the appellate court. Where one party appeals and perfects his appeal, and the other desires to appeal, he need do nothing more than serve and file in the court below his motion of appeal. The City of Panama v. Phelps (Wash. T. 1880) 3 Pac. 204.

613. —— Refusal of appeal by lower court.—On the erroneous refusal of an appeal by the district court in admiralty, application may be made to the appellate court which will require the proper security to be given. The Enterprise (C. C. 1855) Fed. Cas. No. 4,497.

614. —— Time of taking and perfecting.—In prize cases, wherever it appears that notice of appeal or of intention to appeal to the supreme court of the United States was filed with the clerk of the district court within 30 days next after the final decree therein, an appeal will be allowed to the supreme court whenever the purposes of justice require it. The Nuestra Senora De Regla (1872) 84 U. S. (17 Wall.) 29.

Act March 3, 1891 (26 Stat. 829), allowing an appeal to be taken to the circuit court of appeals at any time within six months, applies to an admiralty proceeding. The City of Naples (1895) 69 Fed. 794, 16 C. C. A. 421.

An appeal from a district court in admiralty to the circuit court of appeals, under Act March 3, 1891, c. 517, § 11, 26 Stat. 829, may be taken any time within six months after the entry of the decree or order appealed from. The New York (1900) 104 Fed. 561, 44 C. C. A. 38.

An appeal from a decree of the district court, to be effectual, must be entered before the adjournment sine die of the district court, unless a different time is specially allowed by the district court in the peculiar case, or is prescribed by the general rules of the court. The New England (C. C. 1839) Fed. Cas. No. 10,151; Norton v. Rich (C. C. 1824) Fed. Cas. No. 10,352.

If in either case an appeal is entered within the prescribed term, it relates back to the time of the decree, although actually entered in vacation. The New England (C. C. 1839) Fed. Cas. No. 10,151.

In the absence of any general rule or special order fixing the time within which the bond must be given, the appellant has, under rule 45, 30 days from the rendition of the decree within which to perfect his appeal. The Canary No. 2 (C. C. 1884) 22 Fed. 536.

615. —— **At what term appeal entered.**—No appeal lies from a decree of the district court in an admiralty cause, except to the next term of the appellate court. The New England (C. C. 1839) Fed. Cas. No. 10,151; U. S. v. The Glamorgan (C. C. 1855) Fed. Cas. No. 15,214; U. S. v. Five Thousand One Hundred Dollars in Specie (C. C. 1870) Fed. Cas. No. 15,-119; The Oriental (C. C. 1877) Fed. Cas. No. 10,570. But see The Chatham, 52 Fed. 396, 3 C. C. A. 161, 8 U. S. App. 104.

After a final decree has been made by a district court, sitting in admiralty, and the court has adjourned without day, the decree cannot be set aside or opened so as to allow an appeal to the appellate court, a term whereof has intervened since the decree was made. U. S. v. The Glamorgan (C. C. 1855) Fed. Cas. No. 15,214.

An appeal from the district court is properly entered at the term of the appellate court begun next after the entry of the decree in the district court, though the term of the latter was not ended when the term of the circuit court began. U. S. v. Certain Hogsheads of Molasses (C. C. 1852) Fed. Cas. No. 14,766.

616. —— **Effect of delay in perfecting appeal.**—If the appellant delay to perfect his appeal, so that the record is filed a very short time before the term of this court, the appellee may notice the cause for hearing or continue it, at his option. Backus v. The Marengo (C. C. 1855) Fed. Cas. No. 713.

A party appealing, in admiralty, from the district court, and delaying to perfect his appeal for six months and till within two days of the term, will be required to take his depositions forthwith, and come to a hearing in that term, provided the appellee sets down the cause for hearing. Nall v. The Illinois (C. C. 1855) Fed. Cas. No. 10,005.

After a decree was entered giving libelants possession of a vessel, respondent gave notice of appeal, but took no steps to perfect his appeal for several days, and the owners (libelants) applied to the court for leave to bond the vessel. Held that the court would not grant leave to bond the vessel, but would direct that the decree would be executed unless the appeal was perfected in two days. Muir v. The Brisk (D. C. 1870) Fed. Cas. No. 9,901.

Reasonable diligence should be used in prosecuting an appeal in admiralty. Nall v. The Illinois (C. C. 1855) Fed. Cas. No. 10,005.

617. —— **Dismissal by lower court for delay in perfecting appeal.**—The district court can only give a remedy in case of an unreasonable delay to take an appeal. A motion to dismiss an appeal already taken, on the ground that notice of appeal and affidavit of service had not been filed in time, should be made in the circuit court. The Josephine (D. C. 1849) Fed. Cas. No. 7,-545.

618. —— **Waiver implied from failure to appeal.**—In admiralty, whenever damages are claimed by the libelant or claimant in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages, and the party will be considered as having waived his claim for damages, unless he then appeals. Canter v. American & Ocean Ins. Co. (1830) 28 U. S. (3 Pet.) 307, 7 L. Ed. 688.

619. —— **Return of appeal.**—No order of the district court fixing the return of an appeal is necessary. The law makes the appeal returnable to the next term of the circuit court. The Canary No. 2 (C. C. 1884) 22 Fed. 536.

620. —— **Assignment of errors.**—Rule 11, requiring assignments of error, is applicable to cases of appeals in admiralty. Dufour v. Lang (1892) 54 Fed. 913, 4 C. C. A. 663; Chicago Ins. Co. v. Graham & Morton Transp. Co. (1901) 108 Fed. 271, 47 C. C. A. 320, rehearing denied (1901) 109 Fed. 352, 48 C. C. A. 397.

Where one vessel and cargo were totally lost by a collision resulting from mutual fault, and the other vessel, after paying full damages for the lost cargo, was permitted to recoup one-half thereof from the half damages awarded to the owners, officers, and crew of the lost vessel, but the decree was open to the construction that the recoupment was to be pro rata on the sums apportioned to owners, master, and crew, held that, in the absence of an assignment of error in respect to the recoupment against the seamen, the appellate court would, of its own motion (seamen being wards of the admiralty), direct that the decree be modified so that the several sums awarded to the mate and crew, who were in no way responsible for the fault of navigation, should be exonerated by, and have priority over, the amounts awarded the owners and master. The Chattahoochee (1896) 74 Fed. 899, 21 C. C. A. 162.

In an admiralty suit the circuit court of appeals may, on motion, and for cause shown, permit the filing therein of additional assignments of error, to cover points not specifically included in the original assignments. Cory v. Penco (1896) 76 Fed. 997, 22 C. C. A. 675.

An assignment that the court erred in allowing certain claims, which the evidence adduced by libelant did not substantiate, is too general to be con-

sidered. The Natchez (1896) 78 Fed. 183, 24 C. C. A. 49.

An assignment "that the court erred in holding that libelant was entitled to any compensation for the injuries received" by him is too general. Lafourche Packet Co. v. Henderson (1899) 94 Fed. 871, 36 C. C. A. 519.

An assignment that the court erred in not dismissing a libel against a vessel with costs was a mere expression of opinion of counsel as to the duty of the district judge and not a sufficient assignment of error. The Wyandotte (1906) 145 Fed. 321, 75 C. C. A. 117, affirming decree (D. C. 1905) 136 Fed. 470.

621. —— **Petition of appeal and apostles.**—As Act March 2, 1803, c. 20, 1 Stat. 244, authorizes appeals to the circuit court only from all final judgments or decrees of the circuit court, neither the circuit court nor the supreme court can allow an amendment of the record of appeal, by an insertion of what the parties agree to be final judgment as to amount, in a libel against a vessel for nondelivery of goods shipped on board of her. Mordecai v. Lindsay (1856) 60 U. S. (19 How.) 199, 15 L. Ed. 624.

Where an appeal was taken to the supreme court on the affirmance by the circuit court of a decree for libelants, and appellant fails to serve a copy of their petition of appeal within the 10 days, so as to make the appeal operate as a stay of execution under Act Sept. 24, 1789, § 23, and Act March 3, 1803, § 2, the court had no power to permit such services to be made nunc pro tunc. The Roanoke (C. C. 1855) Fed. Cas. No. 11,875.

In admiralty proceedings, an appeal which asks for a review, and also gives notice that the appellant will introduce in the supreme court new proof, is bad for duplicity. The Leonede v. U. S. (1861) 1 Wash. T. 153.

When an appeal is taken and allowed from a definitive sentence in admiralty, at the time of its entry, and time is allowed in which to perfect the appeal, no written petition for an appeal or for apostles is necessary under the admiralty rules, nor are letters dismissory of the cause. Waddell v. The Daisy (1881) 2 Wash. T. 76, 3 Pac. 616.

622. —— **Appellatory libel.**—The appellatory libel, required by the civil law, is unnecessary in the existing admiralty practice. Waddell v. The Daisy (1881) 2 Wash. T. 76, 3 Pac. 616.

623. —— **Appeal bonds in general.**—In the absence of rules specially prescribed, the practice of the court will govern as to appeal bonds. Otis v. The Rio Grande (C. C. 1870) Fed. Cas. No. 10,614.

Appeal bonds may be taken before a United States commissioner, in absence of a rule of court providing otherwise. The Canary No. 2 (C. C. 1884) 22 Fed. 536.

Where the record showed that the vessel was, at the time of the appeal, in appellants' possession, and the appeal bond recited that the judgment was against appellants for delivery of possession to claimant, and was conditioned for payment of $15,000, the bond was in the nature of a stipulation for value, and claimant having, in reliance thereon, refrained from disturbing appellants in their possession pending the appeal, the instrument was valid as a voluntary bond. Braithwaite v. Jordan (1895) 5 N. D. 196, 65 N. W. 701.

624. —— **Necessity for appeal bonds.**—On an appeal in admiralty proceedings, it is indispensable that an appeal bond for damages and costs be filed. Chew v. Baker (C. C. 1836) Fed. Cas. No. 2,663; Hayford v. Griffith (C. C. 1853) Fed. Cas. No. 6,263; The Leonede v. U. S. (1861) 1 Wash. T. 153. And see Providence Washington Ins. Co. v. Wager (C. C. 1888) 37 Fed. 59.

A seaman may be required to give security for costs on appeal unless he prove by satisfactory affidavits that he is unable to do so. Wheatley v. Hotchkiss (D. C. 1854) Fed. Cas. No. 17,483.

Where the motion and order for appeal were not taken against any of the numerous libelants by name, and where no bond was given in favor of any other than one of the libelants, the appeal can only hold as to him, and must be dismissed as to the others. Mason v. Ervine (C. C. 1885) 27 Fed. 240.

Where an appeal in admiralty has been taken by petition and citation, and the appellee has been served with notice and appeared in the circuit court, the appeal has a standing irrespective of the bond. The Natchez (C. C. 1886) 27 Fed. 309, distinguishing The City of Lincoln (C. C. 1883) 19 Fed. 460.

625. —— **Amount of appeal bond.**—The amount of the bond to be required on granting a supersedeas is to be determined by the circuit court in its sound discretion, under the laws and rules of the supreme court. U. S. v. Mayor of New Orleans (C. C. 1881) 8 Fed. 112.

626. —— **Sufficiency of appeal bonds.**—Sureties in appeal bonds are not required to appear before the court for examination concerning their property after final decree. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

A stipulation on appeal, in order to suspend execution, must be executed by libelants personally, if resident within the district, and with at least one surety resident therein. Nonresident parties must supply at least two sureties. The Grand Republic (D. C. 1882) 10 Fed. 398.

An appeal bond in admiralty must name all the persons which the appeal is intended to bring before the court. On appeal from a decree in favor of several libelants, a bond executed in favor of one, without specifically nam-

ing any others, is fatally defective. The City of Lincoln (C. C. 1883) 19 Fed. 460.

Where the motion and order for appeal were not taken against any of the libelants by name, and where no bond was given in favor of any other than one of the libelants, the appeal can only hold as to him, and must be dismissed as to the others. Mason v. Ervine (C. C. 1885) 27 Fed. 240.

Appeal bonds may be taken before a United States commissioner, in absence of a rule of court providing otherwise. The Canary No. 2 (C. C. 1884) 22 Fed. 536.

On appeal from the district court to the circuit court it is not necessary for an appellant, who has given security on the release of the vessel, to give a new stipulation for the whole amount of the decree and costs. New security to cover the damages for delay and the costs and interest on the appeal is sufficient. A rejustification of the sureties on the original stipulation will, however, be ordered, if reasonably required. The Brantford City (D. C. 1887) 32 Fed. 324.

Where an undertaking given on appeal in a territorial court sitting in admiralty was treated by respondent as entitling appellants to a stay, and no attempt was made by respondent to enforce the judgment, the undertaking was valid as a common-law obligation. Braithwaite v. Jordan (1895) 5 N. D. 196, 65 N. W. 701.

627. —— Amendment of appeal bonds.—A bond on appeal in admiralty fatally defective, in that it names but one of several appellees, cannot be amended. The City of Lincoln (C. C. 1883) 19 Fed. 460.

628. —— Time for filing appeal bonds.—To effectuate an appeal so as to suspend execution, it was held necessary for libelants to give security by stipulation within 10 days after decree is rendered (Dist. Ct. Rule 153), and also to serve upon claimants four days' notice of the names of the sureties proposed, and of the time and place of giving stipulation (Rule 154). The Infanta (D. C. 1848) Fed. Cas. No. 7,031.

In the absence of any general rule or special order fixing the time within which the bond must be given, the appellant has, under Adm. Rule 45, 30 days from the rendition of the decree within which to perfect his appeal. The Canary No. 2 (C. C. 1884) 22 Fed. 536.

629. —— Objections to appeal bonds.—An irregularity consisting in furnishing one instead of two sureties must be objected to by the party affected by it, within the term of the court next subsequent to its becoming known to him. The Infanta (D. C. 1848) Fed. Cas. No. 7,031.

630. —— Citation and notice.—A formal citation, such as is required on an appeal to the supreme court, is not necessary in taking an appeal from district court to a circuit court. A written notice by the appellant's proctor to the respondents is sufficient. The Ellen (C. C. 1857) Fed. Cas. No. 4,375.

In the absence of rules specially prescribed, the practice of the court will govern as to notice of appeal. Otis v. Rio Grande (C. C. 1870) Fed. Cas. No. 10,614.

Appeal in admiralty held well taken, where notice was given in open court, and a written notice and bond in an approved amount were subsequently filed during the term, though such facts were not entered on the docket or minutes of the district court. Id.

In appeals in admiralty proceedings no monition issuing out of supreme court to the trial court to transmit the cause to supreme court is required. Waddell v. The Daisy (1881) 2 Wash. T. 76, 3 Pac. 616.

Where the only notice of appeal in an admiralty suit was given more than two months after the decree, and more than forty days after the expiration of the time granted, when sentence was entered, in which to perfect an appeal, the notice is ineffectual either under civil-law rules, or those rules as modified by rules in admiralty. The Lone Fisherman (1887) 3 Wash. T. 316, 13 Pac. 617.

631. —— Appearance.—The want of a monition to appear on appeal is cured by actual appearance. Penhallow v. Doane (1795) 3 U. S. (3 Dall.) 87, 1 L. Ed. 507.

The appearance of the appellee in an admiralty suit, and his participation in taking evidence in the appellate court, estop him from denying that there is a valid appeal pending. If, in the opinion of his proctor, another and more specific bond is necessary for the due prosecution of the appeal, the appellants will be directed to furnish one. The Natchez (C. C. 1886) 27 Fed. 309.

632. Effect of appeal and stay of execution.—An appeal in admiralty from the district to the circuit court in effect vacates the decree of the district court. A new trial in all respects, and a new decree, are to be had in the circuit court; and the latter must execute its own decree, the district court having nothing more to do with the case. Yeaton v. U. S. (1809) 9 U. S. (5 Cranch) 283, 3 L. Ed. 101; The Lucile (1873) 86 U. S. (19 Wall.) 73, 74, 22 L. Ed. 64; The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton (C. C. 1870) Fed. Cas. No. 12,356; Dutcher v. Woodhull (D. C. 1874) Fed. Cas. No. 4,204; The Cassius (C. C. 1890) 41 Fed. 367 (following The Hesper [C. C. 1883] 18 Fed. 696).

Where libelants appeal in a salvage case the appeal opens the whole case. They cannot be allowed to claim the benefit of the decree below, and, stand-

ing secure on that, try their pretenses in this court. The Hesper (C. C. 1883) 18 Fed. 696 (following The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton [C. C. 1870] Fed. Cas. No. 12,356).

An appeal from the dismissal of a libel in rem for repairs, taken on the same day and immediately after the dismissal of proceedings, operates as a stay of proceedings under the dismissal, so that the circuit court will retain jurisdiction notwithstanding that, after the appeal was taken, the vessel was improvidently restored to claimants. The Rio Grande (1874) 90 U. S. (23 Wall.) 458, 23 L. Ed. 158.

An appeal from an order refusing an application, on a cross libel, for security and stay, under rule 53, does not suspend the proceedings in the original suit. Franklin Sugar-Refining Co. v. Funch (1896) 73 Fed. 844, 20 C. C. A. 61, affirming order (D. C. 1895) 66 Fed. 342.

A commission to take testimony cannot be issued by the circuit court in an admiralty case after an appeal has been taken to the supreme court, until after the supreme court on motion has decided the question as to the admissibility of the evidence. The Ocean Queen (C. C. 1868) Fed. Cas. No. 10,411.

Where libelant recovered a small amount and appealed, the circuit court dismissed the libel at libelant's costs, though claimant had not appealed. The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton (C. C. 1870) Fed. Cas. No. 12,356.

An appeal to the supreme court of the United States from the judgment of the circuit court, affirming a decree made by the district court duly entered, with stipulations approved by the court, does not operate as a supersedeas, or vacate the decree so as to prevent the entry of judgment against the stipulators in the district and circuit courts. The Belgenland (C. C. 1883) 16 Fed. 430, decree affirmed (1885) 5 Sup. Ct. 860, 114 U. S. 355, 29 L. Ed. 152.

633. —— **Control of property.**—Where an appeal is taken from a decree of the district court in a proceeding in rem, the property or its proceeds follows the cause into the appellate court. The Collector (1821) 19 U. S. (6 Wheat.) 194, 5 L. Ed. 239; The Lottawanna (1873) 87 U. S. (20 Wall.) 201, 22 L. Ed. 259; The Grotius (C. C. 1813) Fed. Cas. No. 5,844; Hayford v. Griffith (C. C. 1853) Fed. Cas. No. 6,263; Davis v. The Seneca (D. C. 1828) Fed. Cas. No. 3,651; U. S. ex rel. Hill v. Towns (D. C. 1874) Fed. Cas. No. 16,534; The Wanata (1877) 95 U. S. 600, 24 L. Ed. 461. CONTRA, see Jones v. Walker (C. C. 1803) Fed. Cas. No. 7,506.

Money deposited in a district court as a tender by respondents in an admiralty cause remains in that court pending an appeal from a decree for libelants, and the Circuit Court of Appeals has no control over the money, or over the District Court in regard to it, except when the cause is reviewed and determined and remanded for further proceedings. Mignano v. McAndrews (1892) 56 Fed. 300, 1 U. S. App. 312, 4 C. C. A. 4.

An inferior court of admiralty, notwithstanding an appeal, has control over the property, subject to the suit, and may order its sale where perishable. Jones v. Walker (C. C. 1803) Fed. Cas. No. 7,506. But see The Grotius (C. C. 1813) Fed. Cas. No. 5,844.

On appeal to the circuit court from a decree of the district court dismissing the libel, the claimant of the vessel which was attached on service of the monition is not entitled to have her rereleased, or to a bond from the libelants to pay such damages as the claimant may sustain by reason of her detention pending the appeal, in case the libel shall be dismissed in the appellate court. To hold otherwise would be inconsistent with admiralty rule 11. Unless the attachment was mala fide, or there was gross negligence amounting to bad faith, no damages for her detention caused by such arrest can be recovered. The English cases, if not consistent with this rule, cannot now be sustained. Suits for possession stand on a different ground. The Adolph (D. C. 1880) 5 Fed. 114.

634. **Record.**—Record on appeal to Supreme Court and Circuit Court of Appeals, see notes under § 1654, post.

Where no exceptions are taken during the trial, the only paper which the judge can sign upon appeal is a record showing the proceedings which took place in court in the case at the trial prior to the decision of it by the court, embodying the requests to find on both sides, and also the findings made and the written opinion of the court, and the exceptions filed, showing the dates of the several proceedings. Richardson v. The Havre (C. C. 1880) 4 Fed. 748.

635. —— **Exceptions to admission or exclusion of evidence.**—Where a seizure case, by agreement of the parties, is tried by the district court without a jury, the record should be made up as in the case of a writ of error, with the proper exceptions to the admissions or rejections of testimony, etc. U. S. v. Fifteen Hogsheads of Brandy (C. C. 1862) Fed. Cas. No. 15,090.

636. —— **Evidence.** — Act Feb. 16, 1875, requiring the circuit courts, in admiralty cases, to make separate findings of fact and conclusions of law, and limiting the supreme court, on appeal, to a review of the questions of law arising on the record, etc., is not applicable to the trial of admiralty cases in the district courts, and the review thereof on

appeal by the circuit courts of appeal; but in the latter courts an admiralty appeal is, to all intents and purposes, a trial de novo, so that the appeal cannot be heard upon the merits, where the transcript of the record does not contain the testimony taken below, as required by general admiralty rule 52 and by the rules of the circuit court of appeals. Nelson v. White (1897) 83 Fed. 215, 32 C. C. A. 166. And further, as to the necessity of bringing the evidence into the record, on appeal to the circuit court, see Gloucester Ins. Co. v. Younger (C. C. 1855) Fed. Cas. No. 5,487.

A decree in admiralty, adjudging a portion of the fund realized from the sale of a vessel libeled by a lienholder to the receiver in bankruptcy of the owner, on recitals that the vessel was in the custody of the bankruptcy court when seized, and that the receiver expended the sum allowed him for its benefit because of such custody, cannot be reviewed, where the record does not contain the evidence on which such recitals were based. The Falcon (1910) 177 Fed. 916, 101 C. C. A. 196, affirming decree In re Hughes (D. C. 1909) 170 Fed. 809.

Where the report of the commissioner to which a case has been referred to ascertain the amount of damages is not excepted to, it is not necessary that his minutes of the testimony should be brought up on appeal. The City of Paris (C. C. 1878) Fed. Cas. No. 2,767.

A deposition, entitled in the district court, but not received by the clerk until after the trial there, and not sent up as a part of the record of that court, cannot be read on appeal. The Buckeye State (C. C. 1857) Fed. Cas. No. 2,085.

Where the exclusion of a witness by the master to whom a case in admiralty has been referred does not appear by his report, there must be an affidavit of the fact, and of the expected testimony, that the court may know whether it would amount to independent or only cumulative evidence. New Philadelphia (1861) 66 U. S. (1 Black) 62, 17 L. Ed. 84.

The circuit court of appeals cannot be required to review the testimony in an admiralty appeal when the record is not made up as required by admiralty rule 52, but contains only the judge's notes of the testimony, and there is no stipulation that anything may be omitted. The Alijandro v. Wallace (1893) 56 Fed. 621, 6 C. C. A. 54.

On appeals in admiralty the record should be so prepared as to show which witnesses were examined in the presence of the district judge and which were not. The Gypsum Prince (1895) 67 Fed. 612, 14 C. C. A. 573, reversing decree (D. C. 1893) 57 Fed. 859.

Under the authority conferred by this section, the Circuit Court of Appeals, Second Circuit, adopted rules requiring assignments of error to accompany the petition of appeal and requiring all the testimony in the district court to be included in the transcript of record as required by Supreme Court Admiralty Rule 52, and also adopted special rules in admiralty. Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C. A. 360, certiorari denied (1909) 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068.

In admiralty suits which are heard de novo on appeal, it is important that charts referred to by witnesses, and on which locations pointed out or marked, should be preserved in the record. The Catawissa (1914) 213 Fed. 14, 129 C. C. A. 352.

Where by reason of the failure of the stipulators to appear, a decree pro confesso might have been entered against them, the fact that the court hears the cause ex parte does not necessitate the setting out in the record the evidence thus taken. Meaher v. Tindal (1867) 41 Ala. 385.

637. —— **Findings of fact.**—See § 1585, and notes thereunder.

638. —— **Statement of facts.**—Where there is nothing in the certificate of the judge to the statement of facts, or elsewhere in the transcript, to show that the adverse party was present when the statement was made up, or had any notice that it would be made, in the absence of a showing of one or both of these facts, the certificate to the statement will be of no avail, and the appeal should be dismissed. The Lone Fisherman (1887) 3 Wash. T. 316, 13 Pac. 617.

639. —— **Amendment.** — Under Act March 2, 1803, c. 20, 1 Stat. 244, authorizing appeals to the circuit court only "from all final judgments or decrees" of the district court, it was held that neither the circuit court nor the supreme court could allow an amendment of the record of appeal by an insertion of what the parties agree to be a final judgment as to amount, in a libel against a vessel for nondelivery of goods shipped on board of her. Mordecai v. Lindsay (1856) 60 U. S. (19 How.) 199, 15 L. Ed. 624.

640. —— **Dismissal of appeal.**—On an appeal in admiralty from a pro forma decree of the circuit court affirming a decree of the district court, the circuit court of appeals will not dismiss the cause merely because it was not docketed in the circuit court at the next term thereof held in the district, when all other requirements relating to appeals to the circuit court were complied with. The Chatham (1892) 52 Fed. 396, 3 C. C. A. 161, affirming decree (D. C. 1890) 44 Fed. 384.

A motion to dismiss an appeal in admiralty calls in question the jurisdiction of the appellate court to deal with the subject-matter of the appeal, and it is not a ground for dismissal that the evidence on which the decree appealed

from was rendered is not in the record. Brown v. Merchants' Marine Ins. Co. (1906) 144 Fed. 85, 75 C. C. A. 243.

It is not ground for dismissal of an appeal in admiralty that the notice of appeal was not served on parties for whom appellant had been substituted by an order of the district court, and who make no claim that their interests are not represented by appellant. Id.

It is not ground for dismissal of an appeal in admiralty that an order substituting appellant for other parties in the suit, which was made and served before the expiration of the time for appeal, was not filed with the clerk until afterward. Id.

An appeal will not be dismissed on account of the transcript not having been properly made up or certified when the fault thereof is not attributable solely to the appellant. The Ethel (C. C. 1887) 31 Fed. 576.

641. **Hearing.**—Where, on a libel for damage to cargo, the trial judge saw none of the witnesses and the controversy involved a sharp conflict of evidence on the issue of the cause of the damage, the entire record will be examined on appeal. Lazarus v. Barber (1905) 136 Fed. 534, 69 C. C. A. 310, affirming decree (D. C. 1903) 124 Fed. 1007.

After an appeal, the court may allow evidence, not received in season, to be put upon the record de bene esse, with a memorandum of the fact. The London Packet (C. C. 1815) Fed. Cas. No. 8,474.

The absence of a witness on the hearing of an admiralty appeal is no ground of continuance, where he failed to attend in the court below, and no effort was made to secure his attendance in the circuit court until five days before the case on appeal was called for trial. Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794.

If the appellant delay to perfect his appeal, so that the record is filed a very short time before the term of this court, the appellee may notice the cause for hearing or continue it, at his option. Backus v. The Marengo (C. C. 1855) Fed. Cas. No. 713.

In the case of six months' delay to perfect the appeal, the appellee was allowed to notice the cause for a hearing, and was required to take his depositions during the session of the court. Nall v. The Illinois (C. C. 1855) Fed. Cas. No. 10,005.

Where an appeal in a prize case was taken from an order overruling a motion for further proofs, and also from the decree on the merits, held, that the appellate court would not grant a separate hearing on the motion, but would consider the entire appeal at the same time. U. S. v. The Lilla (C. C. 1863) Fed. Cas. No. 15,600.

642. **Rehearing.**—A rehearing of an appeal in admiralty should not be granted on the ground of newly discovered evidence of a fact not known to the petitioner, but which was known to the witnesses of the opposite party, and not disclosed by them, where no sufficient reason is shown why it was not ascertained and proved while the case was regularly open. Wineman v. The Iron Chief (1894) 63 Fed. 289, 11 C. C. A. 196.

On appeal the court cannot rehear a cause or admit a claim at a term subsequent to that in which the cause was finally decided. The Avery (C. C. 1815) Fed. Cas. No. 672.

643. **Amendments, new pleadings, and proofs, and trial of cause anew.**—In the interest of uniformity in practice, rule 11 of the circuit court of appeals for the seventh circuit (see notes under § 1114, ante), which requires an assignment of errors to be filed and returned with the record, will be held to apply to appeals in admiralty. This, however, does not prevent the court from permitting new pleadings or new evidence in proper cases, and, under section 10 of the act creating such courts, the cause will be remanded to the court below for decree as in case of other appeals. Chicago Ins. Co. v. Graham & Morton Transp. Co. (1901) 108 Fed. 271, 47 C. C. A. 320, rehearing denied (1901) 109 Fed. 352, 48 C. C. A. 397.

When an appeal is taken from a decree in admiralty, it suspends the decree of the district court, and the case proceeds de novo in the circuit court, and the libelant is the actor having the affirmative, and must make out the allegations of his libel, and the court may allow amendments to the pleadings. The Morning Star (C. C. 1882) 14 Fed. 866.

644. —— **Trial de novo in general.**—Since Act Feb. 16, 1875, "to facilitate the disposition of cases in the supreme court," a case in admiralty cannot be retried in the United States supreme court on all the evidence. Merchants' Mut. Ins. Co. v. Allen (1887) 121 U. S. 67, 7 Sup. Ct. 821, 30 L. Ed. 858.

The hearing on appeal from the district court is de novo. Irvine v. The Hesper (1887) 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175; The Louisville (1880) 154 U. S. 657, 14 Sup. Ct. 1190, 25 L. Ed. 771; Pettie v. Boston Towboat Co. (1891) 49 Fed. 464, 1 C. C. A. 314, 1 U. S. App. 57; The San Rafael (1905) 141 Fed. 270, 72 C. C. A. 388, reversing judgment (D. C. 1904) 134 Fed. 749; Two Hundred and Fifty Barrels of Molasses v. U. S. (C. C. & D. C. 1869) Fed. Cas. No. 14,293; Ayer v. The Glaucus (C. C. 1870) Fed. Cas. No. 683; The Ethel (C. C. 1887) 31 Fed. 576.

The cause is tried de novo on the original or amended pleadings, and on such evidence as may be properly offered, whether the same was offered in the district court or not. The Ethel (C. C. 1887) 31 Fed. 576. On such hear-

ing, but on questions of fact, the burden is on appellant. Ayer v. The Glaucus (C. C. 1870) Fed. Cas. No. 683. The opinion of the district judge cannot be read. Two Hundred and Fifty Barrels of Molasses v. U. S. (C. C. & D. C. 1869) Fed. Cas. No. 14,293.

The appellate court has jurisdiction to reduce an award decreed to libelants as salvors in the district court, although the libelees have themselves failed to appeal. The Hesper (1887) 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175.

Act March 3, 1891, c. 517, § 11, 26 Stat. 829, creating the circuit courts of appeals, which provides that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals," an appeal in an admiralty cause, which by such act is taken to that court instead of to the circuit court, as formerly, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the circuit courts prior to the passage of that act; and, under the settled rule, such an appeal vacates entirely the decree of the district court, and brings the cause up for trial de novo upon every issue raised by the pleadings, those determined by the district court in favor of the appellant as well as those determined against him. Gilchrist v. Chicago Ins. Co. (1899) 104 Fed. 566, 44 C. C. A. 43.

An appeal in admiralty from a district court to the circuit court of appeals opens the whole case for trial de novo in the appellate court subject to its rules, and that one party did not appeal does not preclude the court from directing entry by the district court of a decree more favorable to him. Munson S. S. Line v. Miramar S. S. Co., 167 Fed. 960, 93 C. C. A. 360, modifying decree on motion (1908) 166 Fed. 722, 92 C. C. A. 412, and writ of certiorari denied Steamship Miramer Co. v. Munson S. S. Line (1909) 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068. And an appeal cannot be heard on the merits where the record does not contain the testimony. Nelson v. White (1897) 83 Fed. 215, 32 C. C. A. 166.

Where a joint libel by seamen against the ship stated separate and distinct causes of action, as to some of which no finding was made or decree entered by the trial court, and the only appeal was from decrees in favor of certain of the libelants on one cause of action, taken by the claimant, which in accordance with the rules embodied in the record only the evidence relating to such cause of action, the appellate court cannot on such record try the case de novo, and enter decrees for libelants on the other causes of action. The John and Winthrop (1910) 182 Fed. 380, 106 C. C. A. 1.

An appeal in admiralty vacates the decree below, and the cause is tried anew, and parties other than those appealing may have new relief. Reid v. Fargo (1914) 213 Fed. 771, 130 C. C. A. 285.

645. —— **Amendment of process.**— On appeal from district to circuit court, defective process could not be cured by amendment. The City of Lincoln (C. C. 1883) 19 Fed. 460; Mason v. Ervine (C. C. 1885) 27 Fed. 240.

646. —— **Amendment of pleadings.**— An appellate court will not allow amendments, so as to give the court jurisdiction, when it has none on the face of the record. Udall v. The Ohio (1854) 58 U. S. (17 How.) 17. And see Agnew v. Dorman (C. C. 1838) Fed. Cas. No. 100.

Amendments in matters of substance on appeal cannot be allowed in the circuit courts of appeal. The Philadelphian (1894) 60 Fed. 423, 9 C. C. A. 54 (following the Mabey [1870] 10 Wall. 419, 19 L. Ed. 963, and decree affirmed [1894] 61 Fed. 862, 10 C. C. A. 127).

Issues not made by the pleadings nor tried below in an admiralty cause in the second circuit will not be tried on appeal unless application to amend is made and notice given as required by rule 7. The Minnie (1915) 225 Fed. 36, 140 C. C. A. 362.

On appeal from the district court the appellate court may allow the pleadings to be amended. Anonymous (C. C. 1812) Fed. Cas. No. 444; The Edward (C. C. 1816) 14 U. S. (1 Wheat.) 261; The Morton (C. C. 1876) Fed. Cas. No. 9,864; Warren v. Moody (C. C. 1881) 9 Fed. 673; The Morning Star (C. C. 1882) 14 Fed. 866.

Such amendments may be made in the appellate court, not only as to form but as to matter of substance. The Palmyra (1827) 25 U. S. (12 Wheat.) 1, 6 L. Ed. 531. But not in the circuit courts of appeal. The Philadelphian (1894) 60 Fed. 423, 9 C. C. A. 54 (following The Mabey [1870] 77 U. S. [10 Wall.] 419, 20 L. Ed. 881).

Amendments allowed by Rule No. 24 may be made. The Charles Morgan v. Kouns (1885) 115 U. S. 69, 5 Sup. Ct. 1172, 29 L. Ed. 316. A libel may be amended by striking out the names of parties improperly introduced. Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794. Also by making a claim in the appellate court for damages above costs, caused by a vexatious appeal. Weaver v. Thomson (C. C. 1849) Fed. Cas. No. 17,311. Amendments may also be made so as to permit new evidence and new grounds of defense. But such amendments ought only to be exercised to bring the merits of the controversy fairly before the court.

Reppert v. Robinson (C. C. 1851) Fed. Cas. No. 11,703. And they should not be allowed when they are known to exist at the time of the hearing in the district court. Coffin v. Jenkins (C. C. 1844) Fed. Cas. No. 2,948.

In admiralty, amendments in sworn answers in the appellate court should introduce new substantive facts previously unknown, or correct substantial mistakes in matters of fact, and cannot be allowed on account of any mere defect of skill in drafting the original answer, in consequence of which respondent's case was not presented on the record in the best possible manner, or so as to secure to him all possible legal advantages. Lamb v. Parkman (C. C. 1859) Fed. Cas. No. 8,019.

An appeal having been taken from a decree of the district court dismissing a libel in rem to foreclose a mortgage on a vessel, a motion to amend the libel, so as to change the proceedings into a possessory action, was denied in the circuit court. The John Jay (C. C. 1853) Fed. Cas. No. 7,352.

If any persons have joined in a libel who are not competent to sue for the matter complained of, the circuit court, although an appellate court, will give leave to amend and strike out the names of parties improperly introduced, so as to enable it to dispose of the appeal upon its real and substantial merits. Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794.

After the decision, on the merits, of certain cases of recovery from a British steamship of damages to cargo, a motion was made in the circuit court by the respondent for leave to amend its answers so as to qualify its appearance in such actions, and its admission of the jurisdiction of the federal courts, and to set up and prove a law of Great Britain alleged to be applicable to the cases, by which the liability of the respondent for the losses would be limited. Rule 4 of the circuit court provides that an appeal shall "state whether it is intended, on the appeal, to make new allegations, to pray different relief, or to seek a new decision on the facts, and the appellants shall be concluded in this behalf, by the appeal filed." The petition of appeal in these cases stated that the respondent, on the appeal, intended "to have the cause heard anew on the pleadings and proofs in the district court, and other proofs to be introduced in the circuit court." Held, that the respondent was concluded from making new allegations in the circuit court on the appeal, and that, having appeared unreservedly and admitted the jurisdiction of the district court, the respondent could not, in the circuit court, be permitted to change that to a qualified appearance and admission. The Montana (C. C. 1884) 22 Fed. 730, decree affirmed Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (1889) 9 Sup. Ct. 469, 129 U. S. 397, 32 L. Ed. 788.

The libel for damage to a cargo charged an unsafe and unseaworthy condition of the vessel, so that her decks leaked, and want of proper care, insufficient dunnage, and improper stowage. The main damage was caused by sea water, but in part by coal dust. This last element of damage was not referred to in the libel. It came up in dealing with insurers, and some few questions were asked about it in libelant's depositions, but it was not insisted on until the trial, more than three years after the arrival of the ship, and long after respondent's depositions had been concluded, and the goods had been sold and taken away beyond the reach of examination. Held, that libelant was not entitled to file a new or amended libel in the circuit court on appeal, under rules of the circuit court, Southern district of New York, No. 131, providing for the exhibition, without leave, of "new allegations," etc. The Thomas Melville (C. C. 1888) 34 Fed. 350.

647. —— Striking out new libel.— Under rule 130 of the circuit court, Southern district of New York, providing that if the appellee "shall have any cause to show why new allegations (filed without leave, under rule No. 131) or proofs should not be offered, or new relief prayed on the appeal, he shall give four days' notice thereof, * * * and such cause shall be shown within the first two days of the term; otherwise the appeal shall be allowed according to its terms," it has been held that the circuit court had power to strike the "new allegations" from the files on motion. The Thomas Melville (C. C. 1888) 34 Fed. 350.

648. —— New proofs in general.— New evidence on appeal to supreme court and circuit court of appeals, see notes under § 1654, post.

On appeal in admiralty new evidence is admissible. Either party may introduce such evidence. The James Wells v. U. S. (1812) 11 U. S. (7 Cranch) 22, 3 L. Ed. 256; The Clarissa Claiborne v. U. S. (1812) 11 U. S. (7 Cranch) 107, 3 L. Ed. 284; Rose v. Himely (C. C. 1805) Fed. Cas. No. 12,045; Carrigan v. The Charles Pitman (C. C. 1849) Fed. Cas. No. 2,444; The Morning Star (C. C. 1882) 14 Fed. 866; The City of Panama (1879) 1 Wash. T. 615. CONTRA, see Cutler v. Columbia (1854) 1 Or. 101. And time will be given to produce such evidence where it appears that appellant was not guilty of laches in not producing it in the court below. Rose v. Himely (C. C. 1805) Fed. Cas. No. 12,045. But the appellate court should be very cautious in admitting new matters of defense or allegation to be introduced, where the facts on which they rest are not new, or newly dis-

covered, but were perfectly known at or before the hearing in the district court. Coffin v. Jenkins (C. C. 1844) Fed. Cas. No. 2,948.

On appeal, where damages are discretionary, the burden of proof is on the appellant to show some clear mistake or error in the court below, either in awarding excessive damages, or in promulgating an incorrect rule of law, or to offer new and materially important testimony, which must go to the proof of the new allegations without contradicting the former evidence. Cushman v. Ryan (C. C. 1840) Fed. Cas. No. 3,515.

Rule 7 of the admiralty rules promulgated by the circuit court of appeals for the second circuit, to take effect July 2, 1892, authorizing the taking of new proofs only on sufficient cause shown to the court or a judge thereof, pursuant to an application made within 15 days after the filing of the apostles, and on 4 days' notice to the adverse party, will not be enforced as against a party whose case was tried in the district court prior thereto, in reliance upon the right to introduce such new testimony on an appeal as was permissible under the then existing rules and practice of the circuit; and in such a case the court will, as under the old practice, receive new material evidence which was not intentionally withheld in the district court. The rule is not an innovation in admiralty practice. The Venezuela (1892) 52 Fed. 873, 3 C. C. A. 319.

In a collision case involving the conduct of a French vessel, there were offered in evidence as new proofs, on appeal, the records of the French consulate, containing statements made by the master and certain members of the crew in the course of an examination before a consular officer, a copy of which record had been served upon the opposite party as the master's protest. Held, that this record was admissible, in so far as the master's statements were concerned. The Lisbonense (1892) 53 Fed. 293, 3 C. C. A. 539, following The Potomac (1869) 8 Wall. 590, 19 L. Ed. 511, and reversing decree (D. C. 1891) 47 Fed. 122.

In so far as the record contained statements of others than the master, it was only admissible in contradiction of testimony given by them at the trial, and to which their attention had been called when under examination. The Lisbonense (1892) 53 Fed. 293, 3 C. C. A. 539, reversing decree (D. C. 1891) 47 Fed. 122.

An appellate court should not receive as new evidence in an admiralty case a deposition by a witness who testified in the trial below concerning the very matters referred to in the deposition, when no ground for introducing additional proof is shown. Oliver v. The Sirius (1893) 54 Fed. 188, 4 C. C. A. 273.

Under rule 8 the practice in admiralty appeals is not like that formerly existing in the circuit courts under admiralty rule 49, but like the supreme court practice, and new evidence cannot be taken by deposition de bene esse, but only by a commission under supreme court rule 12, (3 S. Ct. ix,) which should not issue of course, but only when it appears that the testimony is material, and a good excuse for not offering it in the trial court is given. The Beeche Dene (1893) 55 Fed. 526, 5 C. C. A. 208, granting motion to retax costs (1893) 55 Fed. 525, 5 C. C. A. 207.

The parties to a suit in admiralty should make reasonable effort to obtain all testimony material to the issues in the trial court, and the practice of taking further testimony after an adverse decision, to be used in the appellate court, is one not to be encouraged. Pacific Steam Whaling Co. v. Grismore (1902) 117 Fed. 68, 54 C. C. A. 454, affirming decree The Valencia (D. C. 1901) 110 Fed. 221.

In the case of a collision between vessels mutually in fault, an insurer of a cargo of one lost by the collision who has paid the loss cannot be permitted on appeal, and where the carrier vessel has been sold several times since the collision, and his remedy over has been lost by delay, to make proof of the innocent ownership of the cargo so as to charge the other vessel with the entire damages. The City of Paris (C. C. 1878) Fed. Cas. No. 2,767.

On a trial in the district court, claimants put in no testimony, and, on the libelant's testimony and the pleadings, a decree was rendered in favor of libelant. On appeal to the circuit court, claimants offered in evidence the depositions of witnesses taken in the circuit court, under libelant's objection to them that the witnesses were not examined in the district court, though present or procurable. Held, that the libelant had substantially complied with rule 15 of this court, requiring cause to be shown against the admission of new proofs, and that those depositions as to which it was proved that the deponents had been present at the trial in the district court must be rejected, but not the others. The Stonington (C. C. 1885) 25 Fed. 621.

Where, although the answer denies negligence, it yet admits facts which raise a presumption of negligence, and the apostles indicate that the question of negligence has not been fully entered into, and the claimant has relied upon the theory that the facts found did not make out a prima facie case against him, he may be permitted to apply for leave to introduce further evidence in this regard. The Sydney (C. C. 1886) 27 Fed. 119.

649. —— Testimony withheld below. —Though, on an appeal in admiralty from the district to the circuit court of

appeals, it is not a matter of course to allow parties who have withheld evidence available to them in the district court to present such evidence on appeal, it has been the practice in the second circuit to take such testimony, without excusing its nonproduction below, where neither side has objected; and in view of such practice, where no objection was interposed by an appellee to the taking of new proof until such taking was completed, a motion thereafter made, to suppress such depositions, will be denied. Singlehurst v. La Compagnie Générale Transatlantique (1892) 50 Fed. 104, 1 C. C. A. 487, denying motion to suppress testimony (D. C. 1891) 47 Fed. 122.

In an admiralty case the circuit court of appeals will, on motion, strike from the files depositions taken on appeal by a party who might easily have produced them in the trial court, and who was as well informed then as now as to its materiality and necessity. The Lurline (1893) 57 Fed. 398, 5 C. C. A. 165.

New testimony will be admitted on appeal in admiralty when the court is of opinion that, under all the circumstances, substantial justice requires it, though a satisfactory excuse is not given for failing to produce the testimony below. Red River Line v. Cheatham (1894) 60 Fed. 517, 9 C. C. A. 124, reversing decree Cheatham v. Red River Line (D. C. 1893) 56 Fed. 248.

An appellant will not be allowed to produce testimony upon appeal which he has deliberately withheld in the court below. The Saunders (C. C. 1885) 23 Fed. 303.

650. —— Weight of new testimony.—New testimony, introduced on an appeal in admiralty, except under peculiar circumstances, is not entitled to the same consideration as testimony introduced in the first instance. Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794. And see The Busy (C. C. 1856) Fed. Cas. No. 2,232.

651. —— Questions of costs.—On an appeal in admiralty, the circuit court of appeals must deal with questions of costs as if they were original questions. Pettie v. Boston Towboat Co. (1891) 49 Fed. 464, 1 C. C. A. 314, 1 U. S. App. 57.

652. Review—Scope and extent of review in general.—Review of questions of fact in admiralty cases tried to a jury, see § 1585, and notes.

Where the libel in a suit in admiralty on a contract of reinsurance avers the identity of the two insurances, which is essential to a recovery, and the answer denies it, but the findings of fact by the trial court do not assert it, the question on appeal is not whether it may be deduced as a conclusion of fact from the facts found, but whether it follows as a conclusion of law. Sun Mut. Ins. Co. v. Ocean Ins. Co. (1882) 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

Although, in a case of collision, there is no express finding of negligence, as matter of fact, if the facts found by the court below furnish conclusive proof of negligence, it may be regarded, on appeal, as properly found among the conclusions of law, as a legal inference from those facts. The Belgenland (1884) 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

On an appeal in admiralty from the district court to the circuit court of appeals, the case is reviewable both upon the law and the facts. City of Cleveland v. Chisholm (1898) 90 Fed. 431, 33 C. C. A. 157.

Where a decree disposes of a number of distinct claims, an appeal by one party from an adverse decision as to one of such claims does not bring up for review the other portions of the decree. Mason v. Marine Ins. Co. (1901) 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700.

Where the issues presented by a libel and cross-libel and the answers thereto in an admiralty cause are tried as a single controversy in the District Court, the effect is the same as if the two suits had been formally consolidated, and an appeal from the final decree brings up the questions. The Colorado (1910) 184 Fed. 609, 106 C. C. A. 613, denying motion to dismiss appeal (D. C. 1909) 173 Fed. 649.

The review of a decree in admiralty on appeal is limited by the assignments of error. Cook v. Smith (1911) 187 Fed. 538, 109 C. C. A. 304, affirming decree Smith v. Cook (D. C. 1908) 164 Fed. 628.

An appeal by any parties interested in the distribution of salvage, as to their shares, brings up incidentally a review of the whole decree, so far as the distribution is concerned. The Henry Ewbank (C. C. 1833) Fed. Cas. No. 6,376.

On an appeal to the circuit court, in admiralty, the whole decree of the district court is brought up, although only part of it is appealed from. The Roarer (C. C. 1845) Fed. Cas. No. 11,876.

On appeal by one party alone from a decree finding mutual fault, the circuit court cannot inquire as to the fault of the party not appealing. The Quickstep (C. C. 1870) Fed. Cas. No. 11,509.

Where libelants appeal in a salvage case the appeal opens the whole case. They cannot be allowed to claim the benefit of the decree below, and, standing secure on that, try new claims in the appellate court. The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton (C. C. 1870) Fed. Cas. No. 12,356.

Where a libel against a vessel shows that the entire debt constitutes a lien on the vessel, and the account attached may be construed consistently with the libel, the appellate court will not,

especially after a final decree, construe the account in such a manner as to infer that the debt, or any part of it, does not constitute a lien on the vessel. The Southron v. O'Riley (1852) 21 Ala. 228.

653. —— **On appeal from intermediate court.**—Where exceptions of form are taken on a libel in admiralty in the district court, but are not found in the records of the appeal to the circuit court, or to the supreme court, and do not appear to have been brought to the attention of the circuit court, or acted on in any manner by it, they must be held in the supreme court to have been waived. The Vaughan (1871) 81 U. S. (14 Wall.) 258, 20 L. Ed. 807.

When two courts have considered the facts, and reached the same conclusion as to the fault for a collision, the burden rests upon an appellant to show that such decisions were manifestly wrong before the judgment of the lower court will be reversed. Wilder's S. S. Co. v. Low (1901) 112 Fed. 161, 50 C. C. A. 473.

654. —— **Review limited by scope of record.**—The clause in Act Feb. 16, 1875, § 1 (section 1585, this compilation), limiting the power of the supreme court, on appeals from the circuit courts in admiralty causes, to a review of the questions arising on the face of the record, and to such rulings as are properly presented by a bill of exceptions, applies to appeals from the district court of Alaska sitting in admiralty. The Sylvia Handy v. U. S. (1892) 12 S. Ct. 464, 143 U. S. 513, following Ex parte Cooper (1892) 12 Sup. Ct. 453, 143 U. S. 472, 36 L. Ed. 232.

Act Feb. 16, 1875, post, § 1585, applies to the district court of Alaska sitting in admiralty. Ex parte Cooper (1892) 12 Sup. Ct. 453, 464, 143 U. S. 472, 36 L. Ed. 232.

A decree in admiralty will not be reversed on appeal because of a misjoinder of causes of action in the libel, where one was dismissed by the court, either on exceptions or on final hearing, and a decree on the merits entered upon the other only. Where the final condition of the record is in accordance with the substantial rules of the law, a court of admiralty does not look at the intervening steps. The S. L. Watson (1902) 118 Fed. 945, 55 C. C. A. 439.

Evidence not made a part of the bill of exceptions will not be considered. The Wyandotte (1906) 145 Fed. 321, 75 C. C. A. 117, affirming decree (D. C. 1905) 136 Fed. 470.

655. —— **Review of interlocutory decree on appeal from final decree.**—A decree sustaining a demurrer to a libel, but giving the libelant leave to file an amended libel, of which he avails himself, is interlocutory only, and is brought up for review by an appeal from the final decree subsequently entered on the amended libel. Dennis v. Slyfield (1902) 117 Fed. 474, 54 C. C. A. 520.

656. —— **Persons entitled to allege error in general.**—Two consignees filed libels for damage to the cargo and the shipowner filed a libel for freight. The causes were tried as one, and sent together to the master, upon whose report a decree was entered for each consignee for the excess of damage over the freight, and the owner's libel was dismissed. On an appeal by the owner, the circuit court ordered a decree in his favor for his whole freight, and in favor of each consignee for his whole damage, leaving the set-off to be made by the parties or the district court. Held that, as the shipowner was not injured by the decree because he was allowed costs on his own libel, he had no ground of appeal therefrom. The Water Witch (1861) 66 U. S. (1 Black) 494, 17 L. Ed. 155.

Although the general rule is that a party who does not appeal cannot be heard in opposition to the decree, still where it appeared—the suit below being a libel for collision against a tug and her tow—that an appeal from the district to the circuit court had been taken from the entire decree, by the owners of the tow who had ordered the tug, and who had undertaken her defense as well as their own, and thus represented the entire interest of the losing party in the suit, an appeal by the tug from the circuit court to the supreme court was entertained there; the court expressing a doubt as to the regularity of the proceeding. The Mabey (1871) 81 U. S. (14 Wall.) 204, 20 L. Ed. 881.

The appellee, in whose favor both the original decree and the decree in review was made, cannot, on appeal to the circuit court, raise the question as to the power of the district court to entertain a libel of review. The Enterprise (C. C. 1855) Fed. Cas. No. 4,497.

657. —— **Errors alleged by one not appealing.**—On appeals in admiralty suits, the decree will not be examined, except as it respects the party appealing. McDonough v. Dannery (1796) 3 U. S. (3 Dall.) 188, 1 L. Ed. 563.

If libelant does not appeal from a decree of the district court, he cannot ask to have the damages increased on the claimant's appeal. Airey v. Merrill (C. C. 1854) Fed. Cas. No. 115; Allen v. Hitch (C. C. 1854) Fed. Cas. No. 224; Merrill v. Arey (D. C. 1859) Fed. Cas. No. 9,468. Except by an allowance for the delay of payment. Allen v. Hitch (C. C. 1854) Fed. Cas. No. 224. And see The Ciampa Emilia (1892) 50 Fed. 239, 1 C. C. A. 508, 1 U. S. App. 143, affirming (D. C. 1890) 41 Fed. 57.

Failure of a party to a decree for divided damages to appeal therefrom prevents the appellate court from reversing the decree as against him. The J. & J. McCarthy (1894) 61 Fed. 516, 9

C. C. A. 600, affirming decree (D. C. 1893) 55 Fed. 85.

Where, on appeal on a decree of salvage by all the owners of the goods saved, libelant did not appeal, he could not claim, in the appellate court, anything beyond the amount allowed him in the court below. Stratton v. Jarvis (1834) 33 U. S. (8 Pet.) 4, 8 L. Ed. 846. And see McDonough v. Dannery (1795) 3 U. S. (3 Dall.) 188, 1 L. Ed. 563. But see The Hesper (1887) 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175, holding that the appellate court had jurisdiction to reduce an award decreed to libelants as salvors in the district court, although the libelees have themselves failed to appeal.

Where libelant has not appealed, he cannot contend in the circuit court of appeals that certain items of his loss were improperly disallowed in the court below. The Ciampa Emilia (1892) 50 Fed. 239, 1 C. C. A. 508, affirming (D. C. 1890) 41 Fed. 57.

On a libel against one vessel for damages to the cargo of another by collision, and a decree against her, if the decree is reversed on appeal by claimant therefrom, libelants are entitled to a decree against the owner of the vessel sunk to the same extent as though they had appealed, but without costs of the appellate court. The Umbria (1892) 59 Fed. 489, 8 C. C. A. 194, 11 U. S. App. 612.

Where libelant recovered a small amount, and appealed, the circuit court dismissed the libel at libelant's costs, though claimant had not appealed. The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton (C. C. 1870) Fed. Cas. No. 12,356.

The libelants proceeded against two vessels for damages by collision. The district court dismissed the libel, with costs, as to one, and awarded the libelants their whole damages, with costs, against the other. An appeal was taken by the latter vessel, and also by the libelants. The libelants subsequently abandoned their appeal. Upon the hearing in the circuit court all parties appeared, and litigated the cause. The decree of the district court was reversed, and both vessels pronounced in fault. Held that, although the libelants were in the position of not having appealed, they were entitled to a decree against both vessels, such a decree being necessary to protect the appellant and do full justice between all parties, but that the libelants were not entitled to costs of the circuit court. The Galileo (C. C. 1886) 29 Fed. 538.

658. —— **Allegation of error by stipulators.**—At common law, stipulators may not question the correctness of a decree of condemnation; and, if stipulators alone appeal, they are confined to a review of the judgment so far only as they are themselves concerned. Livingston v. The Tallapoosa (Ala. 1839) 9 Port. 111.

Where the court has jurisdiction of a libel to enforce a lien on a steamboat, and renders a decree for the sale and condemnation of the boat, the stipulators cannot complain, on error, of any irregularity in the proceedings against the boat. Murphy v. Roberts (1857) 30 Ala. 232.

659. —— **Questions of jurisdiction.**—Where a foreign vessel was libeled in an admiralty court of the United States, the libelant and claimant both being foreigners, the places of shipment and consignment being foreign ports, and all the transactions relating to the matter having occurred abroad, held, that the question of jurisdiction was open to the appellants, though no such question was directly presented in the pleadings, nor raised in the court below. The Maggie Hammond (1869) 76 U. S. (9 Wall.) 435, 19 L. Ed. 772.

660. —— **Questions of costs.**—On an appeal in admiralty, the circuit court of appeals tries the case de novo, and therefore must deal with questions of costs as if they were original questions. Pettie v. Boston Towboat Co. (1891) 49 Fed. 464, 1 C. C. A. 314, modifying decree (D. C. 1890) 44 Fed. 382.

The awarding of costs in admiralty is in the discretion of the court, not reviewable where that is the sole question involved. The Eva D. Rose (1908) 166 Fed. 101, 92 C. C. A. 85, affirming decree (D. C. 1907) 153 Fed. 912.

The question of costs is reviewable where the whole case is taken to the appellate court. Lubker v. The A. H. Quinby (C. C. 1879) Fed. Cas. No. 8,-586.

661. —— **Adhering to theory pursued below.**—When a case has been prosecuted as one of prize in the district court, the property, it seems, cannot be condemned in the supreme court because of a breach of statutory provisions; but the case may be remanded for further proceedings below, if the court thinks that there has been such a breach. U. S. v. Weed (1866) 72 U. S. (5 Wall.) 62, 18 L. Ed. 531.

662. —— **Objections not raised below.**—A point not presented in the district court, or pointed out in the assignment of errors, will not be considered in the circuit court of appeals. Brauer v. Campania Navigacion La Flecha (1895) 66 Fed. 776, 14 C. C. A. 88, affirming decree Brauer v. Compagnia de Navigacion La Flechs (D. C. 1894) 61 Fed. 860, and decree affirmed Compania De Navigacion La Flecha v. Brauer (1897) 18 Sup. Ct. 12, 168 U. S. 104, 42 L. Ed. 398.

Objections to the sufficiency of a libel are too late when taken in the appellate court. Witherspoon v. Wallis (1841) 2 Ala. 667; Monroe v. Brady (1844) 7 Ala. 59.

Objections to want of proper parties being matter which should be taken in the court below, a party cannot, in an

admiralty proceeding by the owners of a vessel, to recover damages for a cargo lost on their ship by collision, object in the supreme court, for the first time, that the owners of the vessel were not the owners of the cargo, and therefore that they cannot sustain the libel. The Commander in Chief (1863) 68 U. S. (1 Wall.) 43, 17 L. Ed. 609.

In collision cases, if respondent makes no claim either in the district or circuit court for injuries sustained to the libeled vessel, the respondent cannot make a claim in the supreme court for damages which he alleges there for the first time to have been sustained by him. The Sapphire (1873) 85 U. S. (18 Wall.) 51, 21 L. Ed. 814.

Where the amount due for supplies to a vessel is determined by the report of a commissioner before libelant's right to recover is established, no objection to allowances can be made on appeal which were not raised in the court below. Harris v. Wheeler (C. C. 1870) Fed. Cas. No. 6,129.

An objection that certain repairs for which a lien was enforced by decree of the district court were made in the home port cannot be set up for the first time in the circuit court on appeal, especially when not averred in the pleadings. Meagher v. The Lizzie (C. C. 1876) Fed. Cas. No. 9,377.

It is too late after a cause has been fully heard, and after appellants have taken their chances of obtaining a favorable decree, for them to object that they were sued in the cross libel, when they were not parties in the original suit, where the cause was tried on its merits; all parties, so far as appears, submitting to the jurisdiction. The Ping-On v. Blethen (C. C. 1882) 11 Fed. 607.

The objection that the district court has not jurisdiction of a cause of seizure, under the laws of impost, navigation, and trade, because it does not appear that the property was seized before the proceeding was commenced, may be urged successfully upon appeal in the circuit court, notwithstanding it was not taken in the district court. The Fideliter (C. C. 1870) Fed. Cas. No. 4,755.

663. —— **Presumptions in general.**—Every presumption is in favor of the correctness of a decree in admiralty that comes into the court of last resort sustained by the district judge and the circuit judge on appeal, and the appellate court will not disturb such a decree unless a manifest mistake is made clearly to appear. The S. S. Wilhelm (1893) 59 Fed. 169, 170, 8 C. C. A. 72.

One to whom a decree in admiralty directs the payment of a fund is presumptively a party to the suit, or in court as a claimant of the fund, and evidence is required to rebut such presumption, where a denial of the fact is made a basis for impeaching the decree. The Falcon (1910) 177 Fed. 916, 101 C. C. A. 196, affirming decree (D. C. 1909) In re Hughes, 170 Fed. 809.

Commissioners appointed to award a full indemnity for certain losses will be presumed to have fulfilled their duty, and the compensation allowed by them will be presumed to be a full indemnity for a loss. Brown v. Lull (C. C. 1836) Fed. Cas. No. 2,018.

On a libel for damages caused by collision, where both vessels were found in fault, the damages and costs ordered to be divided equally, and the assessment of damages referred to a commissioner, an appellate court will not assume that the commissioner awarded interest to one vessel and not to the other, where no indication or intention to discriminate appears in the record, and by a prior report he awarded interest to both vessels. Simpson v. The State of California (1893) 54 Fed. 404, 4 C. C. A. 393.

664. —— **Presumptions concerning jurisdiction.**—Where the character of the vessel does not appear, the state court will not assume on appeal that the vessel was domestic. The Montauk v. Walker (1868) 47 Ill. 335. Contra, the state court will not assume that the vessel is foreign, and on that ground decline jurisdiction. City of Jeffersonville v. The John Shallcross (1870) 35 Ind. 19.

665. —— **Presumptions from record.**—Where, on an appeal from a decree of the district court of Alaska forfeiting a vessel for taking fur seal contrary to law, it was claimed that the court had no jurisdiction because the vessel was seized more than three miles from the shore, but in the bill of exceptions, the only exception stated was that defendants "there and then excepted to the ruling of the court, and the law as declared by the court, viz.," and then followed the findings and conclusion, and the only finding in relation to the place of seizure was that it was made "in that portion of Behring Sea ceded by Russia to the United States," "and within the waters of Alaska," and the bill did not purport to set out all the evidence, the supreme court could not examine the evidence to discover the exact locality of the seizure, and it must be presumed that it was within the waters of Alaska, even though the dominion of the United States in Behring Sea should be held to extend only three miles from the shore. The Sylvia Handy v. U. S. (1892) 143 U. S. 513, 12 Sup. Ct. 464, 36 L. Ed. 246, following In re Cooper (1892) 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

666. —— **Review of discretion of lower court.**—It is against sound policy to encourage appeals in matters of discretion, and the amount of salvage allowed by the district court will not be disturbed unless there is clear and palpable mistake or gross overallow-

ance. Hobart v. Drogan (1836) 10 Pet. 108, 119, 9 L. Ed. 363.

In an action by the master of a vessel who had been discharged before the expiration of his contract term of service to recover damages for breach of the contract, it was within the discretion of the court to determine whether a reference was necessary to determine the damages, and his action in refusing such reference is not reviewable on appeal. Jenkins S. S. Co. v. Preston (1911) 186 Fed. 609, 108 C. C. A. 473.

Appeals from the district court on matters depending on sound discretion will be discouraged unless in such cases where reason and sound policy require a modification of the decree of the court below. Hill v. The Emma Peterson (C. C. 1846) Fed. Cas. No. 6,490.

The opening of a default in admiralty being discretionary with the court, under rule 39, a ruling on a motion to that end is not reviewable on appeal. Cape Fear Towing & Transportation Co. v. Pearsall (1898) 90 Fed. 435, 33 C. C. A. 161.

The allowance of interest in admiralty cases is discretionary, and not reviewable on appeal by the supreme court of the United States, except in a very clear case. The Albert Dumois (1900) 20 Sup. Ct. 595, 177 U. S. 240, 44 L. Ed. 751, affirming decree Jakobsen v. Springer (1898) 87 Fed. 948, 31 C. C. A. 315.

Although the amount of salvage rests in the discretion of the court awarding it, an appellate court may reduce the award, if in making it there was a clear and palpable mistake, or violation of just principles, or a departure from the path of authority. Hall v. The Bay of Naples (1891) 48 Fed. 737, 1 C. C. A. 81, 1 U. S. App. 47, reversing (D. C. 1890) 44 Fed. 90.

Costs in the admiralty are in the sound discretion of the court; and no appellate court should interfere with that discretion, unless under peculiar circumstances. U. S. v. The Malek Adhel (1844) 43 U. S. (2 How.) 210, 11 L. Ed. 239. And see Taylor v. Woods (C. C. 1878) Fed. Cas. No. 13,809.

The action of the court in respect to amendments is not reviewable on appeal. Brown v. The Cadmus (C. C.) Fed. Cas. No. 1,997.

667. —— **Review of weight and sufficiency of evidence in general.**—In admiralty appeals the findings of the district judge on conflicting evidence will not be disturbed unless clearly against the weight of the evidence. The Alijandro v. Wallace (1893) 56 Fed. 621, 6 C. C. A. 54, following The Albany (C. C. 1891) 48 Fed. 565.

A finding of the district court based on conflicting evidence will not be disturbed. The City of Naples (1895) 69 Fed. 794, 16 C. C. A. 421.

In an action for damages for a collision between a schooner and a tug and tow, where the testimony of the witnesses from the tug and schooner are most conflicting, and the opinion of the trial judge shows that the credibility of the witnesses was doubtful, his decision, based on the evidence of disinterested witnesses, will not be disturbed. The George L. Garlick (1901) 107 Fed. 542, 46 C. C. A. 456.

A finding of fact by a court of admiralty on the conflicting testimony of witnesses examined in open court will not be reversed on appeal unless clearly erroneous. Coastwise Transp. Co. v. Baltimore Steam Packet Co. (1906) 148 Fed. 837, 78 C. C. A. 527, affirming decree Baltimore Steam Packet Co. v. Coastwise Transp. Co. (D. C. 1905) 139 Fed. 777.

The finding of the trial court as to when a vessel was ready to load or discharge cargo, based on conflicting evidence, will not be disturbed by an appellate court, unless clearly erroneous. Earn Line S. S. Co. v. Ennis (1908) 165 Fed. 633, 91 C. C. A. 611, affirming decree (D. C. 1907) 157 Fed. 941.

The finding of a fact by the trial court in admiralty is not conclusive, but is entitled to much weight, and under conflicting testimony, with the witnesses testifying before the judge, will not be set aside, unless it clearly appears that it is either unsupported by or against the evidence. Royal Exch. Assur. v. Graham & Morton Transp. Co. (1908) 166 Fed. 32, 92 C. C. A. 66.

The finding of a trial court made on conflicting evidence that a firm to whose agent the bill of lading of a cargo of coal was indorsed was the consignee, and bound by the terms of the bill of lading and charter party in respect to time for discharge, affirmed. Dewar v. Mowinckel (1910) 179 Fed. 355, 102 C. C. A. 539, affirming decree Mowinckel v. Dewar (D. C. 1909) 173 Fed. 544.

On appeal in admiralty cases, the appellate court, though required to determine questions of fact, will give weight to the findings of the District Court, where the evidence is conflicting and the conclusion reached is not obviously wrong. Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissosway Towing & Transportation Co. (1912) 194 Fed. 361, 114 C. C. A. 321, denying rehearing (1911) 191 Fed. 769, 113 C. C. A. 427. Writ of certiorari denied (1912) 32 Sup. Ct. 837, 225 U. S. 704, 56 L. Ed. 1265.

The rule stated as to the review on appeal in admiralty of findings of fact made on conflicting evidence. Monongahela River Consol. Coal & Coke Co. v. Schinnerer (1912) 196 Fed. 375, 117 C. C. A. 193.

When questions of fact are dependent on conflicting evidence, the decision of the judge, before whom the case was tried, will not be reversed, unless clearly against the evidence. The Samson (1914) 217 Fed. 344, 133 C. C. A. 260,

affirming judgment Shaver Transp. Co. v. Columbia Contract Co. (D. C. 1913) 208 Fed. 347.

A finding of fact made by a court of admiralty on conflicting evidence is presumptively correct, and will not be reversed by the appellate court, unless the record clearly shows by the weight of the evidence that it is erroneous. Louisiana Excursion Co. v. Gidionsen (1914) 217 Fed. 751, 133 C. C. A. 445.

The decree of a court of admiralty, in a suit for personal injuries rendered on conflicting testimony taken in open court, will not be disturbed on appeal, unless there is a decided preponderance of evidence against it. The Elenore (1914) 217 Fed. 753, 133 C. C. A. 447.

On appeal in admiralty, findings of fact, whether by the judge or a jury, are not binding on the appellate court, although they will not be disregarded, unless the court is well satisfied that they are contrary to the weight of evidence. The A. G. Brower (C. C. A. 1915) 220 Fed. 648.

Appeals in admiralty on questions of mere fact will be discouraged. Hill v. The Emma Peterson (C. C. 1846) Fed. Cas. No. 6,490.

The decree of the district court, where no question of law is involved, is entitled to the same weight as a verdict in a suit at law, not to be disturbed unless it is contrary to the clear result of the evidence on the facts in issue. Palmer v. Dallet (C. C. 1844) Fed. Cas. No. 10,689.

Where the question is purely one of fact, depending upon the testimony of numerous witnesses, the judgment will not be reversed except for clear error. Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794.

The decision of a trial court in admiralty upon questions of fact, based on the conflicting testimony of witnesses examined before the judge, will not be reversed on appeal, unless there is a decided preponderance of evidence against it. The City of New York (1893) 54 Fed. 181, 4 C. C. A. 268, 14 U. S. App. 39; S. H. Harmon Lumber Co. v. The Warrior (1893) 54 Fed. 534, 4 C. C. A. 498; Bixby v. Deemar (1893) 54 Fed. 718, 4 C. C. A. 559, 13 U. S. App. 243; The Brandywine (1898) 87 Fed. 652, 31 C. C. A. 187; City of Cleveland v. Chisholm (1898) 90 Fed. 431, 33 C. C. A. 157; The E. Luckenbach (1899) 93 Fed. 841, 35 C. C. A. 628; The Columbian (1900) 100 Fed. 991, 41 C. C. A. 150; The Newport News (1900) 105 Fed. 389, 44 C. C. A. 541; The Anaces (1901) 106 Fed. 742, 45 C. C. A. 596; Elphicke v. White Line Towing Co. (1901) 106 Fed. 945, 46 C. C. A. 56; Whitney v. Olsen (1901) 108 Fed. 292, 47 C. C. A. 331; Jacobsen v. Lewis Klondike Expedition Co. (1901) 112 Fed. 73, 50 C. C. A. 121; Alaska Packers' Ass'n v. Domenico (1902) 117 Fed. 99, 54 C. C. A. 485; Baker-Whiteley Coal Co. v. Neptune Nav. Co. (1903) 120 Fed. 247, 56 C. C. A. 83; The Oscar B. (1903) 121 Fed. 978, 58 C. C. A. 316; Memphis & Newport Packet Co. v. Hill (1903) 122 Fed. 246, 58 C. C. A. 610; Paauhau Sugar Plantation Co. v. Palapala (1904) 127 Fed. 920, 62 C. C. A. 552; Baton Rouge & B. S. Packet Co. v. George (1904) 128 Fed. 914, 63 C. C. A. 640; Jameson v. Lewis (1904) 131 Fed. 728, 65 C. C. A. 586; Perriam v. Pacific Coast Co. (1904) 133 Fed. 140, 66 C. C. A. 206; The Edward Smith (1905) 135 Fed. 32, 67 C. C. A. 506 (affirming judgment The Edward Smith No. 2 [D. C. 1901] 105 Fed. 987); The Svealand (1905) 136 Fed. 109, 69 C. C. A. 97 (affirming decree The Svaeland [D. C. 1904] 132 Fed. 932); Peterson v. Larsen (1910) 177 Fed. 617, 101 C. C. A. 243; The Bailey Gatzert (1910) 179 Fed. 44, 102 C. C. A. 612 (affirming decree [D. C. 1909] 170 Fed. 101); The J. G. Gilchrist (1910) 183 Fed. 105, 105 C. C. A. 397 (affirming decree [D. C. 1909] 173 Fed. 666); The Sampson (C. C. 1857) Fed. Cas. No. 12,279; Baker v. Smith (C. C. 1872) Fed. Cas. No. 781; Guimarais' Appeal (C. C. 1886) 28 Fed. 528; Stafford v. The Ludvig Holberg (1890) 43 Fed. 117; (decree affirmed The Ludvig Holberg [1895] 15 Sup. Ct. 477, 157 U. S. 60, 39 L. Ed. 620).

To warrant a reversal, the preponderance of evidence must be such as would justify the granting of a new trial in a court of common law. The Grafton (C. C. 1846) Fed. Cas. No. 5,655.

The rule that the judgment of a District Court in admiralty will not be reversed on a question of fact on conflicting evidence, unless there is a decided preponderance against the judgment, where the judge saw and heard the witnesses, is not inapplicable because he did not file a written opinion when his finding on such question is obvious from the judgment rendered. Monongahela River Consol. Coal & Coke Co. v. Schinnerer (1912) 196 Fed. 375, 117 C. C. A. 193. But the decision of the trial judge rendered without an opinion cannot be reviewed conformably with that rule, and, on appeal therefrom, the appellate court will decide such questions of fact as best it may on reading the record. The City of New York (1893) 54 Fed. 181, 4 C. C. A. 268.

Where the judge below has recorded his impression that certain testimony given by witnesses in his presence was of doubtful value, and on an examination of it by the appellate court there is nothing to suggest that the trial judge overlooked anything appearing on a careful comparison of the whole record, his conclusions will be entitled to

great weight. The City of Augusta (1897) 80 Fed. 297, 25 C. C. A. 430.

When the district judge has rejected the positive testimony of witnesses who were in the best position to know the facts, and has accepted the testimony of others whose opportunities of knowledge were not so good, on the expressed ground that the rejected testimony does not harmonize with some theory as to the movements of the vessels, or with the inherent probabilities of the case, there is no reason why the appellate court may not review the testimony unembarrassed by the findings below. The Albany (1897) 81 Fed. 966, 27 C. C. A. 28, reversing (D. C. 1896) 74 Fed. 314.

When two courts have considered the facts, and reached the same conclusion as to the fault for a collision, the burden rests upon an appellant to show that such decisions were manifestly wrong before the judgment of the lower court will be reversed. Wilder's S. S. Co. v. Low (1901) 112 Fed. 161, 50 C. C. A. 473.

On an appeal in a collision case, where the question, on the proofs, is a close one as to which vessel was in fault, the decree will not be reversed. The Florida (C. C. 1860) Fed. Cas. No. 4,889. But the decree will be reversed where there is a direct conflict between the testimony of the crews on the colliding vessels, and the testimony of witnesses on other vessels is opposed to the finding of the lower court. Wells v. The Ann Caroline (C. C. 1859) Fed. Cas. No. 17,389.

A finding of the district court, on libel for damages by collision, that both vessels were in fault, will not be disturbed on appeal, when no new proofs are taken, and the evidence was conflicting, and the finding turned on the credibility of witnesses who were examined in the presence of the district judge, though the testimony seems to warrant another conclusion. Cooper v. The Saratoga (C. C. 1889) 40 Fed. 509.

668. —— **Presumption as to sufficiency of evidence.**—Where a district court and circuit court below have concurred in finding the facts in a case in admiralty for collision, the case will come into the supreme court with a presumption that the facts found below are correct. The Quickstep (1869) 76 U. S. (9 Wall.) 665, 19 L. Ed. 767.

Where the testimony of the witnesses in a suit in admiralty was largely taken by deposition, there is not the same presumption in favor of a finding of fact by the trial court as when based on oral testimony of witnesses appearing before it, and it will be more readily reviewed by an appellate court. The Santa Rita (1910) 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210, reversing decree (D. C. 1909) 173 Fed. 413.

669. —— **Review of evidence by supreme court.**—The supreme court of the United States, in an admiralty case coming up by appeal, will not reverse a decision of the court below, which turned on matters of fact, unless mistake is clearly shown. Walsh v. Rogers (1851) 54 U. S. (13 How.) 283, 14 L. Ed. 147.

Under Act Feb. 16, 1875, § 1 (section 1585, this compilation), it has been held that on appeal from the circuit court to the supreme court, the supreme court was bound to accept as conclusive the findings of the circuit court on disputed questions of fact. The Abbotsford (1878) 98 U. S. 440, 25 L. Ed. 168; The Benefactor (1880) 102 U. S. 214, 26 L. Ed. 157; The E. A. Packer (1891) 11 Sup. Ct. 794, 140 U. S. 360. And see The Louisville (1880) 154 U. S. 657, 14 Sup. Ct. 1190, 25 L. Ed. 771. CONTRA, see Marshall v. The Adriatic (1882) 107 U. S. 512, 2 Sup. Ct. 355, 27 L. Ed. 497.

Where a commissioner to whom the cause was referred, the district court, and the circuit court of appeals, all agreed that a certain claim for expenses of keeping a vessel wrongfully detained by a collector of customs was reasonable, held, that the supreme court would not disturb the finding, though the charge seemed large. The Conqueror (1897) 17 Sup. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree (D. C. 1892) 49 Fed. 99.

Successive concurring decisions of two courts on questions of fact in admiralty are not to be disturbed by the Supreme Court, unless clearly shown to be erroneous. Compania De Navigacion La Flecha v. Brauer (1897) 18 Sup. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree Brauer v. Compania Navigacion La Flecha (1895) 66 Fed. 776, 14 C. C. A. 88; Smith v. Burnett (1899) 19 Sup. Ct. 442, 173 U. S. 430, 43 L. Ed. 756, affirming decree (1897) 10 App. D. C. 469. And see The Lady Pike (1874) 88 U. S. (21 Wall.) 1, 22 L. Ed. 499.

670. —— **Review of evidence by circuit court of appeals.**—See, also, notes, ante.

The circuit courts of appeals may review findings of fact in admiralty cases, but will follow the conclusions of the trial judge unless based on evidence manifestly insufficient. The Brandywine (1898) 87 Fed. 652, 31 C. C. A. 187.

On an appeal in admiralty from the district court to the circuit court of appeals, the case is reviewable both upon the law and the facts. City of Cleveland v. Chisholm (1898) 90 Fed. 431, 33 C. C. A. 157.

Though questions of fact are reviewable by the circuit court of appeals on appeals in admiralty, where the cause was tried before the judge, who saw and heard the witnesses, and the record contains the testimony of a large number of

witnesses in direct conflict, a judgment based upon questions of fact will not be reversed, unless against the decided preponderance of the evidence. City of Cleveland v. Chisholm (1898) 90 Fed. 431, 33 C. C. A. 157. But such facts will not be reviewed on appeal to circuit court of appeals from district court in admiralty unless proofs are reduced to writing. The Philadelphian (1894) 60 Fed. 423, 9 C. C. A. 54.

Act Feb. 16, 1875, c. 77, § 1 (§ 1585 of this compilation), limiting the supreme court, on an appeal in admiralty, to a review of the findings of the circuit court on questions of law merely, held not to apply to circuit courts of appeals. The State of California (1892) 49 Fed. 172, 1 C. C. A. 224, 7 U. S. App. 20; The Coquitlam (1896) 77 Fed. 744, 23 C. C. A. 438. But see Ross v. Rittenhouse (1792) 2 U. S. (2 Dall.) 160, 1 L. Ed. 331, construing Act Sept. 9, 1778, establishing a court of admiralty, and allowing appeals from that court unless from the determination or finding of facts by the jury, which was to be without re-examination or appeal, and Act Jan. 15, 1780, providing that the trials in the Court of Appeals be according to the usage of nations and not by jury, to mean that the Court of Appeals of the United States on appeal from the judge of admiralty had no jurisdiction to investigate the facts after a trial and general verdict by jury and to give a contrary decision without the intervention of another jury.

Where a decree of the district court in admiralty on conflicting evidence was sustained by the circuit court on appeal, the circuit court of appeals should not reverse the findings below, though it might originally have reached a different conclusion. Vance v. The S. S. Wilhelm (1893) 59 Fed. 169, 8 C. C. A. 72.

The circuit court of appeals is not bound by a finding of fact made by the court below in an admiralty case, but it is its duty, under the statute giving the right of appeal, to determine such question in accordance with the convictions formed from the record by the judges sitting on the appeal. The Columbian (C. C. A. 1900) 100 Fed. 991.

While a Circuit Court of Appeals is not limited to the review of questions of law only, in admiralty appeals, yet, where the decision involves questions of fact dependent on conflicting testimony, the finding of the district judge will not be set aside unless it is clearly against the weight of evidence. Reed v. Weule (1910) 176 Fed. 660, 100 C. C. A. 212.

671. —— Review of evidence by circuit courts.—See The Alijandro v. Wallace (1893) 56 Fed. 621, 6 C. C. A. 54; The City of Naples (1895) 69 Fed. 794, 16 C. C. A. 421; Davison v. Sealskins (C. C. 1835) Fed. Cas. No. 3,661; Cushman v. Ryan (C. C. 1840) Fed. Cas. No. 3,515; Taylor v. Harwood (C. C. 1845) Fed. Cas. No. 13,794; Hill v. The Emma Peterson (C. C. 1846) Fed. Cas. No. 6,490; McGuire v. The Golden Gate (C. C. 1856) Fed. Cas. No. 8,815; Baker v. The Potomac (C. C. 1859) Fed. Cas. No. 778; The Sunswick (C. C. 1865) Fed. Cas. No. 13,625; The Heroine (C. C. 1868) Fed. Cas. No. 6,417; Ayer v. The Glaucus (C. C. 1870) Fed. Cas. No. 683; Baker v. Smith (C. C. 1872) Fed. Cas. No. 781; Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202; The Lord Derby (C. C. 1883) 17 Fed. 265; The Maggie P. (C. C. 1885) 25 Fed. 202; The Rockaway (C. C. 1885) 25 Fed. 775; The Thomas Melville (C. C. 1888) 36 Fed. 708; Levy v. The Thomas Melville (C. C. 1888) 37 Fed. 271; Mentz v. The Sammy (C. C. 1890) 44 Fed. 624; Duncan v. The Gov. Francis T. Nicholls (C. C. 1890) 44 Fed. 302; The Parthian (C. C. 1891) 48 Fed. 564; The Albany (C. C. 1891) 48 Fed. 565.

672. —— Review of amount of recovery.—The United States supreme court will not, upon an appeal in admiralty from the circuit court, revise a decree on the ground that the amount awarded therein is excessive, unless it is so clearly so that the award cannot be justified by any rule of law applicable to the facts. The Hesper (1886) 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175.

Where the insurer of a vessel pays a loss occasioned by her injury through the fault of another vessel only after the damage has been appraised by a commission, and the ordinary steps have been taken to verify such appraisement, there is a strong presumption that the damage was equal to the amount paid; and the estimate of witnesses who made an examination of the vessel five or six years later for the express purpose of minimizing the damages does not justify an appellate court in reversing a decree for damages against the offending vessel equal to the amount of the original appraisal, and which is also supported by other evidence. Fairgrieve v. Marine Ins. Co., Limited, of London (1901) 112 Fed. 364, 50 C. C. A. 286, writ of certiorari denied (1902) 22 Sup. Ct. 943, 186 U. S. 484, 46 L. Ed. 1261.

Where, on a libel for damage to cargo, the trial judge saw none of the witnesses and the controversy involved a sharp conflict of evidence on the issue of the cause of the damage, the entire record will be examined on appeal. Lazarus v. Barber (1905) 136 Fed. 534, 69 C. C. A. 310, affirming decree (D. C. 1903) 124 Fed. 1007, and writ of certiorari denied Barber v. Lazarus (1905) 25 Sup. Ct. 802, 198 U. S. 585, 49 L. Ed. 1174.

In a case of marine tort, the decree of the district court will not be reversed on appeal on a question of the amount of damages, unless it is clearly exces-

sive. Smith v. Jordan (C. C. 1857) Fed. Cas. No. 13,068.

Where additional testimony is not taken, the court, on appeal, will not readily interfere with the amount of damages decreed in the court below. The Narragansett (C. C. 1847) Fed. Cas. No. 10,017; McGuire v. The Golden Gate (C. C. 1856) Fed. Cas. No. 8,815; The Lord Derby (C. C. 1883) 17 Fed. 265 (following Cushman v. Ryan [C. C. 1840] Fed. Cas. No. 3,515).

Where damages are discretionary, the burden of proof is on the appellant to show some clear mistake or error in the court below, either in awarding excessive damages, or in promulgating an incorrect rule of law, or to offer new and materially important testimony, which must go to the proof of the new allegations without contradicting the former evidence. Cushman v. Ryan (C. C. 1840) Fed. Cas. No. 3.515.

Allowances for salvage services will not ordinarily be disturbed upon appeal. The Delaware (C. C. 1869) Fed. Cas. No. 3,761; The Albany (C. C. 1891) 48 Fed. 565. And see The Boston (C. C. 1833) Fed. Cas. No. 1,673.

673. —— **Review of findings of fact by commissioner.**—When all the testimony in the cause has been taken, not before the judge below, but before a commissioner, and is all before the appellate court in his report, that court must examine it for itself, and reach its own conclusions. The Glendale (1897) 81 Fed. 633, 26 C. C. A. 500.

Where the evidence in a suit in admiralty is taken before an examiner, the decision of the trial court on questions of fact is not entitled to the same controlling weight as where the judge saw and heard the witnesses testify, and will be more readily reviewed by an appellate court. The Sappho (1899) 94 Fed. 545, 36 C. C. A. 395. But such findings of fact will not be disturbed, unless manifestly wrong. Appeal of Cahill (1903) 124 Fed. 63, 59 C. C. A. 519.

The findings of a commissioner in admiralty on questions of fact depending upon conflicting testimony or the credibility of witnesses should not be disturbed by a court of revision unless clearly erroneous. The North Star (1907) 151 Fed. 168, 80 C. C. A. 536.

The finding of a commissioner appointed in an admiralty cause, on a question of fact depending largely on the credit to be given to the various witnesses testifying before him, confirmed by the court, has every reasonable presumption in its favor; and an appellate court is not justified in setting aside or modifying the decree based thereon, unless there clearly appears to have been error or mistake in the finding or the conclusion drawn therefrom. United S. S. Co. v. Haskins (1910) 181 Fed. 962, 104 C. C. A. 426; Same v. A. Schilling & Co. (1910) 181 Fed. 965, 104 C. C. A. 429.

A finding of facts by a commissioner in admiralty, based on conflicting testimony of witnesses who testified before him, will not be disturbed, except for clear mistake or error. The Minnehaha (D. C. 1907) 151 Fed. 782.

A finding of a commissioner on a question of fact, based on conflicting evidence, will not be disturbed, unless obviously erroneous. The Oceanica (D. C. 1907) 156 Fed. 306.

674. —— **Harmless error in general.**—Where a decree in the circuit court allowed a certain sum for repairs to a vessel, and rejected (improperly, perhaps) a claim for demurrage, the decree was not reversed by the supreme court on that account; it appearing from a subsequent part of the record that the judge had in fact considered that the sum he allowed for repairs eo nomine was too large for repairs simply, but was "about just" for repairs and demurrage together. Sturgis v. Clough (1863) 68 U. S. (1 Wall.) 269, 17 L. Ed. 580.

Mere technical errors in the decree of the lower court, not injuriously affecting the rights of the parties, do not present sufficient grounds for reversing it. The Wanata (1877) 95 U. S. 600, 24 L. Ed. 461.

A decree in admiralty will not be reversed on appeal because of a misjoinder of causes of action in the libel, where one was dismissed by the court, either on exceptions or on final hearing, and a decree on the merits entered upon the other only. Where the final condition of the record is in accordance with the substantial rules of the law, a court of admiralty does not look at the intervening steps. The S. L. Watson (1902) 118 Fed. 945, 55 C. C. A. 439.

Although the language of a decree in admiralty, in an inferior court, may declare a decision which might not, if it were construed by its exact words, be capable of being supported, still, if it is obvious from subsequent parts of the record that no error has been committed, the supreme court will not reverse, for this circumstance. Sturgis v. Clough (1863) 68 U. S. (1 Wall.) 269, 17 L. Ed. 580.

On appeal in a salvage case, the burden to prove mistake of law or fact is on appellant, and error must be clearly shown. The Emulous (C. C. 1832) Fed. Cas. No. 4,480; Bearse v. 340 Pigs of Copper (C. C. 1840) Fed. Cas. No. 1,193; The Anna (C. C. 1873) Fed. Cas. No. 401.

675. —— **Harmless error in rulings on evidence.**—An admiralty case on appeal should not be remanded for a new trial because of the erroneous rejection of evidence, since the appeal is itself a new trial, and such evidence, if offered, would be received and considered by the appellate court. Oliver v. The Sirius (1893) 54 Fed. 188, 4 C. C. A. 273, distinguishing The Portland and

The State of California (1892) 49 Fed. 172, 1 C. C. A. 224.

An invocation of documents made at the original hearing, though not strictly regular, will not cause a reversal of the decree of the district court if such irregularity was not inconsistent with the lawful exercise of the jurisdiction of that court. The Springbok (1866) 72 U. S. (5 Wall.) 1, 18 L. Ed. 480.

Where the liability depended upon whether the accident happened because of defective apparatus or unseaworthiness of the vessel, and the court held that it was due to the former, held, that a refusal to consider evidence as to the seaworthiness of the vessel was not open to exception, that question having become immaterial. The Francis Wright (1881) 105 U. S. 381, 26 L. Ed. 1100.

Where, upon a proper construction of a dredge charter, it did not cover the dredging of material not ordinarily found in such dredging operations, and for which a dredge of that construction was not adapted, the charterer, in a libel for the hire of the dredge, was not prejudiced by the admission of representations made by one of its officers as to the character of the material which was to be dredged. Bowers Hydraulic Dredging Co. v. Federal Contracting Co. (1907) 153 Fed. 870, 83 C. C. A. 52, affirming decree (D. C. 1906) 148 Fed. 290, and writ of certiorari denied Federal Contracting Co. v. Bowers Hydraulic Dredging Co. (1907) 28 Sup. Ct. 255, 207 U. S. 587, 52 L. Ed. 352.

676. Determination and disposition of cause.—Two several consignees libeled for damage to the cargo, and the shipowner libeled for freight. The causes were tried as one, and sent together to a master, upon whose report a decree was entered for each consignee for the excess of damage over the freight, and the owner's libel was dismissed. On an appeal by the owner, the circuit court ordered a decree in his favor for his whole freight, and in favor of each consignee for his whole damage, leaving the set-off to be made by the parties or the district court. Held, that the decree in the circuit court was correct. The Water Witch (1861) 66 U. S. (1 Black) 494, 17 L. Ed. 155.

Where a specific relief is asked for, even though there be a prayer for general relief, the court, on appeal in admiralty, cannot grant a relief which is inconsistent with, or entirely different from, that which is prayed. Wilson v. Graham (C. C. 1821) Fed. Cas. No. 17,804.

On appeal in a salvage case the whole case is before the appellate court, and it may decree more or less or nothing. Lubker v. The A. H. Quinby (C. C. 1879) Fed. Cas. No. 8,586.

On an appeal from the district court in an admiralty cause, the appellate court will not award increased damages to the appellee, though the allowance made by the district court was too small. Shaw v. Folsom (C. C. 1889) 40 Fed. 511, commenting upon The Hesper (1887) 7 Sup. Ct. 1177, 122 U. S. 256, 30 L. Ed. 1175.

Although a decree dismissing a libel in admiralty by a charterer to recover damages for breach of charter party was erroneous, it cannot be reversed, further than to award costs to the libelant, where with his acquiescence a portion of the damages claimed by him were proved and allowed as a set-off in a cross-action brought against him by the owners in another court, and no proceedings have been prosecuted to review the judgment in such action. S. P. Shotter Co. v. Larsen (1905) 134 Fed. 705, 67 C. C. A. 259, affirming decrees The Hercules (D. C. 1904) 129 Fed. 945, and Larsen v. S. P. Shotter Co. (C. C. 1904) Id.

Where, on an appeal in admiralty, the court was of the opinion that the damage sustained by a charterer for breach of a condition in the charter party should be deducted from the freight in an action therefore, the court, to save expense and prevent delay, made the proper deduction itself, instead of sending the case back to the clerk to take proof. Parsons v. Ogden (C. C. 1857) Fed. Cas. No. 10,781.

A decree of the circuit court, affirming, on appeal, a decree of the district court, which had charged a respondent in admiralty with the payment of a sum of money specified, and decreeing that the appellee in the circuit court should recover it; and decreeing, further, that, unless an appeal should be taken from the said decree of the circuit court to the supreme court within the time limited by law, a summary judgment should be entered therefor against the stipulators on their stipulations given on appeal from the district court,—is, as to the stipulators, a provisional decree only, and one which on appeal to the supreme court becomes inoperative. Ex parte Sawyer (1874) 88 U. S. (21 Wall.) 235, 22 L. Ed. 617.

It is not necessary to set forth as a conclusion of law or finding of fact that the circumstance that some of the witnesses were examined before the district judge influenced the circuit court in deciding to affirm the judgment of the district court rendered upon conflicting evidence. Stafford v. The Ludvig Holberg (C. C. 1890) 43 Fed. 120, decree affirmed The Ludvig Holberg (1895) 15 Sup. Ct. 477, 157 U. S. 60, 39 L. Ed. 620.

677. —— Affirmance.—Where, on appeal in an admiralty proceeding from a decree in favor of libelant for $5,000, the Court of Appeals found that the amount awarded would compensate libelant for her injury, the decree would be affirmed, with interest and costs, in-

stead of directing the District Court to enter a decree in accordance with the views of the Court of Appeals, which would be the proper course; the proceeding on appeal being in the nature of a new trial. The Western States (1908) 159 Fed. 354, 86 C. C. A. 354, affirming decree (D. C. 1907) 151 Fed. 929, and writ of certiorari denied Sweeting v. The Western States, (1908) 28 Sup. Ct. 762, 210 U. S. 433, 52 L. Ed. 1136.

If, in a prize cause, claimant appeals, and deserts his appeal, the circuit court may affirm the decree below, with costs. The Montgomery v. The Betsey (C. C. 1813) Fed. Cas. No. 9,734.

On affirmance of a decree for libelant in a collision case, the decree will be entered for the amount of the loss at the time of the loss, with interest from such time, and for costs in the district court, without interest thereon. Deems v. Albany & Canal Line (C. C. 1878) Fed. Cas. No. 3,736.

678. —— **Allowance of interest.**—Though a discretionary power is reserved upon appeal in admiralty cases to add to the damages awarded by the court below further damages, by way of interest, in cases where, in the opinion of the court, the appellee, upon the proofs, is justly entitled thereto, yet such allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court, but must be in the exercise of its discretionary power, and is, pro tanto, a new judgment. Hemmenway v. Fisher (1857) 61 U. S. (20 How.) 255.

The appellate court, when differing from the conclusions of the court below as to the ground on which that court allowed interest on the damages awarded for collision, may modify the decree by excluding such interest. The North Star (C. C. A. 1894) 62 Fed. 71.

Upon an affirmance of the decree of the circuit court sitting in admiralty by the supreme court upon an equal division, it has no discretionary power to allow interest on the decree where none was given by the circuit court, the appellee being entitled upon such an affirmance to the benefit of the decree of the circuit court, but nothing more. Hemmenway v. Fisher (1857) 61 U. S. (20 How.) 255.

Where a final decree of the District Court, in admiralty divides the damages and costs, no allowance for interest being "specially directed," pursuant to rule 30, par. 4, of the Circuit Court of Appeals and on appeal such decree is affirmed, with costs, the District Court thereafter is without authority to allow interest on the final decree, unless the Circuit Court of Appeals so modifies its affirmative decree as to include interest. The Glenochil (D. C. 1904) 128 Fed. 963.

A party who appeals from a decree in his favor in a collision case is not entitled to interest on the original recovery pending the appeal. The Express (1892) 59 Fed. 476, 8 C. C. A. 182, denying motion to deny mandate (1892) 52 Fed. 890, 3 C. C. A. 342.

Where both parties appeal from a decree for salvage, which is affirmed, libelants will not be allowed interest from the date of decree in the court below. The Rebecca Clyde (C. C. 1875) Fed. Cas. No. 11,622.

Where both parties appeal from the decision of the district court apportioning damages in a collision case, the circuit court, on affirming the decree of the district court, will not allow interest thereon. The C. P. Raymond (C. C. 1887) 36 Fed. 336.

679. —— **Issuance of execution on affirmance.**—On affirmance by the circuit court of a decree for libelant in admiralty, no execution can issue until the entry of a formal decree awarding a recovery to libelant. Harris v. Wheeler (C. C. 1870) Fed. Cas. No. 6,130.

680. —— **Voluntary nonsuit.**—On an appeal in admiralty, after the case is entered, plaintiff, who is appellant, and recovered judgment below for less than he asked, cannot become nonsuit without prejudice, on payment of costs, if defendant object. Folger v. The Robert G. Shaw (C. C. 1847) Fed. Cas. No. 4,899.

681. —— **Dismissal of libel.**—Where libelant in admiralty recovered a small amount, and appealed, held, that the circuit court could dismiss the libel at libelant's costs, although claimant had not appealed. The Saratoga v. Four Hundred and Thirty-Eight Bales of Cotton (C. C. 1870) Fed. Cas. No. 12,-356.

Where the findings of the district court against libelant are warranted by the proofs, and the new testimony introduced in the circuit court does not substantially change them, the libel will be dismissed with costs. Jacobs v. Ousatonic Water Co. (C. C. 1882) 10 Fed. 826.

682. —— **Dismissal of appeal.**—Where an appeal, in an admiralty suit, is taken from the circuit to the supreme court, but is not prosecuted, it will be dismissed, on producing a certificate of these facts from the circuit court. The Jonquille (1821) 19 U. S. (6 Wheat.) 452, 5 L. Ed. 303.

It is error and ground of reversal to confirm a decree in admiralty of the district court, and at the same time dismiss the appeal. The Lottawanna (1874) 87 U. S. (20 Wall.) 201, 22 L. Ed. 259.

A motion to dismiss an appeal in admiralty calls in question the jurisdiction of the appellate court to deal with the subject-matter of the appeal, and it is not a ground for dismissal that the evidence on which the decree appealed

from was rendered is not in the record. Nor is it ground for dismissal that the notice of appeal was not served on parties for whom appellant had been substituted by an order of the district court, and who make no claim that their interests are not represented by appellant. Nor that an order substituting appellant for other parties in the suit, which was made and served before the expiration of the time for appeal, was not filed with the clerk until afterward. Brown v. Merchants' Marine Ins. Co. (1906) 144 Fed. 85, 75 C. C. A. 243.

An appeal from a decree rendered on the report of a commissioner awarding damages cannot be dismissed on motion, but must be heard in the usual way, where appellant appeared before the commissioner, and contested the damages, though he took no exception to the report of the commissioner to whom the cause was referred on appellant's default on the merits. Farrell v. Campbell (C. C. 1870) Fed. Cas. No. 4,682.

The respondent in an admiralty suit appeared before the commissioner, and contested the damages after a default, but did not take any exceptions to his report. Held, that a motion to dismiss an appeal taken by him was not the proper remedy. Id.

Where the appeal was taken and bond given before the decree below was made final by the signature of the judge, and where all parties against whom the decree below was rendered have not appealed nor severed, and where the motion and order for appeal were not taken against any of the numerous libelants by name, and where no bond was given in favor of any other than one of the libelants, and the judgment below in his favor was only for $40, not sufficient to give jurisdiction to this court, the appeal will be dismissed. The City of Lincoln (C. C. 1883) 19 Fed. 460.

A motion to dismiss an appeal taken from a decree in the district court must be made in the appellate court. The Josephine (D. C. 1849) Fed. Cas. No. 7,545.

683. —— **Partial affirmance or reversal.**—Where a personal decree was rendered against a principal and sureties on a release bond, and, on appeal, it was decided that the sureties were not liable to certain interveners, because they intervened after the bond was given, held, that the decree would be reversed as against the sureties and affirmed as against the principal. The Willamette (C. C. A. 1895) 72 Fed. 79; Oregon Imp. Co. v. Nelson (1895) 18 C. C. A. 373, modifying decree (1895) 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715.

Although a decree dismissing a libel in admiralty by a charterer to recover damages for breach of charter party was erroneous, it cannot be reversed, further than to award costs to the libelant, where with his acquiescence a portion of the damages claimed by him were proved and allowed as a set-off in a cross-action brought against him by the owners in another court, and no proceedings have been prosecuted to review the judgment in such action. S. P. Shotter Co. v. Larsen (1905) 134 Fed. 705, 67 C. C. A. 259, affirming decrees The Hercules (D. C. 1904) 129 Fed. 945, and Larsen v. S. P. Shotter Co. (C. C. 1904) Id.

684. —— **Modification as to amount.**—A decree for a greater amount than the sum for which the sureties were bound, on stipulation for a discharge of the vessel from the marshal's custody, will, on appeal, be reformed so as not to exceed that sum. The Webb (1871) 81 U. S. (14 Wall.) 406, 20 L. Ed. 774.

685. —— **Effect of reversal.**—The portion of the decree unappealed from, in case of a reversal, remains in full force, to be executed in the circuit court, and becomes a part of its decree. The Roarer (C. C. 1845) Fed. Cas. No. 11,876.

686. —— **Restitution on reversal.**—If the supreme court reverse a decree of condemnation, etc., it will order restitution generally, though the property has been sold by the court below. The Rachel v. U. S. (1810) 10 U. S. (6 Cranch) 329, 3 L. Ed. 239.

687. —— **Remand of case in general.**—Where the pleadings in a suit in admiralty are so deficient that the court on an appeal cannot properly apply the evidence in the record, or justly determine the rights of the parties, but there is apparently no design to suppress the facts, the decree below will be set aside, and the case remanded for the filing of new pleadings. Smith v. Elmer E. Wood Transp. Co. (1900) 103 Fed. 685, 43 C. C. A. 347.

On an appeal to the circuit court in admiralty, the appellate court, after decision, must execute the decree, and it has no power to remit the proceedings to the district court. The Roarer (C. C. 1845) Fed. Cas. No. 11,876.

688. —— **Remand for purpose of amendment.**—Where a libel is so defective that a decree cannot be entered upon it, and the evidence discloses a case of forfeiture, and where the evidence shows merits, but does not conform to the allegations, the supreme court will not amend the libel, but will remand the cause to the court below, with directions to permit an amendment. The Caroline (1813) 11 U. S. (7 Cranch) 496, 3 L. Ed. 417; The Anne v. U. S. (1813) 11 U. S. (7 Cranch) 570, 3 L. Ed. 442; The Adeline (1815) 13 U. S. (9 Cranch) 244, 3 L. Ed. 719; The Edward (1816) 14 U. S. (1 Wheat.) 261, 4 L. Ed. 86;

The Mary Ann (1823) 21 U. S. (8 Wheat.) 380, 5 L. Ed. 641.

Where the pleadings in a prize or other admiralty cause are too informal and defective to pronounce a final decree upon the merits, the cause will be remanded to the circuit court, with directions to permit the pleadings to be amended for further proceedings. The Divina Pastora (1819) 17 U. S. (4 Wheat.) 52, 4 L. Ed. 512.

Where the pleadings in a suit in admiralty are so deficient that the court on an appeal cannot properly apply the evidence in the record, or justly determine the rights of the parties, but there is apparently no design to suppress the facts, the decree below will be set aside, and the case remanded for the filing of new pleadings. Smith v. Elmer E. Wood Transp. Co. (1900) 103 Fed. 685, 43 C. C. A. 347.

Where the evidence is sufficient to show a breach of the law, but the information is not sufficiently certain to authorize a decree, the supreme court of the United States will remand the cause to the circuit court, with directions to allow the information to be amended. The Edward (1816) 14 U. S. (1 Wheat.) 261.

Where a vessel is libeled as a prize, and there is no case of prize made out by the evidence, the libel will be dismissed; but, if the evidence show prima facie a violation of the municipal law, the case will be remanded to the district court, with directions to allow a reasonable time to file a new libel. The Watchful (1867) 73 U. S. (6 Wall.) 91, 18 L. Ed. 763.

Where a libel in personam, for collision, was dismissed in the court below, on grounds not involving the merits of the case, and upon appeal the objections were removed by evidence, the court reversed the decree, and allowed both parties to take proof and amend their pleadings. Remington v. Atlantic Royal Mail Steam Nav. Co. (C. C. 1868) Fed. Cas. No. 11,695.

Where respondents in a suit in admiralty pleaded a special defense, which they permitted to stand in the same form during the litigation of the case in the district court, the circuit court of appeals (where new pleadings were filed), and the supreme court, by each of which it was considered and adjudged insufficient, they will not be given leave to amend the answer so as to present such defense in a new form after the cause has been remanded for a retrial upon another issue. Burrill v. Crossman (D. C. 1901) 111 Fed. 192.

689. —— **Remand for new trial.**—An admiralty case on appeal should not be remanded for a new trial because of the erroneous rejection of evidence, since the appeal is itself a new trial, and such evidence, if offered, would be received and considered by the appellate court. Oliver v. The Sirius (1893) 54 Fed. 188, 4 C. C. A. 273; The Portland and The State of California (1892) 49 Fed. 172, 1 C. C. A. 224.

An admiralty cause was tried in the district of Maryland on oral testimony alone, there being no rule in that district requiring testimony to be reduced to writing. An appeal was taken, but, as no evidence had been preserved, it could not be included in the record. The proctor for appellant sought to supply the omission by retaking the testimony before a notary, giving notice to the other side. The latter declined to be present, and, when the testimony was submitted to the judge, he declined to certify the same. Held, that the judge properly refused to make the certificate; that the depositions could not be considered on appeal; and that, under the peculiar circumstances, the appellate court would remand the case, with instructions to grant a new trial, but this proceeding is not to be regarded as a precedent. The Glide (1896) 72 Fed. 200, 18 C. C. A. 504, 25 U. S. App. 636, remanding cause for new trial to district court (1895) 68 Fed. 719, 15 C. C. A. 627.

An admiralty suit will not be remanded for a new trial by an appellate court, or to take new testimony, on the ground that the record is incomplete, where such fact results from the failure of appellant to exercise due diligence. The McDonald (1901) 112 Fed. 681, 50 C. C. A. 423.

It is the practice in admiralty for both parties to put in their evidence before the case is submitted, and where a motion to dismiss the libel, at the close of libelant's evidence, is sustained, and the decree is reversed on appeal, the case will not be sent back for a new trial, but a decree will be directed for libelant. Bull v. New York & Porto Rico S. S. Co. (1909) 167 Fed. 792, 93 C. C. A. 182, writ of certiorari denied New York & Porto Rico S. S. Co. v. Bull (1909) 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068.

Where respondents in a suit in admiralty pleaded a special defense, which they permitted to stand in the same form during the litigation of the case in the district court, the circuit court of appeals (where new pleadings were filed), and the supreme court, by each of which it was considered and adjudged insufficient, they will not be given leave to amend the answer so as to present such defense in a new form after the cause has been remanded for a retrial upon another issue. Burrill v. Crossman (D. C. 1901) 111 Fed. 192.

690. —— **Remand for further proof.**—In a suit to charge a tug with liability for the loss of a tow, the evidence was such as to establish gross fault on the part of the tug, and to create a strong presumption against her; but upon the issue whether the loss was

due to such fault neither party produced evidence which it was apparently within its power to produce, and without which the court on appeal was left to mere conjecture as to material facts, and unable to reach a satisfactory decision. Held, that the case would be remanded to the district court for further proofs, and if none were offered the libel should be dismissed. The Carbonero (1901) 106 Fed. 329, 45 C. C. A. 314.

An admiralty suit will not be remanded to take new testimony, on the ground that the record is incomplete, where such fact results from the failure of appellant to exercise due diligence. The McDonald (1901) 112 Fed. 681, 50 C. C. A. 423.

691. —— Remand for finding of facts.—To justify the United States supreme court in returning a cause in admiralty for the finding of facts required by Act Feb. 16, 1875, § 1 (section 1585, this compilation), the omission to make such finding must have been attributable to the court, and not to the parties. The S. S. Osborne (1881) 104 U. S. 183, 26 L. Ed. 693.

Where the record shows that the court was controlled by the findings of the jury, to which issues of fact were submitted, without consideration of the evidence, the proceeding is irregular; but, where all the evidence is before the appellate court, such judgment will be rendered as the evidence warrants. Lee v. Thompson (C. C. 1878) Fed. Cas. No. 8,202.

692. —— Remand on affirming decree.—Where the district court of the United States sitting in admiralty decreed that a sum of money was due, and an appeal was taken, it was error for that court, on affirming the decree, to remand the case to the district court, since the appeal carried up the res. Montgomery v. Anderson (1858) 62 U. S. (21 How.) 386, 16 L. Ed. 160.

A respondent in an admiralty suit may raise the question of his damages, upon a remand of the cases, after affirmance by the supreme court of a decree which is silent upon that question. American Ins. Co. v. Canter (C. C. 1829) Fed. Cas. No. 302b.

693. —— Amendment in lower court after reversal.—On a hearing on appeal from a decree dismissing a libel in personam on the ground that there was no proof of incorporation of defendant, or that it owned the vessel, where such objections were removed by evidence, the circuit court, on reversing the decree, allowed both parties to take proofs on the merits, with liberty to either to amend his pleadings. Remington v. Atlantic Royal Mail Steam Nav. Co. (C. C. 1868) Fed. Cas. No. 11,695.

Where a decree for libelant was reversed by the supreme court, which held both vessels to be in fault, claimant, who had failed to allege in his answer that he had sustained any damages by the collision, was allowed to amend his answer in that respect. The Pennsylvania (C. C. 1874) Fed. Cas. No. 10,951.

694. —— Assessment of damages after remand.—The question of damages in admiralty may be raised upon a remand after affirmance of a decree silent upon such question. American Ins. Co. v. Canter (C. C. 1829) Fed. Cas. No. 302b.

695. —— Allowance of interest after remand.—Where a decree is reversed and the cause remanded on appeal, the lower court may allow interest, unless expressly forbidden to do so by the decree of the supreme court. The fact that the proceeds have remained for a long time in the registry without producing interest is no reason for refusing interest on the sum found due. The Grapeshot (C. C. 1874) Fed. Cas. No. 5,703.

Where a final decree of the District Court in admiralty divides the damages and costs, no allowance for interest being "specially directed," pursuant to rule 30, par. 4, of the Circuit Court of Appeals, and on appeal such decree is affirmed, with costs, the District Court thereafter is without authority to allow interest on the final decree, unless the Circuit Court of Appeals so modifies its affirmative decree as to include interest. The Glenochil (D. C. 1904) 128 Fed. 963.

Circuit Court of Appeals rule 30 (see notes under § 1114, ante) construed with respect to allowance of interest on an admiralty decree after reversal. The Gladiator (D. C. 1898) 223 Fed. 381.

696. —— Conformity to mandate.—A decree of the circuit court awarded $15,000 damages to libelant on the ground that the libeled vessel was solely responsible for the collision. The supreme court, holding "that both vessels were in fault and that damages ought to be equally divided," remanded the cause, with directions to enter a decree in conformity with the opinion. Held that, as there was no allegation in the pleadings nor any proof that the libeled vessel had sustained injury (though respondent had attempted to claim damages for such injuries in the supreme court), a decree against the vessel libeled for $7,500 was proper. The Sapphire (1873) 85 U. S. (18 Wall.) 51, 21 L. Ed. 814.

A decree of a court of admiralty awarding damages for injury to a vessel in favor of an underwriter which had paid insurance on account of such injury was reversed on appeal because it appeared from the libel that the damages caused by the injury exceeded the amount of insurance paid, and that li-

belant could not split the cause of action, and maintain a suit to recover a portion only of such damages. In its opinion the appellate court stated that on the return of the record to the district court it would be open to libelant "to amend its libel and show, if it can, that the excess of damages over the sum for which it sues has been paid, released, or otherwise extinguished, so that claimants are no longer liable therefor at the suit of any one." After the case was remanded the libel was amended by the addition of an allegation that the only party in interest except libelant was the company owning the injured vessel, which had authorized libelant to file the libel and collect the amount of insurance paid, and that the company made no further claim for damages. In support of such averment libelant offered in evidence a release executed by such company pursuant to a resolution of its board of directors, but after the cause was remanded, and which released any claim for damages beyond those sued for by libelant. Held, that such amendment, and the evidence in support thereof, conformed to the requirements of the mandate, by showing that at the time the libel was filed libelant was the only party in interest asserting any claim, and that the claimants were fully protected against a second suit, and entitled libelant to maintain the suit to recover its own damages. Fairgrieve v. Marine Ins. Co. (1901) 112 Fed. 364, 50 C. C. A. 286.

697. Liabilities on appeal bonds.—A condition in an admiralty appeal bond, "to prosecute such appeal with effect, and pay all damages and costs awarded against" the appellant, is broken by his failure to procure a return of the record to the appellate court; and on the dismissal of the appeal, with directions for "final proceedings" in the district court, it is the province of such court to enforce the appeal bond. Smith v. Pendergast (D. C. 1897) 82 Fed. 504.

698. —— Extent of liability.—Where an appeal was dismissed, without awarding interest or cost, the obligors of the supersedeas bond, who were stipulators for the release of the vessel and for costs, satisfy their obligations by payment of the costs awarded by the decree of the court appealed from, the stipulation of release having been complied with. Providence Washington Ins. Co. v. The Sydney and The William Worden (C. C. 1891) 47 Fed. 260.

699. —— Summary judgment.—Where, in the case of an appeal in admiralty transferred to another circuit, a commissioner in the former circuit certifies to the giving of a stipulation by respondents with sureties, but such stipulation is not filed in court, a summary judgment cannot be entered against the sureties on the affirmance of the decree. Sawyer v. Oakman (C. C. 1873) Fed. Cas. No. 12,403.

Where the amount claimed is sufficient to allow an appeal to the supreme court, summary judgment cannot be rendered by the lower court against the sureties on the appeal bond, on dismissal of the libel, until after the expiration of 10 days after the rendering of the decree. The Jesse Williamson, Jr. (C. C. 1879) Fed. Cas. No. 7,297; The New Orleans, Id. 10,181. But where the judgment is not sufficient to allow an appeal to the supreme court summary judgment may be rendered against the sureties. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,525.

The admiralty practice warrants a summary proceeding against the sureties on an appeal bond, where the condition has been broken, upon an order to show cause, so that every legal and equitable defense available to the sureties can be examined and adjudged, as in a plenary action. Where there has been laches on each side, so that the parties stand equal in that respect, such laches is no bar to the enforcement of an appeal bond by summary proceedings on the judgment. Smith v. Pendergast (D. C. 1897) 82 Fed. 504.

In admiralty stipulations for costs and for value upon the release of vessels, and a supersedeas bond on appeal, are securities taken under the order of court; and where an appeal has been dismissed, the court may enter summary judgments against the obligors of such stipulations and bond. Providence Washington Ins. Co. v. The Sydney and The William Worden (C. C. 1891) 47 Fed. 260.

700. Appeals from territorial courts—Practice.—Act Feb. 16, 1875, post, §§ 1585, 1586, applies to the district court of Alaska sitting in admiralty. Ex parte Cooper (1892) 12 Sup. Ct. 453, 464, 143 U. S. 472, 36 L. Ed. 232; The Sylvia Handy (1892) 12 Sup. Ct. 464, 465, 143 U. S. 513, 36 L. Ed. 246.

Where an admiralty cause, decided by the district court of Washington Territory, and appealed to the territorial supreme court, but not docketed therein, before the territory became a state, has been transferred to the federal district court, that court will deny a motion for leave to issue execution on the ground of laches and abandonment of appeal by appellant's failure to have the transcript sent up and the cause docketed in the circuit court before the beginning of the term, where it appears that there had been no opportunity for the trial of the cause in that court, so that the hearing has not been delayed by appellant's laches. Hamilton v. The Walla Walla (D. C. 1890) 44 Fed. 4.

Practice on appeal from a territorial court sitting in admiralty to the supreme court of the territory is regulated by the rules and usages of courts of admiralty, and not by the territorial statutes. Braithwaite v. Jordan (1895)

5 N. D. 196, 65 N. W. 701. And see Zephyr v. Brown (1880) 2 Wash. T. 44, 3 Pac. 186.

701. —— Review.—When the district court established by Act May 17, 1884, for the territory of Alaska, sits as a court of admiralty, the same rule applies to it as is prescribed by Act Feb. 16, 1875, for the circuit courts in admiralty causes, namely, that it shall make separate findings of fact and conclusions of law, and that the supreme court's power of review on appeal shall be limited to the questions of law arising on the record and rulings properly presented by a bill of exceptions. In re Cooper (1892) 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

(N) Costs

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702. Power to award in general.—In an action for the recovery of excessive customs duties illegally exacted, which is brought in a state court and removed into a federal circuit court by defendant, and in which plaintiffs recover less than $50, neither plaintiffs nor defendant is entitled to costs. Richter v. Magone (C. C. 1889) 47 Fed. 192.

Courts of admiralty will dispose of the question of costs according to the gen-

eral equities of the case. The Martha (D. C. 1830) Fed. Cas. No. 9,144.

Act March 3, 1847, regulating costs in admiralty proceedings in rem, where less than a hundred dollars is recovered, was repealed by Act Feb. 26, 1853. The Young Mechanic (D. C. 1856) Fed. Cas. No. 18,182.

703. —— **Discretion of court.**—Costs in admiralty are in the sound discretion of the court, to be exercised according to settled practice and in furtherance of justice. Hill v. The Triumph (D. C. 1841) Fed. Cas. No. 6,500; Lubker v. The A. H. Quinby (C. C. 1879) Fed. Cas. No. 8,586; The Moslem (D. C. 1846) Fed. Cas. No. 9,876; Regan v. The Amaranth (D. C. 1854) Fed. Cas. No. 11,664; Shaw v. Thompson (D. C. 1845) Fed. Cas. No. 12,726; Taylor v. Woods (C. C. 1878) Fed. Cas. No. 13,-809; Union Ice Co. v. Crowell (C. C. A. 1893) 55 Fed. 87, 5 C. C. A. 49, 5 U. S. App. 270; The E. A. Shores, Jr. (D. C. 1897) 79 Fed. 987; The Oregon (1904) 133 Fed. 609, 68 C. C. A. 603; U. S. v. The Malek Adhel (1844) 43 U. S. (2 How.) 210, 11 L. Ed. 239; Dyer v. National Steam Nav. Co. (1886) 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153; The Maggie J. Smith (1887) 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

In adjudging costs admiralty courts, in their discretion, regard the essential merits and equities of the parties rather than the result of the litigation. Shaw v. Thompson (D. C. 1845) Fed. Cas. No. 12,726.

The common-law rule to give costs in all cases to the successful suitor is not recognized in admiralty as the law of costs, and they are awarded at the sound discretion of the court, without regard to the ultimate termination of the action. The Moslem (D. C. 1846) Fed. Cas. No. 9,876.

In admiralty, as in equity, it is within the discretion of the court to dismiss a suit without costs, where the complaining party is entitled to nominal damages only. Munson v. Straits of Dover S. S. Co. (1900) 102 Fed. 926, 43 C. C. A. 57.

The discretion of a court of admiralty in the allowance of costs is limited to an apportionment between the parties of costs legally taxed. The Gov. Ames (1911) 187 Fed. 40, 109 C. C. A. 94, writ of certiorari denied Smith v. Davis (1911) 32 Sup. Ct. 525, 223 U. S. 725, 56 L. Ed. 631.

704. **Parties to and against whom awarded.**—A tug, M., which, while incumbered with a tow, was run into by the unincumbered tug, B., and forced into collision with a schooner, C., having been brought into the case at the instance of the owners of the B., and having been adjudged to be without fault should be awarded costs as against the B. The Brothers (D. C. 1886) 30 Fed. 75.

Taxation of costs determined in a suit for a maritime tort, in which decree was rendered against a party brought in by respondent under admiralty rule 59 (29 Sup. Ct. xlvi). O'Keefe v. Staples Coal Co. (D. C. 1912) 201 Fed. 144.

705. —— **Protection of proctor.**—Costs are technically awarded to parties, but substantially they belong to the proctor to the suit, and the court will uphold his right to them against acts of the principal to his prejudice; and for this reason a seaman who has obtained a decree for wages for less than $50, from which no appeal lies, is entitled to tax full costs in his favor, notwithstanding that respondent has appealed from a decree in favor of other seamen, who were joint libelants in the action, for more than $50 each. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

706. —— **Right to costs as affected by finality of decree.**—Where several seamen joined in a libel for shares of a whaling voyage, and the decrees in favor of some were final and the others were appealed, held, that the former were entitled to recover all the costs which they had advanced or for which they were liable. Two Hundred and Ninety Barrels of Oil (D. C. 1859) Fed. Cas. No. 14,294.

707. —— **Novel questions raised.**—Where the question as to the liability for injuries in a collision was novel, the court refused to award costs. The Leo (D. C. 1869) Fed. Cas. No. 8,250.

708. —— **Prevailing party in general.**—In admiralty, as in equity, the prevailing party is generally entitled to costs. Leland v. Medora (C. C. 1846) Fed. Cas. No. 8,237; The Moslem (D. C. 1846) Fed. Cas. No. 9,876; Regan v. The Amaranth (D. C. 1854) Fed. Cas. No. 11,664; The E. A. Shores, Jr. (D. C. 1897) 79 Fed. 987. But they do not necessarily follow the decree. The E. A. Shores, Jr. (D. C. 1897) 79 Fed. 987.

The common-law rule to give costs in all cases to the successful suitor is not recognized in admiralty as the law of costs, and they are awarded without regard to the ultimate termination of the action. The Moslem (D. C. 1846) Fed. Cas. No. 9,876.

In adjudging costs, admiralty courts regard the essential merits and equities of the parties rather than the result of the litigation. Shaw v. Thompson (D. C. 1845) Fed. Cas. No. 12,726. Costs may be denied in whole or in part to the prevailing party, or even allowed to the losing party, as, in view of all the facts, seems proper. Union Ice Co. v. Crowell (1893) 55 Fed. 87, 5 C. C. A. 49, 5 U. S. App. 270.

When the libelant has not properly presented his case by pleadings and evidence until after it has reached the appellate court, a recovery of a decree ought not to carry costs. The Jefferson (C. C. 1887) 31 Fed. 489.

Libelant who proves either of two

claims sued on is entitled to costs, but only for the evidence required to prove such claim. Borden v. Hiern (D. C. 1832) Fed. Cas. No. 1,655.

Where both parties except to commissioners' report in a collision case, and libelant's exceptions are overruled, and respondent's allowed, the latter is entitled to costs of the reference. The Baltic (D. C. 1869) Fed. Cas. No. 824.

On a libel for towage under a contract which was made with the father of libelant, where respondent resists the payment for towage services on the ground that he had been forbidden by an order of a state court to pay over the towage earnings to the father of libelant, the respondent is not liable for costs, although the libelant was not a party to the proceedings. Kearney v. A Pile Driver (D. C. 1880) 3 Fed. 246.

The record owner of a vessel during the time repairs were made and supplies furnished to her is not entitled to recover his costs in an action brought against him to recover for such repairs and supplies, though he is successful in defeating recovery by showing that he was not in fact the owner. Hall v. Witter (D. C. 1899) 93 Fed. 977.

In admiralty, as in equity, the prevailing party is generally entitled to costs; but they do not necessarily follow the decree, and are always, in the exercise of a sound discretion, to be allowed, withheld, or divided according to the equities of the case. The Starke (D. C. 1910) 182 Fed. 498, decree affirmed City of Milwaukee v. Kensington S. S. Co. (1912) 199 Fed. 109, 120 C. C. A. 228.

709. —— **Prevailing party in actions by seamen.**—It is the course of admiralty courts not to impose costs upon seamen when they establish probable cause for instituting suits for redress. Howland v. Conway (D. C. 1848) Fed. Cas. No. 6,793. Where a libel by a seaman for injuries sustained by the negligence of the crew is prosecuted in good faith, libelant is entitled to costs, though he is not entitled to recover on the ground of his contributory negligence. The Wanderer (C. C. 1884) 20 Fed. 140. In the absence of proof or allegation of a tender of wages due, which were paid into court after libel filed, the seamen will be entitled to costs. The Cortes (D. C. 1872) Fed. Cas. No. 3,258.

Costs of a suit for seamen's wages imposed on libelants, on dismissal of the libel, where the crew had taken possession of the vessel while on her voyage and brought her home, under reasonable grounds of suspicion that she was to be engaged in the slave trade. The Mary Ann (D. C. 1848) Fed. Cas. No. 9,194.

Costs were allowed seamen in the case of an underpayment by mistake by the master, who refused to correct the error, though they failed on their main contention. Hoffman v. Yarrington (D. C. 1867) Fed. Cas. No. 6,580.

Costs were refused a seaman who sued to recover wages, where the difference between the tender and claim was only $2, although the money was not paid in court under Rule 72. The Brothers (D. C. 1879) Fed. Cas. No. 1,968.

710. —— **Prevailing party in salvage cases.**—In salvage cases costs should be awarded to the successful libelants, where no tender of any sum was at any time made, and such costs should be borne by the respective claimants in proportion to the amounts awarded against them. The Leipsic (D. C. 1880) 5 Fed. 108; The Rialto (D. C. 1882) 15 Fed. 124.

On a libel for salvage in towing boats away from a burning wharf, libelant is not entitled to costs when he filed the libel immediately after the rescue without reporting to their owner where the boats were, or endeavoring to adjust the claim for salvage. The D. L. & W. No. 6 C. (D. C. 1892) 53 Fed. 284.

Where one-half of the value of a boat and cargo worth $1,700 was claimed as salvage, but on the trial the claim was shown to have been greatly exaggerated, only $50 salvage being awarded, claimants would have been allowed costs but for the fact that shortly after the service they forcibly took the property from the salvors. The O. C. De Witt (D. C. 1894) 59 Fed. 620.

711. —— **Right to costs as affected by good faith or misconduct of libelant.**—A libelant who is entitled to recover for the loss of a barge through the negligence of a tug having her in tow, but who, being an expert, falsely testifies as to her value, and procures other witnesses to make statements as to her value which he knows to be incorrect, for the purpose of enhancing the amount of his recovery, should be required to pay the costs of a reference to ascertain such value. Boston Towboat Co. v. Pettie (1891) 49 Fed. 464, 1 C. C. A. 314, 1 U. S. App. 57, modifying (D. C. 1890) 44 Fed. 382. In a suit in admiralty for personal injuries the court found in favor of libelant, and referred the matter to a commissioner to take testimony and assess damages. The testimony taken before the commissioner showed plainly that libelant and one of his witnesses made untrue statements as to his ability to work and the work he had performed since the injury, thereby necessitating meetings additional to those which would otherwise have been required, and the taking of testimony and the incurrence of stenographer's costs which would have been unnecessary had he told the truth. Held, that the libelant would be required to pay the portion of the commissioner's and stenographer's costs for which his misstatements were responsible. The Elton (D. C. 1905) 135 Fed. 446.

If the court is not satisfied that the libelants have acted with absolute good faith, neither interest nor costs will be

allowed. The Ellen Holgate (D. C. 1887) 30 Fed. 125.

When only judicial inquiry could bring out evidence showing that a steamer libeled was not at fault for a collision, the libelants were justified in bringing suit, and costs should not be allowed the claimants. The Olympia v. The John Sherman (D. C. 1891) 52 Fed. 985, decree affirmed The Olympia (1894) 61 Fed. 120, 9 C. C. A. 393.

712. —— **Right to costs as affected by good faith or misconduct of defendant or claimant.**—Costs will be decreed a libelant, though no debt is recovered, where he was misled into bringing suit by the misconduct of defendant. Case of Pettit (D. C.) Fed. Cas. No. 11,047.

Cost will not be awarded against claimants in a suit on a bottomry bond, where there appeared some reason for contesting it. The Robert L. Lane (D. C. 1869) Fed. Cas. No. 11,892.

A vessel was chartered to libelant to proceed to Baltimore to take a cargo, but refused to go there, whereupon the libelant sued in rem for damages. The owner appeared and answered upon the merits, denying the alleged charter party, but did not object to the form of the action. Testimony was taken upon the merits. And after two years, upon the calling of the case for hearing, the objection to the form of the action was first taken; the vessel having been bonded at the commencement of the action. Held, that costs would not be allowed to libelant as his objection was unreasonably delayed. The Monte A. (D. C. 1882) 12 Fed. 331.

713. —— **Recovery on defective libel.**—In a collision case, where the libel alleges that claimant's vessel hugged the shore, but does not allege that she was in fault in so doing, and this fact was withheld from libelant's proctor, though libelant will not be precluded from recovery on that ground, he will not be entitled to costs. The Maryland (D. C. 1884) 19 Fed. 551.

714. —— **Successive libelants.**—Costs and disbursements, as against a fund realized from the sale of a vessel, will be allowed only to the first libel filed, and not to the successive libels. The J. W. Tucker (D. C. 1884) 20 Fed. 129.

715. —— **Effect of failure to demand bond.**—Where a minority owner of a vessel objects to a proposed voyage, he is entitled to a bond for the safe return of the vessel, and his failure to demand it will not prevent his recovering costs on a libel therefor. Sturges v. The Mary Staples (D. C. 1857) Fed. Cas. No. 13,566a.

716. —— **Where party claims title.**—A libelant held liable for the costs of a claimant, which brought in a third party under the fifty-ninth rule, against whom alone libelant recovered. City of Milwaukee v. Kensington S. S. Co. (1912) 199 Fed. 109, 120 C. C. A. 228, affirming decree The Starke (D. C. 1910) 182 Fed. 498.

If a factor claims as general owner, and not for a lien merely, and others claim a title under the owner, he will not be allowed costs. The Packet (C. C. 1824) Fed. Cas. No. 10,655.

The owner of a vessel, injured while passing through a drawbridge by striking the masonry, brought suit therefor against the towing tug. The claimant of the tug brought in the city which maintained the bridge, under the fifty-ninth admiralty rule, and it was held solely in fault and liable for the injury. Held, that the claimant of the tug was entitled to recover its costs from libelant, which was responsible for their being incurred. The Starke (D. C. 1910) 182 Fed. 498, decree affirmed City of Milwaukee v. Kensington S. S. Co. (1912) 199 Fed. 109, 120 C. C. A. 228.

717. —— **Recovery on theory not presented by libel.**—On a libel for salvage, where a special agreement is shown in defense, but no tender of the balance of the stipulated price is shown, a decree will be entered for such amount, with costs. Dominy v. Anchors, Sails, etc., of The D'Alberti (D. C. 1866) Fed. Cas. No. 3,977.

Where salvage compensation was claimed for towage services, and the answer admitted the claimant's liability for a reasonable towage compensation, the libelant recovered a reasonable sum for towage, without costs, and was adjudged to pay the United States marshal's costs. The Plymouth Rock (D. C. 1882) 12 Fed. 927.

718. —— **Right to costs as affected by duty to sue in local courts.**—A libelant in admiralty, for services on board a vessel on the Hudson river, cannot recover costs, where less than $50 is demanded, and he had a clear remedy, known to him, in the local courts. But the burden is on the claimant to show that libelant had such remedy, to entitle himself to a decree for costs. The Harriet (D. C. 1845) Fed. Cas. No. 6,095. And where the owner has refused payment, the burden is upon him to show that the seaman has an adequate remedy in the state court. The Bolivar (D. C. 1847) Fed. Cas. No. 1,610.

The object of this rule was to prevent an unnecessary resort to the expensive proceeding in rem. It will be so enforced as to compel the mariner to resort to the local courts only in case his remedy there is convenient and sure. A similar doctrine prevails in the civil law, and is also employed as a means for preventing the creation of costs unnecessarily in the prosecution of demands. The Harriet (D. C. 1845) Fed. Cas. No. 6,095.

An admiralty court will not allow costs on the arrest of a vessel for a small cause of action, when the party has adequate remedy in the lower mu-

nicipal courts, and especially if the suit is prosecuted vindictively, and with a view to create costs. The Boston (D. C. 1846) Fed. Cas. No. 1,672.

A seaman serving on a small vessel navigating the interior waters of the state should seek his remedy for wages in the local courts of the state, if the owner is known to him and responsible. The Bolivar (D. C. 1847) Fed. Cas. No. 1,609. But costs will not be refused on a libel for wages because libelant did not sue in the state court, where there was no apparent intention to annoy respondents. Jones v. Crowell (D. C. 1854) Fed. Cas. No. 7,459.

A successful respondent should not be denied costs because libelant has mistakenly sued in admiralty instead of in the state courts, in disregard of a long-settled law. In re Keefer (D. C. 1870) Fed. Cas. No. 7,636; Kegan v. The Amaranth (D. C. 1854) Fed. Cas. No. 7,646.

719. —— **On dismissal of libel in general.**—A court of admiralty has power to award costs on entry of a decree dismissing a libel. Hazelwood Dock Co. v. Palmer (C. C. A. 1915) 228 Fed. 325. But costs are disallowed where the libel is dismissed upon grounds not pleaded. The Ocean Express (D. C. 1884) 22 Fed. 176.

On dismissal of a libel against a vessel for damages to the cargo, libelants should be charged with costs, in the absence of fraudulent deception or concealment of facts on the part of the claimants, where the contestation was as to faulty stowage and lading only. Faber v. The Newark (D. C. 1844) Fed. Cas. No. 4,602.

Where an unfounded claim for lien was dismissed, but it appeared that the owners of the vessel had profited by the libelant's services, which constituted a personal demand, under circumstances not quite honorable, they were not allowed costs. McDermott v. The S. G. Owens (C. C. 1849) Fed. Cas. No. 8,748.

On dismissal of a libel for wages by the crew of a vessel, full costs will be decreed the claimant, although the demand of the libelants is less than $50. The Swallow (D. C. 1843) Fed. Cas. No. 13,664.

On a libel to recover possession of a vessel wrongfully taken from the owner, brought against the wrongdoer and a purchaser from him in possession, where no decree for damages is asked against the wrongdoer, the libel against him will be dismissed without costs. Thurber v. The Fannie (D. C. 1876) Fed. Cas. No. 14,014.

Where a libel is dismissed for failure to prove fault, no costs will be awarded against libelant where there was strong probable cause for the action, and the libeling vessel sustained the greater injury. Corks v. The Belle (D. C. 1846) Fed. Cas. No. 3,231a.

Where a libel which fails to convey any idea of the manner in which the collision occurred is not excepted to, and is dismissed at the hearing, no costs will be given. The Warren (D. C. 1868) Fed. Cas. No. 17,192.

In an action against a steamboat to recover the penalties, under R. S. § 4465, post, § 8229, for carrying an unlawful number of passengers, although the defense was established that the persons in excess of the allowed number were intruders against the will of the officers of the boat, and therefore that the penalties had not been incurred, yet there being apparently good ground for the suit, and the case being one proper for judicial investigation, and the answer not explicitly setting forth the real ground of defense, held that, while the libel must be dismissed, it should be without costs to the respondent. The Geneva (D. C. 1886) 26 Fed. 647.

The claimant of a libeled vessel, who for his own protection brings in a third party by petition under or by analogy to admiralty rule 59, is liable for the taxable costs and expenses of such new party in defending, where upon a hearing both the libel and petition are dismissed, and is not entitled to have such costs taxed to the libelant. The Charles Tiberghien (D. C. 1906) 148 Fed. 1016.

720. —— **On dismissal of libel for want of jurisdiction.**—On the dismissal of a suit in admiralty because the cause of action is not within the admiralty jurisdiction, the court has no power to award costs. Abbey v. The Robert L. Stevens (D. C. 1861) Fed. Cas. No. 8; The McDonald (C. C. 1860) Fed. Cas. No. 8,756; Inman v. The Lindrup (D. C. 1895) 70 Fed. 718; Reliance Lumber Co. v. Rothschild (D. C. 1904) 127 Fed. 745; The Mary F. Chisholm (D. C. 1904) 129 Fed. 814. But where a court of admiralty has jurisdiction of the subject-matter and the parties in a suit in rem, the fact that it dismisses the libel on the ground that no maritime lien arose under the facts shown does not affect its power to award cost against the libelant. The Francesco (D. C. 1902) 118 Fed. 112. And see Lowe v. The Benjamin (C. C. 1847) Fed. Cas. No. 8,565; Young v. The City of Florence (D. C. 1893) 56 Fed. 236.

721. —— **On dismissal of libel for collision.**—Where the blame for a collision is found to lie with the libelant alone, the costs will be taxed against him. Winn v. The Carroll (D. C. 1848) Fed. Cas. No. 17,876a.

In a libel for collision, where there is strong probable cause of action, but the libel is dismissed, costs will not necessarily be imposed on the libelant. The Eliza and Abby (D. C. 1834) Fed. Cas. No. 4,349.

Where a libel in a collision case which fails to convey any idea of the manner in which the collision occurred is not

excepted to, and is dismissed at the hearing, no costs will be given. The Warren (D. C. 1868) Fed. Cas. No. 17,-192.

Since where a vessel has been seized on a libel for a collision, and released on stipulation, it cannot be again seized on a libel by the owner of the cargo on the same cause of action, where such second libel is filed it will be dismissed, with costs to libelant. The Nahor (D. C. 1881) 9 Fed. 213.

In a libel for damages by collision with a bridge while in tow of a tug and passing through the draw, where the evidence was conflicting as to the cause of the collision, and the witnesses were unimpeached, the libel will be dismissed, and the costs divided. Assante v. Charleston Bridge Co. (D. C. 1889) 40 Fed. 765.

722. —— **On dismissal of information to enforce forfeiture.**—Fees paid to the officers of the court by the claimant of property seized for alleged violation of the revenue laws are not to be repaid by the United States where the libel is dismissed, as Act 1799, § 8, provides for the payment only of the costs of prosecution, not of the defense, where the information for violation of the penal statute filed by an officer of the United States is dismissed. In re Stover (C. C. 1851) Fed. Cas. No. 13,506.

723. —— **On sustaining dilatory plea.**—Where a dilatory plea was joined with a defense upon the merits, and the libel was dismissed upon the former, though it would have been sustained upon the latter, it was dismissed without costs. The Martha (D. C. 1830) Fed. Cas. No. 9,144.

724. —— **Effect of premature commencement of action.**—Though a plea in abatement on the ground that the action was prematurely commenced has not been interposed, the court will protect the parties in the adjustment of costs from any injustice arising from a too early commencement of the suit. The Isaac Newton (D. C. 1847) Fed. Cas. No. 7,089.

Costs will be given against a libelant who sues for a debt before it is due, even though, on account of the circumstances of the case, the libel is retained. Williams v. The Papa (D. C. 1891) 46 Fed. 576.

725. —— **Costs awarded to neither party.**—Where both parties in an admiralty suit are in the wrong, costs will not be awarded to either. Shaw v. Thompson (D. C. 1845) Fed. Cas. No. 12,726. Where a decree is made dismissing a libel in admiralty, "without costs to either party," it merely imports that the parties are not liable to each other for any costs, but does not affect the liability of a party to the clerk for his fees for services rendered to such party. In re Stover (C. C. 1852) Fed. Cas. No. 13,507.

On a libel in rem for failure to deliver goods consigned, costs will not be allowed against claimants where the report of commissioners, to whom the case was referred, is in the alternative, and does not fix definitely the sum with which they are chargeable, and does not allow them the freight to which they are entitled; and costs will not be against the libelants where the claimants are defeated upon the merits of the exceptions to the report, and the commissioner refuses to allow the freight in consequence of the inadvertent admissions in the answer. The Joshua Barker (D. C. 1848) Fed. Cas. No. 7,547.

726. —— **Costs where each party is in part successful.**—If several distinct causes of action are united in the same libel, the costs may be distributed, and each party may recover costs on those branches of the action in which he succeeds. Thomas v. Gray (D. C. 1836) Fed. Cas. No. 13,898. Where the opposite parties in an admiralty suit each prevail on one of the two issues involved, each is entitled to taxation of costs of the issue decided in his favor, and the two bills of costs should be set off against each other, and any balance paid. Simpson v. Caulkins (D. C. 1849) Fed. Cas. No. 12,880; Thomas v. Gray (D. C. 1836) Fed. Cas. No. 13,898.

Where a libelant unites a demand for contract wages unpaid with a claim for a short allowance, and obtains a decree for the wages, he will only obtain costs on that demand, and is liable for costs on the other branch of the litigation. The Childe Harold (D. C. 1846) Fed. Cas. No. 2,676.

When seven exceptions are filed to a commissioner's report, and six are sustained by the court, costs will be allowed therefor, to be deducted from the amount decreed to the libelant. The New Jersey (D. C. 1846) Fed. Cas. No. 10,162.

Where both a libel by the master against consignees for freight and a libel by the consignees against the vessel for damages to the cargo are sustained, a decree will be given to each party, with costs. The Isabella (D. C. 1875) Fed. Cas. No. 7,099. On libel for collision, where there are two distinct issues, the first as to the right of the owner of the vessel libeled to the benefit of the limited liability act (Act March 3, 1851), which is found for him, and the second as to the negligence of his vessel, which is found against him, he will only be allowed the costs that accrued on the first issue. The Leonard Richards (D. C. 1890) 41 Fed. 818.

The circuit court allowed to a libelant his costs in the district court, and, as the claimant had been partially successful on the appeal, it divided the costs in the circuit court. The Shady Side (C. C. 1879) Fed. Cas. No. 12,692.

Where cross-libels for a collision were filed in admiralty; one in perso-

nam, the other in rem, and libelant obtained a decree in one suit, and the other was dismissed, and the losing party appealed in both, and the damages were apportioned, the aggregate costs in both courts should be divided between the parties. Vanderbilt v. Reynolds (C. C. 1879) Fed. Cas. No. 16,839.

A respondent who contests the entire demand of a libelant when a portion of it is justly claimed, although he defeats the suit in the main matters in contestation, loses his equity to costs. Shaw v. Thompson (D. C. 1845) Fed. Cas. No. 12,726.

Where a libel was not sustained on the primary issue, but was retained on a further issue, including a claim for general average, which was afterwards conceded and arranged by the claimants, held, that the cause was one for an apportionment of the costs, in the court's discretion. The E. A. Shores, Jr. (D. C. 1897) 79 Fed. 987.

In an admiralty suit, where the damages are divided, it is the general rule, binding in all cases, unless the circumstances are exceptional, that the costs will also be divided. The Gladiator (D. C. 1898) 223 Fed. 381.

727. —— **Mutual fault in collision cases.**—The ordinary practice, where both vessels are found in fault in a collision case, is to refuse costs to either. The Favorita (D. C. 1870) Fed. Cas. No. 4,694; The Nautilus (D. C. 1854) Id. 10,058. CONTRA, see The Austin (D. C. 1868) Fed. Cas. No. 663; The Baltic (D. C. 1869) Fed. Cas. No. 824. The damages and costs will be equally divided between them, without regard to the difference of their values. The Magenta (C. C. 1870) Fed. Cas. No. 8,946; Cannon v. The Potomac (C. C. 1878) Fed. Cas. No. 2,386; The Bay State (D. C. 1848) Fed. Cas. No. 1,148; Id. (C. C.) Fed. Cas. No. 1,150; Lenox v. Winisimmet Co. (D. C. 1848) Fed. Cas. No. 8,248; Allen v Mackay (D. C. 1854) Fed. Cas. No. 228; Foster v. The Miranda (D. C. 1854) Fed. Cas. No. 4,977; The Nautilus (D. C. 1854) Fed. Cas. No. 10,058; Schenck v. The Fremont (D. C. 1856) Fed. Cas. No. 12,448; Haney v. The Louisiana (D. C. 1858) Fed. Cas. No. 6,020; The Marcia Tribou (D. C. 1858) Fed. Cas. No. 9,062; The John Henry (D. C. 1860) Fed. Cas. No. 7,350; O'Neil v. Sears (D. C. 1862) Fed. Cas. No. 10,530; The Brothers (D. C. 1869) Fed. Cas. No. 1,969; The Mary Patten (D. C. 1872) Fed. Cas. No. 9,223; The City of Hartford (D. C. 1874) Fed. Cas. No. 2,749; The Kolon (D. C. 1877) Fed. Cas. No. 7,923.

This may be done, where claimants succeed in part, though libelant's vessel was wholly lost. The Hercules (C. C. 1884) 20 Fed. 205. Full costs in admiralty proceedings do not always follow a judgment for partial damages. The Pennsylvania (D. C. 1883) 15 Fed. 814.

Where a collision resulted from joint negligence, and the libelant recovered a judgment for half damages, there being no cross libel, or allegation of damage in respondent's answer, the costs may also be divided. Id. And see The Austin (D. C. 1868) Fed. Cas. No. 663; The Baltic (D. C. 1869) Fed. Cas. No. 824; The Mary Patten (D. C. 1872) Fed. Cas. No. 9,223.

Where both vessels are to blame, and the damages are equally divided, the court may order the vessel most to blame to pay all the costs. The Rival (D. C. 1846) Fed. Cas. No. 11,867; Where both vessels were in fault, and an apportionment of damages was decreed, and no cross libel was filed, the costs will be allowed to the party who recovers. The City of Hartford (D. C. 1874) Fed. Cas. No. 2,750.

In a collision case in which both parties are found at fault, and both except to the commissioner's report, and libelant's exceptions are all overruled, costs of the reference will be allowed the claimant, though libelant has a decree for damages. The Baltic (D. C. 1869) Fed. Cas. No. 824.

Where suit was brought against a steamer by the owners of a sailing vessel totally lost by collision with the steamer, and the owners of the cargo lost with the sailing vessel joined in her libel against the steamer, and both vessels were held in fault for the collision, the defendants should pay only one-half of the cargo owners' bill of costs, and the latter must look to their co-libelants for indemnity against the other half. The Wyanoke (D. C. 1890) 42 Fed. 80.

On a libel for a collision in which libelant's vessel was sunk, the claimants set forth in their answer certain damages to their own vessel, but filed no cross libel. The district court found the claimants' vessel solely in fault, and decreed accordingly. On appeal the circuit court of appeals reversed the decree, deciding that both vessels were in fault, and that the damages should be equally divided. Held, that the costs of the district court should be equally divided. The Horace B. Parker (1896) 76 Fed. 238, 22 C. C. A. 418.

Where, on an appeal by both parties from a decree finding them mutually in fault in a collision case, the decree below was affirmed, no costs were given to either party. The Wings of the Morning (C. C. 1861) Fed. Cas. No. 17,872.

728. —— **Failure to recover full amount claimed.**—Where there was long delay in prosecuting a suit to recover for services in raising a sunken vessel, and the claim made was excessive, and owing to the fact that complainant had a monopoly of such work it was difficult for defendant to obtain proof as

to the value of his services, costs should not be allowed. Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co. (1905) 137 Fed. 780, 70 C. C. A. 356, reversing decree (D. C. 1904) 132 Fed. 154.

Where there was a substantial recovery against respondent who denied all liability, he was liable for costs, in the absence of special circumstances. Shoe v. George F. Craig & Co. (1912) 194 Fed. 678, 115 C. C. A. 72.

Where a libel demanded the recovery of $6.75, wages due to each of two libelants, and $75 to each for salvage services, and the claim for wages was allowed, but that for salvage service was disallowed, and the decree was generally for the wages due, "with costs," it was held that plenary costs were taxable in favor of libelants. The Caithneshire (D. C. 1848) Fed. Cas. No. 2,294. But when one of the libelants unites a demand for contract wages unpaid him with his claim for short allowance, and obtains a decree for those wages, the court will only allow him proportionate costs against the vessel on that demand, not including witness fees to his colibelants, and will order full costs against him in connection with his colibelants upon the other branch of the litigation. The Childe Harold (D. C. 1846) Fed. Cas. No. 2,676. And where libelant, in his libel, claims a sum exceeding $50, yet if upon the hearing he admits that an amount less than that sum is all that is due to him, and claims to recover only such lesser sum, he can recover only summary costs on a decree in his favor. McGinnis v. Carlton (D. C. 1849) Fed. Cas. No. 8,799.

Where libelant in a suit on a bottomry bond included in the bond unauthorized charges, and brought his action, without giving claimant a reasonable time to examine into the question of the amount really due, the court refused him costs. The Edward Albro (D. C. 1879) Fed. Cas. No. 4,290.

Costs will be allowed neither party on libel for collision where both claim a greater amount of damages than they were able to prove. The David Morris (D. C. 1871) Fed. Cas. No. 3,596.

Costs will be awarded salvors, though their claim was inequitable in amount, where claimants offered no particular sum before suit. The Wexford (D. C. 1872) Fed. Cas. No. 17,472.

Where one-half of the value of a boat and cargo worth $1,700 was claimed as salvage, but on the trial the claim was shown to have been greatly exaggerated, only $50 salvage being awarded, claimants would have been allowed costs but for the fact that shortly after the service they forcibly took the property from the salvors. The O. C. De Witt (D. C. 1894) 59 Fed. 620.

Claimants in a suit for salvage will be charged with costs where they denied the service, though an exorbitant claim was made therefor. Johnson v. The Industry (D. C. 1868) Fed. Cas. No. 7,391.

A libelant in admiralty who fails as to the greater part of his claim cannot recover costs. The Gomez De Castro (D. C. 1879) Fed. Cas. No. 5,525; The John Walls, Jr. (D. C. 1849) Fed. Cas. No. 7,432; The Marinin S. (D. C. 1886) 28 Fed. 664. And a libelant who demands an entire sum when part of it has been paid according to his directions, and compels the respondent to defend, impairs his equity to costs. Shaw v. Thompson (D. C. 1845) Fed. Cas. No. 12,726.

The law does not permit the insertion of an excessive demand in a libel against a ship by way of punishment for previous wrongdoing on the part of the ship's owner. The Stelvio (D. C. 1888) 34 Fed. 431.

A party will not be allowed, by tacking a small undisputed claim, upon which he has never made a demand, to a contested claim for wages denied him, to recover costs on the demand denied him. The Swallow (D. C. 1843) Fed. Cas. No. 13,664.

A libelant who has filed a claim for $20,000, and recovered only $500, will not be allowed costs where it appears that by waiting two days he could have ascertained, without risk, that his loss would be less than $1,000. The Stelvio (D. C. 1888) 34 Fed. 431. But it has been held that, where the libelant succeeded upon the issues, costs should be allowed him, even though he recovered less than the amount claimed. The Tiger Lily (D. C. 1882) 14 Fed. 591. And also that costs will not be placed on libelant in whose favor a final decree has been made, on account of the decree not exceeding the amount which was admitted by respondent's answer, although all questions in controversy were decided in respondent's favor, and the expenses of the suit were greatly increased by the large sum originally claimed by libelant. Spreckels v. The Weatherby (D. C. 1892) 49 Fed. 463.

On the assessment of damages for the negligent sinking of a vessel, the recovery of a much less sum than claimed for the value of an old vessel is not sufficient evidence of fraudulent exaggeration to deprive the plaintiff of his statutory right to costs, where the libelant's estimates are largely sustained by reputable witnesses, though the court adopt a much smaller valuation. Pettie v. Boston Tow-Boat Co. (D. C. 1890) 44 Fed. 382.

Costs are not allowed where the claim for demurrage was in part sustained and in part abandoned. Irzo v. Perkins (D. C. 1881) 10 Fed. 779.

Where a libelant's claim was very much in excess of the damage proved, and the vessel was thereby kept in

custody at much expense, held, that no costs should be allowed. The Marinin S. (D. C. 1886) 28 Fed. 664.

A suit in general average was brought by libelant, a shipmaster, against respondent, who denied the necessity for the jettison, thus making the main issue whether libelant's entire claim was a fraud. This suit was the only method of arriving at a solution of the question. Libelant was successful on the main issue, though the amount of his claim was diminished for want of evidence which could satisfy the court. Held, that respondent should pay the costs. Forace v. Salinas (D. C. 1892) 50 Fed. 284.

729. —— **Unnecessary litigation.**—A respondent who contests the entire demand of a libelant when a portion of it is justly claimed, although he defeats the suit in the main matters in contestation, loses his equity to costs. Shaw v. Thompson (D. C. 1845) Fed. Cas. No. 12,726.

Although one sued for damages growing out of a collision made voluntary reparation for most of the libelant's damages, yet, in view of the absolute denial of responsibility contained in the answer, held, that the defendant was justly chargeable with full costs, he having chosen to litigate that question unsuccessfully. The Robert Jenkins (D. C. 1885) 22 Fed. 797.

Costs will not be allowed where vessel is arrested for a small cause of action, for which the party has another adequate remedy, and the suit is prosecuted vindictively. The Boston (D. C. 1846) Fed. Cas. No. 1,672.

It appearing that respondents had been at all times willing to pay the contract price for the towage, the costs were put upon the libelant, notwithstanding the fact that no technical tender had been made. The Sebastian Bach (D. C. 1882) 12 Fed. 172.

Where litigation between a carrier and shipper over the payment of freight was wholly unnecessary, and was caused by the unreasonable conduct of both parties, a court of admiralty will require each party to pay its own costs. The Asiatic Prince (D. C. 1900) 103 Fed. 676.

See, also, notes to § 1619.

730. —— **Failure of libelant to offer to arbitrate.**—The fact that a libelant for salvage service made no offer to arbitrate does not entitle claimant to costs, where there was no tender in claimant's answer either of arbitration or payment for libelant's services. Charente Steamship Co. v. The Dupuy De Lome (D. C. 1893) 55 Fed. 93, decree reversed Compagnie Commerciale de Transport a Vapeur Francaise v. Charente S. S. Co. (1893) 60 Fed. 921, 9 C. C. A. 292.

731. —— **Effect of compromise or attempt to compromise.**—A mere attempt to negotiate a compromise of a claim at an amount specified, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs. The H. B. Foster (D. C. 1848) Fed. Cas. No. 6,290. But where each party had made an offer of settlement, libelant is entitled to costs where he recovered more than he was offered, though much less than he had demanded. The Walter W. Pharo (D. C. 1870) Fed. Cas. No. 17,124.

In a suit in admiralty, in forma pauperis, to recover for services rendered by libelant as master of a vessel, the officers of court cannot be deprived of their fees by a settlement out of court; and where the defendant makes such settlement without the knowledge of the libelant's proctor, and obtains a writing dismissing the suit, he will be taxed with the costs. Erratt v. Humphreys (D. C. 1900) 102 Fed. 925.

Where an intervener in an admiralty suit, who had obtained leave to prosecute his claim in forma pauperis, made a settlement with the claimants without paying costs or attorney fees, and it appears that the claim is valid, the costs made by the intervention will be taxed to the claimants. The Bella (D. C. 1899) 91 Fed. 540.

732. —— **Necessity of tender in general.**—Failure to tender the amount admitted to be due by the answer gives libelant a right to costs, though no more is recovered. Nine Thousand Six Hundred and Eighty-One Dry Ox Hides (D. C. 1872) Fed. Cas. No. 10,-273.

733. —— **Sufficiency of tender in general.**—An offer by a shipper to pay a balance of freight, deducting damages to the goods, to be ascertained by arbitration or sale at auction, held a sufficient tender to relieve him from payment of costs. Dedekam v. Vose (D. C. 1851) Fed. Cas. No. 3,732.

Circumstances held equivalent to a tender of the balance of freight after sale of damaged cargo, and before suit brought. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,729; Id. (D. C. 1851) Fed. Cas. No. 3,732.

Under admiralty rule 36 of the District Court for the Southern District of New York, which provides that a tender inter partes before suit shall be of no avail in defense or in discharge of costs unless on suit brought the same tender is deposited in court, a claimant who failed to deposit the amount is liable for interest thereon and for costs of such court, although libelant failed to recover a more favorable decree. The Ponce (1910) 178 Fed. 76, 103 C. C. A. 346.

On a libel for freight under a charter party, claimants, tendering freight due under a bill of lading, but not having brought the money into court until after appeal by them, will be allowed, on reversal, only costs of appeal. Da-

vis v. Five Hundred and Seventy-Four Bags of Coffee (C. C. 1862) Fed. Cas. No. 3,633a.

An offer to pay wages at the owner's counting house, and a refusal to pay elsewhere, does not exonerate him from costs. The Sarah Jane (D. C. 1833) Fed. Cas. No. 12,348.

Costs were refused a seaman who sued to recover wages, where the difference between the tender and claim was only $2, although the money was not paid into court under Rule 72. The Brothers (D. C. 1879) Fed. Cas. No. 1,968.

Filing a libel in admiralty, and delivery of the writ to the officer, is a commencement of the suit, such that a tender afterwards made must include costs of suit, although the vessel has not been seized. The Sunshine (D. C. 1859) Fed. Cas. No. 13,623.

A payment of money into court, on plea of tender, at the filing of the answer, will not affect the question of costs, unless it is specified how much is tendered as payment of the claim and how much for costs. The Good Hope (D. C. 1889) 40 Fed. 608.

On deposit of money as a tender in the registry of the court, the clerk's and marshal's statutory fees payable thereon must be also added and paid by the depositor, in order to make the tender good, if first made after suit brought; otherwise, if the deposit is only in support of a sufficient legal tender made before suit brought. In the former case the tender will be held available only for the deposit, less the clerk's and marshal's charges. The Serapis (D. C. 1889) 37 Fed. 436.

A tender or offer of payment relied on to bar costs should be a continuing offer. The Walter W. Pharo (D. C. 1870) Fed. Cas. No. 17,124.

734. —— **Effect of tender in general.**—Where the amount of the recovery is tendered before suit, libelant cannot recover costs. The Alaska (D. C. 1869) Fed. Cas. No. 129; The M. M. Caleb (D. C. 1877) Fed. Cas. No. 9,682.

On a libel in rem against cargo for freight and demurrage, where the freight was previously tendered, and after suit brought paid into court, libelant is liable for costs where he fails to recover demurrage. One Hundred and Twelve Sticks of Timber (D. C. 1875) Fed. Cas. No. 10,524.

Where the claimant of a vessel libeled for collision made reasonable offers of settlement, and, pursuant thereto, paid into court an amount equal to what was afterwards found due by the court, held, that he was entitled to his costs. The Glencairn (D. C. 1897) 78 Fed. 379.

Where libelant failed to perform a contract for the carriage of lumber, and the owner tendered into court the amount which libelant was entitled to for carrying the part carried, less the amount of cash advanced for fuel and damages for increased freight it was compelled to pay for transporting the balance of the lumber, libelant was not entitled to costs, but a judgment should have been rendered in favor of the shipper, with costs from the time of the tender. Edward Hines Lumber Co. v. Chamberlain (1902) 118 Fed. 716, 55 C. C. A. 236.

A libel for salvage was filed by the owners only of a vessel, and not also on behalf of the master and crew. When the answer was filed a tender was made and refused, which by the decree was held sufficient and awarded libelants, with costs up to the time the answer was filed, less the amount of claimants' costs since that time. The decree also provided that a certain amount should be paid the master and crew on the libel being amended so as to make them parties. Held, that the master and crew should not be allowed any costs except clerk's fees which accrued since the filing of the answer, since they were not parties to the libel before its amendment; and that, as they were not responsible for the refusal of the tender, their compensation should not be diminished by claimants' costs. Laverty v. The Dennis Valentine (D. C. 1891) 47 Fed. 664, decree affirmed (1893) 57 Fed. 398, 6 C. C. A. 409.

735. —— **Pleading and proof of tender in general.**—A tender or offer of payment relied on to bar costs should be set up in the pleading. The Walter W. Pharo (D. C. 1870) Fed. Cas. No. 17,124. In the absence of proof or allegation of a tender of wages due, which were paid into court after libel filed, the seaman will be entitled to costs. The Cortes (D. C. 1872) Fed. Cas. No. 3,258.

736. —— **Tender in salvage cases.**—Where a tender of a certain sum as salvage is refused, and the same sum is decreed to libelant, he is chargeable with his own costs subsequent to the tender, and, generally, with the owner's costs also. Lubker v. The A. H. Quinby (C. C. 1879) Fed. Cas. No. 8,586. Where, in a suit for salvage, the proctors for respondent offer to deposit in court for the benefit of libelants a fair compensation, the court will decree costs against the libelants out of such amount. Hessian v. The Edward Howard (D. C. 1855) Fed. Cas. No. 6,436.

A libel for salvage having been filed by the owners of a steam tug in their behalf only, claimants paid into court the full amount claimed by libelants, with accrued costs. Held, that libelants, thereafter failing to establish a right to more than the amount so paid, were properly charged with costs accruing subsequent to such payment. Laverty v. The Dennis Valentine (1892) 57 Fed. 398, 6 C. C. A. 409, affirming (D. C. 1891) 47 Fed. 664.

On a libel for salvage, where a special agreement is shown in defense, but no tender of the balance of the stipulated price is shown, a decree will be entered

for such amount, with costs. Dominy v. Anchors, Sails, etc., of The D'Alberti (D. C. 1866) Fed. Cas. No. 3,977.

In salvage cases the court will not deny libelant compensation nor award costs to respondent on a plea of tender alleged in a supplemental answer, where there was not a legal tender of a specific amount by a deposit of the money in court, and the propositions for a compromise were not so made as that they could be made a matter of judicial cognizance. Evans v. The Charles (D. C. 1842) Fed. Cas. No. 4,556.

737. —— **Personal liability for costs or payment out of fund.**—The costs of the prevailing party are ordinarily treated as a legal incident of the debt, and, like the debt, paid out of the fund, though subsequent lienors may be prejudiced thereby; but, where the action is unreasonably defended, costs in admiralty, as in equity, may, in the discretion of the court, be imposed personally on the litigating parties. Since part owners of vessels have a right to litigate a doubtful claim against the vessel, when the defense is reasonable, bona fide, and in part successful, the libelant's costs should be imposed, not upon those defending personally, but upon the proceeds of the vessel. In re Wright (D. C. 1883) 16 Fed. 482.

In cases in which a common interest has been promoted by services of counsel which a mere selfish consideration of his client's interest would not have induced him to render, a part or even the whole of his compensation may occasionally be allowed from the general fund arising from the sale of the vessel. The Wreath (D. C. 1872) Fed. Cas. No. 18,061.

A third person, who appears and defends in behalf and in the absence of the party to a suit in admiralty, is personally liable for the clerk's fees. In re Stover (C. C. 1852) Fed. Cas. No. 13,507.

738. —— **Liability for custody fees of marshal.**—Where a vessel, libeled on behalf of the United States, was afterwards libeled for seamen's wages, sold on an interlocutory order, and finally decreed to be restored, it was held that the custody fees should not be borne by the owners, nor by the seamen, but by the United States. The Louisetta (C. C. 1814) Fed. Cas. No. 8,535.

739. —— **Liability of marshal for costs of reference.**—In a proceeding by the government to obtain a decree of forfeiture against a vessel, when the forfeiture is remitted on condition that claimants of the vessel pay all costs and expenses, the costs of a reference to ascertain the amount of the marshal's fees must be borne by claimants, even though, on such reference, the sum claimed by the marshal has been reduced by the court to a sum less than what the claimants were at all times willing to pay. The Captain John (D. C. 1890) 41 Fed. 147.

In a proceeding by the government to obtain a decree of forfeiture against a vessel, when the forfeiture is remitted on condition that claimants of the vessel pay all costs and expenses, the costs of a reference to ascertain the amount of the marshal's fees must be borne by claimants, even though, on such reference, the sum claimed by the marshal has been reduced by the court to a sum less than what the claimants were at all times willing to pay. Id.

740. —— **Liability of persons not parties.**—Where a third person appears and defends a suit in admiralty, in behalf and in the absence of the party to the suit, he is to be treated as a party, and made liable, personally, for the fees of the clerk of the court, for services rendered in the cause at his request. In re Stover (C. C. 1852) Fed. Cas. No. 13,507.

741. —— **Liability of United States.**—Where a vessel, libeled on behalf of the United States, was afterwards libeled for seamen's wages, sold on an interlocutory order, and finally decreed to be restored, it was held that the custody fees should not be borne by the owners, nor by the seamen, but by the United States. The Louisetta (C. C. 1814) Fed. Cas. No. 8,535.

742. —— **Costs in alternative.**—Costs in admiralty upon exceptions to a commissioner's report made in the alternative. The Joshua Barker (D. C. 1848) Fed. Cas. No. 7,547.

743. —— **Effect of stipulation.**—A stipulation to abide the decision of a suit by another party will not prevent the successful claimant recovering costs because not given in the suit prosecuted, which was against an administratrix substituted as libelant. The Aberfoyle (D. C. 1848) Fed. Cas. No. 16. And see The Buffalo (D. C. 1849) Fed. Cas. No. 2,110.

A libelant is not precluded from asserting his right to recover interest and costs from the claimant in a suit in rem, in excess of the stipulation given, by the fact that his application for leave to amend his libel by inserting a claim in personam for the damages sued for was denied on the ground of laches. The claimant of a ship who contests a suit in rem against it to recover damages, whether for a maritime tort or for breach of a contract of carriage, is liable for costs, although the damages awarded to the libelant, together with the costs may exceed the amount of the stipulation given for the vessel's release; the decree in such case to be entered against the stipulators to the extent of their contract liability, and against the claimant for the remainder of the interest and the costs. The Southwork (D. C. 1904) 129 Fed. 171.

A stipulation between parties in admiralty that the action shall be discontinued and that libelant shall pay costs as taxed by the court, limits the power

of the court to a taxation of costs, which do not include damages for the fraud of libelant in filing the libel, nor for surveyor's fees and expenses not taken under order of court, nor for detention of the vessel, nor for premiums paid for bond for value; but claimant, if aggrieved, must be left to his remedy at law or otherwise. The Reliance (D. C. 1911) 189 Fed. 416.

744. —— **Failure to seek settlement, make demand, or give notice of claim.**—A party will not be allowed, by tacking a small undisputed claim, upon which he has never made a demand, to a contested claim for wages denied him, to recover costs on the demand denied him. The Swallow (D. C. 1843) Fed. Cas. No. 13,-664.

Costs will be denied a seaman who has not given the master and owners a reasonable time for an amicable settlement of his claim. The Susan (D. C. 1859) Fed. Cas. No. 13,631. Where the balance due for wages is small, and the seaman failed to demand it of the owner or master, costs will be denied him in a suit therefor. The Moslem (D. C. 1846) Fed. Cas. No. 9,876. Where it appeared that the managing owner of a vessel was directed by the libelant, in an action by a father to recover the wages of a minor son, not to pay the wages to the son, but to retain them until the libelant called for them, and that the libelant never demanded them before the suit was brought, held that the libelant could not recover costs. The L. B. Snow (D. C. 1883) 15 Fed. 282.

Where a libel for salvage is filed without notice to the owner of the vessel to whom the service was rendered, costs will not be allowed. The Jack Jewett (D. C. 1868) Fed. Cas. No. 7,122; The Rosedale (D. C. 1884) 20 Fed. 447; The D. L. & W. No. 6 C. (D. C. 1892) 53 Fed. 284.

Where claims for special damage incurred in rendering a salvage service are not advanced until the trial, even though full opportunity is thereafter given contestants to meet such claims, costs will not be allowed to libelants. The Benison (D. C. 1888) 36 Fed. 793.

Costs were awarded where the suit was defended in the interest of a former owner, though no demand had been made of the claimants. The Melissa (D. C. 1874) Fed. Cas. No. 9,400.

On a libel for damages sustained by negligently running a boat so as to create an unusual swell, which broke over libelant's boat, no costs will be allowed to libelant, where no notification of any claim for damages was given otherwise than by the filing of the libel, which was over a month after the occurrence, it appearing, also, that it was impossible for those on the libeled vessel to recall the circumstances attending the particular voyage complained of, and that libelant offered no reasonable excuse for his failure to make known the existence of his demand. The Rhode Island (D. C. 1875) Fed. Cas. No. 11,742. And see The Massachusetts (D. C. 1878) Fed. Cas. No. 9,258.

Costs were properly denied on a libel filed eight months after a slight collision, and after a season's running of the boat without repair, no notice of claim or of survey having been made until six months after the collision. Low v. The Komuk and The Don Juan (D. C. 1892) 50 Fed. 618.

A libelant in rem, suing on the contract of affreightment to recover damages for loss of cargo, failed to sustain the allegations of his pleadings, and increased the expense of the case by introducing immaterial evidence. He was allowed, however, to recover in general average, but had not attempted an adjustment on that basis before commencing the suit. Held, that he was not entitled to full costs. Deming v. The Rapid Transit (D. C. 1892) 52 Fed. 320.

Where, in a libel for materials and supplies furnished a vessel, it appeared that the managing owner requested of libelant a bill of the supplies; that libelant promised to furnish one, but did not do so; and that two days before the filing of the libel libelant telegraphed the managing owner that, unless a certain sum was paid within two days, the libel would be filed, which sum was in excess of the amount actually due,—interest and costs will be denied. The Ellen Holgate (D. C. 1887) 30 Fed. 125.

Where libelant in a suit on a bottomry bond included in the bond unauthorized charges, and brought his action, without giving claimant a reasonable time to examine into the question of the amount really due, the court refused him costs. The Edward Albro (D. C. 1879) Fed. Cas. No. 4,290.

745. **Security for payment—Necessity in general.**—By the long-standing practice in courts of admiralty, parties prosecuting or defending or intervening are required to give a stipulation for costs. In actions in personam, such security was formerly obtainable under the express rule, when the process was by warrant, which was at the option of the libelant. Now that the process by warrant is abolished in ordinary cases, the requirement of security for costs should still be maintained under rule 25, and an amendment of the old rule 44 of this court should be made, in order that no doubt may exist as to the proper practice. Rawson v. Lyon (D. C. 1883) 15 Fed. 831.

746. —— **Necessity in actions by seamen.**—Where a cook's shipping articles are silent on the subject of the disposition of the slush made during the voyage, and he has been paid his wages in full in accordance with the articles, he cannot maintain a libel in rem for the value of the slush appropriated by the master, under rule 45, which provides that seamen suing for wages in their own

right shall not be required to give a stipulation for costs. The Great Britain (D. C. 1843) Fed. Cas. No. 5,736.

A suit by seamen for breaking up a voyage is not a suit for wages, within a rule excusing libelant in such suit from giving security for costs. The Caroline and Cornelia (D. C. 1868) Fed. Cas. No. 2,420.

Where one of the crew of a salving vessel libeled the property saved to recover his share of the salvage, and a motion was made to compel him to file security for costs, upon the ground that the salvage had been paid to the master of the salving vessel, held that, in the absence of an agreement on the part of the seaman to waive his right to salvage he would not be compelled to give security for costs. The Cetewayo (D. C. 1881) 7 Fed. 128.

747. —— **Necessity in actions by informers.**—Under Act Feb. 28, 1799 (1 Stat. 626) § 8, providing that, unless an informer be an officer of the United States, he shall be liable for the fees of prosecution on the termination thereof in favor of the adverse party on a libel, under Act July 7, 1838 (5 Stat. 304), providing for the better security of passengers on steam vessels, the court may require the informer to give security for costs, and on his failure to do so may strike out his name, and let the suit proceed in the name of the United States alone. Aliter, if the informer is an officer whose duty it is to institute the proceedings. U. S. v. The Planter (D. C. 1852) Fed. Cas. No. 16,054.

748. —— **Necessity in actions by poor persons.**—See, also, §§ 1626, 1627, and notes thereunder.

Poor persons may sue in the admiralty, without giving security for the costs, on complying with the practice of the court for giving the juratory caution. Polydore v. Prince (D. C. 1837) Fed. Cas. No. 11,257; Wheatley v. Hotchkiss (D. C. 1854) Fed. Cas. No. 17.483; Thomas v. Thorwegan (D. C. 1886) 27 Fed. 400.

A showing to obtain leave to maintain a suit in admiralty in forma pauperis, although made in conformity to rules of the court long in force, must also conform to the requirements of Act July 20, 1892 (post, § 1626 et seq.); but when process has issued without such showing, and a motion has been made to require security for costs, libelant may be permitted to supply the omission, as contemplated by section 2 of the act (post, § 1627). Donovan v. Salem & P. Nav. Co. (D. C. 1904) 134 Fed. 316.

In a case of forfeiture, on a suggestion that the owners were unable to give security for costs, held, that an affidavit of ownership, inability, and merits would be exacted, before the government would be required to make further proofs. U. S. v. The Lion (D. C. 1858) Fed. Cas. No. 15,607.

Where libelant, in a proceeding in admiralty for collision resulting in the loss of libelant's sloop, tackle, apparel, and furniture, alleged that by reason of his poverty he was unable to defray the expense of litigation, and prayed that process might issue and be served in forma pauperis, as authorized by Act July 20, 1892, § 1, post, § 1626, and there was no proof that libelant's sworn statement as to his poverty was false, the fact that he purchased the sloop for $500 was insufficient to establish that he possessed property at the time the suit was instituted, or had acquired any since that time, justifying the court in requiring him to give security for costs. The Our Friend (D. C. 1904) 131 Fed. 395.

749. —— **Waiver of right to require.**—Generally security for costs is not required of seamen in a libel for wages. The Shelbourne (D. C. 1887) 30 Fed. 510. The reason for this rule is because the amount is small. The Arctic (D. C. 1871) Fed. Cas. No. 509a. The rule produces no unreasonable inequality as against shipowners. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014. The rule must be modified in cases where they have been paid off before a shipping commission. The Niveto (D. C. 1873) Fed. Cas. No. 10,279.

Security for costs will not be required on a libel for seaman's wages, when the answer is "forfeiture for desertion," and an attachment issued after hearing upon summons, but such defense was not then interposed. Chambers v. The Henry Kneeland (D. C. 1844) Fed. Cas. No. 2,581a. But a seaman will be required to file a stipulation for costs when suing in rem to enforce a conditional agreement outside the written articles. The Great Britain (D. C. 1843) Fed. Cas. No. 5,736.

The respondent may waive the right to require the libelant to give security for costs. Polydore v. Prince (D. C. 1837) Fed. Cas. No. 11,257.

750. —— **Failure to give and objections thereto.**—Libelant is not entitled to ground any proceedings on the omission of the respondent to give security for costs. Gaines v. Spann (C. C. 1823) Fed. Cas. No. 5,178.

If the former rules of the district court respecting security to be given for costs may be considered as still in force for the purpose of protection to the officers of the court for the recovery of their fees, this is not a matter which affects the libelant, and he is not entitled to ground any proceeding on the omission of the respondent to give the security prescribed by those rules. Gaines v. Travis (D. C. 1848) Fed. Cas. No. 5,179.

In actions brought on behalf of the next of kin against a steamship com-

pany to recover for deaths resulting from the sinking of a vessel which was a total loss,—defendant being therefore relieved from all liability for faults of navigation,—plaintiffs will be required to give security for costs, unless the inability of all the persons interested in the recovery to do so is shown. Raymond v. La Compagnie Generale, etc. (C. C. 1898) 90 Fed. 105.

Respondent will not be required to file a stipulation for costs in a suit in personam, where libelant does not move therefor until after a decree and notice of appeal. Pharo v. Smith (D. C. 1859) Fed. Cas. No. 11,062.

Where one of the crew of a salving vessel libeled the property saved to recover his share of the salvage, and a motion was made to compel him to file security for costs, upon the ground that the salvage had been paid to the master of the salving vessel, held that, in the absence of an agreement on the part of the seaman to waive his right to salvage, he would not be compelled to give security for costs. The Cetewayo (D. C. 1881) 7 Fed. 128.

751. —— **Additional security.**—The affidavit on a motion for additional security for costs may be made by the proctor of the party. The Harriet (D. C. 1845) Fed. Cas. No. 6,096.

An increased stipulation for costs should not be required from the claimants on account of a delay in the progress of the action, occasioned or obtained by the libelants. The Laurens (D. C. 1848) Fed. Cas. No. 8,121.

Under a strict rule that a stipulation for costs must be filed with the libel, on proper showing one may be allowed to sue on "a juratory caution," and a libel having been filed, with security, which was shown to be bad, on motion to file additional security the court ordered additional security to be put in within five days, at the end of which time it might be shown that it could not be furnished, and the case proceed on its merits. The Phœnix (D. C. 1888) 36 Fed. 272.

Under a strict rule that a stipulation for costs must be filed with the libel, on proper showing one may be allowed to sue on "a juratory caution"; and a libel having been filed, with security, which was shown to be bad, on motion to file additional security the court ordered additional security to be put in within five days, at the end of which time it might be shown that it could not be furnished, and the case proceed on its merits. Id.

752. —— **Sufficiency of security.**—Until satisfactory proof is put in that the officer, in accepting a stipulation for costs in admiralty proceedings, was deceived or did not properly perform his duty, the court will assume that the security is sufficient; and when the surety has made oath that he is worth a sufficient sum over and above all his just debts and liabilities, the stipulation is prima facie good. The Snap (D. C. 1884) 24 Fed. 510.

753. —— **Liability of surety.**—A consent to a rehearing by the parties to a suit will not affect the rights of a surety in a stipulation for costs, who has been discharged by a previous final decree. The Martha (D. C. 1830) Fed. Cas. No. 9,144.

754. —— **Enforcement of stipulation for costs.**—The regular method of proceeding against a surety in a stipulation for costs in a suit in admiralty is by petition, after notice to the surety. In such a case the decree may be final and peremptory. But upon a proceeding by motion, after a personal demand of the costs from the surety, a conditional decree only will be awarded. The Baltic (D. C. 1830) Fed. Cas. No. 826.

Under Rule 21, providing that when a decree is for the payment of money libelant may have an attachment to compel defendant to perform the decree or an execution against the property, on default of stipulators for costs an order for decree may be obtained on which execution may issue against the entire estate of the parties, as under the rules of the district court a stipulation for costs includes a consent that execution shall issue against all the estate of the parties, in case the stipulators do not perform their engagement. The party is entitled to either alternative of the twenty-first rule. Taking out a fi. fa. in the first instance without success does not prevent his resorting to process of capias ad satisfaciendum or to an attachment. He may have relief at his option, as to the order of process. The Delaware (D. C. 1846) Fed. Cas. No. 3,762.

755. **Amount and items.**—In cases of claims on proceeds in the custody of the court, where other parties are entitled, no attorney's fee, or other costs beyond actual charges of court, can be allowed. The Jerusalem (C. C. 1815) Fed. Cas. No. 7,294.

Where process in rem is commenced without notice to the owners who reside within the district, no more costs will be allowed than in the case of a monition to show cause. Chatfield v. The Wolga (D. C. 1840) Fed. Cas. No. 2,632.

Where claimants in admiralty appear by the same counsel, though their rights are different, but one bill of costs will be taxed. The Jeremiah (D. C. 1879) Fed. Cas. No. 7,290.

A claimant who desires to contest the liability of a vessel, sold by a trustee under the limited liability act, and gives a stipulation for costs, under rule 26, is liable only for the costs properly incident to such contest. The Vernon (D. C. 1888) 36 Fed. 113.

756. —— Amount dependent on amount in controversy.—The district court in admiralty does not tax plenary costs when the sum in dispute does not exceed $50, although the proceedings are plenary. Summary costs only are recoverable on a libel in admiralty, where libelant admits that a sum less than $50 is all that is due, irrespective of the claim in the libel. McGinnis v. Charlton (D. C. 1849) Fed. Cas. No. 8,799. But see The Swallow (D. C. 1843) Fed. Cas. No. 13,664. And see The Young Mechanic (D. C. 1856) Fed. Cas. No. 18,182, holding that Act March 3, 1847, regulating costs in admiralty proceedings in rem where less than $100 is recovered, was repealed by Act Feb. 26, 1853.

757. —— Items in general.—Libelants are not responsible for the expense incurred in effecting an average between the respective owners. Edwards v. Thirty-Five Boxes of Gold Dust, Saved from Wreck of The Union (D. C. 1851) Fed. Cas. No. 4,299a.

Libelant having asked no costs but disbursements, no costs but disbursements were awarded against him on a dismissal of the libel. The Seneca (D. C. 1876) Fed. Cas. No. 12,668.

The charges of a person employed to make soundings, and prepare a map of the locality of a collision, cannot be taxed as disbursements. The Vernon (D. C. 1888) 36 Fed. 113.

Upon taxation of costs disbursements made by the libelant for searching titles of sureties offered on a stipulation, expenses of real-estate brokers called in to appraise property, and notary's fees in taking depositions of sureties, were allowed as proper items of a bill of costs, but not telegrams and postage to secure attendance of attorneys upon the examination of claimant's witnesses in Georgia. it appearing that a persistent attempt had been made to defraud the court, and obtain the discharge of the cargo from custody upon worthless security. Simpson v. Sticks of Hewn Timber (D. C. 1881) 7 Fed. 243.

Where, in an admiralty proceeding for seamen's wages against a foreign vessel, a commissioner, in the absence of the judge from the district, heard the testimony, and issued process under R. S. §§ 4546, 4547, post, §§ 8335, 8336, and the libelant's proctor, beginning to fear that the statute was not applicable, sent telegrams to the judge, asking him to issue or authorize his warrant of arrest, which he declined to do, such telegrams were for the convenience of the counsel, to save traveling expenses, and the money paid therefor cannot be taxed as costs, as money properly and necessarily expended. Kelly v. The Topsy (D. C. 1891) 45 Fed. 486.

758. —— Proctor's or advocate's fees and costs in general.—Costs in admiralty are wholly within the control of the court, and are allowed upon equitable considerations. Where a large number of persons joined in the same libel, appearing by the same attorney, and the cause of action of each was proved by substantially the same witnesses, the allowance of a proctor's fee of $10 on each claim was ample, and will not be disturbed on appeal. The Oregon (1904) 133 Fed. 609, 68 C. C. A. 603.

Where, in the discussion before the district court, a person was recognized as proctor for the successful party, he must be allowed his costs, though there was no entry of appearance by him within the time required by rule. Mellor v. Cox (C. C. 1891) 46 Fed. 662.

Since the adoption of the circuit court rules of 1845, rule 96 of the district court of 1838, refusing to a proctor in a suit fees as advocate, is abrogated, in respect to all fees other than those specifically introduced and appointed by the district court; and fees for services as proctor and as advocate are taxable to the same person. Manchester v. Milne (D. C. 1848) Fed. Cas. No. 9,007.

The rate of compensation of proctors in admiralty is controlled by the statutes in force at the time the right to costs accrues or at the time of taxation. Sturgis v. The Joseph Johnson (D. C. 1860) Fed. Cas. No. 13,576a.

Since Act Feb. 26, 1853, the district court in admiralty has no power to award an additional sum to libelants, in the court's discretion, under the name of proctor's fees. Sturgis v. The Joseph Johnson (D. C. 1860) Fed. Cas. No. 13,576a.

The fee of libelant's proctor for attending a reference in a proceeding in admiralty, not being among the fees enumerated in R. S. tit. 13, c. 16 (this chapter), than which none others are allowed to be taxed as costs under R. S. § 823, ante, § 1375, cannot be so taxed. Kelly v. The Topsy (D. C. 1891) 45 Fed. 486.

In summary proceedings, where the amount is less than $50, and libelant's proctor takes the benefit of the rule of court dispensing with libelant's stipulation for costs, no proctor's fee can be taxed in his favor, except by special allowance by the court on a showing of special circumstances; and the allowance will not be made merely because he had the testimony taken before a commissioner, instead of before the court, as he might have done. The Ethel (D. C. 1894) 59 Fed. 474.

Where libelant was the prevailing party in a suit in admiralty, but for equitable reasons the court directed that the costs be divided and paid by the parties in stated proportions, such order should be construed as including the statutory fee for libelant's proctor, which in ordinary course would have been taxed as costs, but not a fee for respondent's proctor, which, if taxable under R. S. § 824, ante, § 1378, is only

so against his own client. The L. F. Munson (D. C. 1904) 127 Fed. 767.

Counsel fees may be allowed in admiralty, where there is a fund in court, irrespective of statutory provisions. The Gordon Campbell (D. C. 1904) 131 Fed. 963. They may be allowed both on the instance and prize side of the court. The Apollon (1824) 22 U. S. (9 Wheat.) 362, 6 L. Ed. 111. And see Shannon v. The Angelique (D. C.) Fed. Cas. No. 12,705. But see The Baltimore (1869) 75 U. S. (8 Wall.) 377, 19 L. Ed. 463, holding that the successful party in a court of admiralty cannot properly be allowed counsel fees, as incident to the judgment, beyond the costs and fees allowed by statute. The Elizabeth Frith (D. C. 1831) Fed. Cas. No. 4,361, holding that, in actions for seamen's wages, counsel fees will not be allowed as costs, unless the defense is merely vexatious, or there are special reasons for the allowance. The Liverpool Packet (D. C. 1861) Fed. Cas. No. 8,407, holding that counsel fees cannot be allowed as part of the taxable costs, beyond the amount mentioned in Act 1853, c. 80.

Where the libelant is the prevailing party in a suit in admiralty, but the costs are divided, the fee of $20 to libelant's proctor should also be divided. The Bencliff (D. C. 1908) 158 Fed. 377.

759. —— **Proctor's or advocate's fees on motions.**—Where libelant cannot proceed in a cause without application to the court and its specific order, his proctor will be allowed 62½ cents for every necessary motion made in court on every necessary proceeding in a cause. Sanborn v. Stetson (C. C. 1843) Fed. Cas. No. 12,291.

The proctor may charge $1.25 in each of several sequent motions before the court, when necessarily in attendance to make one of them. Sancho v. Atwood (D. C. 1848) Fed. Cas. No. 12,291a.

Costs cannot be taxed in admiralty for services rendered by an advocate or proctor on merely supposititious motions, such as motion for final decree, motion for costs, for reference, etc., when the objects of the supposed motions are embraced in the decretal order of the court, though there may be foundation for similar charges when they are based upon specific application to the court for the modification, reversal, or enlargement of the final decree as to any of those particulars. Costs are not taxable in admiralty for services rendered by a proctor or advocate on a motion to postpone the hearing of a cause called in its order on the calendar. Manchester v. Milne (D. C. 1848) Fed. Cas. No. 9,007.

760. —— **Proctor's docket fees.**—A proctor representing more than one libelant on final hearing, though under independent libels, is entitled to but one docket fee. Dedekam v. Vose (C. C. 1853) Fed. Cas. Nos. 3,730, 3,731; The Mount Eden (D. C. 1898) 87 Fed. 483; The Gordon Campbell (D. C. 1904) 131 Fed. 963.

Where separate claims and demands are filed, which could, and properly should, be united, all the causes of action being proven by the same witnesses in the same depositions, all the parties appearing by the same attorneys, and the causes covered by one final decree, it is error for the court to allow more than one docket fee. The State of Missouri (1896) 76 Fed. 376, 22 C. C. A. 239. And see The Medusa (D. C. 1891) 47 Fed. 821.

Where a number of libels against the same vessel are consolidated, and heard at the same time, and represented by the same proctor, but one proctor's docket fee should be allowed. The H. C. Grady (D. C. 1897) 84 Fed. 226.

Where a vessel is libeled by material men, and thereafter other material men file libels in the nature of interventions to be perfected if the vessel is released, otherwise to operate on the balance of the proceeds of the sale, proctors' costs should not be allowed on such subsequent suits. Butler v. The Julia (D. C. 1893) 57 Fed. 233.

There can be but one docket fee, though the case is appealed from the district to the circuit court. Mellor v. Cox (C. C. 1891) 46 Fed. 662.

In cross-appeals heard together on the same evidence only one docket fee is taxable. The Rabboni (1898) 84 Fed. 681, 28 C. C. A. 517.

Where a libel is filed against a tug for negligence, and a cross-libel by the owners of the tug for towage services, and the libelant recovers his damages less the value of the towage services, no mention being made of the cross-libel in the decree, libelant's proctor is entitled to but one docket fee. The W. B. Castle (C. C. 1883) 16 Fed. 927.

Where a petition is filed by persons claiming a lien on the proceeds of a vessel in the registry, and it is referred to a commissioner to take proof of the facts, and exceptions are taken to his report, only one docket fee can be charged. In re Trundy (D. C. 1883) 18 Fed. 607.

A docket fee of $20 to the proctor is taxable under R. S. § 824, ante, § 1378, on a final disposition by the court of a cause on the calendar. Hayford v. Griffith (C. C. 1853) Fed. Cas. No. 6,264. This docket fee can be taxed only on a final hearing. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,730; Id. (C. C. 1853) Fed. Cas. No. 3,731. A "final hearing," within said section, is a submission of the case for determination on the merits, or the submission of some question the disposition of which finally ends the case. The Mount Eden (D. C. 1898) 87 Fed. 483.

The docket fee is taxable whenever a trial is begun by the swearing of a jury in a common-law case, or by the introduction of testimony or the final open-

ing of the argument upon a final hearing in equity or admiralty. The Bay City (D. C. 1880) 3 Fed. 47. It may be taxed on dismissal of the appeal for an irregularity in failing to give security for costs. Hayford v. Griffith (C. C. 1853) Fed. Cas. No. 6,264.

Where a vessel was in custody of the court under process issued against her, and the case was entered in the admiralty docket, and a consent was given that the case be discontinued on payment of the amount claimed and libelant's costs, the granting of a motion for an order discharging the vessel from custody, and canceling stipulations, was a final hearing. The Alert (D. C. 1883) 15 Fed. 620.

Where, in a libel of intervention in an admiralty case, the parties stipulated for a decree in favor of the intervener, and a decree was entered accordingly, there was such a final hearing as would entitle the proctors for intervener to the allowance of the docket fee. The H. C. Grady (D. C. 1898) 87 Fed. 483.

A proceeding before a commissioner on reference is not a final hearing. The Mount Eden (D. C. 1898) 87 Fed. 483.

The hearing of exceptions to a pleading in admiralty, where the exceptions are in the nature of a special demurrer, or a motion to make more certain, is not a final hearing. The Anchoria (D. C. 1885) 23 Fed. 669.

761. —— **Cost of motions.**—Costs will be taxed for opposing motions made on notice to put the cause over the term, but not where the applications were without notice, and only to defer the hearing to another day in the same session. Manchester v. Milne (D. C. 1848) Fed. Cas. No. 9,007.

Costs cannot be taxed in admiralty for attending court, and for motions made in writing, merely formal, as for time to enable the defendant to answer, etc. Id.

762. —— **Preparation of written arguments.**—Costs are not taxable for the preparation of written arguments, except upon a stipulation in writing to that effect. Manchester v. Milne (D. C. 1848) Fed. Cas. No. 9,007.

763. —— **Fees for removal of cause.**—On removal to the circuit court of an appeal in admiralty before the passage of Act Feb. 26, 1853, the fee for removal is not taxable. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,730.

764. —— **Cost of bringing in new party.**—The claimant of a libeled vessel secured an order, under admiralty rule 53, requiring the libelant to give security to respond in damages as claimed in respondent's cross-libel. In compliance with such order, libelant procured a bond to be executed by a surety company. Held that, on dismissal of the cross-libel on final hearing, respondent was properly taxed with the amount paid by libelant for such bond, as a part of the costs. Jacobsen v. Lewis Klondike Expedition Co. (1901) 112 Fed. 73, 50 C. C. A. 121.

The premium paid by a libelant to a surety company for entering a stipulation for costs required by a rule of court is taxable as costs where reasonable in amount. The Bencliff, 158 Fed. 377.

While the prevailing party in an admiralty cause is entitled to recover as part of the taxable costs the amount of actual expenditures for a surety company bond when necessary to release a vessel from custody, no sum can be taxed on account of such bond, although executed by a surety company, where it was given for its own protection because it had previously become obligated to the owner to protect the vessel from the liens while in possession of the charterer, so that it was in fact the real defendant in interest, and no sum was actually paid it for signing the bond. The Robert Dollar (C. C. 1902) 116 Fed. 79.

Where a libel for collision is dismissed at libelant's costs, the libeled vessel being held without fault on a trial, it is entirely proper for the court to allow the respondent to tax all costs necessarily or properly incurred, including those incident to the bringing in of a new party under rule 59. The Maurice (D. C. 1904) 130 Fed. 634.

765. —— **Cost of procuring bond or stipulation.**—In the absence of a statute or rule of court, or a practice equivalent thereto, the expense of procuring a surety company bond for release of a vessel libeled for collision is not taxable as costs. The Texas (C. C. A. 1915) 226 Fed. 897.

While the prevailing party in an admiralty cause is entitled to recover as part of the taxable costs the amount of actual expenditures for a surety company bond when necessary to release a vessel from custody, no sum can be taxed on account of such bond, although executed by a surety company, where it was given for its own protection because it had previously become obligated to the owner to protect the vessel from the liens while in possession of the charterer, so that it was in fact the real defendant in interest, and no sum was actually paid it for signing the bond. The Robert Dollar (C. C. 1902) 116 Fed. 79. But see The Willowdene (D. C. 1899) 97 Fed. 509.

Where the claimant of a libeled vessel gives a bond for her release, and decree is eventually rendered in his favor, the expense actually incurred by him in procuring the execution of the bond for her release by a surety company is a legitimate item of costs, to be taxed in his favor. The release of a vessel on bond is not merely an accommodation to the claimant, but inures to the benefit of other litigants by reliev-

ing them from the expense of her custody, and the court will exercise its discretion in awarding costs in a manner to encourage the substitution of bonds. The South Portland (D. C. 1899) 95 Fed. 295, appeal dismissed (1899) 97 Fed. 988, 38 C. C. A. 699.

Where the claimant of a libeled vessel secured an order, under rule 53, requiring the libelant to give security to respond in damages as claimed in respondent's cross-libel, and libelant procured a bond to be executed by a surety company, respondent was properly taxed with the amount paid by libelant for such bond, as a part of the costs, on dismissal of the cross-libel on final hearing. Jacobsen v. Lewis Klondike Expedition Co. (1901) 112 Fed. 73, 50 C. C. A. 121.

Where the claimant of a libeled vessel has prevailed on the trial, and the libel is dismissed, he is entitled to tax as a part of his costs the premium paid by him to a surety company for a bond to obtain the release of the vessel, where it is reasonable in amount. The John D. Dailey (D. C. 1907) 158 Fed. 642.

Disbursements in giving stipulations for value, even if not to surety companies, are taxable, if reasonable. The Hurstdale (D. C. 1909) 171 Fed. 607.

The amount paid by the owners of a vessel libeled for collision to a surety company for furnishing stipulation for discharge of the vessel, the giving of which is optional with him, is not taxable as costs against the other party on his failure to recover, in the absence of any general order, rule, or usage for such taxation in force or existing when the stipulation was given. The Gov. Ames (D. C. 1912) 199 Fed. 587.

766. —— **Witness' fees and mileage.**—Witness fees in the federal courts are taxable for travel not exceeding 100 miles, unless the distance be wholly within the district, though the witness attend the trial voluntarily, at the request of one of the parties. The Syracuse (C. C. 1888) 36 Fed. 830. And see The Vernon (D. C. 1888) 36 Fed. 113.

To tax witness fees, it must appear that they have actually been paid eo nomine at or before trial. The Highlander (N. Y. 1860) 19 How. Prac. 343.

Proof that a party disbursed in traveling expenses and maintenance of his witnesses while attending court a sum exceeding that sought to be taxed as witness fees will not enable him to tax such fees. The statute requires proof that the amount sought to be taxed be amounts actually paid the witnesses as fees. Leary v. The Miranda (D. C. 1889) 40 Fed. 607.

Witness' fees and mileage for the attendance of a party to an admiralty suit cannot be taxed in his favor against the other party. The Elizabeth and Helen (D. C. 1870) Fed. Cas. No. 4,354.

767. —— **Stenographer's fees.**—A direction made in open court that the testimony given in court be taken down by a stenographer is sufficient to entitle the stenographer's fees to be taxed by the successful party. The E. Luckenback (D. C. 1884) 19 Fed. 847.

768. —— **Clerk's fees.**—The clerk is entitled to commissions upon money deposited in a bank under a decree of the court and subject to its order. Ex parte Prescott (C. C. 1814) Fed. Cas. No. 11,388.

Where a vessel is sold by a trustee under the limited liability act, and the proceeds are paid into court, the clerk's commission is payable from such proceeds, though the owner appears and contests the liability of the vessel. The Vernon (D. C. 1888) 36 Fed. 113.

Where a decree for salvage was rendered, but the claim was paid without sale of the vessel libeled, the clerk, under R. S. § 828, ante, § 1383, giving him a commission for "receiving, keeping, and paying out money" in pursuance of any order of court, of a given per cent. of the amount "received, kept, and paid," was not entitled to any compensation. Smith v. The Morgan City (D. C. 1889) 39 Fed. 572.

The following clerk's fees have been held properly taxable: Orders actually entered on behalf of the succeeding party in the progress of the cause. Sancho v. Atwood (D. C. 1848) Fed. Cas. No. 12,291a. Two dollars for notices of trial. The Siren (D. C. 1877) Fed. Cas. No. 12,910. Ten cents for each oath, and 15 cents for each jurat, the charge for one not including the other; 15 cents for making up the costs on the bonding of the vessel; $3 for the attendance of the clerk on the justification of sureties; on dismissal of libel with costs only 10 cents each for filing and entering "claim," "answer," "appearance," and "consent," and not as for "making a record." The F. Merwin (D. C. 1879) Fed. Cas. No. 4,893. Fees for copying the process and pleadings into the final record in cases appealed to the circuit court. The Thomas Fletcher (C. C. 1884) 24 Fed. 481.

769. —— **Marshal's fees and disbursements in general.**—Money paid by the marshal for insurance of an arrested vessel cannot be taxed as costs. Burke v. The M. P. Rich (C. C. 1860) Fed. Cas. No. 2,162.

The marshal cannot appoint an auctioneer to conduct a judicial sale at the expense of the government or of a private party, without the consent of the party for whose benefit the services are performed. The Tubal Cain (D. C. 1863) Fed. Cas. No. 14,212.

The marshal is not entitled to any fee or mileage for the service of the writ of supersedeas or order of the court commissioner notifying the mar-

shal of the discharge of a vessel on stipulation, as such writ or order is served on himself. The Jeanie Landles (D. C. 1883) 17 Fed. 91.

A marshal may charge for actual expenses incurred in traveling to make service of a monition in lieu of mileage. The Wavelet (D. C. 1885) 25 Fed. 733.

770. —— **Marshal's fees for sale of vessel.**—R. S. § 829, ante, § 1386, further provides that for sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying over the money, the marshal shall receive 2½ per centum on any sum under $500, and 1¼ per centum on the excess of any sum over $500. Under this provision it has been held: That a marshal was entitled to a commission as for the sale of property in a suit in rem against a vessel, where process issued, and a bond was given, though the amount of the final decree was paid before execution. The City of Washington (C. C. 1876) Fed. Cas. No. 2,772. That where a marshal had been paid his fees and commissions on the sale of a vessel under decree of the district court, and a claimant filed a petition, on which monition was issued asking that the balance of the proceeds of the sale in the registry of the court be paid to him, and it was so ordered, the marshal was not entitled, in addition to his fees for serving the process, to a commission on the amount paid to the claimant. The Colorado (D. C. 1884) 21 Fed. 592. That where a vessel was sold by a trustee under the limited liability act the marshal was not entitled to a commission. The Vernon (D. C. 1888) 36 Fed. 113.

R. S. § 829, ante, § 1386, provides that where the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of 1 per centum on the first $500 of the claim or decree, and one-half of 1 per centum on the excess of any sum thereof over $500, provided that, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof. Under this provision it has been held: That the marshal was entitled to his commissions, when, after a seizure in admiralty, the suit is settled, though without an order of sale, and that the commissions would be computed upon the amount paid in settlement. The Clintonia (D. C. 1882) 11 Fed. 740. That the sum paid libelant in settlement of his claim, and not the amount claimed in the libel, was the basis on which the marshal's commissions are determined. Robinson v. Fifteen Thousand Five Hundred and Sixteen Bags of Sugar (D. C. 1888) 35 Fed. 603. That where a libel was filed against a steamer, she was seized under process issued on it, and was discharged from that arrest on a stipulation for value, and subsequently a final decree was rendered against her for $150,000, and that sum was paid into the registry of the court by the claimants without an execution having been issued, or a sale of property, and thereupon the marshal by whom the original process was served presented to the clerk for taxation a bill for his commissions on the $150,000 as on a settlement of the case, the payment of the money under the decree was a settlement of the claim, and that the marshal was entitled to the commission. The Russia (D. C. 1871) Fed. Cas. No. 12,170. That where a vessel was libeled for salvage, but the warrant of arrest remained in the clerk's office, and was never given to the marshal, and the parties stipulated that the vessel should remain in her owners' possession, and the bond was neither taken in the marshal's name, nor delivered to him, and after a decree for salvage was rendered, the claim was paid without sale, no money passing through the marshal's hands. The marshal should receive the reduced commission, which is given him as compensation for the loss of his opportunity to earn fees by a sale of the property, and not as a compensation for services. Smith v. The Morgan City (D. C. 1889) 39 Fed. 572. That where a vessel was seized by the marshal under a monition, and thereafter was released on a stipulation for her appraised value, the marshal was not entitled to a commission on such appraised value. The Acadia (D. C. 1879) Fed. Cas. No. 23.

R. S. § 829, ante, § 1386, further prescribes a fee to the marshal of $1 for executing a deed prepared by a party or his attorney, and a fee of $5 for drawing and executing a deed. Under this provision a party purchasing at a sale of a vessel has an option of drawing his own deed, and in such case the marshal's fee is only $1. The John E. Mulford (D. C. 1883) 18 Fed. 455.

771. —— **Marshal's fees for custody and expenses of keeping vessel or other property.**—An officer who, in executing admiralty process in rem, does not take and hold actual and manifest possession, cannot charge custody fees, although he may be liable for the safekeeping of the vessel. The Hibernia (D. C. 1844) Fed. Cas. No. 6,455.

A vessel which has been retained by a shipkeeper, pending a controversy, must be delivered up to her owner immediately upon the settlement of the suit. The marshal will not be justified in employing a shipkeeper after the suit has been settled, merely because a formal order of discontinuance has not been entered. The J. W. Dennis (D. C. 1884) 19 Fed. 799.

When the marshal holds a vessel by virtue of two warrants to arrest in

different suits, the custody fees are to be charged equally upon the two suits. The John Walls, Jr. (D. C. 1849) Fed. Cas. No. 7,432.

A marshal who holds property under several processes in admiralty is entitled to a per diem custody fee, to be apportioned among the cases in which the several processes were issued. The Circassian (D. C. 1873) Fed. Cas. No. 2,725.

A notice to the marshal is not sufficient to relieve the libelant from expense of a keeper of the vessel arrested. Application must be made to the court. The Independent (D. C. 1878) Fed. Cas. No. 7,016.

Under R. S. § 829, ante, § 1386, the marshal is entitled to the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding $2.50 a day. This provision does not fix $2.50 per day as an absolute limit of the charges taxable by the marshal. The Perseverance (D. C. 1884) 22 Fed. 462. CONTRA, see The Circassian (D. C. 1873) Fed. Cas. No. 2,725. His fees for the custody of goods in cases of seizure and other proceedings in rem are not honorary, but are dependent upon the precise regulations of law, or, in the absence of such regulations, are to be allowed upon the principles of a quantum meruit, graduated by the ordinary value of similar services, and dependent upon the circumstances of each particular case. The practice in the admiralty is to refer disputed cases of this nature to an auditor, to examine the evidence, hear the parties, and report the case to the court for a final decision. Bottomley v. U. S. (C. C. 1840) Fed. Cas. No. 1,689.

Where it becomes necessary, in order to prevent loss, for a marshal to expend over $2.50 per day, he should be allowed, in taxing his costs, for necessary extra expenses, such an amount as the work done is reasonably worth. But where a marshal has work done in a defective manner, and additional labor becomes necessary in consequence, no compensation for the latter should be allowed. The Nellie Peck (D. C. 1885) 25 Fed. 463.

The charge of $2.50 a day does not include wharfage, and a bill for wharfage paid by the marshal for the vessel, while she is in his custody, can be properly taxed as a disbursement. The F. Merwin (D. C. 1879) Fed. Cas. No. 4,893. But a marshal cannot charge $5 per day for care of property attached on the ground that he paid a watchman $2.50 for watching the property in the daytime and another watchman $2.50 for watching the property in the nighttime. The Perseverance (D. C. 1884) 22 Fed. 462.

A steamship, condemned to be sold, remained in the custody of the marshal. By an arrangement between the proctors the sale was adjourned from October to February, the proctors for the claimant agreeing to place a watchman on board. No direction was given the marshal to release the vessel, nor was any order of court to that effect applied for. Held (1) that such an arrangement was not approved by the court; (2) that the marshal was correct in keeping his watchman aboard; (3) that he was entitled to tax in his costs the amount disbursed by him for a shipkeeper, notwithstanding the presence on the vessel of the keeper employed by claimant. The San Jacinto (D. C. 1887) 30 Fed. 266.

In a suit for possession of personal property, which is taken on process issued on the application of libelants, the same should be delivered to them; and therefore, if they procure the arrest of the property and leave it in the custody of the marshal, they cannot recover the cost and expense of such custody, either as damages or costs. The Director (D. C. 1888) 34 Fed. 57.

Where a deputy marshal, by permission of the collector of the port, entered a warehouse in which goods were stored, in the custody of the collector, and made service of process, and affixed a notice of seizure to the property, and thereafter a keeper visited the storehouse three times a day, though without entering it he had effected an attachment, and was entitled to tax as custody fees such amount as he had actually paid a keeper for that service. Casks of Cement (D. C. 1889) 40 Fed. 606.

772. —— **Commissioner's fees.**—Where in admiralty proceedings for seamen's wages there were four seamen whose cause of complaint was the same, they should be joined as complainants, under R. S. § 4547, post, § 8336, and the commissioner is entitled to charge for issuing, filing, and returning but one summons on the master, and for but one certificate that admiralty process should issue, though in fact he issued four summonses and made four certificates. Kelly v. The Topsy (D. C. 1891) 45 Fed. 486.

773. —— **Taxation in favor of auctioneer.**—An auctioneer cannot have costs or disbursements taxed in his favor by the court in invitum. The Tubal Cain (D. C. 1863) Fed. Cas. No. 14,212.

774. —— **Charges for taking depositions.**—A commissioner is entitled to charge for taking depositions though the examination is not had before him, where the witnesses are first sworn before him, and subsequently swear to the depositions before him. The F. Merwin (D. C. 1879) Fed. Cas. No. 4,893.

When an appointment to take testimony is made, and the commissioner attends, he is entitled to charge three

dollars whether the parties attend or not; and where one of the parties appears, and the failure to go on arises from the absence of the other, the defaulting party should pay the charge, and, if neither attend, the losing party should be charged therewith, when the court orders the costs to be paid to the successful party. The Wavelet (D. C. 1885) 25 Fed. 733.

The fact that the notary public who took the depositions was a clerk of the proctor of the claimant does not affect the right to tax the amount of usual compensation which was paid to him. The F. Merwin (D. C. 1879) Fed. Cas. No. 4,893.

In the absence of evidence to show the existence at the place of executing a commission of a customary rate of charges for commissioner's services or for like services, proof that the sum actually paid the commissioner is a reasonable sum for like work at the place of payment is sufficient to warrant the allowance of the item as a disbursement properly made to secure the execution of the commission. The Frisia (D. C. 1885) 27 Fed. 480.

Where, after issue joined by the pleadings, the case is referred to a commissioner, under rule 19, to take testimony, and the depositions are returned to the court, and used by the court as evidence in deciding the cause, the clerk may tax as costs to the proctor of the prevailing party $2.50 for each one. The Sallie P. Linderman (D. C. 1883) 22 Fed. 557.

The provisions of R. S. § 824, allowing the taxation of $2.50 "for each deposition taken and admitted in a cause," does not apply to testimony taken before a commissioner to distribute the proceeds from the sale of a vessel in the registry of a court of admiralty. James Dalzell's Son & Co. v. The Daniel Kaine (D. C. 1887) 31 Fed. 746.

Under R. S. § 4547, post, § 8336, authorizing the issue of admiralty process in proceedings for seamen's wages on the certificate of a commissioner in the absence of the judge, the discretion of the commissioner is absolute, and he is not required to take and send up any depositions with the certificate, and he cannot charge fees for the same, to be taxed as costs. Kelly v. The Topsy (D. C. 1891) 45 Fed. 486.

A party in admiralty can tax neither costs nor disbursements in respect of depositions taken by him which he did not offer in evidence. The Persiana (D. C. 1907) 158 Fed. 912.

775. —— **Costs of reference.**—As a general rule, a reference to a commissioner, in a suit for wages, is a regular and necessary step on the part of the libelant, incidental to the prosecution of the action, and cannot be the subject of an independent charge in a bill of costs. Where, however, the reference is solely for the benefit of the respondent, the court will modify the order of reference so as to require the extra costs incurred to be defrayed by him. Such modification must be asked for on obtaining the order of reference. Holmes v. Dodge (D. C. 1847) Fed. Cas. No. 6,637.

Where both parties except to a commissioner's report, and libelant's exceptions are overruled and respondent's allowed, and the evidence related almost wholly to the items which were disallowed, held, that the respondent should be allowed costs of the reference. The Baltic (D. C. 1869) Fed. Cas. No. 824.

776. —— **Costs where there are several suits.**—The owners of the steamship A. libeled the steamship W. for damages by collision. The W., by petition under the fifty-ninth rule, made certain tugs co-defendants with herself in this suit, and also brought a cross suit against the A. and the tugs jointly. The A. was represented by one proctor; the tugs all appeared by another proctor. On the trial the W. was declared solely in fault for the collision. Held, that the tugs, and also the A., were entitled to tax against the W. a single bill of costs in each action. The Waverly and The Anglia (D. C. 1890) 42 Fed. 188.

The owner of the M. having libeled the M. E. S. for collision, the owner of the latter filed a libel against the M. to recover damages arising out of the same collision. The second libel was not filed as a cross libel, separate stipulations and a separate answer were filed, and the two causes proceeded to hearing and decree as two separate suits. Held, that the successful party could tax a bill of costs in each suit. The Medusa (D. C. 1891) 47 Fed. 821.

777. —— **Where suits are consolidated.**—Where two separate suits in admiralty by seamen were filed and process issued, and afterwards a number of other suits were consolidated therewith, the costs of the first two suits to the date of consolidation should be taxed separately, but that a single bill of costs only could be allowed to either party after the consolidation. Simpson v. Caulkins (D. C. 1849) Fed. Cas. No. 12,880.

778. **Taxation of costs—Proof of expenses.**—The affidavit of a proctor that certain expenses have been actually incurred is not a sufficient voucher to authorize the clerk to tax such expenses as witness fees; and, if the opposing proctor object to such proof, the receipt of the witness, or the affidavit of the proctor that he has "actually paid" the fees, should be required. The Sallie P. Linderman (D. C. 1883) 22 Fed. 557.

779. —— **Remedy for irregularities.**—An assignment of error in respect to

the clerk's taxation of costs cannot be considered when there is nothing in the record to show that the matter was brought to the attention of the judge below. The Robert Graham Dun (1895) 70 Fed. 270, 17 C. C. A. 90.

An irregularity in the taxation of costs may be corrected by the court, on motion, after final decree rendered. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

780. —— **Retaxation.**—It rests within the discretion of a court of admiralty to entertain, after decree, a motion for a reargument on the question of costs. Elliott v. The Leah H. Miller (D. C. 1843) Fed. Cas. No. 4,393a.

A retaxation will be allowed where, by mistake or other casualty, the original taxation was not opposed. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

781. —— **Appeal from taxation.**—The discretionary power of the court over the award of costs cannot be exercised on an appeal from taxation, especially after the expiration of the term in which the decree is rendered. The Caithneshire (D. C. 1848) Fed. Cas. No. 2,294.

782. **Costs on appeal.**—Rule 11, providing that a ship arrested may be given to the claimant upon his giving a stipulation, and that the court may, in the absence of such stipulation, order a sale of such ship, does not authorize the court on dismissing the libel, and before the expiration of the 10 days allowed for appeal, to order that libelant shall give bond to pay such damages as may be sustained by the claimant pending the appeal, or that the appeal be dismissed on his failure to do so, even though the claimant made affidavit that he was unable to give bond for the release of the ship. The Swedish Bark Adolph (D. C. 1880) 5 Fed. 114.

783. —— **Dependent on amount recovered.**—Recovery of less than jurisdictional amount, see notes to § 1609, post.

784. —— **Costs to neither party.**—Where, on appeal from a decree holding that a tug was at fault for collision between her tow and a schooner, it was held that both vessels were at fault, costs on appeal would be granted to neither party. The Anna W. (1912) 201 Fed. 58, 119 C. C. A. 396, modifying decree (D. C. 1910) 181 Fed. 604.

Where both parties have unnecessarily incumbered the record, no costs will be allowed. The Ashland (C. C. 1884) 19 Fed. 651. And see The Wings of the Morning (C. C. 1861) Fed. Cas. No. 17,872.

785. —— **On affirmance in general.**—The action becomes a plenary suit on appeal in admiralty, and full costs may be taxed where the decree is affirmed with costs. Godfrey v. Gilmartin (C. C. 1851) Fed. Cas. No. 5,498.

On affirmance of a decree for libelant in a collision case, the decree will be entered for the amount of the loss at the time of the loss, with interest from such time, and for costs in the district court, without interest thereon. Deems v. Albany & Canal Line (C. C. 1878) Fed. Cas. No. 3,736; The Alexandria (C. C. 1879) Fed. Cas. No. 179.

A decree simply affirming a decree of the district court in admiralty "with costs" means that costs are to be paid by the losing party. Mellor v. Cox (C. C. 1891) 46 Fed. 662.

The district court ordered respondent to pay costs, and then dismissed the libel. Libelant appealed, and the decree was affirmed, with costs. Held, that libelant was to pay the costs of the appellate court and respondent those of the district court. Healy v. Cox (C. C. 1891) 46 Fed. 663.

786. —— **Apportionment on affirmance.**—Where both parties have appealed, and neither has maintained its appeal, the rule as to costs in The North Star (1882) 1 Sup. Ct. 41, 106 U. S. 17, 29, 27 L. Ed. 91, requiring each party to pay his own costs, is applicable, in preference to that in McComb v. Frink (1893) 13 Sup. Ct. 993, 149 U. S. 629, 644, 37 L. Ed. 876, equally dividing the costs. Donnell v. Amoskeag Mfg. Co. (1902) 118 Fed. 10, 55 C. C. A. 178. And see further The Eleanora (C. C. 1879) Fed. Cas. No. 4,335; The Warren (D. C. 1882) 11 Fed. 443; Id. (C. C. 1885) 25 Fed. 782; The C. P. Raymond (C. C. 1887) 36 Fed. 336; The S. V. Luckenbach (1912) 197 Fed. 893, 117 C. C. A. 219.

787. —— **On reversal.**—When an admiralty decree is reversed on appeal on new evidence, not accessible at the time of the trial below, neither party being in fault in respect thereto, each party should pay his own costs on appeal. The Oxford (1895) 66 Fed. 590, 13 C. C. A. 647, reversing decree (D. C. 1894) 66 Fed. 584.

On reversal on appeal from the district court in admiralty, the successful party is entitled to costs on the appeal, unless new evidence is introduced which might have affected the judgment in the court below. The Margaret v. The Connestoga (C. C. 1851) Fed. Cas. No. 9,070.

Where a collision libel is reversed on the ground that both vessels were in fault, appellant is entitled to costs. The Umbria (1892) 59 Fed. 475, 8 C. C. A. 181, 11 U. S. App. 691; Id. (1892) 59 Fed. 489, 8 C. C. A. 194, 11 U. S. App. 612; The Horace B. Parker (1896) 76 Fed. 238, 22 C. C. A. 418.

Counsel fees may be allowed appellant, in the discretion of the court. The Margaret v. The Connestoga (C. C. 1851) Fed. Cas. No. 9,070.

Costs allowed on reversal in the cir-

cuit court on new evidence in an admiralty case, where there was a transparent contrivance to rescue freight from attachment. Gonzales v. Minor (C. C. 1852) Fed. Cas. No. 5,530.

Claimants in admiralty, not tendering the actual amount due until after appeal, allowed only costs of appeal, on reversal. Davis v. Five Hundred and Seventy-Four Bags of Coffee (C. C. 1862) Fed. Cas. No. 3,633a.

When an admiralty case comes into the United States circuit court for the Third circuit, on an appeal from the district court, and the decree of the district court is reversed on account of a different state of the evidence as presented in the circuit court, the party succeeding in the circuit court does not have costs. Carrigan v. The Charles Pitman (C. C. 1849) Fed. Cas. No. 2,444.

An appellant, in fault for delays before the circuit court on appeal, may be charged with the costs in the circuit court of appeals, though successful in obtaining a reversal. The Ethel (1895) 66 Fed. 340, 13 C. C. A. 504.

The libelants proceeded against two vessels for damages by collision. The district court dismissed the libel, with costs as to no one, and awarded the libelants their whole damages, with costs, against the other. An appeal was taken by the latter vessel, and also by the libelants. The libelants subsequently abandoned their appeal. Upon the hearing in the circuit court all parties appeared, and litigated the cause. The decree of the district court was reversed, and both vessels pronounced in fault. Held that, although the libelants were in position of not having appealed, they were entitled to a decree against both vessels, such a decree being necessary to protect the appellant, and do full justice between all parties; but that the libelants were not entitled to costs of the circuit court. The Galileo (C. C. 1886) 29 Fed. 538.

788. —— **On partial affirmance of decree, or modification thereof.**—A party to a suit in admiralty which by an appeal secures the modification of a decree against it is entitled to recover its costs in the appellate court. The Strathleven (1914) 213 Fed. 979, 130 C. C. A. 385, denying resettlement of costs (1914) 213 Fed. 975, 130 C. C. A. 381.

The circuit court allowed to a libelant his costs in the district court, and, as the claimant had been partially successful on the appeal, it divided the costs in the circuit court. The Shady Side (C. C. 1879) Fed. Cas No. 12,692.

No costs on appeal awarded to either party where a decree of the district court was affirmed in so far as it dismissed the libel, but reversed as to the award of costs of claimant. The McDonald (C. C. 1860) Fed. Cas. No. 8,756.

Though the decree is reduced in amount, costs of appeal will be given against appellant, where the reduction is by striking out items to which no objection was made below. Ross v. Southern Cotton-Oil Co. (C. C. 1890) 41 Fed. 152.

Where the amount of a decree is reduced on appeal for an apparent error in the commissioner's report, which was not excepted to below, such reduction should not affect the costs. Western Assur. Co. v. Southwestern Transp. Co. (1895) 68 Fed. 923, 16 C. C. A. 65.

The party appealing in a collision case, and securing a division of damages, is entitled to costs of appeal. The Bedford (C. C. 1863) Fed. Cas. No. 1,216.

If there be enough in the circumstances of a libel in admiralty, for damages caused by collision to a tow, to justify the libelants in joining both the tug and the colliding vessel as respondents in the district court, and if upon appeal by one of the respondents to the circuit court the appellant is adjudged to be without fault, it is in accordance with equitable principles to so frame the decree that the costs in the circuit court shall be adjudged against the guilty vessel, and in favor of the appellant. The Dentz (C. C. 1886) 29 Fed. 525.

Where a decree for salvage services was modified on appeal by awarding compensation for towage services merely, libelant was allowed his costs in the district court, while claimant was awarded costs of appeal. The Emily B. Souder (C. C. 1878) Fed. Cas. No. 4,458.

789. —— **Items in general.**—A fee of $2.50 for reading on appeal a deposition read below is not taxable. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,730.

As rule 52 requires that the record on appeal shall contain the testimony on both sides, the clerk is entitled to a fee for such services, though Act Feb. 16, 1875, § 1 (18 Stat. 315), limits the right to review to a determination of questions of law. The Alice Tainter (C. C. 1877) Fed. Cas. No. 196.

A calendar fee of one dollar, paid to the clerk on delivering a note of issue on an appeal, is taxable. Id.

790. —— **Proctor's docket fee.**—As an appeal in admiralty suspends the original decree, and there is no final hearing until that in the appellate court, the proctor's docket fee of $20, accrues in case of appeal only in the circuit court, and should be charged but once. The Lillie (C. C. 1890) 42 Fed. 179. The $20 docket fee allowed to a proctor of attorney by Act Feb. 26, 1853 (10 Stat. 161), being recoverable but once, and then only on a final hearing, is not taxable after a decree on an appeal in admiralty on a

[illegible] on the ap- [illegible] amount of their [illegible] v. Vose (C. [illegible] No. 3,731.

[illegible] — [illegible] refusal of costs [illegible]—In a collision case, [illegible] court of appeals [illegible] appellants on their [illegible] intentional, affords no [illegible] complaining of a subse- [illegible] of the district court, for [illegible] if any, should have been [illegible] by motion in the appellate [illegible] the mandate issued. [illegible] v. The State of California [illegible] 34 Fed. 404, 4 C. C. A. 393.

In a collision case, the failure of the [illegible] court of appeals to decree costs [illegible] appellants on their appeal, even if [illegible], affords no ground for com- [illegible] of a subsequent decree of the [illegible] court, for the error, if any, should have been corrected by motion in the appellate court before the mandate issued. Id.

792. Payment and remedies for collection—Priority of claim for costs.—Where parties appear in court, not under compulsion, but voluntarily, to protect their own rights, their claims for costs are entitled to only the same priority with their other claims. The Rodney (D. C. 1831) Fed. Cas. No. 11,993.

In a suit for wages entitled to be first paid in full, under which, also, the vessel was seized and sold, the costs should also be paid in full. The Grapeshot (D. C. 1884) 22 Fed. 123.

Costs upon all necessary libels for repairs and supplies to a tug operating in New York harbor should be taxed and added, to the respective claims to be paid with them pro rata. Id.

793. —— Enforcement of claim for costs.—An appellate court, in an admiralty case, reversed a decree in favor of the libelant, and directed a decree in his favor for a smaller sum, with the costs of the district court, but condemned him to pay the costs of the appellate court. Held, that costs in the appellate court could not be set off against the unpaid costs of the district court, so as to prevent the officers of the latter from collecting the sums due them from the claimant. Aiken v. Smith (1893) 57 Fed. 423, 6 C. C. A. 414.

Costs and charges must be paid by the property saved, and apportioned among the claimants according to their respective interests. The Nathaniel Hooper (C. C. 1839) Fed. Cas. No. 10,-032.

On a motion to show cause why an attachment should not issue against the parties for the payment of costs, or for other proper relief, the remedy is to be governed by the rules of the supreme court of the United States or of this court, if any apply to it, and, if not, then "according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law." The provisions of the state statutes, or the decisions of the courts in explanation or enforcement of these laws, will not supply a rule of decision in this court, unless such regulations are adopted by rules of the United States courts. Under the rules of this court, a stipulation for costs includes a consent that execution shall issue against all the estate of the parties, in case the stipulators do not perform their engagements. An order or decree of the court must be first obtained on default of the stipulators. The right to such process is now made positive and certain by a rule of the supreme court, so far as concerns goods and chattels, and the arrest of the person in case the decree is not satisfied. Taking out a fi. fa. in the first instance, without success, for costs in admiralty, does not prevent resorting to process of ca. sa. or to an attachment. The Delaware (D. C. 1846) Fed. Cas. No. 3,762.

The remedy on attachment for costs, etc., in admiralty is to be governed by the rules which belong to courts of admiralty as contradistinguished from courts of common law. On default of stipulators for costs an order or decree must be obtained, on which execution may issue against the entire estate of the parties. Id.

Quære, whether the arrest of stipulators under a ca. sa. or attachment satisfies the decree? Also whether, after a ca. sa. executed, the claimant may sue out an attachment? Id.

Where several seamen unite in an action in personam to recover wages, a seaman recovering less than $50 can tax full costs, and enforce his decree by execution, where the decrees for the others are appealed. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

Act July 20, 1892, post, § 1626 et seq., permitting the bringing of actions in forma pauperis, does not take away from the clerk, in actions brought thereunder, the right to charge and collect the same fees as in other causes, but provides only that he shall not be entitled to demand their payment in advance or security therefor; and a libelant who brings a suit in admiralty thereunder, and recovers, but without costs, is not entitled to withdraw the money paid in satisfaction of the judgment from the registry of the court without paying the clerk's fees taxed against him. Davis v. Adams (D. C. 1901) 109 Fed. 271.

Where, after a libel in admiralty had been filed, respondent made default, and settled the case out of court, he was not entitled to have a release executed on such settlement filed in satisfaction of a judgment recovered against him by default, except on payment of costs authorized by R. S. § 983, post, § 1624. Naretti v. Scully (D. C. 1904) 133 Fed. 828.

794. —— Enforcing payment of marshal's fees.—The marshal, in preserving property arrested under process, acts as bailee, and is responsible to all parties interested for its proper care. In the absence of any statute or rule of court, he is entitled to be paid his fees at the time he delivers up the property to the person entitled to receive it. Where libelants sued as seamen, under rule 45, without giving security, and the vessel was arrested, and 19 days afterwards was released on a deposit by the claimant in the registry of the amount sued for, with interest, costs, and officer's fees, under rule 65, and on trial the libel was dismissed, it was held that the object of rule 65 was not to deprive the marshal of his security for fees, but to confirm and regulate it; that he was entitled to be paid his fees out of the deposit in the registry; and that it was laches in the claimant not to apply to the court, under rule 45, immediately upon arrest of the vessel, to require security from the libelant, or the release of the vessel. The Georgeanna (D. C. 1887) 31 Fed. 405.

795. Rights of proctor on compromise or settlement of litigation.—A settlement of seaman's wages without the concurrence or knowledge of his proctor will not bar the latter's claim for costs. The Victory (D. C. 1834) Fed. Cas. No. 16,937. And see Collins v. Nickerson (D. C. 1846) Fed. Cas. No. 3,016; Trask v. The Dido (D. C. 1827) Fed. Cas. No. 14,142; The Ontonagon (D. C. 1884) 19 Fed. 800.

The proctor cannot proceed with a libel by a seaman against an officer of a vessel for a tort, to recover costs, where there has been a settlement made in good faith, though without his consent. Purcell v. Lincoln (D. C. 1854) Fed. Cas. No. 11,471.

Where a proctor, in conducting a suit in rem for wages, to recover his costs, after a settlement without his knowledge with the libelant, makes unnecessary litigation, the cost thereof may be set off against his claim. The Victory (D. C. 1834) Fed. Cas. No. 16,937.

A settlement after suit brought with a seaman, whose name is continued afterwards as a party to the record, does not necessarily bar his proctor of of his claim to costs. A proctor who in such case intends to continue the suit to recover costs, must give distinct notice to claimant or respondent. The Sarah Jane (D. C. 1833) Fed. Cas. No. 12,348.

A notice by the proctor to respondent that, in case of a compromise, he will be held liable for the costs, is ineffectual. Peterson v. Watson (D. C. 1835) Fed. Cas. No. 11,037.

In actions for personal torts, courts of admiralty afford to seamen no remedies and no privileges to which they would not be entitled in courts of common law, so that on settlement of an action in personam for assault and battery without the knowledge of the libelant's proctor, the libelant, at the instance of his proctor, cannot compel respondent to pay the taxed costs, notwithstanding the settlement. The mere institution of a suit for damages by a seaman against the master for assault and battery does not carry with it a lien upon or equitable claim to the costs created in bringing the action, nor can the libelant's proctor hold defendant responsible for his costs in the suit where the cause of action was settled by the libelant and respondent before the hearing. Peterson v. Watson (D. C. 1835) Fed. Cas. No. 11,037.

A defendant who settles a seaman's suit brought in forma pauperis out of court, without the knowledge of libelant's proctor, will be taxed with costs. Erratt v. Humphreys (D. C. 1900) 102 Fed. 925, 926.

796. —— Premature payment by garnishee.—A libel for seamen's wages was pending in admiralty. After service of the libel on the master, the wages were seized by garnishment from a state court. It was held that the master by instantly paying the money under the garnishment at the request of the seamen, without any notice to their proctor in admiralty to enable him to secure his costs and fees, had rendered himself liable therefor. McDonald v. The Cabot (D. C. 1844) Fed. Cas. No. 8,759.

(O) Proceedings to limit liability of ship owner

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797. Summary of procedure in general.—The proper course of proceeding for obtaining the benefit of Act March 3, 1851 (sections 8020–8027, this compilation), limiting the liability of shipowners in certain cases, would seem to be this: When a libel for damages is filed, either against the ship in rem or the owners in personam, the latter (whether with or without an answer to the merits) should file a proper petition for an apportionment of the damages according to the statute, and should pay into court (if the vessel or its proceeds is not already there), or give due stipulation for, such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the shipowner will be entitled to a monition against all persons to appear and intervene, and to an order restraining the prosecution of other suits. If an action should be brought in a state court, the shipowner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court or procure an order from the district court to restrain the further prosecution of the suit. The court having jurisdiction of the case under and by virtue of the act of congress would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. Norwich & N. Y. Transp. Co. v. Wright (1871) 80 U. S. (13 Wall.) 104, 20 L. Ed. 585.

The cases collected under this subdivision do not include those decisions which relate directly to the provisions of Act March 3, 1851, c. 43, but are intended to cover only those matters of procedure arising in proceedings to limit liability, which are not governed by express provisions in said Act March 3, 1851, and which are covered by provisions in the admiralty rules, particularly rules 54–58. See notes to sections 8020–8027, post.

798. Nature of proceeding in general.—A proceeding to obtain the benefit of Act March 3, 1851 (sections 8020–8027, this compilation), limiting the liability of shipowners, is not an action in rem, but is a proceeding sui generis, which partakes rather of the character of a suit in personam. The City of Norwich (D. C. 1873) Fed. Cas. No. 2,762. It is an equitable action, and not one against the vessel and her freight. In re Morrison (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

799. —— Separate proceeding.—The owner of an American steamer may, while denying all liability for any damage by reason of a collision, and consequent loss of cargo, make the alternative prayer that, if the court find the petitioner or steamer liable, the petitioner may then have the benefit of R. S. §§ 4283–4285, and the acts amendatory thereof (post, §§ 8021–8023), limiting the liability of shipowners. In re Piper Aden Goodall Co. (D. C. 1898) 86 Fed. 670. CONTRA, see Thomassen v. Whitwell (D. C. 1878) Fed. Cas. No. 13,930.

800. What law governs in proceedings.—Under the general law that the territorial sovereignty of a state extends to a vessel of such state when it is upon the high seas, the law of France, which authorizes a recovery for loss of life against a vessel in fault therefor, governs in proceedings by the owner of a French vessel in the courts of the United States for limitation of liability for claims arising out of the sinking of such vessel in collision on a voyage across the Atlantic, and claims for loss of life resulting from the collision may be proved against the fund paid in if the vessel is held in fault. La Bourgogne (1908) 139 Fed. 433, 71 C. C. A. 489, reversing decree In re La Bourgogne (D. C. 1902) 117 Fed. 261, and decree affirmed Deslions v. La Compagnie Générale Transatlantique (1908) 28 Sup. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

801. Power to prescribe forms.—The supreme court has power to prescribe the form of proceedings to limit liability of shipowners. Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1883) 3 Sup. Ct. 379, 388, 109 U. S. 578, 27 L. Ed. 1038.

802. Conditions precedent to bringing of proceedings.—Damages recovered by the owner for the loss of his vessel by collision stand in the place of the vessel herself, and he is not entitled to the benefit of the statutes for limitation of liability, unless he surrenders the sum recovered for the benefit of the ship's creditors. O'Brien v. Miller (1897) 18 Sup. Ct. 140, 168 U. S. 287, 42 L. Ed. 469, affirming decree Miller v. O'Brien (D. C. 1894) 59 Fed. 621, and reversing decree (1895) 67 Fed. 605, 14 C. C. A. 566. Such statute is not to be applied to a case of collision where both vessels are in fault, until the balance of dam-

age has been struck; and then the party against whom the decree passes may have the benefit of the statute (if he is otherwise entitled to it) in respect of the balance which he is decreed to pay. The North Star and The Ella Warley (1882) 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

Rules 54–57, governing proceedings to limit liability, do not require, as a condition to proceedings, that there should have been a prior suit by one or more of the sufferers by the disaster. The Alpena (D. C. 1881) 8 Fed. 280, 10 Biss. 436.

803. Jurisdiction of proceedings in general.—A district court has jurisdiction, under rule 57, of proceedings by libel and petition for limitation of liability by the owner of a steamship which has collided with and sunk a steam yacht, where such proceedings are instituted while the steamship is in the district, and subject to control of the court for the purposes of the case, as provided in rules 54, 55, and 56, and before the steamship is libeled for damages by the collision or suit is commenced against the owner. Morrison v. District Court for Southern District of New York (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

Jurisdiction of circuit courts under rule 58, see The Mary Lord (C. C. 1887) 31 Fed. 416. And see Elwell v. Geibei (C. C. 1887) 33 Fed. 71.

Rule 57 construed with respect to the court having jurisdiction of proceedings for limitation of liability, where suits have been commenced against the owner, but the vessel has not been libeled. In re Louisville & Cincinnati Packet Co. (D. C. 1915) 223 Fed. 185.

See also notes under § 991(3), and under Const. art. 3, § 2, cl. 1, as to "Cases of Admiralty and Maritime Jurisdiction."

804. Loss or divestiture of jurisdiction.—The filing of the libel and petition by the owner of the steamship, with the offer to give a stipulation, confers jurisdiction, which no subsequent irregularity of procedure can take away. Morrison v. District Court for Southern District of New York (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

Jurisdiction of a proceeding to limit liability is not lost by allowing a steamship, after giving a stipulation for her value under rule 54, to go into another district in the ordinary course of her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight. Id. Nor is it lost by a recovery by a claimant of less than the stipulated value of the vessel, where his original claim was greater than its value. Briggs v. Day (D. C. 1884) 21 Fed. 727.

Where the owners of a steamboat which had been sued in the state courts in actions given by the statute of Maryland for loss of life arising out of a collision in the harbor of Baltimore applied for a limitation of liability, and after the steamboat had been appraised, and stipulation given in the district court for the payment into court of the amount of the appraisement when ordered, the amounts sued for in the state courts were reduced so that the aggregate of the amounts claimed in those suits was below the amount of the appraisement and stipulation, the jurisdiction of the district court was not lost, even conceding that the claims so reduced were all that the owners of the steamboat could be made liable for. The Tolchester (D. C. 1890) 42 Fed. 180.

Where a District Court has acquired jurisdiction of a proceeding for limitation of liability for a claim for damages on which the owner has been sued in another district, the claimant cannot defeat such jurisdiction by appearing specially and offering or attempting to reduce the amount of his claim below the appraised value of the vessel and her pending freight. The John K. Gilkinson (D. C. 1907) 150 Fed. 454. And see The John K. Gilkinson (D. C. 1907) 156 Fed. 868. See, also, The Tolchester (D. C. 1890) 42 Fed. 180.

Although the Supreme Court of a state has decided that the statute giving the right to a limited liability of shipowners can be enforced in the courts of the state, this does not deprive the courts of admiralty of this jurisdiction, and the right may be asserted by application to the United States court after a trial and defense on the merits and application for limitation in the state court; but relief will be granted only on condition of the applicant paying all costs and expenses of both courts. The S. A. McCaulley (D. C. 1899) 99 Fed. 302.

805. Number and amount of claims against vessel.—The court has jurisdiction to decree a limitation of liability, though there is but a single claim. In re Starin (D. C. 1903) 124 Fed. 101; The Hoffmans (D. C. 1909) 171 Fed. 455.

A single claim against a shipowner founded on a personal injury to a passenger makes applicable the limitation of liability statute, notwithstanding the plurality of claims apparently contemplated by the terms of sections 4284, 4285, R. S., sections 8022, 8023, post, requiring pro rata distribution of the value of the vessel and freight, and making the surrender of the vessel and freight a sufficient compliance with the statute, and declaring that on such surrender all proceedings against the owner shall cease. White v. Island Transp. Co. (1914) 34 Sup. Ct. 589, 233 U. S. 346, 58 L. Ed. 993. CONTRA, see, Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co. (1914) 218 Fed. 161, 134 C. C. A. 575 (affirm-

ing decree The Dauntless [D. C. 1914] 212 Fed. 455); The Eureka No. 32 (D. C. 1901) 108 Fed. 672; Delaware River Ferry Co. v. Amos (D. C. 1910) 179 Fed. 756; The Dauntless (D. C. 1914) 212 Fed. 455. Nor is the right to limit liability defeated by the fact that the only claims on which suit has been brought do not amount to the admitted value of the vessel, where there is a probability that there may be others. The Defender (D. C. 1912) 201 Fed. 189.

806. Venue of proceedings.—The jurisdiction of proceedings to obtain the benefit of the act limiting liability belongs to the district court of the district in which the vessel was stranded, where the liability arises from such stranding, where the property which such owner seeks to abandon is within such district, and no suit has been instituted in any other district. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334. The proceedings may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. In re Leonard (D. C. 1882) 14 Fed. 53.

Where the vessel has not been libeled, a proceeding for limitation of liability may be brought in the District Court either of the district in which the owner has been sued or in that of the district in which the vessel may be, and an allegation in the petition that the vessel is within the district gives the court jurisdiction. The John K. Gilkinson (D. C. 1907) 150 Fed. 454.

A tug, which, in the pursuit of her business, was frequently within the Southern district of New York, and was there in a regular way at the time of the filing of a petition for limitation of liability by her owner, was within the district for the purpose of giving the court jurisdiction, under admiralty rule 57, although the domicile of the owner was elsewhere. The John K. Gilkinson (D. C. 1907) 156 Fed. 868.

A proceeding by a shipowner for limitation of liability may be brought in the district court for any district in which said owner may be sued in that behalf, on payment into court of, or stipulation to pay, the appraised value of the vessel, or upon the transfer of his interest to a trustee; and the presence of the vessel within the district is not essential to the court's jurisdiction. Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100.

An owner who fails to institute proceedings until after a suit has been brought by a loser must commence them in the same district court as that in which such suit was brought. The Alpena (D. C. 1881) 8 Fed. 280, 10 Biss. 436.

A libel having been filed for damages against a tug, in the district court, upon which an appeal was taken by the owners to the circuit, and thence to the supreme court, other suits arising out of the same disaster having been brought against the owners in the state courts, a petition to limit liability was filed by the owners in the district court during the pendency of the appeal in the libel suit. Held, that the petition should have been filed in the district court in which the original libel was filed. The Luckenback (D. C. 1886) 26 Fed. 870.

Rule 57, providing for proceedings for limitation of liability, construed with respect to the district in which such proceedings may be brought. The Enterprise (D. C. 1912) 196 Fed. 404.

807. Persons entitled to institute proceedings.—The owner of a vessel may, before an action is instituted against a ship in rem or against the owner in personam, maintain a proceeding to obtain the benefit of the statute, although he alleges that he does not admit any liability. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334.

Any damage creditor may institute proceedings to arrest the offending vessel, and to have the amount of all damages, as well as the value of the vessel, judicially ascertained, and the proceeds of the vessel and freight distributed pro rata among all claimants. The H. F. Dimock (D. C. 1892) 52 Fed. 598.

808. —— Waiver of or loss of right to institute proceedings.—A vessel owner does not waive his right to limitation of liability against claims for collision damages by failure to assert such right in the collision suit, nor by an exception to the libel therein. Monongahela River Consol. Coal & Coke Co. v. Hurst (1912) 200 Fed. 711, 119 C. C. A. 127.

809. —— Contesting liability in original suit.—A shipowner, who, on the trial of the issue as to the cause of collision, contests all liability whatever, is not thereby precluded from claiming the benefit of the limitation of liability. New York & W. S. S. Co. v. Mount (1880) 103 U. S. 239, 26 L. Ed. 351, reversing In re New York & W. S. S. Co. (D. C. 1877) Fed. Cas. No. 10,200. CONTRA, vessel owners, by allowing a final decree for damages for collision in the federal district court, waive their right to institute proceedings to limit their liability. Dyer v. National Steam Nav. Co. (C. C. 1878) Fed. Cas. No. 4,225. After the collision, the vessel of the defendants, while pursuing her voyage, was stranded and was afterwards sold as a wreck at public auction by direction of her owners, and was delivered to other parties after the filing of the libel, but before the answer was filed. Held, that the defendant must, by the general maritime law, be held to have intentionally waived his right to claim exemption from personal liability beyond

the ship and her freight, and cannot obtain the limitation of liability which he seeks. Thomassen v. Whitwell (D. C. 1878) Fed. Cas. No. 13,929, affirmed Thommasen v. Whitwill (C. C. 1882) 12 Fed. 891, 21 Blatchf. 45.

810. —— Proceedings in state court.—Prior litigation in a state court of the question of his liability growing out of a collision will not deprive a vessel owner of the right to institute proceedings in an admiralty court for a limitation of his liability, however far the prior litigation may have proceeded. In re Meyer (D. C. 1896) 74 Fed. 881; The Ocean Spray (D. C. 1902) 117 Fed. 971; The City of Boston (D. C. 1906) 159 Fed. 257. And see Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100; In re Starin (D. C. 1903) 124 Fed. 101. But where a shipowner permitted an action for damages for an alleged tort to be prosecuted to judgment against him in a state court, which has been reversed on appeal, and the cause remanded for a new trial, his laches in invoking the admiralty jurisdiction warrants the court in requiring him, as a condition to the granting of the relief sought, to pay the costs incurred by the plaintiff in the state court. Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100; The Ocean Spray (D. C. 1902) 117 Fed. 971.

A shipowner is debarred from maintaining a proceeding to limit his liability by the fact that he gave a supersedeas bond, as required by statute, to enable him to safely present his contention to the appellate court. Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100.

811. —— Giving of bond or stipulation.—The right of a vessel owner to a limitation of liability, as against a decree for collision damages recovered against him in a suit in personam, is not waived by the giving of a supersedeas bond on appeal from such decree. Monongahela River Consol. Coal & Coke Co. v. Hurst (1912) 200 Fed. 711, 119 C. C. A. 127.

Proceedings by the owners of a vessel to limit liability in respect to a collision may be instituted, even after the giving of a stipulation in an action in rem for the full value of the vessel, for the benefit of all demands arising from the collision. The City of Norwich (D. C. 1873) Fed. Cas. No. 2,762; In re New York & W. S. Co. (D. C. 1877) Fed. Cas. No. 10,200; Eldridge v. The Rose Culkin (D. C. 1892) 52 Fed. 328; nor is the giving of such a stipulation a bar to the surrender of the vessel herself in that proceeding; and though the vessel may have made several short voyages after the giving of such stipulation, and before the surrender, she may still be surrendered in exoneration of liability, provided her value has not in the meantime become impaired, and the circumstances show that no waiver of the right of surrender was intended. Eldridge v. The Rose Culkin (D. C. 1892) 52 Fed. 328.

812. Time for institution of proceedings.—The owner of a vessel may, before he or it is sued, institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability. Ex parte Slayton (1881) 105 U. S. 451, 26 L. Ed. 1066.

Under rule 54 of the United States supreme court authorizing a petition or libel in a proceeding to limit the liability of a shipowner for loss or damage to persons or goods, to be filed after a suit for damages has been commenced, the petition may be filed before as well as after the commencement of the suit for damages. Black v. Southern Pac. R. Co. (C. C. 1889) 39 Fed. 565.

Although the owner of a vessel allows a court of common law to retain jurisdiction of a suit against him for a maritme tort for several years, during which time he takes all the chances of success before that tribunal, he is still in time, and has the right, by petition to a court of admiralty, to limit his liability, and remove the case to that court; but the court, in granting such petition, can require him to pay all the costs that had accrued in the common-law proceeding. The S. A. McCaulley (D. C. 1899) 99 Fed. 302.

813. Parties.—The right of a limitation of liability is an absolute one, and is not dependent upon the joinder of all the part owners in the application for it; it may be availed of by any one or more of them. The S. A. McCaulley (D. C. 1899) 99 Fed. 302.

On appointment of a commissioner to take proofs on a damage claim filed in a proceeding for limitation of liability by the owner of one of two vessels in collision, after an authoritative determination by the Circuit Court of Appeals that both vessels were in fault, the owner of the other vessel, if not a party, should be brought in by notice, being liable to contribution if the claim is established and enforced. The City of Boston (D. C. 1909) 182 Fed. 171.

814. Consolidation of proceedings.—A motion denied to consolidate proceedings for limitation of liability commenced independently by owners of each of two vessels in collision. The City of Boston (D. C. 1909) 182 Fed. 171.

815. Process to bring vessel into court.—It is not material in limited liability proceedings, where the vessel has been brought into court, and her owner has stipulated to pay her appraised value, whether or not she was brought in by the appropriate process. Ore-

gon R. R. & Nav. Co. v. Balfour (1898) 90 Fed. 295, 33 C. C. A. 57.

Where shipowners have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, under R. S. §§ 4283, 4284, post, §§ 8020, 8021, and having thereby secured the stay of proceedings by libelants surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper, and only equitable, course, where, by reason of the proceedings, suits by libelants have been delayed for a number of years, during which the shipowners have become insolvent. Id.

816. Notice of proceedings.—In order to sustain the proceeding for limiting liability, it is not necessary that the owner and captain of the steam yacht, who were damaged by the collision, should be personally served with notice within the district, or that the steamship should be taken and held by the court until the owner or captain of the steam yacht appears in the cause. Morrison v. District Court for Southern District of New York (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

817. Libel, petition, or application.—A petition for limitation of liability held sufficient to give the court jurisdiction as against a special plea. In re Eastern Dredging Co. (D. C. 1905) 138 Fed. 942.

818. —— Averments as to right to bring proceeding.—Where an application for the limitation of liability of a shipowner to the value of the vessel and freight does not present facts entitling the application to be considered under said act, it may nevertheless be treated as an application for a release of the vessel on bail, addressed to the ordinary discretion of the court. Place v. The City of Norwich (D. C. 1866) Fed. Cas. No. 11,202.

A petition for limitation of liability must allege the facts necessary to entitle the petitioner to the relief sought. In re Davidson S. S. Co. (D. C. 1904) 133 Fed. 411.

Where a petition to limit the liability of a vessel and cargo for collision, failed to state the facts and circumstances by reason of which exemption from liability was claimed, as required by rule 56, the petition was insufficient to entitle petitioner to contest the question of fault on the part of its vessel. The Sacramento (D. C. 1904) 131 Fed. 373.

The failure of a petition for limitation of liability on account of collision to set out the grounds on which exemption from liability is claimed, as required by rule 56, when it is intended to contest such liability, cannot be taken advantage of by the adverse parties, where by stipulation such proceedings have been consolidated with cross-suits between the two vessels, in which the question of liability has been put in issue by the pleadings. The Trader (D. C. 1904) 129 Fed. 462.

819. —— Averments as to claims against vessel.—A petition in admiralty to limit liability and to restrain the prosecution of an action in a state court must show the existence, or probability of existence, of more than one damage claimant, and the need of an apportionment, in order to make such a special proceeding either necessary or appropriate, or else it must show such a special case as does not admit of the full statutory defense in the common-law suit in the state court. The Rosa (D. C. 1892) 53 Fed. 132. But it is not necessary to aver in the petition, or to prove, that the claims against the vessel are in excess of her value, as a condition of the jurisdiction of this court to entertain the proceeding. The Garden City (D. C. 1886) 26 Fed. 766, 770.

820. —— Amendment.—The libel in a proceeding to obtain the benefit of the limitation of liability will be amended so as to show the residence of the libelant. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334.

821. Claims, claimants, and answers —Necessity for filing.—Under rule 56 a person who has not presented a claim for damages in a proceeding for limitation of liability has no standing as a claimant to answer the petition. The Pere Marquette 18 (D. C. 1913) 203 Fed. 127; The Klotawah (D. C. 1914) 210 Fed. 677.

822. —— Time for filing.—Damage claimants held not chargeable with laches in proving their claims in a proceeding for limitation of liability. Union Steamboat Co. v. Chaffin's Adm'rs (1913) 204 Fed. 412, 122 C. C. A. 598.

In a proceeding in admiralty for a limitation of liability, the court has discretionary power to permit the filing of a claim for damages after the expiration of the time fixed in the monition, in a proper case. The Argus (D. C. 1900) 100 Fed. 143; The City of Boston (D. C. 1906) 159 Fed. 257; In re Eastern Dredging Co. (D. C. 1907) 159 Fed. 549. Especially where the fund still remains in court undistributed, and a proper showing is made, upon such terms as may appear equitable. The Argus (D. C. 1900) 100 Fed. 143. Such permission will be granted where the claim was forwarded by mail to the clerk on the last day of such time and received before any action was or could have been taken respecting such claims. The City of Boston (D. C. 1906) 159

Fed. 257. But such discretion cannot properly be exercised in favor of a claimant who elected to bring suit, against the owners of the other vessel in collision, by permitting the filing of a claim more than two years after such return day, and after all other claims have been heard and determined. In re Eastern Dredging Co. (D. C. 1907) 159 Fed. 549.

823. —— Sufficiency.—Where the owners of a vessel destroyed by fire filed a petition limiting their liability, and obtained an injunction restraining the prosecution of suits which had been commenced against them by owners of cargo on board, and plaintiffs in one of those suits, without having presented their claims to the commissioner, as required by rule 57, filed a paper called "exceptions and answer," seeking by it to contest the right of the owners of the vessel to exemption or limitation of liability, such paper was improperly filed, but the exception might stand as an exception to the jurisdiction of the court to enjoin the parties. In re Providence & N. Y. S. S. Co. (D. C. 1872) Fed. Cas. No. 11,452.

The proof required in support of the petition that any liability incurred was without the privity or knowledge of the petitioner does not reach the subsequent issue of liability of the vessel for individual claims sought to be proved under rule 55, the right to contest which is reserved to the petitioner by rule 56, which issue should be presented by appropriate pleadings conforming to the general practice in admiralty, the claimant being required to allege and prove a cause of action as in an original suit. In re Davidson S. S. Co. (D. C. 1904) 133 Fed. 411.

A damage claimant, contesting the right to limit liability, must take issue by answer, which answer must be full and explicit and distinct to each separate article and separate allegation in the petition, as required by admiralty rule 27. Id. But in a proceeding for limitation of liability for claims for cargo lost, cargo owners are not required to allege any specific negligence of petitioner in their answer. The John H. Starin (1911) 191 Fed. 800, 112 C. C. A. 286. But where the petition alleges generally freedom from fault on the part of the vessel, its owner, officers, and navigators, if fault is claimed by a claimant, he must allege and offer evidence to prove the same; and it is not sufficient to merely deny such allegation of the petition, but the answer should specify in what the fault consisted. In re Starin (D. C. 1909) 173 Fed. 721. And where claimants pleaded as a defense the negligence of petitioner, because of the unseaworthiness of the vessel, but failed to comply with an order requiring them to specify the particulars, they will not be permitted to give testimony as to such defense under a general denial, to controvert petitioner's prima facie case. The John H. Starin (D. C. 1909) 175 Fed. 527.

A claim for damages by reason of the death of a person in collision, filed in proceedings in admiralty for limitation of liability by the administratrix of the deceased, but based on a state statute which gives the right of recovery to the widow, is sufficient to authorize a recovery where it discloses that the claimant is also the widow of the deceased, and an amendment making the claim in that capacity may properly be allowed. The Saginaw (D. C. 1905) 139 Fed. 906. And see The Hamilton (1906) 146 Fed. 724, 77 C. C. A. 150, decree affirmed Old Dominion S. S. Co. v. Gilmore (1907) 28 Sup. Ct. 133, 207 U. S. 398, 52 L. Ed. 264.

A denial of the allegation of the owner of the vessel that whatever damage may have resulted from any act or negligence of those in charge of his vessel was without his privity or knowledge is not necessary; but, if a damage claimant denies it in his answer with the intention of raising an issue of fact and offering evidence thereon, he should specify the acts relied on to establish petitioner's privity or knowledge. The Murrell (D. C. 1910) 188 Fed. 727.

The requisites of an answer by a contesting claimant in a proceeding for limitation of liability considered. The Pere Marquette 18 (D. C. 1913) 203 Fed. 127.

824. Issues, proof, and variance.—A federal District Court has jurisdiction of proceedings to limit shipowner's liability for a personal injury to a passenger, instituted by a petition alleging that the injury was occasioned without the owner's privity, though the passenger affirms in her answer that such injury was caused by the owner's negligence, where she expressly waived proof of the allegations of the petition, thereby consenting that they be taken as true. White v. Island Transp. Co. (1914) 34 S. Ct. 589, 233 U. S. 346, 58 L. Ed. 993.

A failure to comply with the steamboat inspection law may be invoked to prove that a shipowner is not entitled to a limitation of liability, though it is not set up in the pleadings of the parties to the proceeding for limitation. The Annie Faxon (1896) 75 Fed. 312, 21 C. C. A. 366, 44 U. S. App. 591.

Claimants, who pleaded as a defense to a petition for limitation of liability the negligence of petitioner, because of the unseaworthiness of the vessel, but failed to comply with an order requiring them to specify the particulars, will not be permitted to give testimony as to such defense under a general denial, to controvert petitioner's prima facie case. The John H. Starin (D. C. 1909) 175 Fed. 527.

825. Stipulations for value and appraisal of interest or value.—R. S. §§

the clerk's taxation of costs cannot be considered when there is nothing in the record to show that the matter was brought to the attention of the judge below. The Robert Graham Dun (1895) 70 Fed. 270, 17 C. C. A. 90.

An irregularity in the taxation of costs may be corrected by the court, on motion, after final decree rendered. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

780. —— **Retaxation.**—It rests within the discretion of a court of admiralty to entertain, after decree, a motion for a reargument on the question of costs. Elliott v. The Leah H. Miller (D. C. 1843) Fed. Cas. No. 4,393a.

A retaxation will be allowed where, by mistake or other casualty, the original taxation was not opposed. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

781. —— **Appeal from taxation.**—The discretionary power of the court over the award of costs cannot be exercised on an appeal from taxation, especially after the expiration of the term in which the decree is rendered. The Caithneshire (D. C. 1848) Fed. Cas. No. 2,294.

782. **Costs on appeal.**—Rule 11, providing that a ship arrested may be given to the claimant upon his giving a stipulation, and that the court may, in the absence of such stipulation, order a sale of such ship, does not authorize the court on dismissing the libel, and before the expiration of the 10 days allowed for appeal, to order that libelant shall give bond to pay such damages as may be sustained by the claimant pending the appeal, or that the appeal be dismissed on his failure to do so, even though the claimant made affidavit that he was unable to give bond for the release of the ship. The Swedish Bark Adolph (D. C. 1880) 5 Fed. 114.

783. —— **Dependent on amount recovered.**—Recovery of less than jurisdictional amount, see notes to § 1609, post.

784. —— **Costs to neither party.**—Where, on appeal from a decree holding that a tug was at fault for collision between her tow and a schooner, it was held that both vessels were at fault, costs on appeal would be granted to neither party. The Anna W. (1912) 201 Fed. 58, 119 C. C. A. 396, modifying decree (D. C. 1910) 181 Fed. 604.

Where both parties have unnecessarily incumbered the record, no costs will be allowed. The Ashland (C. C. 1884) 19 Fed. 651. And see The Wings of the Morning (C. C. 1861) Fed. Cas. No. 17,872.

785. —— **On affirmance in general.**—The action becomes a plenary suit on appeal in admiralty, and full costs may be taxed where the decree is affirmed with costs. Godfrey v. Gilmartin (C. C. 1851) Fed. Cas. No. 5,498.

On affirmance of a decree for libelant in a collision case, the decree will be entered for the amount of the loss at the time of the loss, with interest from such time, and for costs in the district court, without interest thereon. Deems v. Albany & Canal Line (C. C. 1878) Fed. Cas. No. 3,736; The Alexandria (C. C. 1879) Fed. Cas. No. 179.

A decree simply affirming a decree of the district court in admiralty "with costs" means that costs are to be paid by the losing party. Mellor v. Cox (C. C. 1891) 46 Fed. 662.

The district court ordered respondent to pay costs, and then dismissed the libel. Libelant appealed, and the decree was affirmed, with costs. Held, that libelant was to pay the costs of the appellate court and respondent those of the district court. Healy v. Cox (C. C. 1891) 46 Fed. 663.

786. —— **Apportionment on affirmance.**—Where both parties have appealed, and neither has maintained its appeal, the rule as to costs in The North Star (1882) 1 Sup. Ct. 41, 106 U. S. 17, 29, 27 L. Ed. 91, requiring each party to pay his own costs, is applicable, in preference to that in McComb v. Frink (1893) 13 Sup. Ct. 993, 149 U. S. 629, 644, 37 L. Ed. 876, equally dividing the costs. Donnell v. Amoskeag Mfg. Co. (1902) 118 Fed. 10, 55 C. C. A. 178. And see further The Eleanora (C. C. 1879) Fed. Cas. No. 4,335; The Warren (D. C. 1882) 11 Fed. 443; Id. (C. C. 1885) 25 Fed. 782; The C. P. Raymond (C. C. 1887) 36 Fed. 336; The S. V. Luckenbach (1912) 197 Fed. 893, 117 C. C. A. 219.

787. —— **On reversal.**—When an admiralty decree is reversed on appeal on new evidence, not accessible at the time of the trial below, neither party being in fault in respect thereto, each party should pay his own costs on appeal. The Oxford (1895) 66 Fed. 590, 13 C. C. A. 647, reversing decree (D. C. 1894) 66 Fed. 584.

On reversal on appeal from the district court in admiralty, the successful party is entitled to costs on the appeal, unless new evidence is introduced which might have affected the judgment in the court below. The Margaret v. The Connestoga (C. C. 1851) Fed. Cas. No. 9,070.

Where a collision libel is reversed on the ground that both vessels were in fault, appellant is entitled to costs. The Umbria (1892) 59 Fed. 475, 8 C. C. A. 181, 11 U. S. App. 691; Id. (1892) 59 Fed. 489, 8 C. C. A. 194, 11 U. S. App. 612; The Horace B. Parker (1896) 76 Fed. 238, 22 C. C. A. 418.

Counsel fees may be allowed appellant, in the discretion of the court. The Margaret v. The Connestoga (C. C. 1851) Fed. Cas. No. 9,070.

Costs allowed on reversal in the cir-

cuit court on new evidence in an admiralty case, where there was a transparent contrivance to rescue freight from attachment. Gonzales v. Minor (C. C. 1852) Fed. Cas. No. 5,530.

Claimants in admiralty, not tendering the actual amount due until after appeal, allowed only costs of appeal, on reversal. Davis v. Five Hundred and Seventy-Four Bags of Coffee (C. C. 1862) Fed. Cas. No. 3,633a.

When an admiralty case comes into the United States circuit court for the Third circuit, on an appeal from the district court, and the decree of the district court is reversed on account of a different state of the evidence as presented in the circuit court, the party succeeding in the circuit court does not have costs. Carrigan v. The Charles Pitman (C. C. 1849) Fed. Cas. No. 2,444.

An appellant, in fault for delays before the circuit court on appeal, may be charged with the costs in the circuit court of appeals, though successful in obtaining a reversal. The Ethel (1895) 66 Fed. 340, 13 C. C. A. 504.

The libelants proceeded against two vessels for damages by collision. The district court dismissed the libel, with costs as to no one, and awarded the libelants their whole damages, with costs, against the other. An appeal was taken by the latter vessel, and also by the libelants. The libelants subsequently abandoned their appeal. Upon the hearing in the circuit court all parties appeared, and litigated the cause. The decree of the district court was reversed, and both vessels pronounced in fault. Held that, although the libelants were in position of not having appealed, they were entitled to a decree against both vessels, such a decree being necessary to protect the appellant, and do full justice between all parties; but that the libelants were not entitled to costs of the circuit court. The Galileo (C. C. 1886) 29 Fed. 538.

788. —— On partial affirmance of decree, or modification thereof.—A party to a suit in admiralty which by an appeal secures the modification of a decree against it is entitled to recover its costs in the appellate court. The Strathleven (1914) 213 Fed. 979, 130 C. C. A. 385, denying resettlement of costs (1914) 213 Fed. 975, 130 C. C. A. 381.

The circuit court allowed to a libelant his costs in the district court, and, as the claimant had been partially successful on the appeal, it divided the costs in the circuit court. The Shady Side (C. C. 1879) Fed. Cas No. 12,692.

No costs on appeal awarded to either party where a decree of the district court was affirmed in so far as it dismissed the libel, but reversed as to the award of costs of claimant. The McDonald (C. C. 1860) Fed. Cas. No. 8,756.

Though the decree is reduced in amount, costs of appeal will be given against appellant, where the reduction is by striking out items to which no objection was made below. Ross v. Southern Cotton-Oil Co. (C. C. 1890) 41 Fed. 152.

Where the amount of a decree is reduced on appeal for an apparent error in the commissioner's report, which was not excepted to below, such reduction should not affect the costs. Western Assur. Co. v. Southwestern Transp. Co. (1895) 68 Fed. 923, 16 C. C. A. 65.

The party appealing in a collision case, and securing a division of damages, is entitled to costs of appeal. The Bedford (C. C. 1863) Fed. Cas. No. 1,216.

If there be enough in the circumstances of a libel in admiralty, for damages caused by collision to a tow, to justify the libelants in joining both the tug and the colliding vessel as respondents in the district court, and if upon appeal by one of the respondents to the circuit court the appellant is adjudged to be without fault, it is in accordance with equitable principles to so frame the decree that the costs in the circuit court shall be adjudged against the guilty vessel, and in favor of the appellant. The Dentz (C. C. 1886) 29 Fed. 525.

Where a decree for salvage services was modified on appeal by awarding compensation for towage services merely, libelant was allowed his costs in the district court, while claimant was awarded costs of appeal. The Emily B. Souder (C. C. 1878) Fed. Cas. No. 4,458.

789. —— Items in general.—A fee of $2.50 for reading on appeal a deposition read below is not taxable. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,730.

As rule 52 requires that the record on appeal shall contain the testimony on both sides, the clerk is entitled to a fee for such services, though Act Feb. 16, 1875, § 1 (18 Stat. 315), limits the right to review to a determination of questions of law. The Alice Tainter (C. C. 1877) Fed. Cas. No. 196.

A calendar fee of one dollar, paid to the clerk on delivering a note of issue on an appeal, is taxable. Id.

790. —— Proctor's docket fee.—As an appeal in admiralty suspends the original decree, and there is no final hearing until that in the appellate court, the proctor's docket fee of $20, accrues in case of appeal only in the circuit court, and should be charged but once. The Lillie (C. C. 1890) 42 Fed. 179. The $20 docket fee allowed to a proctor of attorney by Act Feb. 26, 1853 (10 Stat. 161), being recoverable but once, and then only on a final hearing, is not taxable after a decree on an appeal in admiralty on a

motion that the stipulators on the appeal pay into court the amount of their stipulations. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,731.

791. —— **Improper refusal of costs on former appeal.**—In a collision case, the failure of a circuit court of appeals to decree costs to appellants on their appeal, even if intentional, affords no ground for complaining of a subsequent decree of the district court, for the error, if any, should have been corrected by motion in the appellate court before the mandate issued. Simpson v. The State of California (1893) 54 Fed. 404, 4 C. C. A. 393.

In a collision case, the failure of the circuit court of appeals to decree costs to appellants on their appeal, even if intentional, affords no ground for complaining of a subsequent decree of the district court, for the error, if any, should have been corrected by motion in the appellate court before the mandate issued. Id.

792. **Payment and remedies for collection—Priority of claim for costs.**—Where parties appear in court, not under compulsion, but voluntarily, to protect their own rights, their claims for costs are entitled to only the same priority with their other claims. The Rodney (D. C. 1831) Fed. Cas. No. 11,993.

In a suit for wages entitled to be first paid in full, under which, also, the vessel was seized and sold, the costs should also be paid in full. The Grapeshot (D. C. 1884) 22 Fed. 123.

Costs upon all necessary libels for repairs and supplies to a tug operating in New York harbor should be taxed and added, to the respective claims to be paid with them pro rata. Id.

793. —— **Enforcement of claim for costs.**—An appellate court, in an admiralty case, reversed a decree in favor of the libelant, and directed a decree in his favor for a smaller sum, with the costs of the district court, but condemned him to pay the costs of the appellate court. Held, that costs in the appellate court could not be set off against the unpaid costs of the district court, so as to prevent the officers of the latter from collecting the sums due them from the claimant. Aiken v. Smith (1893) 57 Fed. 423, 6 C. C. A. 414.

Costs and charges must be paid by the property saved, and apportioned among the claimants according to their respective interests. The Nathaniel Hooper (C. C. 1839) Fed. Cas. No. 10,-032.

On a motion to show cause why an attachment should not issue against the parties for the payment of costs, or for other proper relief, the remedy is to be governed by the rules of the supreme court of the United States or of this court, if any apply to it, and, if not, then "according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law." The provisions of the state statutes, or the decisions of the courts in explanation or enforcement of these laws, will not supply a rule of decision in this court, unless such regulations are adopted by rules of the United States courts. Under the rules of this court, a stipulation for costs includes a consent that execution shall issue against all the estate of the parties, in case the stipulators do not perform their engagements. An order or decree of the court must be first obtained on default of the stipulators. The right to such process is now made positive and certain by a rule of the supreme court, so far as concerns goods and chattels, and the arrest of the person in case the decree is not satisfied. Taking out a fi. fa. in the first instance, without success, for costs in admiralty, does not prevent resorting to process of ca. sa. or to an attachment. The Delaware (D. C. 1846) Fed. Cas. No. 3,762.

The remedy on attachment for costs, etc., in admiralty is to be governed by the rules which belong to courts of admiralty as contradistinguished from courts of common law. On default of stipulators for costs an order or decree must be obtained, on which execution may issue against the entire estate of the parties. Id.

Quære, whether the arrest of stipulators under a ca. sa. or attachment satisfies the decree? Also whether, after a ca. sa. executed, the claimant may sue out an attachment? Id.

Where several seamen unite in an action in personam to recover wages, a seaman recovering less than $50 can tax full costs, and enforce his decree by execution, where the decrees for the others are appealed. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

Act July 20, 1892, post, § 1626 et seq., permitting the bringing of actions in forma pauperis, does not take away from the clerk, in actions brought thereunder, the right to charge and collect the same fees as in other causes, but provides only that he shall not be entitled to demand their payment in advance or security therefor; and a libelant who brings a suit in admiralty thereunder, and recovers, but without costs, is not entitled to withdraw the money paid in satisfaction of the judgment from the registry of the court without paying the clerk's fees taxed against him. Davis v. Adams (D. C. 1901) 109 Fed. 271.

Where, after a libel in admiralty had been filed, respondent made default, and settled the case out of court, he was not entitled to have a release executed on such settlement filed in satisfaction of a judgment recovered against him by default, except on payment of costs authorized by R. S. § 983, post, § 1624. Naretti v. Scully (D. C. 1904) 133 Fed. 828.

794. —— **Enforcing payment of marshal's fees.**—The marshal, in preserving property arrested under process, acts as bailee, and is responsible to all parties interested for its proper care. In the absence of any statute or rule of court, he is entitled to be paid his fees at the time he delivers up the property to the person entitled to receive it. Where libelants sued as seamen, under rule 45, without giving security, and the vessel was arrested, and 19 days afterwards was released on a deposit by the claimant in the registry of the amount sued for, with interest, costs, and officer's fees, under rule 65, and on trial the libel was dismissed, it was held that the object of rule 65 was not to deprive the marshal of his security for fees, but to confirm and regulate it; that he was entitled to be paid his fees out of the deposit in the registry; and that it was laches in the claimant not to apply to the court, under rule 45, immediately upon arrest of the vessel, to require security from the libelant, or the release of the vessel. The Georgeanna (D. C. 1887) 31 Fed. 405.

795. **Rights of proctor on compromise or settlement of litigation.**—A settlement of seaman's wages without the concurrence or knowledge of his proctor will not bar the latter's claim for costs. The Victory (D. C. 1834) Fed. Cas. No. 16,937. And see Collins v. Nickerson (D. C. 1846) Fed. Cas. No. 3,016; Trask v. The Dido (D. C. 1827) Fed. Cas. No. 14,142; The Ontonagon (D. C. 1884) 19 Fed. 800.

The proctor cannot proceed with a libel by a seaman against an officer of a vessel for a tort, to recover costs, where there has been a settlement made in good faith, though without his consent. Purcell v. Lincoln (D. C. 1854) Fed. Cas. No. 11,471.

Where a proctor, in conducting a suit in rem for wages, to recover his costs, after a settlement without his knowledge with the libelant, makes unnecessary litigation, the cost thereof may be set off against his claim. The Victory (D. C. 1834) Fed. Cas. No. 16,937.

A settlement after suit brought with a seaman, whose name is continued afterwards as a party to the record, does not necessarily bar his proctor of of his claim to costs. A proctor who in such case intends to continue the suit to recover costs, must give distinct notice to claimant or respondent. The Sarah Jane (D. C. 1833) Fed. Cas. No. 12,348.

A notice by the proctor to respondent that, in case of a compromise, he will be held liable for the costs, is ineffectual. Peterson v. Watson (D. C. 1835) Fed. Cas. No. 11,037.

In actions for personal torts, courts of admiralty afford to seamen no remedies and no privileges to which they would not be entitled in courts of common law, so that on settlement of an action in personam for assault and battery without the knowledge of the libelant's proctor, the libelant, at the instance of his proctor, cannot compel respondent to pay the taxed costs, notwithstanding the settlement. The mere institution of a suit for damages by a seaman against the master for assault and battery does not carry with it a lien upon or equitable claim to the costs created in bringing the action, nor can the libelant's proctor hold defendant responsible for his costs in the suit where the cause of action was settled by the libelant and respondent before the hearing. Peterson v. Watson (D. C. 1835) Fed. Cas. No. 11,037.

A defendant who settles a seaman's suit brought in forma pauperis out of court, without the knowledge of libelant's proctor, will be taxed with costs. Erratt v. Humphreys (D. C. 1900) 102 Fed. 925, 926.

796. —— **Premature payment by garnishee.**—A libel for seamen's wages was pending in admiralty. After service of the libel on the master, the wages were seized by garnishment from a state court. It was held that the master by instantly paying the money under the garnishment at the request of the seamen, without any notice to their proctor in admiralty to enable him to secure his costs and fees, had rendered himself liable therefor. McDonald v. The Cabot (D. C. 1844) Fed. Cas. No. 8,759.

(O) Proceedings to limit liability of ship owner

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797. Summary of procedure in general.—The proper course of proceeding for obtaining the benefit of Act March 3, 1851 (sections 8020–8027, this compilation), limiting the liability of shipowners in certain cases, would seem to be this: When a libel for damages is filed, either against the ship in rem or the owners in personam, the latter (whether with or without an answer to the merits) should file a proper petition for an apportionment of the damages according to the statute, and should pay into court (if the vessel or its proceeds is not already there), or give due stipulation for, such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the shipowner will be entitled to a monition against all persons to appear and intervene, and to an order restraining the prosecution of other suits. If an action should be brought in a state court, the shipowner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the state court or procure an order from the district court to restrain the further prosecution of the suit. The court having jurisdiction of the case under and by virtue of the act of congress would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. Norwich & N. Y. Transp. Co. v. Wright (1871) 80 U. S. (13 Wall.) 104, 20 L. Ed. 585.

The cases collected under this subdivision do not include those decisions which relate directly to the provisions of Act March 3, 1851, c. 43, but are intended to cover only those matters of procedure arising in proceedings to limit liability, which are not governed by express provisions in said Act March 3, 1851, and which are covered by provisions in the admiralty rules, particularly rules 54–58. See notes to sections 8020–8027, post.

798. Nature of proceeding in general.—A proceeding to obtain the benefit of Act March 3, 1851 (sections 8020–8027, this compilation), limiting the liability of shipowners, is not an action in rem, but is a proceeding sui generis, which partakes rather of the character of a suit in personam. The City of Norwich (D. C. 1873) Fed. Cas. No. 2,762. It is an equitable action, and not one against the vessel and her freight. In re Morrison (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

799. —— Separate proceeding.—The owner of an American steamer may, while denying all liability for any damage by reason of a collision, and consequent loss of cargo, make the alternative prayer that, if the court find the petitioner or steamer liable, the petitioner may then have the benefit of R. S. §§ 4283–4285, and the acts amendatory thereof (post, §§ 8021–8023), limiting the liability of shipowners. In re Piper Aden Goodall Co. (D. C. 1898) 86 Fed. 670. CONTRA, see Thomassen v. Whitwell (D. C. 1878) Fed. Cas. No. 13,930.

800. What law governs in proceedings.—Under the general law that the territorial sovereignty of a state extends to a vessel of such state when it is upon the high seas, the law of France, which authorizes a recovery for loss of life against a vessel in fault therefor, governs in proceedings by the owner of a French vessel in the courts of the United States for limitation of liability for claims arising out of the sinking of such vessel in collision on a voyage across the Atlantic, and claims for loss of life resulting from the collision may be proved against the fund paid in if the vessel is held in fault. La Bourgogne (1908) 139 Fed. 433, 71 C. C. A. 489, reversing decree In re La Bourgogne (D. C. 1902) 117 Fed. 261, and decree affirmed Deslions v. La Compagnie Générale Transatlantique (1908) 28 Sup. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

801. Power to prescribe forms.—The supreme court has power to prescribe the form of proceedings to limit liability of shipowners. Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1883) 3 Sup. Ct. 379, 388, 109 U. S. 578, 27 L. Ed. 1038.

802. Conditions precedent to bringing of proceedings.—Damages recovered by the owner for the loss of his vessel by collision stand in the place of the vessel herself, and he is not entitled to the benefit of the statutes for limitation of liability, unless he surrenders the sum recovered for the benefit of the ship's creditors. O'Brien v. Miller (1897) 18 Sup. Ct. 140, 168 U. S. 287, 42 L. Ed. 469, affirming decree Miller v. O'Brien (D. C. 1894) 59 Fed. 621, and reversing decree (1895) 67 Fed. 605, 14 C. C. A. 566. Such statute is not to be applied to a case of collision where both vessels are in fault, until the balance of dam-

age has been struck; and then the party against whom the decree passes may have the benefit of the statute (if he is otherwise entitled to it) in respect of the balance which he is decreed to pay. The North Star and The Ella Warley (1882) 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91.

Rules 54–57, governing proceedings to limit liability, do not require, as a condition to proceedings, that there should have been a prior suit by one or more of the sufferers by the disaster. The Alpena (D. C. 1881) 8 Fed. 280, 10 Biss. 436.

803. Jurisdiction of proceedings in general.—A district court has jurisdiction, under rule 57, of proceedings by libel and petition for limitation of liability by the owner of a steamship which has collided with and sunk a steam yacht, where such proceedings are instituted while the steamship is in the district, and subject to control of the court for the purposes of the case, as provided in rules 54, 55, and 56, and before the steamship is libeled for damages by the collision or suit is commenced against the owner. Morrison v. District Court for Southern District of New York (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

Jurisdiction of circuit courts under rule 58, see The Mary Lord (C. C. 1887) 31 Fed. 416. And see Elwell v. Geibel (C. C. 1887) 33 Fed. 71.

Rule 57 construed with respect to the court having jurisdiction of proceedings for limitation of liability, where suits have been commenced against the owner, but the vessel has not been libeled. In re Louisville & Cincinnati Packet Co. (D. C. 1915) 223 Fed. 185.

See also notes under § 991(3), and under Const. art. 3, § 2, cl. 1, as to "Cases of Admiralty and Maritime Jurisdiction."

804. Loss or divestiture of jurisdiction.—The filing of the libel and petition by the owner of the steamship, with the offer to give a stipulation, confers jurisdiction, which no subsequent irregularity of procedure can take away. Morrison v. District Court for Southern District of New York (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

Jurisdiction of a proceeding to limit liability is not lost by allowing a steamship, after giving a stipulation for her value under rule 54, to go into another district in the ordinary course of her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight. Id. Nor is it lost by a recovery by a claimant of less than the stipulated value of the vessel, where his original claim was greater than its value. Briggs v. Day (D. C. 1884) 21 Fed. 727.

Where the owners of a steamboat which had been sued in the state courts in actions given by the statute of Maryland for loss of life arising out of a collision in the harbor of Baltimore applied for a limitation of liability, and after the steamboat had been appraised, and stipulation given in the district court for the payment into court of the amount of the appraisement when ordered, the amounts sued for in the state courts were reduced so that the aggregate of the amounts claimed in those suits was below the amount of the appraisement and stipulation, the jurisdiction of the district court was not lost, even conceding that the claims so reduced were all that the owners of the steamboat could be made liable for. The Tolchester (D. C. 1890) 42 Fed. 180.

Where a District Court has acquired jurisdiction of a proceeding for limitation of liability for a claim for damages on which the owner has been sued in another district, the claimant cannot defeat such jurisdiction by appearing specially and offering or attempting to reduce the amount of his claim below the appraised value of the vessel and her pending freight. The John K. Gilkinson (D. C. 1907) 150 Fed. 454. And see The John K. Gilkinson (D. C. 1907) 156 Fed. 868. See, also, The Tolchester (D. C. 1890) 42 Fed. 180.

Although the Supreme Court of a state has decided that the statute giving the right to a limited liability of shipowners can be enforced in the courts of the state, this does not deprive the courts of admiralty of this jurisdiction, and the right may be asserted by application to the United States court after a trial and defense on the merits and application for limitation in the state court; but relief will be granted only on condition of the applicant paying all costs and expenses of both courts. The S. A. McCaulley (D. C. 1899) 99 Fed. 302.

805. Number and amount of claims against vessel.—The court has jurisdiction to decree a limitation of liability, though there is but a single claim. In re Starin (D. C. 1903) 124 Fed. 101; The Hoffmans (D. C. 1909) 171 Fed. 455.

A single claim against a shipowner founded on a personal injury to a passenger makes applicable the limitation of liability statute, notwithstanding the plurality of claims apparently contemplated by the terms of sections 4284, 4285, R. S., sections 8022, 8023, post, requiring pro rata distribution of the value of the vessel and freight, and making the surrender of the vessel and freight a sufficient compliance with the statute, and declaring that on such surrender all proceedings against the owner shall cease. White v. Island Transp. Co. (1914) 34 Sup. Ct. 589, 233 U. S. 346, 58 L. Ed. 993. CONTRA, see, Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co. (1914) 218 Fed. 161, 134 C. C. A. 575 (affirm-

ing decree The Dauntless [D. C. 1914] 212 Fed. 455); The Eureka No. 32 (D. C. 1901) 108 Fed. 672; Delaware River Ferry Co. v. Amos (D. C. 1910) 179 Fed. 756; The Dauntless (D. C. 1914) 212 Fed. 455. Nor is the right to limit liability defeated by the fact that the only claims on which suit has been brought do not amount to the admitted value of the vessel, where there is a probability that there may be others. The Defender (D. C. 1912) 201 Fed. 189.

806. Venue of proceedings.—The jurisdiction of proceedings to obtain the benefit of the act limiting liability belongs to the district court of the district in which the vessel was stranded, where the liability arises from such stranding, where the property which such owner seeks to abandon is within such district, and no suit has been instituted in any other district. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334. The proceedings may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. In re Leonard (D. C. 1882) 14 Fed. 53.

Where the vessel has not been libeled, a proceeding for limitation of liability may be brought in the District Court either of the district in which the owner has been sued or in that of the district in which the vessel may be, and an allegation in the petition that the vessel is within the district gives the court jurisdiction. The John K. Gilkinson (D. C. 1907) 150 Fed. 454.

A tug, which, in the pursuit of her business, was frequently within the Southern district of New York, and was there in a regular way at the time of the filing of a petition for limitation of liability by her owner, was within the district for the purpose of giving the court jurisdiction, under admiralty rule 57, although the domicile of the owner was elsewhere. The John K. Gilkinson (D. C. 1907) 156 Fed. 868.

A proceeding by a shipowner for limitation of liability may be brought in the district court for any district in which said owner may be sued in that behalf, on payment into court of, or stipulation to pay, the appraised value of the vessel, or upon the transfer of his interest to a trustee; and the presence of the vessel within the district is not essential to the court's jurisdiction. Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100.

An owner who fails to institute proceedings until after a suit has been brought by a loser must commence them in the same district court as that in which such suit was brought. The Alpena (D. C. 1881) 8 Fed. 280, 10 Biss. 436.

A libel having been filed for damages against a tug, in the district court, upon which an appeal was taken by the owners to the circuit, and thence to the supreme court, other suits arising out of the same disaster having been brought against the owners in the state courts, a petition to limit liability was filed by the owners in the district court during the pendency of the appeal in the libel suit. Held, that the petition should have been filed in the district court in which the original libel was filed. The Luckenback (D. C. 1886) 26 Fed. 870.

Rule 57, providing for proceedings for limitation of liability, construed with respect to the district in which such proceedings may be brought. The Enterprise (D. C. 1912) 196 Fed. 404.

807. Persons entitled to institute proceedings.—The owner of a vessel may, before an action is instituted against a ship in rem or against the owner in personam, maintain a proceeding to obtain the benefit of the statute, although he alleges that he does not admit any liability. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334.

Any damage creditor may institute proceedings to arrest the offending vessel, and to have the amount of all damages, as well as the value of the vessel, judicially ascertained, and the proceeds of the vessel and freight distributed pro rata among all claimants. The H. F. Dimock (D. C. 1892) 52 Fed. 598.

808. —— Waiver of or loss of right to institute proceedings.—A vessel owner does not waive his right to limitation of liability against claims for collision damages by failure to assert such right in the collision suit, nor by an exception to the libel therein. Monongahela River Consol. Coal & Coke Co. v. Hurst (1912) 200 Fed. 711, 119 C. C. A. 127.

809. —— Contesting liability in original suit.—A shipowner, who, on the trial of the issue as to the cause of collision, contests all liability whatever, is not thereby precluded from claiming the benefit of the limitation of liability. New York & W. S. S. Co. v. Mount (1880) 103 U. S. 239, 26 L. Ed. 351, reversing In re New York & W. S. S. Co. (D. C. 1877) Fed. Cas. No. 10,200. CONTRA, vessel owners, by allowing a final decree for damages for collision in the federal district court, waive their right to institute proceedings to limit their liability. Dyer v. National Steam Nav. Co. (C. C. 1878) Fed. Cas. No. 4,225. After the collision, the vessel of the defendants, while pursuing her voyage, was stranded and was afterwards sold as a wreck at public auction by direction of her owners, and was delivered to other parties after the filing of the libel, but before the answer was filed. Held, that the defendant must, by the general maritime law, be held to have intentionally waived his right to claim exemption from personal liability beyond

the ship and her freight, and cannot obtain the limitation of liability which he seeks. Thomassen v. Whitwell (D. C. 1878) Fed. Cas. No. 13,929, affirmed Thommasen v. Whitwill (C. C. 1882) 12 Fed. 891, 21 Blatchf. 45.

810. —— Proceedings in state court.—Prior litigation in a state court of the question of his liability growing out of a collision will not deprive a vessel owner of the right to institute proceedings in an admiralty court for a limitation of his liability, however far the prior litigation may have proceeded. In re Meyer (D. C. 1896) 74 Fed. 881; The Ocean Spray (D. C. 1902) 117 Fed. 971; The City of Boston (D. C. 1906) 159 Fed. 257. And see Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100; In re Starin (D. C. 1903) 124 Fed. 101. But where a shipowner permitted an action for damages for an alleged tort to be prosecuted to judgment against him in a state court, which has been reversed on appeal, and the cause remanded for a new trial, his laches in invoking the admiralty jurisdiction warrants the court in requiring him, as a condition to the granting of the relief sought, to pay the costs incurred by the plaintiff in the state court. Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100; The Ocean Spray (D. C. 1902) 117 Fed. 971.

A shipowner is debarred from maintaining a proceeding to limit his liability by the fact that he gave a supersedeas bond, as required by statute, to enable him to safely present his contention to the appellate court. Gleason v. Duffy (1902) 116 Fed. 298, 54 C. C. A. 100.

811. —— Giving of bond or stipulation.—The right of a vessel owner to a limitation of liability, as against a decree for collision damages recovered against him in a suit in personam, is not waived by the giving of a supersedeas bond on appeal from such decree. Monongahela River Consol. Coal & Coke Co. v. Hurst (1912) 200 Fed. 711, 119 C. C. A. 127.

Proceedings by the owners of a vessel to limit liability in respect to a collision may be instituted, even after the giving of a stipulation in an action in rem for the full value of the vessel, for the benefit of all demands arising from the collision. The City of Norwich (D. C. 1873) Fed. Cas. No. 2,762; In re New York & W. S. Co. (D. C. 1877) Fed. Cas. No. 10,200; Eldridge v. The Rose Culkin (D. C. 1892) 52 Fed. 328; nor is the giving of such a stipulation a bar to the surrender of the vessel herself in that proceeding; and though the vessel may have made several short voyages after the giving of such stipulation, and before the surrender, she may still be surrendered in exoneration of liability, provided her value has not in the meantime become impaired, and the circumstances show that no waiver of the right of surrender was intended. Eldridge v. The Rose Culkin (D. C. 1892) 52 Fed. 328.

812. Time for institution of proceedings.—The owner of a vessel may, before he or it is sued, institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability. Ex parte Slayton (1881) 105 U. S. 451, 26 L. Ed. 1066.

Under rule 54 of the United States supreme court authorizing a petition or libel in a proceeding to limit the liability of a shipowner for loss or damage to persons or goods, to be filed after a suit for damages has been commenced, the petition may be filed before as well as after the commencement of the suit for damages. Black v. Southern Pac. R. Co. (C. C. 1889) 39 Fed. 565.

Although the owner of a vessel allows a court of common law to retain jurisdiction of a suit against him for a maritme tort for several years, during which time he takes all the chances of success before that tribunal, he is still in time, and has the right, by petition to a court of admiralty, to limit his liability, and remove the case to that court; but the court, in granting such petition, can require him to pay all the costs that had accrued in the common-law proceeding. The S. A. McCaulley (D. C. 1899) 99 Fed. 302.

813. Parties.—The right of a limitation of liability is an absolute one, and is not dependent upon the joinder of all the part owners in the application for it; it may be availed of by any one or more of them. The S. A. McCaulley (D. C. 1899) 99 Fed. 302.

On appointment of a commissioner to take proofs on a damage claim filed in a proceeding for limitation of liability by the owner of one of two vessels in collision, after an authoritative determination by the Circuit Court of Appeals that both vessels were in fault, the owner of the other vessel, if not a party, should be brought in by notice, being liable to contribution if the claim is established and enforced. The City of Boston (D. C. 1909) 182 Fed. 171.

814. Consolidation of proceedings.—A motion denied to consolidate proceedings for limitation of liability commenced independently by owners of each of two vessels in collision. The City of Boston (D. C. 1909) 182 Fed. 171.

815. Process to bring vessel into court.—It is not material in limited liability proceedings, where the vessel has been brought into court, and her owner has stipulated to pay her appraised value, whether or not she was brought in by the appropriate process. Ore-

gon R. R. & Nav. Co. v. Balfour (1898) 90 Fed. 295, 33 C. C. A. 57.

Where shipowners have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, under R. S. §§ 4283, 4284, post, §§ 8020, 8021, and having thereby secured the stay of proceedings by libelants surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper, and only equitable, course, where, by reason of the proceedings, suits by libelants have been delayed for a number of years, during which the shipowners have become insolvent. Id.

816. **Notice of proceedings.**—In order to sustain the proceeding for limiting liability, it is not necessary that the owner and captain of the steam yacht, who were damaged by the collision, should be personally served with notice within the district, or that the steamship should be taken and held by the court until the owner or captain of the steam yacht appears in the cause. Morrison v. District Court for Southern District of New York (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

817. **Libel, petition, or application.**—A petition for limitation of liability held sufficient to give the court jurisdiction as against a special plea. In re Eastern Dredging Co. (D. C. 1905) 138 Fed. 942.

818. —— **Averments as to right to bring proceeding.**—Where an application for the limitation of liability of a shipowner to the value of the vessel and freight does not present facts entitling the application to be considered under said act, it may nevertheless be treated as an application for a release of the vessel on bail, addressed to the ordinary discretion of the court. Place v. The City of Norwich (D. C. 1866) Fed. Cas. No. 11,202.

A petition for limitation of liability must allege the facts necessary to entitle the petitioner to the relief sought. In re Davidson S. S. Co. (D. C. 1904) 133 Fed. 411.

Where a petition to limit the liability of a vessel and cargo for collision, failed to state the facts and circumstances by reason of which exemption from liability was claimed, as required by rule 56, the petition was insufficient to entitle petitioner to contest the question of fault on the part of its vessel. The Sacramento (D. C. 1904) 131 Fed. 373.

The failure of a petition for limitation of liability on account of collision to set out the grounds on which exemption from liability is claimed, as required by rule 56, when it is intended to contest such liability, cannot be taken advantage of by the adverse parties, where by stipulation such proceedings have been consolidated with cross-suits between the two vessels, in which the question of liability has been put in issue by the pleadings. The Trader (D. C. 1904) 129 Fed. 462.

819. —— **Averments as to claims against vessel.**—A petition in admiralty to limit liability and to restrain the prosecution of an action in a state court must show the existence, or probability of existence, of more than one damage claimant, and the need of an apportionment, in order to make such a special proceeding either necessary or appropriate, or else it must show such a special case as does not admit of the full statutory defense in the common-law suit in the state court. The Rosa (D. C. 1892) 53 Fed. 132. But it is not necessary to aver in the petition, or to prove, that the claims against the vessel are in excess of her value, as a condition of the jurisdiction of this court to entertain the proceeding. The Garden City (D. C. 1886) 26 Fed. 766, 770.

820. —— **Amendment.**—The libel in a proceeding to obtain the benefit of the limitation of liability will be amended so as to show the residence of the libelant. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334.

821. **Claims, claimants, and answers —Necessity for filing.**—Under rule 56 a person who has not presented a claim for damages in a proceeding for limitation of liability has no standing as a claimant to answer the petition. The Pere Marquette 18 (D. C. 1913) 203 Fed. 127; The Klotawah (D. C. 1914) 210 Fed. 677.

822. —— **Time for filing.**—Damage claimants held not chargeable with laches in proving their claims in a proceeding for limitation of liability. Union Steamboat Co. v. Chaffin's Adm'rs (1913) 204 Fed. 412, 122 C. C. A. 598.

In a proceeding in admiralty for a limitation of liability, the court has discretionary power to permit the filing of a claim for damages after the expiration of the time fixed in the monition. in a proper case. The Argus (D. C. 1900) 100 Fed. 143; The City of Boston (D. C. 1906) 159 Fed. 257; In re Eastern Dredging Co. (D. C. 1907) 159 Fed. 549. Especially where the fund still remains in court undistributed, and a proper showing is made, upon such terms as may appear equitable. The Argus (D. C. 1900) 100 Fed. 143. Such permission will be granted where the claim was forwarded by mail to the clerk on the last day of such time and received before any action was or could have been taken respecting such claims. The City of Boston (D. C. 1906) 159

Fed. 257. But such discretion cannot properly be exercised in favor of a claimant who elected to bring suit, against the owners of the other vessel in collision, by permitting the filing of a claim more than two years after such return day, and after all other claims have been heard and determined. In re Eastern Dredging Co. (D. C. 1907) 159 Fed. 549.

823. —— Sufficiency.—Where the owners of a vessel destroyed by fire filed a petition limiting their liability, and obtained an injunction restraining the prosecution of suits which had been commenced against them by owners of cargo on board, and plaintiffs in one of those suits, without having presented their claims to the commissioner, as required by rule 57, filed a paper called "exceptions and answer," seeking by it to contest the right of the owners of the vessel to exemption or limitation of liability, such paper was improperly filed, but the exception might stand as an exception to the jurisdiction of the court to enjoin the parties. In re Providence & N. Y. S. S. Co. (D. C. 1872) Fed. Cas. No. 11,452.

The proof required in support of the petition that any liability incurred was without the privity or knowledge of the petitioner does not reach the subsequent issue of liability of the vessel for individual claims sought to be proved under rule 55, the right to contest which is reserved to the petitioner by rule 56, which issue should be presented by appropriate pleadings conforming to the general practice in admiralty, the claimant being required to allege and prove a cause of action as in an original suit. In re Davidson S. S. Co. (D. C. 1904) 133 Fed. 411.

A damage claimant, contesting the right to limit liability, must take issue by answer, which answer must be full and explicit and distinct to each separate article and separate allegation in the petition, as required by admiralty rule 27. Id. But in a proceeding for limitation of liability for claims for cargo lost, cargo owners are not required to allege any specific negligence of petitioner in their answer. The John H. Starin (1911) 191 Fed. 800, 112 C. C. A. 286. But where the petition alleges generally freedom from fault on the part of the vessel, its owner, officers, and navigators, if fault is claimed by a claimant, he must allege and offer evidence to prove the same; and it is not sufficient to merely deny such allegation of the petition, but the answer should specify in what the fault consisted. In re Starin (D. C. 1909) 173 Fed. 721. And where claimants pleaded as a defense the negligence of petitioner, because of the unseaworthiness of the vessel, but failed to comply with an order requiring them to specify the particulars, they will not be permitted to give testimony as to such defense under a general denial, to controvert petitioner's prima facie case. The John H. Starin (D. C. 1909) 175 Fed. 527.

A claim for damages by reason of the death of a person in collision, filed in proceedings in admiralty for limitation of liability by the administratrix of the deceased, but based on a state statute which gives the right of recovery to the widow, is sufficient to authorize a recovery where it discloses that the claimant is also the widow of the deceased, and an amendment making the claim in that capacity may properly be allowed. The Saginaw (D. C. 1905) 139 Fed. 906. And see The Hamilton (1906) 146 Fed. 724, 77 C. C. A. 150, decree affirmed Old Dominion S. S. Co. v. Gilmore (1907) 28 Sup. Ct. 133, 207 U. S. 398, 52 L. Ed. 264.

A denial of the allegation of the owner of the vessel that whatever damage may have resulted from any act or negligence of those in charge of his vessel was without his privity or knowledge is not necessary; but, if a damage claimant denies it in his answer with the intention of raising an issue of fact and offering evidence thereon, he should specify the acts relied on to establish petitioner's privity or knowledge. The Murrell (D. C. 1910) 188 Fed. 727.

The requisites of an answer by a contesting claimant in a proceeding for limitation of liability considered. The Pere Marquette 18 (D. C. 1913) 203 Fed. 127.

824. Issues, proof, and variance.—A federal District Court has jurisdiction of proceedings to limit shipowner's liability for a personal injury to a passenger, instituted by a petition alleging that the injury was occasioned without the owner's privity, though the passenger affirms in her answer that such injury was caused by the owner's negligence, where she expressly waived proof of the allegations of the petition, thereby consenting that they be taken as true. White v. Island Transp. Co. (1914) 34 S. Ct. 589, 233 U. S. 346, 58 L. Ed. 993.

A failure to comply with the steamboat inspection law may be invoked to prove that a shipowner is not entitled to a limitation of liability, though it is not set up in the pleadings of the parties to the proceeding for limitation. The Annie Faxon (1896) 75 Fed. 312, 21 C. C. A. 366, 44 U. S. App. 591.

Claimants, who pleaded as a defense to a petition for limitation of liability the negligence of petitioner, because of the unseaworthiness of the vessel, but failed to comply with an order requiring them to specify the particulars, will not be permitted to give testimony as to such defense under a general denial, to controvert petitioner's prima facie case. The John H. Starin (D. C. 1909) 175 Fed. 527.

825. Stipulations for value and appraisal of interest or value.—R. S. §§

4283, 4285, post, §§ 8021, 8023, clearly give the owner of any vessel the right to personal exemption from liability for any damage occasioned by such vessel without his privity or knowledge by transferring her and her pending freight to a trustee to be appointed by a court of admiralty, and although admiralty rule 54, prescribing the procedure under said sections, permits him at his option to retain the vessel by having her appraised and paying her appraised value, and pending freight into court or giving a stipulation therefor, he still has the right before an appraisement made on his petition has been accepted, or any order has been made thereon, to dismiss that part of his petition, and, instead, to ask for the appointment of a trustee to whom he may transfer the vessel and her freight. Ohio Transp. Co. v. Davidson S. S. Co. (1906) 148 Fed. 185, 78 C. C. A. 319, affirming decree The Sacramento (D. C. 1904) 131 Fed. 373, and writ of certiorari denied Ohio Transp. Co. v. Davidson S. S. Co. (1906) 27 Sup. Ct. 782, 203 U. S. 593, 51 L. Ed. 332.

A court of admiralty cannot under that act, in an action in rem against a vessel alone by a single freighter, make upon a petition a summary order declaring the owners of the vessel free from personal liability to any freighter on filing a stipulation as proposed. Such an order would be neither an assignment of the vessel to a trustee for the benefit of the persons having claims for losses, nor "appropriate proceedings in any court to apportion the sum for which the owners may be liable, among the parties entitled thereto," which are the only forms of proceeding authorized by the act. Place v. The City of Norwich (D. C. 1866) Fed. Cas. No. 11,202.

Where, on arrest, a vessel is released upon a stipulation given for her value, and by subsequent amendment in the progress of the cause is allowed to plead the statutes in limitation of liability, the owners are not estopped by the stipulation from showing that the stipulated value included the value of subsequent repairs. The Doris Eckhoff (D. C. 1887) 30 Fed. 140.

Where, under rule 54, a stipulation is given for the value of the vessel, instead of the "transfer" provided for by statute, a "due appraisement" of the vessel is requisite to the validity of the proceeding. As, however, it is competent for a court, having ordered an ex parte appraisement, to order a reappraisement and further security on cause shown by any creditor, the mere fact that the first appraisement and giving of the stipulation were ex parte does not render the proceeding void, or invalidate an ex parte injunction against other suits; and a subsequent suit in another district, for the same cause, should be dismissed. The H. F. Dimock (D. C. 1892) 52 Fed. 598.

The making of an ex parte appraisement and the taking of a stipulation thereon under rule 54 are at most irregularities which the district court can correct, since the stipulation stands in place of the vessel and her freight, and the court can stay further proceedings, deny all relief, and dismiss the libel and petition on failure of the owner to comply with an order to give a new stipulation on a further appraisement. The giving by the owner of a stipulation for the value of his interest in a vessel and her freight under rule 54, without a judicial determination of such value after a hearing of the persons interested, is equivalent to a "transfer" of his interest in the vessel and her freight to a trustee for the benefit of claimants, under R. S. § 4285, post, § 8023. In proceedings for the limitation of liability under rule 54, prior notice to damage creditors of an appraisement is not necessary, and an ex parte appraisement is not void. Morrison v. District Court for Southern District of New York (1893) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

In proceedings for limitation of liability by the owner of a vessel which had been in collision, a bond for value given by petitioner must cover her value at the time she ended her voyage, and her then pending freight, and unadjudicated claims for salvage services and general average charges cannot be deducted from such value, although such expenses were incurred to enable her to complete the voyage, and are entitled to precedence over collision claims, since the collision claimants have the right to contest such claimed liens. The H. F. Dimock (D. C. 1910) 186 Fed. 662.

Where a vessel, at the time of the commission of injuries for which her owners seek limitation of liability, had been so far dismantled as to have no market value as a vessel, for the purpose of fixing the amount of the stipulation to be given by petitioners, the net value of the materials in her after she is broken up may properly be taken; but in such computation the value of a dummy engine placed on board for use in removing her machinery, and which was no part of her equipment, should be excluded. The C. H. Northam (D. C. 1909) 181 Fed. 985. The price realized at a marshal's sale of the vessel, though prima facie fixing the value for which a bond will be required, is not conclusive; and the court, upon cause shown, may require a bond for the actual value, as proved. The U. S. Grant (D. C. 1891) 45 Fed. 642. The valuation of a boat in a stipulation for value given in suits brought against her after she was repaired is immaterial in determining her value for the purpose of limiting the

owner's liability. In re Norwich & N. Y. Transp. Co. (C. C. 1879) Fed. Cas. No. 10,362, affirming (D. C. 1875) Fed. Cas. No. 10,360, and affirmed Place v. Norwich & N. Y. Transp. Co. (1886) 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

826. —— **Interest.** — In proceedings for limitation of liability, a bond for the appraised value of petitioners' interest should include a stipulation for interest from its date. In re Harris (1893) 57 Fed. 243, 6 C. C. A. 320, 14 U. S. App. 506.

Where, in an action for damages arising from a collision, the owners of the colliding steamer applied under the admiralty rules for a limitation of their liability as such owners, and by stipulation with approved sureties agreed to make payment of the assessed value of the steamer, and thereby procured her release from arrest, the owners were liable, in addition to such assessed value of their steamer, for the interest thereon from the date of the stipulation, with costs of the litigation. The Favorite (D. C. 1882) 12 Fed. 213, 11 Biss. 283; The Battler (D. C. 1893) 58 Fed. 704.

827. —— **Liabilities on stipulations.**— Where the owners of a vessel, in proceedings for limitation of their liability for a collision, gave bond conditioned for the payment into court on its order of the appraised value of the vessel "and the interest on the same as provided by law," and thereafter contested their liability, the result being an award against the vessel exceeding its value, the stipulators are liable for interest on the bond from the date of its execution at the legal rate. The George W. Roby (1901) 111 Fed. 601, 49 C. C. A. 481, modifying decree In re Lakeland Transp. Co. (D. C. 1900) 103 Fed. 328.

In cases of limited liability, interest will only be allowed on the appraised value from the date of the decree until payment, and in the event of an appeal by the owners, which is unsuccessful, such interest will be decreed against them, in personam, and not against the stipulators. The H. F. Dimock (1896) 77 Fed. 226, 23 C. C. A. 123.

828. **Enjoining or staying proceedings in other suits.**—Proceedings of the United States district court, under rule 54, R. S. §§ 4283–4285, post, §§ 8021–8023, Act June 26, 1884, post, § 8028, and R. S. § 4289, post, § 8027, to limit the liability of shipowners for loss or damages to persons or goods, supersede all other actions and suits for the same damages in the state or national courts, upon the matters being properly presented therein; and such actions or suits may be stayed by injunction. New York & W. S. S. Co. v. Mount (1880) 103 U. S. 239, 26 L. Ed. 351; Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1883) 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; Metropolitan Redwood Lumber Co. v. Doe (1912) 32 Sup. Ct. 275, 223 U. S. 365, 56 L. Ed. 473; Black v. Southern Pac. R. Co. (C. C. 1889) 39 Fed. 565; In re Providence & N. Y. S. S. Co. (D. C. 1872) Fed. Cas. No. 11,451; Churchill v. The British America (D. C. 1878) Fed. Cas. No. 2,715; The City of Columbus (D. C. 1884) 22 Fed. 460; The Amsterdam (D. C. 1885) 23 Fed. 112; The Tolchester (D. C. 1890) 42 Fed. 180; In re Humboldt Lumber Mfg. Ass'n (D. C. 1894) 60 Fed. 428; In re Whitelaw (D. C. 1896) 71 Fed. 733; The City of Boston (D. C. 1906) 159 Fed. 257. But such an injunction should not prohibit the collection of the taxable costs in such suits. In re Norwich & N. Y. Transp. Co. (D. C. 1878) Fed. Cas. No. 10,361.

A court of admiralty, in a proceeding for limitation of liability has power to modify its injunctional order restraining the commencement or prosecution of suits by damage claimants to the extent of permitting the formal commencement of suits to prevent claims from possibly becoming barred by limitation. In re Oceanic Steam Navigation Co. (1913) 204 Fed. 260, 124 C. C. A. 352, modifying order The Titanic (D. C. 1912) 204 Fed. 295.

On a libel in personam for damages to a vessel in collision, the district court in admiralty has no power to reserve its final decree that the owners may take appropriate proceedings to limit their liability, where neither the ship and freight, nor the amount or value, is within its control. Wright v. Norwich & N. Y. Transp. Co. (D. C. 1867) Fed. Cas. No. 18,086.

829. **Interrogatories.** — A claim of privilege from answering interrogatories annexed to answers under rules 31 and 32 in a proceeding by a vessel owner for limitation of liability can only be made on the ground that the answers will expose the petitioner to a criminal prosecution, or to such penalties or forfeitures as may be the subject of a penal or criminal proceeding. That the answers may show that the loss or damage occurred through his "privity or knowledge," and thus deprive him of the right to a limitation of liability, does not entitle him to refuse to answer, as the loss of such right is not a forfeiture within the meaning of the rules. La Bourgogne (D. C. 1900) 104 Fed. 823.

Objections to interrogatories propounded by a libelant under rule 23, in a proceeding for limitation of liability, considered. The Murrell (D. C. 1910) 188 Fed. 727.

Rule 23, permitting a libelant to attach to his libel interrogatories to be answered by a respondent, is applicable to proceedings for limitation of liability brought by a vessel owner, and the peti-

tioner in such a proceeding is to be regarded as a libelant within such rule and may attach to his petition interrogatories to be answered by a damage claimant who has brought suit on his claim or by leave of court may be allowed to do so by amending his petition after it has been filed. Id.

Interrogatories annexed to an answer in a proceeding for limitation of liability, which are directed solely to the discovery of assets of the petitioner, are immaterial to the issues, and subject to exception. In re Knickerbocker Steamboat Co. (D. C. 1905) 136 Fed. 956.

830. Evidence—Presumptions.—Privity or knowledge by a steamship company of the fault of its servants in maintaining an excessive rate of speed in a fog is not to be presumed from a failure to comply, in proceedings to limit liability, with an order for the production of certain log books, where the claimant made no attempt to introduce secondary evidence, and did not ask a dismissal of the proceedings or such other action for the alleged contumacy as the case required. Deslions v. La Compagnie Générale Transatlantique (1908) 28 Sup. Ct. 664, 210 U. S. 95, 52 L. Ed. 973, affirming decree La Bourgogne (1906) 144 Fed. 781, 75 C. C. A. 647.

When, in a proceeding for the limitation of the liability of the owner of a seagoing, coastwise vessel, involving the question of the competency of the captain, it is shown that such captain is a licensed shipmaster, and no evidence whatever is given as to whether or not he is also licensed as a pilot, or whether or not a licensed pilot was on board the vessel, the court will be justified in presuming that the captain was a licensed pilot, and that the law in that respect was complied with. In re Meyer (D. C. 1896) 74 Fed. 881.

831. —— Burden of proof.—The claimants in proceedings by a steamship company to limit its liability for claims arising out of a collision are charged with the burden of proving that the regulations promulgated by the steamship company for the conduct of its business, which exacted compliance by the captains of its vessels with the international rules, were not promulgated in good faith, or that a willful departure from their requirements was indulged in, and was brought home to, or was countenanced by, the company. Deslions v. La Compagnie Générale Transatlantique (1908) 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973, affirming decree La Bourgogne (1906) 144 Fed. 781, 75 C. C. A. 647.

The right of a shipowner to limit its liability for a casualty is dependent on its want of complicity in the acts causing the disaster, and the burden of proof is therefore on it to show affirmatively that it had properly officered and equipped the vessel for the contemplated service. McGill v. Michigan S. S. Co. (1906) 144 Fed. 788, 75 C. C. A. 518, reversing decree In re Michigan S. S. Co. (D. C. 1904) 133 Fed. 577.

The owner of a vessel has the burden of proving the necessary allegation of his petition that whatever damage may have resulted from any act or negligence of those in charge of his vessel was without his privity or knowledge. The Murrell (D. C. 1910) 188 Fed. 727.

The burden rests on a claimant of damages for a death in proceedings for limitation of liability to prove the time and place of the death where such facts are material. Thompson Towing & Wrecking Ass'n v. McGregor (1913) 207 Fed. 209, 124 C. C. A. 479.

832. —— Admissibility.—Where, in a proceeding for limitation of liability for claims for cargo lost, petitioner undertakes to excuse the nondelivery of goods on the ground of perils of the sea, the cargo owners are entitled to cross-examine as to the seaworthiness of the vessel, and also to offer proof on the subject. The John H. Starin (1911) 191 Fed. 800, 112 C. C. A. 286.

833. —— Sufficiency.—See The Annie Faxon (1896) 75 Fed. 312, 21 C. C. A. 366, 44 U. S. App. 591; The John H. Starin (1911) 191 Fed. 800, 112 C. C. A. 286; Memphis & C. Packet Co. v. Overman Carriage Co. (C. C. 1899) 93 Fed. 246; In re Pacific Mail S. S. Co. (D. C. 1903) 126 Fed. 1020; In re Starin (D. C. 1906) 151 Fed. 274.

834. Reference to commissioners.—On appointment of a commissioner to take proofs on a damage claim filed in a proceeding for limitation of liability by the owner of one of two vessels in collision, after an authoritative determination by the Circuit Court of Appeals that both vessels were in fault, the owner of the other vessel, if not a party, should be brought in by notice, being liable to contribution if the claim is established and enforced. The City of Boston (D. C. 1909) 182 Fed. 171.

A motion to require the commissioner to make certain findings in a proceeding for limitation of liability denied, on the ground that the matters were irrelevant. The Titanic (D. C. 1913) 204 Fed. 298.

835. Scope and extent of hearing or decision.—A court of admiralty in which proceedings are instituted by a vessel owner for limitation of liability has exclusive jurisdiction to settle in such proceedings all claims arising out of the matters on which they are based, and an order made therein restraining all persons having claims from prosecuting suits thereon elsewhere is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed. Seese's Adm'x v. Monongahela River Consol. Coal & Coke Co. (C. C. 1907) 155 Fed. 507.

Where shipowners have invoked the

jurisdiction of a court of admiralty by a petition to limit their liability, and, having thereby secured the stay of proceedings by libelants, surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper, and only equitable, course, where, by reason of the proceedings, suits by libelants have been delayed for a number of years, during which the shipowners have become insolvent. Oregon R. R. & Nav. Co. v. Balfour (1898) 90 Fed. 295, 33 C. C. A. 57.

Petitioners for limitation of liability are entitled, under rule 56, to litigate in the same proceeding the question of the existence of any liability. The Annie Faxon (D. C. 1895) 66 Fed. 575, following The Benefactor (1880) 103 U. S. 239, 26 L. Ed. 351, and Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1883) 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038, and decree modified The Annie Faxon (1896) 75 Fed. 312, 21 C. C. A. 366.

A court of admiralty, which has in its possession a fund arising from the sale of a vessel in proceedings for limitation of liability for collision, has jurisdiction to determine conflicting claims to such fund between the owners of the injured vessel and her insurers, who claim to be subrogated to their right to the fund by reason of having paid a policy of insurance on the vessel. The St. Johns (D. C. 1900) 101 Fed. 469.

In a proceeding by a shipowner in a district court for limitation of liability, the question whether a fire by which cargo was destroyed was caused by the design or neglect of such shipowner, so as to deprive it of the exemption from liability, if not previously adjudicated, will be determined by the court, and will not be left open to be determined by a jury in an action brought by the cargo owner for the purpose. In re Old Dominion S. S. Co. (D. C. 1902) 115 Fed. 845.

836. Order of trial of issues.—In a proceeding for limitation of liability the petition and answer on the one hand and the individual claims for damages on the other present distinct issues, which are to be separately adjudicated in the order named. In re Davidson S. S. Co. (D. C. 1904) 133 Fed. 411.

In a proceeding by the owner of a vessel for limitation of liability on account of a collision, where an answer is filed by the owner of the other vessel setting up a claim for damages, the question of the knowledge or privity of the petitioner, though jurisdictional, and the question of liability for the collision, where both are put in issue by the pleadings and are to be determined largely upon the same evidence, may properly be heard at the same time as a matter of convenience, and the court is not required to hear and dispose of the jurisdictional question separately. In re Eastern Dredging Co. (D. C. 1906) 159 Fed. 541.

Where damage claimants have answered the petition of a shipowner for limitation of liability on account of the loss of the vessel with its passengers and cargo, alleging the negligence of the vessel and the privity of petitioner thereto, the court will not enter upon the consideration of the individual claims until it has determined the questions of liability affecting all claimants alike, unless the petitioner admits such liability in whole or in part, and, if in part only, shows that as to the residue of claims not admitted there can be no reasonable expectation of recovery under the law. La Bourgogne (D. C. 1900) 106 Fed. 232.

The court will not determine petitioner's liability and right to limitation before passing on an appraisal of the vessel and stipulation for value. The Klotawah (D. C. 1914) 210 Fed. 677.

837. Sale of vessel.—In proceedings to limit the liability of a shipowner, the vessel will be sold where it appears that, if she is compelled to remain in custody until the termination of the obligation, her value will be greatly impaired, if not substantially destroyed, though attachment proceedings are pending against her in the state court. The Mendota (D. C. 1882) 14 Fed. 358.

838. Effect of decision.—Proceedings for a limitation of liability, if not instituted until after a party has obtained satisfaction of his demand, are ineffectual as to him. A return to the money should not be compelled, nor, in general, should relief be granted, except upon condition of compensating the party for any costs and expenses to which he may have been subjected by reason of the delay of the shipowner in claiming the benefit of the statute. The Benefactor (1880) 103 U. S. 239, 26 L. Ed. 351.

In proceedings by petition brought by the owners of a vessel under the limited liability act where the vessel has been decreed liable for damages sustained by a collision, the question of liability is res adjudicata, and in no way involved, and the losing party cannot revive and retry the case upon its merits. The Maria and Elizabeth (D. C. 1882) 12 Fed. 627.

Where, after collision, the corporation owning both boats filed a petition to limit its liability with reference to the boat lost only, and did not offer to surrender the colliding boat, an interlocutory decree that the owner of the boat lost was entitled to limit its liability to the appraised value of such boat with its freight pending was no

son Smith (1905) 142 Fed. 724, 74 C. C. A. 56.

The petitioner is entitled to a docket fee for each creditor who comes in and proves his claim, but has no preference for his costs over those of the creditor. In re Norwich & N. Y. Transp. Co. (D. C. 1878) Fed. Cas. No. 10,361.

847. —— **On appeal.**—The act limiting the liability of shipowners does not release them from the payment of costs taxable in the appellate court, or for interest in the nature of damages occasioned by the appeal, beyond the amount of the stipulation filed therefore, if they appear and make defense, The Wanata (1877) 95 U. S. 600, 24 L. Ed. 461.

848. —— **Payment out of fund.**—The costs and expenses of a proceeding to limit the liability of a shipowner are first to be paid out of the fund. Norwich & N. Y. Transp. Co. (D. C. 1878) Fed. Cas. No. 10,361.

The application of rule 55, providing that in cases of limited liability the costs and expenses of the proceeding shall be paid out of the fund in court, is confined to those cases in which the owner of the vessel libeled, after having established his claim to the benefit of the limited liability act does not contest the liability of his vessel for the alleged wrong. The Leonard Richards (D. C. 1890) 41 Fed. 818.

The expenses of administration, including the fees and other charges of the officers of the court and of the commissioner, should be paid from the fund, unless and so far as parties have made issues, and as to this exception the owner stands in the same condition as any other party. All such costs of adverse issues should be taxed without reference to the fund or its existence, the same as the costs of any entirely independent litigation. The H. F. Dimock (1896) 77 Fed. 226, 23 C. C. A. 123; In re Excelsior Coal Co. (D. C. 1905) 136 Fed. 271, affirmed The Harry Hudson Smith (1905) 142 Fed. 724, 74 C. C. A. 56. The cost of issuing and publishing the monition is an expense to be paid out of the fund. Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co. (1912) 197 Fed. 703, 117 C. C. A. 97.

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§ 1537. (R. S. § 914.) Practice and proceedings in other than equity and admiralty causes to conform to practice, etc., in courts of State.

The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the [circuit and] district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such [circuit or] district courts are held, any rule of court to the contrary notwithstanding.

Act June 1, 1872, c. 255, § 5, 17 Stat. 197.

The words of this section inclosed in brackets, "circuit and," and "circuit or," became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Provisions similar to those of this section relating to proceedings for condemnation of land for sites of public buildings, etc., authorized by Act Aug. 1, 1888, c. 728, were made by section 2 of that act, post, § 6910.

The laws of the several States, except where the Constitution, treaties, or

statutes of the United States otherwise require or provide, were made rules of decision in trials at common law in the United States courts, by R. S. § 721, post, § 1538.

Depositions may be taken in the mode prescribed by the laws of the state in which the courts are held, by Act March 9, 1892, c. 14, ante, § 1476.

Marshals and their deputies are given, in each state, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof, by R. S. § 788, ante, § 1312.

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4. Applicability of act to newly admitted states and dependencies.
5. Object of enactment.
6. Jurisdiction of courts.
7. Practice prior to conformity act of 1872.
8. Rules of court.
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12. Mandamus.
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16. Recovery of possession of property.
17. Action by trustee in bankruptcy.
18. Habeas corpus.
19. Scire facias.
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29. —— Statutory rights and remedies not inherently equitable.
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32. Cancellation of instruments.
33. Creditor's proceedings—After execution levy or return.
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36. Determination of corporate power under franchise.
37. Garnishment.
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40. Mortgage foreclosure.
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42. Passing title to real estate by decree.
43. Quieting title—Complainant in possession.
44. —— Unoccupied land.
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48. Tax cases.
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(C) Effect of statute blending equitable and legal claims

51. Obliteration of distinction between action at law and suit in equity.
52. Blending equitable and legal claims in one suit.
53. Equitable defenses to action at law.
54. Action at law on equitable title.

(D) Effect of statutes creating remedy at law in state courts

55. General rule.
56. Application to particular statutes—Creditor's proceedings.
57. —— Mechanic's lien cases.
58. —— Mortgage foreclosure.
59. —— Quieting title.
60. —— Tax cases.
61. Remedy at law in federal courts arising from state statute.

(E) Effect of limitation statutes

62. Application of laches in conformity with limitation statutes.
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64. Where action at law is barred—Claims against decedent's estates.
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(G) Effect of usury statutes

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75. Notice of lis pendens.
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IV. Procedure in Trial Court—Cont'd.

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96. —— Issues, proofs, and variance.
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98. Dismissal or nonsuit before trial.
99. Evidence.
100. —— Decisions of state courts.
101. Witnesses.
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103. Examination of party, production of evidence, or view before trial.
104. Trial—Time of trial.
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106. —— Order of trial.
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110. —— Verdict and submission of special issues.
111. —— Trial by court.
112. New trial.
113. Reference.
114. Receivers.
115. Motions in general.
116. Damages.
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118. Vacation of judgment.
119. Execution and proceedings after judgment.
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V. Procedure in Appellate Court

122. Practice in general.
123. —— Appeal, or writ of error.
124. —— Jurisdiction.
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126. —— Presentation of questions in trial court.
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129. —— Record.
130. —— Bills of exceptions.
131. —— Mandate and proceedings in lower court.
132. —— Liabilities on bonds.

I. NATURE OF REQUIREMENT OF CONFORMITY

1. In general.—In the absence of provisions of positive statute, the state practice prevails in common-law cases. Republic Ins. Co. v. Williams (C. C. 1872) Fed. Cas. No. 11,707; Bills v. New Orleans, St. L. & C. R. Co. (C. C. 1876) Fed. Cas. No. 1,409; Witters v. Sowles (C. C. 1888) 34 Fed. 119; Johnson v. Cadillac Motor Car Co. (D. C. 1912) 197 Fed. 485.

There is no general law or statute of the United States prescribing the forms of procedure, and the law of the trial in the Circuit Court must, as required by this section, conform to the forms and modes of procedure in civil cases in like cases in the courts of record of the state within which the federal court is held. Mexican Nat. R. Co. v. Slater (1902) 115 Fed. 593, 53 C. C. A. 239 (affirmed [1904] 24 Sup. Ct. 581, 194 U. S. 120, 48 L. Ed. 900); Pomeroy v. Manin (C. C.) Fed. Cas. No. 11,260; Golden v. Prince (C. C. 1814) Fed. Cas. No. 5,509; Hale v. Wharton (C. C. 1896) 73 Fed. 739, 746.

Under this section decisions of the supreme court of a state construing its practice acts are binding on the federal courts. Atlantic & P. R. Co. v. Hopkins (1876) 94 U. S. 11, 13, 24 L. Ed. 48.

Decisions of a state court construing the practice acts of the state are binding on the federal courts. Id.

The right to seize the plates and copies which infringed a copyright, issues not solely under this section as analogous to a right of replevin by a state court, but also under the broad grant of power in section 1239, ante. American Tobacco Co. v. Werckmeister (1906) 146 Fed. 375, 76 C. C. A. 647.

The federal courts are not implicitly bound by the practice and decisions of the state courts with regard to amendments. Tobey v. Claflin (C. C. 1838) Fed. Cas. No. 14,066.

State statutes govern in the federal courts when they fix the right or title in litigation, but are not allowed to interfere with the processes or modes of procedure of the federal courts. New England Screw Co. v. Bliven (C. C. 1854) Fed. Cas. No. 10,156.

Under this section the provisions of the state statutes as to pleading and practice in purely legal actions are in the main applicable to such actions in the circuit court of the United States. Weed Sewing Mach. Co. v. Wicks (C. C. 1875) Fed. Cas. No. 17,348.

In an action against a railroad company of one state, brought in the federal court by a citizen of another, the practice is the same as that of the state court. Brownell v. Troy & B. R. Co. (C. C. 1880) 3 Fed. 761, 763.

The statutes of a state regulating practice, and the construction given them by the highest court of the state, are binding upon federal courts sitting within the state in actions at law. Duffy v. Glucose Sugar Refining Co. (C. C. 1905) 141 Fed. 206.

The state practice is applicable to suits at law in the district court of the Southern district of New York. U. S. v. Tracy (D. C. 1875) Fed. Cas. No. 16,536.

The rules of practice in state courts adopted by legislative act are rules of practice in the federal courts, by force of this section, and the federal judges are deprived of discretion over them. Mutual Building Fund Society & Dollar Sav. Bank v. Bossieux (D. C. 1877) Fed. Cas. No. 9,977.

The form of procedure in the district courts of the United States is that of the respective states, subject to discre-

tional change on the part of the courts of the United States. (1855) 7 Op. Atty. Gen. 50.

2. What state practice governs.—The practice of Arkansas used in the state courts of original jurisdiction is binding on the federal courts held in that state and in the Indian Territory. McClellan v. Pyeatt (1892) 50 Fed. 686, 1 C. C. A. 613.

The fact that the assignee of a contract is authorized to sue thereon in his own name in the state where the contract and assignment were made does not give him that right in the federal courts of another state. Nederland Life Ins. Co. v. Hall (1898) 84 Fed. 278, 27 C. C. A. 390.

In a suit in the federal court in Vermont for wrongful death occurring in Connecticut, based on the statute of that state, which requires notice of the claim to be given within four months, the declaration is not demurrable because it fails to allege the giving of such notice, since, while such allegation is required by the Connecticut practice, it is not by that of Vermont, by which the court is governed. Brown v. New York, N. H. & H. R. Co. (C. C. 1905) 136 Fed. 700.

An action in a federal court in one state on a judgment rendered in the courts of another state is governed by the practice and procedure in the courts of the state where the action is brought, and under Code Ga. 1895, § 5126, which provides that "no trial in any civil cause shall be had at the first term except specially provided for by law," the plaintiff in such an action is not entitled to a judgment at the first term, even though no sufficient answer is filed. Springs v. James (C. C. 1909) 172 Fed. 626.

A state statute providing for the allowance of an attorney's fee to a plaintiff on recovery in an action on an insurance policy relates solely to a matter of procedure, and does not govern in an action in another state. Kline Bros. & Co. v. Royal Ins. Co. (C. C. 1911) 192 Fed. 378, judgment reversed Royal Ins. Co., Limited, of Liverpool, Eng., v. Kline Bros. & Co. (1912) 198 Fed. 468, 117 C. C. A. 228.

Statutes of the several states, regulating remedies by means of judicial proceedings, are to be understood as intended to apply only to proceedings in the courts of the particular state where adopted, unless it clearly appears that they were intended to have a wider scope. Majors v. Cowell (1876) 51 Cal. 478.

Where a suit against a New York corporation was pending in a district federal court sitting in another state, the New York laws authorizing the revival of actions against a receiver are inapplicable. In re People's Surety Co. of New York (1913) 144 N. Y. S. 131, 82 Misc. Rep. 518.

3. Alteration of state practice.—The acts of congress adopting the state practice do not adopt future regulations. Binns v. Williams (C. C. 1849) Fed. Cas. No. 1,423; Yaw v. Mead (C. C. 1851) Fed. Cas. No. 18,129; Catherwood v. Gapete (C. C. 1854) Fed. Cas. No. 2,513; Lane v. Townsend (D. C. 1835) Fed. Cas. No. 8,054.

Though the act of the state of Ohio regulating procedure in actions on a note was passed after the making of a note on which the action was brought, yet the circuit court for the district of Ohio had power, by law, to adopt such procedure in such action. Fullerton v. Bank of United States (1828) 26 U. S. (1 Pet.) 604, 7 L. Ed. 280.

In the district court of Louisiana the defendant put in a plea of reconvention, which is authorized by the Code of Practice in Louisiana. The district court, on the motion of plaintiffs, ordered the plea stricken. The Code of Practice of Louisiana was adopted by a statute of that state passed after the act of congress of May 26, 1824, regulating practice in the district courts of the United States for the district of Louisiana, and the practice according to that Code had not been adopted as a part of the rules of practice of the district court when the plea was stricken off. Held, that the plea was properly stricken. Wilcox v. Hunt (1839) 38 U. S. (13 Pet.) 378, 10 L. Ed. 209.

The writ of right was abolished in Massachusetts in 1840, but was previously adopted as a process by the acts of congress in 1789 and 1792, and therefore its abolishment in Massachusetts did not repeal it as process in the circuit court of the United States in that state. Homer v. Brown (1853) 57 U. S. (16 How.) 354, 14 L. Ed. 970.

A district court, having adopted a rule, in conformity with the state statute, as to the time within which a defendant is required to appear after service, is not required by this section to change such rule to conform to every change in the statute, and it is not without jurisdiction over a defendant because the time fixed by the rule and the summons issued and served thereunder is shorter than that prescribed by the statute then in force. Shepard v. Adams (1898) 18 Sup. Ct. 214, 168 U. S. 618, 42 L. Ed. 602.

The federal courts do not follow changes in the practice of the state court. Craig's Case (C. C. 1803) Fed. Cas. No. 3,325.

A modification of a state law of practice followed for a long time will be considered as adopted by usage if not conflicting with the acts of congress. Curtis v. Central Railway (C. C. 1855) Fed. Cas. No. 3,501.

The conformity requirement does not necessitate altering a rule of a federal court as to the return day for process, in conformity with the state practice then existing, to conform to a change

by subsequent state legislation. Boston & M. R. Co. v. Gokey (1908) 28 Sup. Ct. 657, 210 U. S. 155, 52 L. Ed. 1002, affirming judgment (1906) 149 Fed. 42, 79 C. C. A. 64, 9 Ann. Cas. 384, which affirmed Gokey v. Boston & M. R. Co. (C. C. 1904) 130 Fed. 992.

The form of original writs in the District Court of the District of Massachusetts as fixed by Act Sept. 29, 1789, § 2 (section 1536, ante), remains, though there is a subsequent change in the statutes of Massachusetts, in the absence of any change in the rules of the District Court. This section does not necessitate altering a rule of a federal circuit court as to the return day for process adopted under the authority of section 918 in conformity with the state practice then existing, so as to conform to a change in such practice made by subsequent state legislation. In re Kinney (1913) 202 Fed. 137, 120 C. C. A. 315.

Even though, under this section, an anomalous proceeding at law may be brought in a federal court in the manner in which it is authorized by special act to be brought in a state court, yet, if the state has repealed such special act, then the special proceeding is no longer maintainable in the federal courts, and must be dismissed, if brought. Harvey v. Commonwealth of Virginia (C. C. 1884) 20 Fed. 411.

4. Applicability of act to newly admitted states and dependencies.—Although Conformity Act May 8, 1792, was expressly confined in its operations to the day of its passage, a district court subsequently established in a newly admitted state had power to adopt the practice of the state courts. Fullerton v. Bank of U. S. (1828) 1 Pet. 604, 612, 7 L. Ed. 280.

An act passed on admitting Iowa into the Union having provided that the laws of the United States not locally inapplicable should have the same effect within that state as elsewhere Process Act May 19, 1828, became applicable to the federal courts of that state. U. S. ex rel. Moses v. Keokuk (1867) 6 Wall. 514, 516, 18 L. Ed. 933.

Act Jan. 29, 1861, § 4, provides for the admission of Kansas into the Union, and "that from and after the admission of the state of Kansas, as heretofore provided, all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within that state as in other states of the Union, and that said state is hereby constituted a judicial district," etc. Held, in effect, a substantial re-enactment for that state of Act 1828, providing that the forms of mesne process, except the title, and the forms and modes of proceeding in suits in courts of the United States, held in states admitted into the Union since September 29, 1789, in those of common law, shall be the same in each of those states, respectively, as are now used in the highest court of original and general jurisdiction of the same; in proceedings in equity, according to the principles, rules, and usages belonging to courts of equity, except so far as may have been otherwise provided by the acts of congress, subject, however, to such alterations and additions as the courts of the United States shall, in their discretion, deem expedient. Smith v. Cockrill (1867) 73 U. S. (6 Wall.) 756, 18 L. Ed. 973.

It was the intention of congress in the Porto Rico Act to require the district court, exercising the jurisdiction of a circuit court in analogy to the powers of the circuit court in the state, to adapt itself, save in the excepted cases in equity and admiralty, to local procedure and practice in Porto Rico. Fernandez y Perez v. Perez y Fernandez (1906) 26 Sup. Ct. 561, 564, 202 U. S. 80, 50 L. Ed. 942.

See Crowley v. U. S., 24 Sup. Ct. 731, 194 U. S. 461, 48 L. Ed. 1075.

5. Object of enactment.—The provision that the proceedings in suits at common law in states admitted to the Union since 1789 shall be the same in the federal courts as those used when the act was passed in the highest courts of original and general jurisdiction in those states is a process provision, designed only to regulate proceedings in the federal courts after they obtained jurisdiction, and the purpose is to make the forms of process and forms and modes of proceedings in the federal courts correspond with the forms and modes in use in the state courts. Bath County v. Amy (1871) 13 Wall. 244, 250, 20 L. Ed. 539.

The object of this section was to assimilate the form and manner in which the parties should present their claims and defenses in preparation for the trial of suits in the federal courts to those prevailing in the courts of the state. James P. Witherow Co. v. De Bardeleben Coal & Iron Co. (1900) 99 Fed. 670, 674, 40 C. C. A. 65.

The purpose of this provision was to bring about uniformity in the law of procedure in the federal and state courts of the same locality, having reference to the statutory enactments of the states, but the federal courts may exercise their discrimination in adopting any state legislation passed after the date of the Revised Statutes. Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 64.

6. Jurisdiction of courts.—The federal courts follow the practice of the courts of the state in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction; but the jurisdiction of the federal courts can be neither restricted nor enlarged by the statutes of a state. Manning v. German Ins. Co. (1901) 107 Fed. 52, 57, 46 C. C. A. 144; Pentlarge v. Kirby (C. C. 1884) 20 Fed. 898, 899; East Ten-

nessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109; Wells v. Clark (C. C. 1905) 136 F. 462 (judgment modified and affirmed Clark v. Wells [1906] 27 Sup. Ct. 43, 203 U. S. 164, 51 L. Ed. 138); Clark v. Southern Pac. Co. (C. C. 1909) 175 Fed. 122.

The acts of congress adopting the state process adopted the form and methods of service only so far as the persons are rightfully within the scope of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. Toland v. Sprague (1838) 12 Pet. 300, 330, 9 L. Ed. 1093.

The process and modes of proceeding in the state were adopted by congress in reference to the jurisdiction otherwise conferred on the circuit courts, and not with a view of limiting their jurisdiction. Massingill v. Downs (1849) 7 How. 760, 766, 12 L. Ed. 903.

This section applies only to cases of which the court has jurisdiction according to the constitution and laws of the United States. Goldey v. Morning News (1895) 15 Sup. Ct. 559, 562, 156 U. S. 518, 39 L. Ed. 517.

In cases which concern the jurisdiction of the federal courts, notwithstanding the provisions of this section, neither the statutes of the state nor the decisions of its courts are conclusive upon the federal courts. Mechanical Appliance Co. v. Castleman (1909) 30 Sup. Ct. 125, 128, 215 U. S. 437, 54 L. Ed. 272.

Plaintiff sued out an attachment under Code Civ. Proc. Kan. § 191, for a debt due, and another, against the same defendant, under section 230, for a debt not due. Both claims grew out of the same running account, and together exceeded $2,000. He sued in the United States circuit court for the whole amount. Defendant, having demurred, cited section 83 of the Code, allowing a defendant to demur where causes of action were improperly joined, and section 92, requiring separate petitions for each cause of action where the demurrer was sustained, and a decision of the supreme court of Kansas construing these provisions, and holding that it was a misjoinder to include in one petition a claim due, and one not due; and he asked judgment on his demurrer in this case because neither claim alone was within the jurisdiction of the court. Held, that this section does not require the federal courts to follow state decisions in matters which affect their jurisdiction, and as the amount in controversy in this case is within the jurisdiction of the court the demurrer will be overruled. O'Connell v. Reed (1893) 56 Fed. 531, 5 C. C. A. 586.

The jurisdiction of a federal court over the subject-matter of and the parties to a judgment includes the power to enforce it, continues until it is satisfied, and may not be destroyed or impaired by the legislation of the states. Collin County Nat. Bank v. Hughes (1907) 152 Fed. 414, 81 C. C. A. 556, rehearing denied (1907) 155 Fed. 389, 83 C. C. A. 661.

Whether a suit in a federal court involves the necessary jurisdictional amount is not a local question controlled by the statutes of the state or the rulings of its Supreme Court. Heffner v. Gwynne-Treadwell Cotton Co. (1908) 160 Fed. 635, 87 C. C. A. 606.

Jurisdiction, where causes of action separately would not reach the required jurisdictional amount for the federal courts, held controlled by the federal law, and not by state legislation. Yates v. Whyel Coke Co. (1915) 221 Fed. 603, 137 C. C. A. 327.

The requirement that a civil suit against an inhabitant of the United States must be brought in the district of which he is an inhabitant, or in which he is found when the writ is served, cannot be changed by state law. Act 1789, § 11. Pomeroy v. New York & N. H. R. Co. (C. C. 1857) Fed. Cas. No. 11,261.

As an action cannot be begun in the federal courts against a corporation not found within the jurisdiction, by an attachment of its property, so where personal service is made upon a foreign corporation in the manner provided by the state law, the requirement of the state law that actions against foreign corporations must be begun by attachment does not affect the court's jurisdiction. Hayden v. Androscoggin Mills (C. C. 1879) 1 Fed. 93, 95.

A provision by a state that a corporation of another state shall not do business therein does not prevent such corporation from suing in a national court in the former state, since a state cannot prevent a foreign corporation from suing in such tribunal. Northwestern Mut. Life Ins. Co. v. Elliott (C. C. 1880) 5 Fed. 225.

The Oregon act (Laws Or. 617) prohibiting a foreign corporation from "transacting business in this state" until it appoints a resident agent therein was not intended to prevent such corporation from maintaining a suit in the state courts, and it is not in the power of the state to prevent it from maintaining a suit in the federal court. Orange Nat. Bank v. Traver (C. C. 1881) 7 Fed. 146.

No question arising on a bill of exceptions can be considered by the circuit court on a writ of error to the district court in an action at law, where the facts were found by the district court without a jury, the matter being one of the power of the court and not a question of practice within this section. Doty v. Jewett (C. C. 1884) 19 Fed. 337, 338.

The defendant, answering to the merits after alleging that he has no knowledge or information sufficient to

form a belief as to plaintiff's citizenship, waives any objecton to the jurisdiction, regardless of the local law allowing dilatory defenses and providing that objection to the jurisdiction may be taken by answer, and of this act. Cuthbert v. Galloway (C. C. 1888) 35 Fed. 466.

Where every jurisdictional requirement of the act of 1875 is complied with, a suit in a district in one state, for a cause not arising there, between a plaintiff residing in another state and a corporation of a third state, will not be dismissed because by the local statutes the state courts have no jurisdiction. Wotherspoon v. Massachusetts Ben. Ass'n (C. C. 1889) 38 Fed. 625.

Though section 1033, ante, authorizes an original suit brought in the circuit court, where jurisdiction is founded on the fact of diverse citizenship solely, to be brought in the district of the residence of either plaintiff or defendant, and the statutes of Connecticut permit the attachment of the property, located in the state, of a nonresident defendant, without personal service on him, and, in the absence of voluntary appearance, the subjection of such property to a judgment in rem, this section and section 1539, post, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings in rem against the property of a nonresident defendant, who has not been personally served or appeared. Harland v. United Lines Tel. Co. (C. C. 1889) 40 Fed. 308, 6 L. R. A. 252.

It is no defense to a suit brought in a federal court by an alien to recover money from a citizen that defendant, after the commencement of the suit, has been ordered by a state court, pursuant to a state statute, to hold the money to the credit of an action pending therein, as if it were paid into court; for the federal jurisdiction cannot be thus impaired. Blydenstein v. New York Security & Trust Co. (C. C. 1893) 59 Fed. 12, judgment affirmed (1895) 67 Fed. 469, 15 C. C. A. 14.

Jurisdiction on the ground of diverse citizenship cannot be defeated by R. L. Vt. § 2125, providing that a claim against the estate of an intestate must go before the state tribunal. Heaton v. Thatcher (C. C. 1893) 59 Fed. 731.

Notwithstanding this section separate claims arising under separate contracts cannot be joined, in order, by their aggregate amount, to confer jurisdiction, though a joinder be authorized by state statute. Holt v. Bergevin (C. C. 1894) 60 Fed. 1.

The jurisdiction of the federal courts cannot be impaired by the laws of the states which prescribe particular methods of redress in their courts or which regulate the distribution of judicial power. Crider v. Shelby (C. C. 1899) 95 Fed. 212, 213.

The authority of a federal court into which a cause has been removed to determine whether the state court, by the service made, acquired jurisdiction over the defendant, a foreign corporation, to render judgment against it, is neither derived from nor limited by the laws of the state; nor is such court concluded by the decision of the state court thereon. Cady v. Associated Colonies (C. C. 1902) 119 Fed. 420.

This section does not appertain to jurisdiction, or the mode of obtaining jurisdiction, of the person in actions brought in the federal courts. Wells v. Clark (C. C. 1905) 136 Fed. 462, judgment modified Clark v. Wells (1906) 27 Sup. Ct. 43, 203 U. S. 164, 51 L. Ed. 138.

A federal court, on its common-law side, had no jurisdiction either to foreclose a mechanic's lien or to award plaintiff any relief against his failure to proceed to the enforcement thereof within the statutory time. Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. 1910) 171 Fed. 778, decree modified (1910) 184 Fed. 199, 107 C. C. A. 93.

A federal court may be held on a day appointed by the president of the United States and the governor of the state as a day of thanksgiving. In re McGlynn (D. C. 1872) Fed. Cas. No. 8,804.

The jurisdiction of the courts of the United States is derived alone from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by state laws or regulations. Hall v. Devoe Mfg. Co. (D. C. 1882) 14 Fed. 183; The H. E. Willard (D. C. 1891) 53 Fed. 599.

On an application to a court of bankruptcy for an injunction and order to prevent a county district attorney from using, and a trustee in bankruptcy from permitting the use, of books of the bankrupt in criminal proceedings, no question arises involving the Constitution of the state; the jurisdiction of the court depending on the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544) and the Constitution of the United States. In re Tracy & Co. (D. C. 1910) 177 Fed. 532.

Notwithstanding this section, state decisions are not conclusive on federal courts on questions of jurisdiction. Southern Photo Material Co. v. Eastman Kodak Co. of New York (D. C. 1915) 224 Fed. 523.

7. Practice prior to conformity act of 1872.—Prior to Conformity Act 1872, the practice of federal courts in actions at law was wholly independent of current state statutes and state decisions, and under Judiciary Act 1789, c. 20, and Process Act 1792, c. 36, the practice at common law in the federal courts was that which obtained in the supreme courts of the original states respectively in September, 1789. Chicago & N. W. Ry. Co. v. Kendall

(1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560.

The common-law practice of the state courts is not followed in the federal courts, except as it existed at the passage of the act of 1789, and as adopted by rule since. Brewster v. Gelston (C. C. 1825) Fed. Cas. No. 1,853.

The forms of process and procedure of the federal courts in actions at common law within the 13 original states are the same as those employed therein May 8, 1792, except so far as the federal courts may have prescribed alterations. U. S. v. Stevenson (D. C. 1869) Fed. Cas. No. 16,-393.

8. Rules of court.—This section should be construed in connection with section 1544, post, authorizing the federal courts to adopt rules of their own. Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282; Osborne v. City of Detroit (C. C. 1886) 28 Fed. 385; Importers' & Traders' Nat. Bank v. Lyons (C. C. 1905) 134 Fed. 510.

State insolvent laws cannot affect proceedings in federal courts unless they are adopted as rules of proceeding. Beers v. Haughton (C. C. 1834) Fed. Cas. No. 1,230.

State insolvent laws may be adopted by a rule of court. Id.

No rule under the provision of Act 1828, § 3, authorizing the courts of the United States to alter final process, so as to conform it to any changes which may be adopted by state legislation, and no rules made by a district judge, will be recognized by the supreme court as binding, except those made by the district courts exercising circuit court powers. Amis v. Smith (1842) 16 Pet. 303, 314, 10 L. Ed. 973.

A court of the United States may adopt in a particular case a rule of practice under a state statute, and where a circuit court is possessed of a case from another circuit it may adopt the practice of the state in which the circuit court from which the case is transferred sits. Lee County v. U. S. ex rel. Rogers (1868) 7 Wall. 175, 181, 19 L. Ed. 162.

A state law prescribing rules of practice has no efficacy in the courts of the United States. Such rules can only be made operative in the national courts by being adopted by a rule of such courts. City of Davenport v. Lord (1869) 76 U. S. (9 Wall.) 409, 19 L. Ed. 704.

By this section and sections 1539, 1540, and 1544, post, it sufficiently appears that, while it was the purpose of congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. Shepard v. Adams (1898) 18 Sup. Ct. 214, 216, 168 U. S. 618, 42 L. Ed. 602.

This section does not require conformity with reference to return days for summons; such courts, as to that, being governed by their own rules. U. S. v. United States Fidelity & Guaranty Co. (1911) 186 Fed. 477, 108 C. C. A. 455, affirming judgment Kinney v. Same (C. C. 1910) 182 Fed. 1005, judgment affirmed U. S. v. Same (1911) 32 S. Ct. 101, 222 U. S. 283, 56 L. Ed. 200.

Rule of state court requiring term notice, not adopted by the federal court, is not obligatory on it. Bayard v. Mandeville (C. C. 1824) Fed. Cas. No. 1,132.

Act June 1, 1872, abrogated all rules of the federal courts inconsistent with the state practice in common-law cases, and required the federal district and circuit courts to conform to the state practice in common-law cases, when practicable. Republic Ins. Co. v. Williams (C. C. 1872) Fed. Cas. No. 11,707.

The right to make rules touching the mode of taking testimony is not conferred upon the district and circuit courts of the United States. Randall v. Venable (C. C. 1883) 17 Fed. 162.

A rule adopted by the federal court regulating the method of serving its process, while the practice of service process by the state courts remains uncertain, is binding on the United States marshal, and is not in conflict with this section. Lowry v. Story (C. C. 1887) 31 Fed. 769.

This section applies to systems of judicial procedure, not to the details of doing the business of courts, which are left to be provided for by rules of court, made pursuant to section 1544, post. Accordingly, held, that rules of a United States circuit court, providing that writs shall be returnable to the regular terms of the court, and that suits are to be docketed on the first day of the term, are not abrogated by the passage of a state statute providing that writs in the state courts shall be returnable to the clerk's office and be docketed therein within 21 days. Ewing v. Burnham (C. C. 1896) 74 Fed. 384.

Rule 7, § 4, of the rules of the Circuit Court of the United States for the Eastern District of Pennsylvania, which provides that "on all motions or rules to show cause on the hearing of which facts are to be investigated, the testimony of witness shall be taken by deposition in writing, * * * and no witness shall be examined at the bar unless by special previous order of the court," prescribes a mode of practice which it was within the power of the

court to adopt, and a witness may lawfully be subpœnaed to give testimony by deposition to be used on such a hearing in an action at law. Despeaux v. Pennsylvania R. Co. (C. C. 1906) 147 Fed. 926.

The federal courts may, by standing rule, change subordinate provisions which they deem unsuited to their procedure, and may in their discretion reject collateral or subordinate provisions of the state practice, pleadings, or forms, which tend to obstruct the administration of justice in any particular case presenting unusual features, without making any standing rule. Hein v. Westinghouse Air Brake Co. (C. C. 1909) 168 Fed. 766.

Where state statute or practice is not adequate to afford the relief which congress has provided by statute, resort must be had to the power of the federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the federal statute. Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co. (D. C. 1912) 196 Fed. 514.

9. Effect of federal statutes regulating procedure.—The Conformity Act applies only in the absence of direct legislation upon a subject by Congress. Keary v. Farmers' & Merchants' Bank (1842) 16 Pet. 89, 93, 10 L. Ed. 897; Ex parte Fiske (1885) 5 Sup. Ct. 724, 113 U. S. 713, 28 L. Ed. 1117; Walker v. Collins (1892) 50 Fed. 737, 1 C. C. A. 642; Lange v. Union Pac. R. Co. (1903) 126 Fed. 338, 340, 62 C. C. A. 48 (writ of certiorari denied [1904] 24 Sup. Ct. 853, 193 U. S. 671, 48 L. Ed. 841); Shumaker v. Security Life & Annuity Co. of America (1908) 159 Fed. 112, 86 C. C. A. 302; Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633 (certiorari denied [1909] 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064); Berry v. Mobile & O. R. Co. (D. C. 1915) 228 Fed. 395; Pentlarge v. Kirby (C. C. 1884) 20 Fed. 898, 899; McLennan v. Kansas City, St. Joseph & C. B. R. Co. (C. C. 1884) 22 Fed. 198, 199; Sulzer v. Watson (C. C. 1889) 39 Fed. 414, 415; Kirkpatrick v. Pope Mfg. Co. (C. C. 1894) 61 Fed. 46, 49; Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554; Allnut v. Lancaster (C. C. 1896) 76 Fed. 131; Webb v. Goldsmith (C. C. 1904) 127 Fed. 572.

In Act July 11, 1890 (26 Stat. 268), which incorporates the North River Bridge Company, gives it power to condemn lands, and provides that the compensation therefor shall be ascertained according to the laws of the state in which they are situated, the provision of section 4, that the condemnation proceedings in the federal circuit court shall conform "as nearly as may be to the practice in the courts of the state," must, like this section, be construed to be an adoption of the state laws only when they are consistent with the federal legislation; and therefore a circuit court should not follow the provisions of the New Jersey statutes requiring the condemnation commissioners appointed by the court to file the report of their assessment in the county clerk's office, but the same should be filed in the clerk's office of the circuit court; and, if a trial by jury should be had by way of appeal, as allowed by the state statutes, such trial must likewise be had in the circuit court. Luxton v. North River Bridge Co. (1893) 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194.

It is very clear that this section goes no further than to provide a general rule regulating practice and procedure in the federal courts, in the absence of any express congressional enactment upon the subject. It does not by implication repeal any previous act of congress expressly requiring a particular mode of proceeding in any given case or class of cases. Wear v. Mayer (C. C. 1880) 6 Fed. 658, 660.

While the practice in the state courts may enlarge the power of amendment in the federal courts, it cannot diminish such powers as are conferred by acts of congress. Norton v. City of Dover (C. C. 1882) 14 Fed. 106.

This section must be construed as not affecting prior acts concerning procedure in the national courts. Cottier v. Stinson (C. C. 1883) 18 Fed. 689, 690.

A federal court is bound by this section, as well as by section 1591, post, and Congress has to some extent regulated the allowance of amendments in the federal courts and the regulations control as far as they extend. De Valle Da Costa v. Southern Pac. Co. (C. C. 1909) 167 Fed. 654.

This section does not require a federal court to follow state procedure, where to do so will defeat the purpose or impair the effect of any congressional statute. U. S. v. Beaty (D. C. 1912) 198 Fed. 284.

10. Degree of conformity.—Under the conformity statute, a federal court will follow the practice prescribed by a state statute "as near as may be," but not where it would defeat or incumber the administration of the law under federal statutes. Mexican Cent. Ry. Co. v. Pinkney (1893) 13 Sup. Ct. 859, 865, 149 U. S. 194, 37 L. Ed. 699; Wall v. Chesapeake & O. Ry. Co. (1899) 95 Fed. 398, 402, 37 C. C. A. 129; Lange v. Union Pac. R. Co. (1903) 126 Fed. 338, 340, 62 C. C. A. 48 (writ of certiorari denied [1904] 24 Sup. Ct. 853, 193 U. S. 671, 48 L. Ed. 841); Williamson v. Liverpool & London & Globe Ins. Co. (1905) 141 Fed. 54, 72 C. C. A. 542; City of St. Charles v. Stookey (1907) 154 Fed. 772, 85 C. C. A. 494 (writ of certiorari denied [1908] 28 Sup. Ct. 569, 208 U. S. 617, 52 L. Ed. 647); Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314; Lowry v. Story (C.

C. 1887) 31 Fed. 769; Hein v. Westinghouse Air Brake Co. (C. C. 1908) 164 Fed. 79; Manitowoc Malting Co. v. Feuchtwanger (D. C. 1912) 196 Fed. 506; Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co. (D. C. 1912) 196 Fed. 514.

The modes of proceeding in civil causes in the federal courts must conform as near as may be to those existing at the time in the courts of record in the state. Perry v. Mechanics' Mut. Ins. Co. (C. C. 1882) 11 Fed. 478; U. S. v. Houston (D. C. 1891) 48 Fed. 207, 210.

Under Act May 26, 1824, c. 181, providing that the mode of proceeding in civil causes in the courts of the United States in Louisiana should thereafter be conformable to the laws directing the mode of practice in the district courts of the state, except wherein the judge of the United States court might so modify them as to adapt them to the organization of his own court, where no rule has been adopted superseding the state practice, that must be followed. Parsons v. Bedford (1830) 28 U. S. (3 Pet.) 433, 7 L. Ed. 732.

A clause void because in conflict with the Constitution of the United States cannot be considered as a rule of decision governing practice under this section. Poindexter v. Greenhow (1885) 5 Sup. Ct. 903, 920, 114 U. S. 270, 29 L. Ed. 185.

Act Va. Jan. 26, 1882, as amended by Act March 13, 1884, forbidding the tax collector to receive coupons cut from the bonds of the state issued under Act Va. March 30, 1871, and providing that no action should be brought against the tax collector, in cases where he has refused to receive coupons for taxes, other than an action to recover back money paid for taxes under protest, being unconstitutional, as impairing the obligation of a contract, cannot be regarded as a rule of practice, within this section. Poindexter v. Greenhow (1885) 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; White v. Same (1885) 114 U. S. 307, 5 Sup. Ct. 923, 962, 29 L. Ed. 199; Chaffin v. Taylor (1885) 114 U. S. 309, 5 Sup. Ct. 924, 962, 29 L. Ed. 198; Allen v. Baltimore & O. R. Co. (1885) 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. Ed. 200; Chaffin v. Taylor (1886) 116 U. S. 567, 6 Sup. Ct. 518, 29 L. Ed. 727.

A substantive right or defense under federal Employers' Liability Act April 22, 1908, cannot be lessened by a local rule of practice. Norfolk Southern R. Co. v. Ferebee (1915) 35 S. Ct. 781, 238 U. S. 269, 59 L. Ed. 1303, affirming judgments Ferebee v. Norfolk Southern R. Co. (1913) 79 S. E. 685, 163 N. C. 351, 52 L. R. A. (N. S.) 1114 and Id. (1914) 83 S. E. 360, 167 N. C. 290.

This section has not always been looked upon with favor by the federal courts, and the clause "as near as may be" has received a liberal construction. Fireman's Fund Ins. Co. v. Norwood (1895) 69 Fed. 68, 71, 16 C. C. A. 136.

The federal courts cannot arbitrarily reject established rules of procedure observed in the courts of the state, in accordance with local laws, but must be governed thereby, except where the rule is in conflict with some federal law or rule of procedure, or where the observance of the local law will occasion great inconvenience or interfere with the due administration of the law. Chicago, M. & St. P. Ry. Co. v. Metalstaff (1900) 101 Fed. 769, 770, 141 C. C. A. 669.

In proceedings under state statute, the court will not follow it in matters of form where it is impracticable. Dunn v. Games (C. C. 1840) Fed. Cas. No. 4,177.

This section applies only to such procedure as is established by the statutes of the several states, and not to that established by judicial construction of common-law remedies. Sanford v. Portsmouth (C. C. 1877) Fed. Cas. No. 12,315.

This section does not require the adoption with local statutes of the local interpretation which may have been put on them, and a federal court is not in all cases bound by the state practice, but need only conform to it as near as may be, and may exercise discretion. Osborne v. Detroit (C. C. 1886) 28 Fed. 385, 387.

Where the laws of a state permit a county to contract and issue obligations as evidences of indebtedness to citizens of other states, such citizens cannot be prevented from bringing suits in a federal court in the state of the county by a law which provides that counties cannot be sued, for the right to create obligations gives the right of such citizens to sue the counties in the federal courts, which right is beyond the control of any legislative action of the state, and can be regulated alone by the constitution and laws of the United States. Hoover v. Crawford County (C. C. 1889) 39 Fed. 7.

The constitution of the United States Circuit Court is such that the rules regulating in detail the time and mode of conducting the business in a state court are not applicable therein; as to such rules and regulations this act is not mandatory. Walker v. Collins (C. C. 1893) 59 Fed. 70, 71, 8 C. C. A. 1, reversed (1897) 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76.

This section simply undertakes to conform the federal practice to the state model "as near as may be," not as near as may be possible, nor as near as may be practicable. Salisbury v. Bennett (C. C. 1896) 72 Fed. 743, 745.

The language of this section does not require a universal following of the

state practice, pleadings, forms, and modes of procedure, though the federal court must conform to them as near as may be. De Valle Da Costa v. Southern Pac. Co. (C. C. 1909) 167 Fed. 654.

This section vests the court with a discretion as to following state trial statutes, and it should decline to follow such a statute where it appears that it would unnecessarily prolong the litigation and add to the expense. Elk Garden Co. v. T. W. Thayer Co. (D. C. 1913) 206 Fed. 212.

II. APPLICABILITY TO PARTICULAR CLASSES OF ACTION OR PROCEEDINGS

11. United States as party in general.—Where a suit was brought in the name of the United States, under Act March 3, 1873, against the Union Pacific Railway Company and others, as provided by such act, the sufficiency of the bill must be determined by the provisions of such act, as by laying down in specific terms the subject-matter of the suit, and granting peculiar powers to the court, it was not intended that any other matters be heard in the case than those provided by the act. U. S. v. Union Pac. R. Co. (1878) 98 U. S. 569, 25 L. Ed. 143.

An action on a defaulting postmaster's bond, brought in a district court of Idaho, is not within Rev. St. Idaho 1887, § 4209, requiring plaintiffs to furnish the items of accounts sued on; and the United States may refuse such items, and thereafter introduce copies of the account current and the money order account of the defaulter. Alexander v. U. S. (1893) 57 Fed. 828, 6 C. C. A. 602.

The right of the United States to maintain an action in respect to a governmental matter cannot be affected by a state enactment requiring a notice to be given or demand made as a condition precedent to suit. McKnight v. U. S. (1904) 130 Fed. 659, 65 C. C. A. 37.

Where the United States prosecute their suits in the state court, they are subject to the state law as to the manner of enforcing their rights. Stearns v. U. S. (C. C.) Fed. Cas. No. 13,341.

The process and forms of proceedings adopted by congress from the state laws are binding upon the United States as parties to an action. U. S. v. Tetlow (D. C. 1872) Fed. Cas. No. 16,456.

State statutes of limitation do not run against claims of the United States. U. S. v. Spiel (D. C. 1881) 8 Fed. 143.

Where the United States has recovered judgment against several defendants, its right to revive the judgment against the executor of one of them, since deceased, is not affected by Gen. St. Kan. § 2890, providing that actions against executors and administrators shall be commenced within three years from the time of notice of appointment and giving bond, and that otherwise the claim shall be forever barred. U. S. v. Houston (D. C. 1891) 48 Fed. 207.

Where the United States is party to a suit arising out of an effort to enforce one of its laws, the laws and established practice in the state wherein the federal court sits are considered as those of a foreign jurisdiction. U. S. v. Rubin (D. C. 1915) 227 Fed. 938.

12. Mandamus.—The United States circuit courts have no jurisdiction to issue writs of mandamus, even when, by the law of the state where the court sits, mandamus is regarded as a civil action, except in cases where the writ is ancillary to some other proceedings. Rosenbaum v. Bauer (1887) 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743; Gares v. Northwest Nat. Building, Loan & Investment Ass'n (C. C. 1892) 55 Fed. 209.

The jurisdiction of a federal court to award a writ of mandamus is not dependent on the laws or practice of the state, but is derived from the federal statute originally section 14, Judiciary Act Sept. 24, 1789, now R. S. § 716, ante, § 1239. Board of Liquidation of City of New Orleans v. U. S. (1901) 108 Fed. 689, 47 C. C. A. 587.

State statutes relating to pleadings and practice in actions of mandamus are not made applicable by this section, to the ancillary jurisdiction of the federal circuit court. U. S. v. Union Pac. R. Co. (C. C. 1873) Fed. Cas. No. 16,599.

Mandamus cannot be issued by the circuit court of the United States under this section, as an original proceeding. Id.

The federal court, in granting writs of mandamus for the purpose of compelling a municipal corporation to levy a tax, will conform as much as possible to the state practice in similar cases. Wisdom v. Memphis (C. C. 1878) Fed. Cas. No. 17,903.

Under this section an original proceeding by mandamus to try a right can be brought in a federal court held in Virginia by reason of its use for such purpose in the state courts. Virginia Coupon Cases (C. C. 1884) 25 Fed. 641, 644.

Statutes of Virginia, which take away mandamus in the state courts in cases where coupons are sought to be used in payment of taxes, take it away in the federal courts under this section. Parsons v. Marye (C. C. 1885) 23 Fed. 113, 121, reversed (1885) 5 Sup. Ct. 932, 962, 114 U. S. 325, 29 L. Ed. 205.

13. Proceeding under reclamation act.—This section does not affect the power conferred on the Secretary of the Interior by Reclamation Act 1902, c. 1093, § 7, and his decision is not re-

viewable by the courts. U. S. v. O'Neill (D. C. 1912) 198 Fed. 677.

14. Condemnation proceedings.—In Act July 11, 1890 (26 Stat. 268), which incorporates the North River Bridge Company, gives it power to condemn lands, and provides that the compensation therefor shall be ascertained according to the laws of the state in which they are situated, the provision of section 4, that the condemnation proceedings in the federal circuit court shall conform "as nearly as may be to the practice in the courts of the state," must, like this section, be construed to be an adoption of the state laws only when they are consistent with the federal legislation; and therefore a circuit court should not follow the provisions of the New Jersey statutes requiring the condemnation commissioners appointed by the court to file the report of their assessment in the county clerk's office, but the same should be filed in the clerk's office of the circuit court; and, if a trial by jury should be had by way of appeal, as allowed by the state statutes, such trial must likewise be had in the circuit court. Luxton v. North River Bridge Co. (1893) 13 Sup. Ct. 356, 357, 147 U. S. 337, 37 L. Ed. 194.

Upon the removal into a federal court of proceedings for the condemnation of land under the laws of the state, such court is limited in its powers, and governed as to its procedure by the statutes of the state prescribing the mode of procedure in such cases in the state courts. Broadmoor Land Co. v. Curr (1905) 142 Fed. 421, 73 C. C. A. 537.

A state statute providing a mode of procedure for condemnation of land by the United States (Act Ohio Feb. 15, 1873) is made applicable to such proceedings in a federal court by this act. U. S. v. Inlots (C. C. 1873) Fed. Cas. No. 15,441.

A federal court, to which an appeal from a sheriff's jury in condemnation proceedings has been removed, should not direct the marshal to oust the railroad from the right of way until the damages are paid. The statute (Code Iowa, § 1258) gives the injured party a remedy, and he should be left to that. Reed v. Chicago, M. & St. P. Ry. Co. (C. C. 1885) 25 Fed. 886.

The method of exercising the right of eminent domain conferred by an act of Congress is fixed by the laws of the several states. Postal Telegraph Cable Co. v. Southern Ry. Co. (C. C. 1898) 89 Fed. 190, 191.

15. Enforcing liability of corporate stockholders.—The mode in which the liability of stockholders for corporate debts shall be enforced depends entirely upon the law of the state governing the corporation. Cuykendall v. Miles (C. C. 1882) 10 Fed. 342, 344.

16. Recovery of possession of property.—Under Act 1828, c. 68, § 51, an action of trespass quare clausum fregit, with notice that it is brought "as well to try titles as to recover damages," may be maintained in the circuit court of the United States in Alabama, to recover possession of lands, the statute of Alabama of December 17, 1821, having substituted that form of action for ejectment. Sears v. Eastburn (1850) 51 U. S. (10 How.) 187, 13 L. Ed. 381.

An action under Code Ala. § 2942, by the United States, brought in the circuit court of the United States to recover in specie logs claimed to belong to the United States, is not a case of an attachment against the property of a defendant, under R. S. § 915, post, § 1539, but is a case where, under this section, the forms and modes of proceeding are to conform, as near as may be, to the forms and modes of proceeding existing at the time, in a like cause, in the courts of the state in which the circuit court is sitting. U. S. v. Bryant (1884) 4 Sup. Ct. 601, 603, 111 U. S. 499, 28 L. Ed. 496.

The remedy of ejectment in favor of a riparian owner to prevent interference with his rights in his submerged water front, when recognized by the state court, will be sustained as a proper one by the supreme court of the United States on writ of error to the state court. Scranton v. Wheeler (1900) 21 Sup. Ct. 48, 179 U. S. 141, 45 L. Ed. 126, affirming judgment (1897) 71 N. W. 1091, 113 Mich. 565, 67 Am. St. Rep. 484.

Holders of oil and gas lease are precluded by this section and section 1538, post, from maintaining ejectment in federal courts, if the action is not maintainable in state court. Guffey v. Smith (1915) 35 S. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; Id. (1915) 35 S. Ct. 532, 237 U. S. 120, 59 L. Ed. 866, reversing decree Smith v. Guffey (1912) 202 Fed. 106, 120 C. C. A. 436.

Parties in actions in federal courts for the recovery of possession of real property are entitled to the rights and remedies prescribed by state statutes defining the rights and remedies in the state courts. Iron Silver Min. Co. v. Campbell (1894) 61 Fed. 932, 933, 10 C. C. A. 172.

The new form of ejectment provided by state statute must be pursued in the federal court. Fraser v. Weller (C. C. 1853) Fed. Cas. No. 5,064.

As the laws of Virginia do not admit the action of replevin, the writ of replevin cannot issue from this court. Baltimore & O. R. Co. v. Hamilton (C. C. 1883) 16 Fed. 181.

This section is applicable to a writ of replevin. Senior v. Pierce (C. C. 1887) 31 Fed. 625, 633.

A state statute, which authorizes any person who has a legal estate in real property and a present right to the possession thereof to recover posses-

sion by an action at law, defines the rule of procedure in the federal courts in actions to recover possession of real property. American Mortg. Co. v. Hopper (C. C. 1891) 48 Fed. 47, 48.

17. Action by trustee in bankruptcy.—The process and pleadings and procedure in an action at law by a trustee in bankruptcy must conform to those applying to other actions at law. Kraver v. Abrahams (D. C. 1913) 203 Fed. 782.

18. Habeas corpus.—The proceedings on habeas corpus in the federal courts are not governed by the local law, but by the common law. Ex parte Kaine (C. C. 1852) Fed. Cas. No. 7,598; Id. (C. C. 1853) Fed. Cas. No. 7,597; In re Morris (C. C. 1889) 40 Fed. 824.

19. Scire facias.—Since the federal statutes do not expressly indicate the practice to be followed on scire facias on a forfeited recognizance or bail bond, resort must be had to the procedure which obtained at common law. Kirk v. U. S. (C. C. 1904) 131 Fed. 331, affirmed (1905) 137 Fed. 753, 70 C. C. A. 187, and U. S. v. Kirk (1907) 27 Sup. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

20. Action by or against national bank.—Act March 3, 1887, § 4, relating to the removal of causes, as corrected by Act Aug. 13, 1888, providing that all national banks shall be deemed citizens of the states in which they are located for the purpose of all actions by or against them, does not subject national banks to the laws of the states in which they are located as to remedies of the debtor for exaction by the creditor of usurious interest. Norfolk Nat. Bank v. Schwenk (1895) 46 Neb. 381, 64 N. W. 1073.

21. Admiralty causes.—While, under this section the provisions of the statutes of a state in regard to pleadings in civil suits in personam apply to like causes in the federal courts, they do not apply to suits in rem by the United States for the forfeiture of property after its seizure for a violation of the internal revenue laws, which are in general conformity to the course in admiralty. Coffey v. U. S. (1886) 6 Sup. Ct. 717, 117 U. S. 233, 29 L. Ed. 890; U. S. v. De Goer (D. C. 1889) 38 Fed. 80, 81; U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601.

The acts of a state legislature, authorizing suits to be sustained by or against steamboats by name, confer no right so to sustain them in the federal courts. The Burns (1869) 76 U. S. (9 Wall.) 237, 19 L. Ed. 620.

The clause in a charter party by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, in the penal sum of estimated amount of freight, to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract, and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular state in which the contract is made and the court of admiralty sits. Watts v. Camors (1885) 6 Sup. Ct. 91, 94, 115 U. S. 353, 29 L. Ed. 406.

If it is considered as a question of the remedy and relief to be judicially administered, the admiralty jurisdiction of the courts of the United States, under the national constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several states. Watts v. Camors (1885) 6 Sup. Ct. 91, 95, 115 U. S. 353, 29 L. Ed. 406.

A provision in a state statute that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons is served on him, etc., does not apply to admiralty suits in the federal courts. Laidlaw v. Oregon Ry. & Nav. Co. (1897) 81 Fed. 876, 26 C. C. A. 665, reversing The Oregon (D. C. 1896) 73 Fed. 846.

That the claimant in an action to recover property seized for failure to declare the same for duty moved the court to direct a verdict in her favor did not constitute a waiver of her right to reserve exceptions to the refusal of her request to send the case to the jury after the denial of her motion to direct, since the technical rule of the state practice in that regard will not be followed in the Circuit Court. One Pearl Chain v. U. S. (1903) 123 Fed. 371, 59 C. C. A. 499.

The maritime law of the United States subsists as an entirety as the subject of federal jurisprudence, and is to be administered by the federal courts without impairment by state legislation. Mack S. S. Co. v. Thompson (1910) 176 Fed. 499, 100 C. C. A. 57.

The ruling of the Court of Appeals of New York that a foreign corporation cannot plead the state statute of limitations will not be followed by a court of admiralty as applied to a corporation which has been continuously subject to service of process within the state. Davis v. Smokeless Fuel Co. (1912) 196 Fed. 753, 116 C. C. A. 381, affirming decree (D. C. 1910) 182 Fed. 1004.

Courts of admiralty are not bound by this section, and are therefore not required to follow the state statutes of limitations. Id.

Courts of admiralty will follow by analogy a state statute of limitations in considering whether claims are stale. Id.

Where a death was caused by a collision, in 1877, near the Cross Rip lightship, in Nantucket Sound, the of-

fending vessel being enrolled in Philadelphia, and a libel in rem was filed in the district court for the Eastern district of Pennsylvania in 1882, by the widow and daughter of the man so killed, their cause of action does not depend upon the statute laws of either Massachusetts or Pennsylvania, and the limitation of one year in the statutes of those states does not operate as a bar. The Harrisburg (C. C. 1883) 15 Fed. 610, decree reversed (1886) 7 Sup. Ct. 140, 119 U. S. 199, 30 L. Ed. 358.

The procedure on enforcement in the district court of a lien given by the local law must be according to that in admiralty. Davis v. New Brig (D. C. 1834) Fed. Cas. No. 3,643.

The admiralty court is not bound by the priority given a lien by the local law. Schuchardt v. The Angelique (D. C. 1853) Fed. Cas. No. 12,483b.

Municipal ordinances concerning vessels are binding only as police regulations. Beyond that they have no force in the admiralty courts. But they may be read, and the court will determine for itself their application to the subject-matter. The Palmetto (D. C. 1856) Fed. Cas. No. 10,699.

An action in a federal court for an assault and battery on a vessel anchored within the limits of a county in Alabama is governed by the maritime law of the United States giving the master the right to inflict reasonable chastisement, and not by the law of Alabama, which prohibits a master from inflicting chastisement on his servant, as the general maritime law was adopted by the constitution of the United States, and no state can have a separate and distinct maritime law by itself. Roberts v. Skolfield (D. C. 1858) Fed. Cas. No. 11,917.

An action by the United States for the forfeiture of smuggled goods is a statutory proceeding assimilated to an action in rem in admiralty, and this section does not apply to such a proceeding so as to abrogate the settled rule of the federal courts that a court has no power to set aside a default judgment after the term at which it was entered to permit a defense to be interposed, because such practice is authorized in the courts of the state. U. S. v. Twenty Packages of Distilled Spirits (D. C. 1878) Fed. Cas. No. 16,569; U. S. v. One Trunk Containing Fourteen Pieces of Embroidery (D. C. 1907) 155 Fed. 651.

A marine tort is one that occurs on any public navigable water of the United States, whether caused by wrongful act or omission, and the proper district court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor. When a passenger on the railway ferry boat, plying across the Wallamet river between East Portland and Portland, was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the district court by the administrator of the deceased to recover the damages given therefor by section 367 of the Oregon Civil Code. Holmes v. Oregon & C. Ry. Co. (D. C. 1880) 5 Fed. 75.

The statute of limitations is followed by analogy in admiralty, as in equity, where no special equitable reasons exist against its application. Scull v. Raymond (D. C. 1883) 18 Fed. 547.

The requirement of the New York state law, that an action for a personal injury must be begun within three years from the occurrence of such injury, has no effect to bar a suit in admiralty, begun after that limit. Withcofsky v. Wier (D. C. 1887) 32 Fed. 301.

Gen. St. Minn. p. 825, § 2, providing that, "when death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action had he lived," etc., does not confer upon the United States district court jurisdiction of a libel in rem, filed by the administratrix of an injured person to enforce a marine tort, as in case of death from such a tort the action does not survive in admiralty. Oleson v. The Ida Campbell (D. C. 1888) 34 Fed. 432.

The period of limitation fixed by statute in common-law actions should not be extended by discretion in admiralty cases, except for some cause of practical inability to sue, or for some peculiarity of a maritime nature that demands recognition in a court of admiralty, and makes it plainly a matter of justice that this discretion should be applied. Nesbit v. The Amboy (D. C. 1888) 36 Fed. 925.

Under Comp. St. Or. §§ 371, 3690, giving a right of action to an administrator for the death of his intestate, and giving a lien on a vessel navigating the waters of the state, for any injury caused thereby, a suit in admiralty may be maintained in the United States district court for such death. The Oregon (D. C. 1891) 45 Fed. 62, decree reversed (1895) 15 S. Ct. 804, 158 U. S. 186, 39 L. Ed. 943.

Code Va. § 2186, providing that a sale of a vessel forfeited by proceedings in the state court for violating the oyster laws of the state "shall vest in the purchaser a clear and absolute title," is null and inoperative, in so far as it would devest the maritime liens of innocent parties attaching before the arrest of the vessel, as it would, in effect, devest the admiralty and maritime jurisdiction of the United States courts; and such vessel may be subsequently seized in the hands of the purchaser, and subjected to such liens, by proceedings in the federal admiralty courts. Hastings v. The Elexena (D. C. 1892) 53 Fed. 359.

An action to recover damages for death caused by a collision on navigable waters is for a tort which by its nature and locality is maritime, and as

such is within the ancient jurisdiction of the United States district court, and equally so whether the right of action is given by state or by federal legislation. The City of Norwalk (D. C. 1893) 55 Fed. 98, decree modified (1894) 61 Fed. 364, 9 C. C. A. 521.

State statutes of limitation do not apply to a libel in rem to enforce a maritime lien for breach of a contract of affreightment. The Queen of the Pacific (D. C. 1894) 61 Fed. 213.

In the exercise of their admiralty and maritime jurisdiction, the United States courts are governed solely by the legislation of congress and the general principles of maritime law. Accordingly, they are not bound by state statutes of limitation. Pacific Coast S. S. Co. v. Bancroft-Whitney Co. (1899) 94 Fed. 180, 36 C. C. A. 135, affirming decree The Queen (D. C. 1896) 78 Fed. 155.

Though St. N. J. 1848 (1 Gen. St. p. 1188), providing that action for wrongful death shall be commenced within 12 calendar months after such death, be held subject to the provision of the general statute that limitation shall not run during the time the defendant is not a resident of the state, a plaintiff bringing an admiralty action to enforce the statutory liability to another jurisdiction more than a year after the death sued for cannot invoke such extension, where the action might have been brought in the same court at any time previously and service on the defendant obtained, and no excuse for the delay be shown. Stern v. La Compagnie Generale Transatlantique (D. C. 1901) 110 Fed. 996.

A state has no power by legislation to restrict the jurisdiction of the federal courts in admiralty. State of Maryland v. Miller (D. C. 1911) 180 Fed. 796, decree modified (1911) 194 Fed. 775, 114 C. C. A. 495.

See, also, notes under § 1536, ante.

22. Criminal causes.—Conformity to state practice as to qualifications of jurors, and decisions under former conformity acts as to jurors, see ante, §§ 1252, 1253.

Offenders against the United States, how arrested and removed for trial, see § 1674, post.

The law governing the admissibility of evidence in criminal cases in the courts of the United States is the law of the state in which the court is held, as it existed at the time of the passage of the judiciary act of 1789. U. S. v. Reid (1851) 53 U. S. (12 How.) 361, 13 L. Ed. 1023.

The competency of witnesses in criminal trials in the federal courts in Texas is not governed by the statutes of the state passed since its admission into the Union, but by the common law, which was the law of Texas at the time of its admission. Logan v. U. S. (1892) 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, reversing U. S. v. Logan (C. C. 1891) 45 Fed. 872.

The United States courts are governed in the administration of the criminal law by the rules of the common law. Howard v. U. S. (1896) 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

The federal courts are governed by the practice at common law as to the method of trying an issue of the present insanity of a defendant, where the objection is urged in bar of his trial; and by such practice the defendant is not entitled to a jury as a matter of right, but the judge may, in his discretion, call a jury, or determine the issue himself, upon his own inspection of the defendant, and such testimony as he may choose to take, or he may direct the question to be tried by the jury with the plea of not guilty. Youtsey v. U. S. (1899) 97 Fed. 937, 38 C. C. A. 562, reversing judgment U. S. v. Youtsey (C. C. 1898) 91 Fed. 864.

The rules of evidence governing federal courts in criminal cases are those which were in force in the state at the time such courts were established therein, subject to such changes as have been made by Congress, and are not changed by subsequent state enactments. In Colorado, such rules are those which were in force in the territory at the time it was admitted as a state and created a federal district. Withaup v. U. S. (1903) 127 Fed. 530, 62 C. C. A. 328.

A state statute requiring corroboration of the testimony of an accomplice in a criminal case is not applicable to a prosecution in a federal court, which, in the absence of a statute of the United States on the subject, is governed by the common-law rule. Hanley v. U. S. (1904) 123 Fed. 849, 59 C. C. A. 153, rehearing granted (1903) 126 Fed. 944, 61 C. C. A. 668, judgment reversed on rehearing (1904) 127 Fed. 929, 62 C. C. A. 561, writ of certiorari denied (1904) 24 Sup. Ct. 858, 194 U. S. 634, 48 L. Ed. 1160.

Code Cr. Proc. N. Y., § 385, providing the order in which jurors drawn for the trial of criminal cases shall be challenged, is not binding on the federal courts sitting in that state for the trial of criminal cases. Radford v. U. S. (1904) 129 Fed. 49, 63 C. C. A. 491.

Questions relating to the admissibility of evidence in criminal prosecutions based on violations of the statutes of the United States are governed wholly by the general rules of law applicable to the conduct of trials, and not by the statutes or decisions of the particular state in which the court is sitting, except so far as the same may be persuasive. Lang v. U. S. (1904) 133 Fed. 201, 66 C. C. A. 255.

The practice of attacking the sufficiency of an indictment by objecting to the introduction of any evidence thereunder is not recognized in the federal courts. Morris v. U. S. (1908) 161 Fed. 672, 88 C. C. A. 532, judgment re-

versed on rehearing (1909) 168 Fed. 682, 94 C. C. A. 168, writ of certorari denied (1909) 29 Sup. Ct. 704, 214 U. S. 527, 53 L. Ed. 1068.

Section 1674, post, providing that any offender against the United States laws may be arrested, imprisoned, or bailed, etc., agreeably to the mode of process against offenders in a particular state, does not make the state statutes relative to the competency of witnesses applicable in federal prosecutions. Cohen v. U. S. (1914) 214 Fed. 23, 130 C. C. A. 417.

The federal courts in criminal cases are not governed by state statutes. Lung v. U. S. (1915) 218 Fed. 817, 134 C. C. A. 505.

The circuit court, under section 4 of the judiciary act, has power to devise the process for bringing any person before it who has committed an offense of which it has cognizance, without reference to the process given by the state law. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,694.

This section has no reference to the designation or selection of jurors. U. S. v. Gardner (C. C. 1873) Fed. Cas. No. 15,187.

The practice established by a state statute to prove handwriting by comparison has no effect on criminal proceedings in United States courts. U. S. v. Jones (C. C. 1882) 10 Fed. 469.

The statutes and practice of the states do not control the rules of pleading in criminal cases in the federal courts. U. S. v. Richardson (C. C. 1886) 28 Fed. 61, 66.

The omission to have the bailiffs placed in charge of the jury specially sworn, on the trial of a felony, is not a ground for new trial in the federal courts, although it is so under the practice of the courts of the state where the trial is had. U. S. v. Davis (C. C. 1900) 103 Fed. 457.

The federal courts are not bound to follow the practice of the state courts in respect to the allowance of challenges to the jury in criminal cases, the primary consideration being, by whatever mode of challenging adopted, to secure to the accused all of his rights of challenging. Id.

Act March 9, 1892, c. 14, 27 Stat. 7, relating to mode of taking depositions in criminal causes, is not supplementary to this section. Smith v. International Mercantile Co. (C. C.) 154 Fed. 786.

The proceedings before United States commissioners shall be agreeable to the usual mode of process in the state where they are appointed, and the proceedings for holding persons accused of crime are to be assimilated to the proceedings had under the laws of the state where such court is held. U. S. v. Harden (D. C. 1881) 10 Fed. 802.

A commissioner of the circuit court, when engaged, under section 1674, post, in causing the arrest or imprisonment, or holding to bail for trial, any person charged with the commission of a crime against the United States, acts as a committing magistrate, and must proceed according to the law of the state in similar cases. U. S. v. Martin (D. C. 1883) 17 Fed. 150.

On the trial of an indictment in a United States court, sitting in a state whose statutes forbid conviction on the uncorroborated testimony of an accomplice, the judge should instruct the jury not to convict on such testimony. U. S. v. Van Leuven (D. C. 1894) 65 Fed. 78.

In the absence of congressional legislation, the laws of the state control the practice before federal grand juries, but that a state statute fails to point out a method for attacking an indictment cannot deprive a defendant of that right. U. S. v. Wells (D. C. 1908) 163 Fed. 313.

It is within the discretion of the United States judge in a criminal case to refuse a new trial, though under the state practice of Georgia he would have been obliged to entertain the motion therefor. U. S. v. Gibson (D. C. 1911) 188 Fed. 396.

State statutes or practice, requiring that the names of the witnesses shall be indorsed on the indictment, are not controlling in the United States courts. U. S. v. Aviles (D. C. 1915) 222 Fed. 474.

A statute prescribing the form of commitment does not apply to criminals tried in the state, but sentenced to imprisonment in another. Martin v. U. S. (1891) 26 Ct. Cl. 160.

III. EXCLUSION OF EQUITY CAUSES

(A) In general

23. Distinction between remedies in equity and at law.—Whether legal or equitable remedies shall be adopted in the federal courts is determined by the nature of the case and not by the state practice or legislation. Sheffield Furnace Co. v. Witherow (1893) 13 Sup. Ct. 936, 939, 149 U. S. 574, 37 L. Ed. 853.

The remedies in the federal equity courts are determined, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in the country from which the principles were derived. Robinson v. Campbell (1818) 3 Wheat. 212, 222, 4 L. Ed. 372; Thomas v. Nantahala Marble & Talc Co. (1893) 58 Fed. 485, 7 C. C. A. 330; Alderson v. Dole (1896) 74 Fed. 29, 20 C. C. A. 280; Schmulbach v. Caldwell (1912) 196 Fed. 16, 115 C. C. A. 650; Duncan v. Greenwalt (C. C. 1882) 10 Fed. 800; Tice v. School Dist. No. 18 (C. C. 1883) 17 Fed. 283; Berkey v. Cornell (C. C. 1898) 90 Fed. 711, 717; Jones v. Mutual Fidelity Co. (C. C. 1903) 123 Fed. 506. But see, also, Central Elec-

tric Co. v. Sprague Electric Co. (1902) 120 Fed. 925, 57 C. C. A. 197; Hale v. Continental Life Ins. Co. (C. C. 1882) 12 Fed. 359; National Park Bank v. Peavey (C. C. 1894) 64 Fed. 912.

Where plaintiff has a plain, adequate, and complete remedy at law, the cause should be deemed an action at law, in which case there is a jury trial as of right, and the procedure in the state and federal courts is not materially different, though some additional burden of pleading may be cast on plaintiff by the removal of the cause to a federal court. Stockton v. Oregon Short Line R. Co. (C. C. 1909) 170 Fed. 627.

24. Rules governing practice and procedure—Application of general equitable principles.—Remedies and modes of procedure in federal courts in equity are determined by general principles of equity having uniform operation in those courts wherever sitting. Boyle v. Zacharie (1832) 31 U. S. (6 Pet.) 648, 8 L. Ed. 532; Noonan v. Lee (1862) 67 U. S. (2 Black) 499, 17 L. Ed. 278; Russell v. Farley (1881) 105 U. S. 433, 437, 26 L. Ed. 1060; Guffey v. Smith (1915) 35 Sup. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; Id. (1915) 35 Sup. Ct. 532, 237 U. S. 120, 59 L. Ed. 866 (reversing decree Smith v. Guffey [1912] 202 Fed. 106, 120 C. C. A. 436); Maish v. Bird (C. C. 1882) 48 Fed. 607, 609; U. S. v. American Bell Tel. Co. (C. C. 1886) 29 Fed. 17; Taylor v. Clark (C. C. 1898) 89 Fed. 7, 8; Alger v. Anderson (C. C. 1899) 92 Fed. 696; United Cigarette Mach. Co. v. Wright (C. C. 1904) 132 Fed. 195.

In administering their equitable jurisdiction, federal courts do not administer the laws of the state in which they sit, except so far as local statutes apply; decisions of the state courts being only persuasive. General Electric Ry. Co. v. Chicago, I. & L. Ry. Co. (1901) 107 Fed. 771, 46 C. C. A. 629; McFarlane v. Griffith (C. C. 1826) Fed. Cas. No. 8,790; Carter v. Treadwell (C. C. 1843) Fed. Cas. No. 2,480; Butler v. Douglass (C. C. 1880) 3 Fed. 612; Loewe v. California State Federation of Labor (C. C. 1911) 189 Fed. 714.

But the United States courts will give a complainant no greater equitable relief than he would be entitled to claim in the state courts. Ewing v. City of St. Louis (1866) 72 U. S. (5 Wall.) 413, 18 L. Ed. 657.

The general effect of a decree of the federal court, except as to matters of law or practice arising under the federal statutes, is governed by the law of the state where the court was sitting. Old Dominion Copper Mining & Smelting Co. v. Bigelow (1909) 89 N. E. 193, 203 Mass. 159.

In cases depending upon the principles of general equity jurisprudence, the courts of the United States are not bound to follow the decisions of the state courts. Russell v. Southard (1851) 53 U. S. (12 How.) 139, 13 L. Ed. 927; Neves v. Scott (1851) 54 U. S. (13 How.) 268, 14 L. Ed. 140; Flagg v. Mann (C. C. 1837) Fed. Cas. No. 4,847; Butler v. Douglass (C. C. 1880) 3 Fed. 612.

The jurisdiction in equity of the circuit court of the United States is derived from the constitution and laws of the United States alone. Strettell v. Ballou (C. C. 1881) 9 Fed. 256, 257.

25. —— Application of local statutes and procedure.—The practice and jurisdiction of the federal courts, as courts of equity, cannot be controlled by the practice of the state courts. U. S. v. Howland (1819) 17 U. S. (4 Wheat.) 108, 4 L. Ed. 526; Surgett v. Lapice (1850) 8 How. 48, 65, 12 L. Ed. 982; Barber v. Barber (1858) 62 U. S. (21 How.) 582, 16 L. Ed. 226; Green v. Creighton (1859) 64 U. S. (23 How.) 90, 16 L. Ed. 419; U. S. ex rel. Moses v. Keokuk (1867) 6 Wall. 514, 516, 18 L. Ed. 933; Blease v. Garlington (1875) 92 U. S. 1, 8, 23 L. Ed. 521; Bronson v. Schulten (1881) 104 U. S. 410, 26 L. Ed. 997; Watts v. Camors (1885) 6 Sup. Ct. 91, 95, 115 U. S. 353, 29 L. Ed. 406; McConihay v. Wright (1887) 7 S. Ct. 940, 946, 121 U. S. 201, 30 L. Ed. 932; National Surety Co. v. State Bank of Humboldt, Neb. (1903) 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Butler Bros. Shoe Co. v. United States Rubber Co. (1907) 156 Fed. 1, 84 C. C. A. 167 (writ of certiorari denied [1908] 29 Sup. Ct. 686, 212 U. S. 577, 53 L. Ed. 658); Dunlop v. Mercer (1907) 156 Fed. 545, 86 C. C. A. 435; Van Deventer v. Lott (1910) 180 Fed. 378, 103 C. C. A. 524 (affirming decree [C. C. 1909] 172 Fed. 574); Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co. (1910) 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873; Mayer v. Foulkrod (C. C. 1823) Fed. Cas. No. 9,341; Gordon v. Hobart (C. C. 1836) Fed. Cas. No. 5,609; Flagg v. Mann (C. C. 1837) Fed. Cas. No. 4,847; Lamson v. Mix (C. C. 1837) Fed. Cas. No. 8,034; Fletcher v. Morey (C. C. 1843) Fed. Cas. No. 4,864; Dow v. Chamberlin (C. C. 1851) Fed. Cas. No. 4,037; Cropper v. Coburn (C. C. 1855) Fed. Cas. No. 3,416; Blanchard v. Sprague (C. C. 1859) Fed. Cas. No. 1,516; U. S. v. Parrott (C. C. 1859) Fed. Cas. No. 15,999; Pulliam v. Pulliam (C. C. 1879) 10 Fed. 23, 29; Johnston v. Roe (C. C. 1880) 1 Fed. 692, 695; Butler v. Douglass (C. C. 1880) 3 Fed. 612; Strettell v. Ballou (C. C. 1881) 9 Fed. 256; Orendorf v. Budlong (C. C. 1882) 12 Fed. 24, 26; Davies v. Lathrop (C. C. 1882) 13 Fed. 565; Steam Stone Cutter Co. v. Jones (C. C. 1882) 13 Fed. 567, 582; Taylor v. Holmes (C. C. 1882) 14 Fed. 498, 514 (affirmed [1888] 8 Sup. Ct. 1192, 127 U. S. 489, 32

L. Ed. 179); Fletcher v. New Orleans N. E. R. Co. (C. C. 1884) 20 Fed. 345; Goldsmith v. Gilliland (C. C. 1885) 22 Fed. 865; Parsons v. Marye (C. C. 1885) 23 Fed. 113; Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337, 343; Gamewell Fire Alarm Tel. Co. v. Mayor (C. C. 1887) 31 Fed. 312; Cochran v. Shoenberger (C. C. 1887) 33 Fed. 397; Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C. 1890) 44 Fed. 151, 11 L. R. A. 623 (decree modified [1893] 56 Fed. 378, 5 C. C. A. 524); Elliott v. Shuler (C. C. 1892) 50 Fed. 454; Wills v. Pauly (C. C. 1892) 51 Fed. 257; Indianapolis Water Co. v. American Strawboard Co. (C. C. 1893) 53 Fed. 970; President and Trustees of Bowdoin College v. Merritt (C. C. 1893) 54 Fed. 55; Union Life Ins. Co. v. Riggs (C. C. 1903) 123 Fed. 312 (order reversed Riggs v. Union Life Ins. Co. [1904] 129 Fed. 207, 63 C. C. A. 365, writ of certiorari denied Fidelity Mut. Life Ins. Co. v. Riggs [1904] 24 Sup. Ct. 860, 194 U. S. 637, 48 L. Ed. 1161); Louisville & N. R. Co. v. Railroad Commission of Alabama (C. C. 1907) 157 Fed. 944; Union Pac. R. Co. v. Flynn (C. C. 1910) 180 Fed. 565; Young v. Aronson (D. C. 1886) 27 Fed. 241; In re Brown (D. C. 1915) 228 Fed. 533.

The jurisdiction of federal equity courts may not be limited or impaired by state legislation conferring exclusive jurisdiction of litigation upon state courts or prescribing exclusive methods of invoking that jurisdiction. Thompson v. Searcy County (1893) 57 Fed. 1030, 6 C. C. A. 674 (following Chicot County v. Sherwood [1893] 13 Sup. Ct. 695, 148 U. S. 529, 37 L. Ed. 546, and judgment affirmed [1895] 66 Fed. 92, 13 C. C. A. 349); Taylor v. Louisville & N. R. Co. (1898) 88 Fed. 350, 31 C. C. A. 537; Barber Asphalt Pav. Co. v. Morris (1904) 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761; Western Union Telegraph Co. v. Trapp (1911) 186 Fed. 114, 108 C. C. A. 226.

Where the laws of a state governing the descent of real property and constituting rules of property conflict with the practice of the federal courts in equity, the former control; and where there is no conflict, both are in force. George T. Smith Middlings Purifier Co. v. McGroarty (1890) 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346; Knapp, Stout & Co. Company v. McCaffrey (1900) 20 Sup. Ct. 824, 177 U. S. 638, 44 L. Ed. 921 (affirming decree [1899] 52 N. E. 898, 178 Ill. 107, 69 Am. St. Rep. 290); Childs v. Ferguson (1910) 181 Fed. 795, 104 C. C. A. 305; Dexter v. Arnold (C. C. 1837) Fed. Cas. No. 3,859.

Where a contract for the sale and purchase of stocks for future delivery was invalid, as an option contract, under the Illinois statute, a court of equity will not entertain a suit based thereon. Clews v. Jamieson (1899) 96 Fed. 648, 38 C. C. A. 473, affirming decree (C. C. 1898) 89 Fed. 63.

Although a state statute cannot restrict or limit the equity powers of the federal courts, yet its provisions may be justly observed, to the extent to which the court is authorized to exercise a discretion, within the general rules of equity jurisprudence. Cowley v. Northern Pac. R. Co. (1895) 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263; Massachusetts Benefit Life Ass'n v. Lohmiller (1896) 74 Fed. 23, 20 C. C. A. 274, 46 U. S. App. 103; Deprez v. Thomson-Houston Electric Co. (C. C. 1894) 66 Fed. 22; Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936; Matheson v. Hanna-Schoelkopf Co. (C. C. 1904) 128 Fed. 162; Hollister v. Vermont Bldg. Co. (Iowa, 1909) 119 N. W. 626.

This rule has been followed: In cases involving procedure, where action was brought on wrong side of federal court. Rosenbaum v. Council Bluffs Ins. Co. (C. C. 1888) 37 Fed. 7, 3 L. R. A. 189; United States Bank v. Lyon County (C. C. 1892) 48 Fed. 632. In considering and determining what constitutes a multiplicity of suits. Northern Pac. R. Co. v. Amacker (C. C. 1891) 46 Fed. 233, 235 (affirmed [1892] 49 Fed. 529, 1 C. C. A. 345). In mortgage foreclosure proceedings. Deck v. Whitman (C. C. 1899) 96 Fed. 873; Knickerbocker Trust Co. v. Penacook Mfg. Co. (C. C. 1900) 100 Fed. 814. In taking judicial notice of an ordinance. Seattle, R. & S. Ry. Co. v. City of Seattle (C. C. 1911) 190 Fed. 75.

Local statutes and procedure do not control determination of the right to sue. A state statute allowing a married woman to sue in her own name does not govern the federal courts in equity suits. Wills v. Pauly (C. C. 1892) 51 Fed. 257.

The provision in the statute of Montana of 1867 regulating proceedings in civil cases, declaring "that an issue of fact shall be tried by a jury, unless a jury trial is waived," does not require the court in an equity case to regard the findings of a jury called in the case as conclusive, though no application to vacate the findings be made by the parties, if in its judgment they are not supported by the evidence. Basey v. Gallagher (1874) 87 U. S. (20 Wall.) 670, 22 L. Ed. 452.

Under the peculiar provisions of the statute of Minnesota, the submission of the facts of a chancery case to a jury renders the verdict a necessary part of the final trial of the cause. Osborn v. Osborn (C. C. 1880) 5 Fed. 389.

Whether a creditor of a bankrupt is entitled to a preference on the ground that the claim is based on the bankrupt's misappropriation of a trust fund, does not depend on the construction of the contract between the parties, but on a rule of preference in equity, as to which

the federal decisions, and not those of the state where the contract was made, must control. John Deere Plow Co. v. McDavid (1905) 137 Fed. 802, 70 C. C. A. 422.

Laws Kan. 1901, c. 127, § 2, held not to prevent action by foreign corporation in federal court to foreclose mortgage, whatever its efficacy as against actions in the state courts. Boatmen's Bank of St. Louis, Mo., v. Fritzlen (1915) 221 Fed. 154, 137 C. C. A. 54, certiorari denied Fritzlen v. Boatmen's Bank of St. Louis, Missouri (1915) 35 S. Ct. 941, 238 U. S. 641, 59 L. Ed. 1501.

The provision of Rev. Laws Minn. 1905, §§ 2888, 2889, 2890, prohibiting unqualified foreign corporations doing business in the state from suing in its courts, does not affect the power of the federal courts to determine controversies of which they have jurisdiction. Dunlop v. Mercer (1907) 156 Fed. 545, 86 C. C. A. 435. But see Maysville Street Railroad & Transfer Co. v. Marvin (1893) 59 Fed. 91, 8 C. C. A. 21; Bunel v. O'Day (C. C. 1903) 125 Fed. 303.

Conditions precedent to suit. Klenk v. Byrne (C. C. 1906) 143 Fed. 1008; Hobe-Peters Land Co. v. Farr (C. C. 1908) 170 Fed. 644 (decree reversed on other grounds Farr v. Hobe-Peters Land Co. [1910] 188 Fed. 10, 110 C. C. A. 160); Springfield v. Hurt (D. C. 1883) 15 Fed. 307.

Mode of service. U. S. v. Miller (C. C. 1908) 164 Fed. 444; Kent v. Honsinger (C. C. 1909) 167 Fed. 619.

But the local statute may be followed where there is no federal statute or practice to determine what office of a defendant corporation should be served. Toledo Computing Scale Co. v. Computing Scale Co. (1906) 142 Fed. 919, 74 C. C. A. 89.

Effect of service to charge third persons with notice. McClaskey v. Barr (C. C. 1891) 48 Fed. 130.

Form and effect of pleadings. Kirkpatrick v. McBride (1912) 202 Fed. 144, 120 C. C. A. 322 (decree modified on rehearing [1913] 203 Fed. 449, 120 C. C. A. 328); Phelps v. Elliott (C. C. 1886) 26 Fed. 881; McClaskey v. Barr (C. C. 1891) 48 Fed. 130; White v. Bower (C. C. 1891) 48 Fed. 186; Commonwealth Title Insurance & Trust Co. v. Cummings (C. C. 1897) 83 Fed. 767; Vitzthum v. Large (D. C. 1908) 162 Fed. 685.

Examination of party to suit. Pennsylvania R. Co. v. Allegheny Valley R. Co. (C. C. 1885) 25 Fed. 115.

Joinder of parties. Camp v. Bonsal (1913) 203 Fed. 913, 122 C. C. A. 207.

Receiverships. First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150 (writ of certiorari denied [1900] 21 Sup. Ct. 919, 179 U. S. 686, 45 L. Ed. 386); Guaranty Trust Co. of New York v. Galveston City R. Co. (1901) 107 Fed. 311, 46 C. C. A. 305 (writ of certiorari denied Paul Shean Sanitary Plumbing & Mfg. Co. v. Guaranty Trust Co. of New York [1901] 21 Sup. Ct. 925, 181 U. S. 622, 45 L. Ed. 1032).

Injunction bonds. Bein v. Heath (1851) 53 U. S. (12 How.) 168, 13 L. Ed. 939; Vrooman v. Burdick (1915) 222 Fed. 900, 138 C. C. A. 380; Northern Pac. R. Co. v. St. Paul, M. & M. Ry. Co. (C. C. 1880) 4 Fed. 688; Goldmark v. Kreling (C. C. 1885) 25 Fed. 349, 359.

Fees and costs. Dodge v. Tulleys (1892) 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501; Wade v. Mathews (C. C. 1851) Fed. Cas. No. 17,029; O'Neil v. Kansas City, S. & M. R. Co. (C. C. 1887) 31 Fed. 663; Phinizy v. Augusta & K. R. Co. (C. C. 1896) 98 Fed. 776.

Excepting to impertinent bill. U. S. v. Kettenbach (C. C. 1909) 175 Fed. 463.

Binding force of evidence on party calling adverse witness. Dravo v. Fabel (1889) 10 Sup. Ct. 170, 132 U. S. 487, 33 L. Ed. 421.

And see Sharp v. Behr (C. C. 1902) 117 Fed. 864.

Deciding case on stipulated facts without pleadings. Nickerson v. Atchison, T. & S. F. R. Co. (C. C. 1880) 30 Fed. 85.

Application for new trial. Tice v. School Dist. No. 18 (C. C. 1883) 17 Fed. 283.

Opening default decree. Scott v. Hore (C. C. 1875) Fed. Cas. No. 12,535; Austin v. Riley (C. C. 1893) 55 Fed. 833.

Dismissals. American Ball Bearing Co. v. Adams (D. C. 1915) 222 Fed. 967; Scully v. Chicago, B. & Q. R. Co. (1877) 46 Iowa, 528.

Special verdicts. Conn v. Penn (C. C. 1818) Fed. Cas. No. 3,104.

Enforcing judgment. Collin County Nat. Bank v. Hughes (1907) 152 Fed. 414, 81 C. C. A. 556, rehearing denied (1907) 155 Fed. 389, 83 C. C. A. 661.

26. —— Cases arising in Louisiana.—See Livingston v. Story (1835) 9 Pet. 632, 656, 9 L. Ed. 255; Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200; Gaines v. Relf (1841) 40 U. S. (15 Pet.) 9, 10 L. Ed. 642; McCollum v. Eager (1844) 2 How. 61, 64, 11 L. Ed. 179; Gaines v. Chew (1844) 43 U. S. (2 How.) 619, 11 L. Ed. 402; Walker v. Dreville (1870) 12 Wall. 440, 442, 20 L. Ed. 429; Ridings v. Johnson (1888) 128 U. S. 212, 9 Sup. Ct. 72, 32 L. Ed. 401; Nalle v. Young (1896) 160 U. S. 624, 16 Sup. Ct. 420, 40 L. Ed. 560; City of New Orleans v. Howard (1908) 160 Fed. 393, 87 C. C. A. 345; Szymanski v. Zunts (C. C. 1884) 20 Fed. 361.

27. Effect of failure to follow usual federal practice.—A decree of the highest court of the Kingdom of Hawaii, given effect by the territorial supreme court as an adjudication of title, will

not be declared invalid by the federal courts because partition is not the proper means of trying a disputed title. Hapai v. Brown (1916) 36 Sup. Ct. 201, 239 U. S. 502, 60 L. Ed. —.

An adjudication in a Circuit Court of the United States that the facts of a particular case are such as to make it cognizable in equity, although erroneous, is not a nullity, and cannot be questioned collaterally. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. (1904) 133 Fed. 267, 68 C. C. A. 19.

Where a decree of a federal court for a sale of real property, though omitting to provide for confirmation, followed the state practice, it was sufficient to confer possession and color of title on the purchaser, though it did not conform to the usual federal practice. Faulds v. Tilton (1911) 192 Fed. 297, 112 C. C. A. 555.

(B) Effect of statutes conferring new rights and remedies or enlarging jurisdiction of local equity courts

28. In general—Statutory rights and remedies of an equitable nature.—The state legislatures have no authority to prescribe forms and modes of proceedings in the federal courts; but, having created a right and prescribed a remedy to enforce it, if the remedy prescribed is consistent with the ordinary procedure on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts. Clark v. Smith (1839) 13 Pet. 195, 202, 10 L. Ed. 123; Fitch v. Creighton (1860) 24 How. 159, 163, 16 L. Ed. 596. See, also, Wehrman v. Conklin (1894) 15 Sup. Ct. 129, 133, 155 U. S. 314, 39 L. Ed. 167; Wells Fargo & Co. v. Miner (C. C. 1885) 25 Fed. 533; Iowa & C. Land Co. v. Temescal Water Co. (C. C. 1899) 95 Fed. 320; City of Davenport v. Allen (C. C. 1903) 120 Fed. 172.

Where a state statute creates a new right or provides a new remedy, federal courts will enforce that right either on the common-law or equity side of its docket as the nature of the new right or new remedy requires. Cummings v. Merchants' Nat. Bank (1879) 101 U. S. 153, 157, 25 L. Ed. 903.

While alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state. In re Broderick (1874) 88 U. S. (21 Wall.) 503, 22 L. Ed. 599; Wells Fargo & Co. v. Miner (C. C. 1885) 25 Fed. 533; Willitt v. Baker (C. C. 1904) 133 Fed. 937.

A state cannot by legislation confer a substantive right or remedy in the way of a suit inter partes upon its own citizens that will not be available to the citizens of the other states, nor can it by any device restrict such right or remedy thus made available to enforcement in its own courts, the conditions of citizenship being such that it would otherwise be enforceable in the federal courts. George T. Smith Middlings Purifier Co. v. McGroarty (1890) 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346; Kirtley v. Holmes (1901) 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; Williams v. Crabb (1902) 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425 (writ of certiorari denied Crab v. Williams [1902] 23 Sup. Ct. 845, 187 U. S. 645, 47 L. Ed. 347); Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Pratt v. Northam (C. C. 1828) Fed. Cas. No. 11,376; Hull v. Dills (C. C. 1884) 19 Fed. 657; Boston & M. R. R. v. Slocum (C. C. 1896) 77 Fed. 345; Order of St. Benedict of New Jersey v. Steinhauser (C. C. 1910) 179 Fed. 137 (decree reversed Steinhauser v. Order of St. Benedict of New Jersey [1912] 194 Fed. 289, 114 C. C. A. 249); Stephens v. Bernays (D. C. 1890) 41 Fed. 401.

A transitory right of action is enforceable in the federal courts having jurisdiction of the subject-matter and the parties, whether given by the common law or a state statute not penal. National Surety Co. v. State Bank of Humboldt, Neb. (1903) 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; St. Bernard v. Shane (1915) 220 Fed. 852, 135 C. C. A. 399 (reversing order [D. C. 1913] 201 Fed. 453); Goldsmith v. Gilliland (C. C. 1885) 22 Fed. 865; Mudge v. McDougal (D. C. 1915) 222 Fed. 562.

Though R. S. § 723, ante, § 1244, forbids suits in equity in the federal courts when a plain, adequate, and complete remedy may be had at law, where a state statute grants an equitable remedy which does not infringe on the right to a jury trial, the federal courts sitting in the state as courts of equity may grant the same statutory relief as is afforded in the state tribunals. Grether v. Wright (1896) 75 Fed. 742, 23 C. C. A. 498; Darragh v. H. Wetter Mfg. Co. (1897) 78 Fed. 7, 23 C. C. A. 609 (removed to supreme court on appeal [1897] 84 Fed. 1016, 28 C. C. A. 680); Lanmon v. Clark (C. C. 1845) Fed. Cas. No. 8,071; Griswold v. Bragg (C. C. 1880) 48 Fed. 519, 520; Aspen Mining & Smelting Co. v. Rucker (C. C. 1886) 28 Fed. 220; Fechheimer v. Baum (C. C. 1889) 37 Fed. 167.

An enlargement of equitable rights by state statute may be administered by the federal courts, and if the case is one of remedial proceedings essentially of an equitable character, there can be no objection to the exercise of the jurisdiction. Gormley v. Clark (1890) 10 Sup. Ct. 554, 556, 134 U. S. 338, 33 L. Ed. 909; Bayerque v. Cohen (C. C. 1856) Fed. Cas. No. 1,134; Goldsmith v. Gilliland (C. C. 1885) 22 Fed. 865; New Jersey Land & Lumber Co. v. Gar-

dener Lacy Lumber Co. (C. C. 1911) 190 Fed. 861.

While the Legislature of a state cannot enlarge the equitable jurisdiction of the federal courts, it nevertheless may provide by statute for the enlargement of the equitable rights, which may be enforced by the Circuit Court of the United States by virtue of its equitable jurisdiction in the same manner as such rights are enforced by state courts. Holland v. Challen (1884) 3 Sup. Ct. 495, 501, 110 U. S. 15, 28 L. Ed. 52; Reynolds v. Crawfordsville First Nat. Bank (1884) 5 Sup. Ct. 213, 216, 112 U. S. 405, 28 L. Ed. 733; Chapman v. Brewer (1885) 5 Sup. Ct. 799, 805, 114 U. S. 158, 29 L. Ed. 83; Darragh v. H. Wetter Mfg. Co. (1897) 78 Fed. 7, 23 C. C. A. 609 (removed to supreme court on appeal [1897] 84 Fed. 1016, 28 C. C. A. 680); Aspen Mining & Smelting Co. v. Rucker (C. C. 1886) 28 Fed. 220; Fechheimer v. Baum (C. C. 1889) 37 Fed. 167; Jones v. Mutual Fidelity Co. (C. C. 1903) 123 Fed. 506; North Carolina Min. Co. v. Westfeldt (C. C. 1907) 151 Fed. 290 (decree reversed Westfeldt v. North Carolina Min. Co. [1909] 166 Fed. 706, 92 C. C. A. 378, writ of certiorari denied North Carolina Min. Co. v. Westfeldt [1909] 29 Sup. Ct. 697, 214 U. S. 516, 53 L. Ed. 1064, appeal dismissed [1909] 30 Sup. Ct. 404, 215 U. S. 586, 54 L. Ed. 339).

A federal equity court, when enforcing a local statute, will accept the construction placed upon it by the state court. Beebe v. Louisville, N. O. & T. R. Co. (C. C. 1889) 39 Fed. 481, 483.

29. —— Statutory rights and remedies not inherently equitable.—A federal court will not enforce a state statute enlarging the equitable jurisdiction of its courts, if such statute contravenes the distinction enforced in the federal courts between law and equity, or violates R. S. § 723, ante, § 1244, or if it violates defendant's right to trial by jury. Grether v. Wright (1896) 75 Fed. 742, 23 C. C. A. 498; Southern Pine Co. v. Hall (1900) 105 Fed. 84, 44 C. C. A. 363 (writ of certiorari denied [1901] 21 Sup. Ct. 921, 180 U. S. 639, 45 L. Ed. 711); Whitehead v. Entwhistle (C. C. 1886) 27 Fed. 778; Davidson v. Calkins (C. C. 1899) 92 Fed. 230; Adoue v. Strahan (C. C. 1899) 97 Fed. 691; New Jersey Land & Lumber Co. v. Gardener Lacy Lumber Co. (C. C. 1911) 190 Fed. 861; In re E. T. Kenney Co. (D. C. 1905) 136 Fed. 451, 455.

A state statute giving chancery courts jurisdiction in all matters of law except for nonliquidated damages, does not enlarge the equitable jurisdiction of the federal courts, and they may not try cases justiciable in courts of common law. American Ass'n v. Williams (1908) 166 Fed. 17, 93 C. C. A. 1.

Const. Ky. § 211, which provides that no railroad corporation doing business, or proposing to do business, in the state shall exercise the power of eminent domain or acquire right of way or real estate until it shall incorporate under the laws of the state, and Ky. St. 1903, § 841, containing substantially the same prohibition, and providing the method by which a foreign corporation may become incorporated in the state by filing its articles of incorporation, declare a public policy of the state; and a federal court of equity, sitting within the state, is without authority to compel a Kentucky corporation to permit a railroad company of Indiana, which has not complied with such requirements, to connect with and use its tracks over a bridge across the Ohio river, to enable such foreign company to do business within the state of Kentucky. Evansville & H. Traction Co. v. Henderson Bridge Co. (C. C. 1904) 132 Fed. 402.

30. Accounting.—Wherever under the state Code a reference of complicated accounts to a referee could be made a suit in equity will lie in the federal courts to enable the chancellor to refer such matters to a master in chancery. Leighton v. Young (1892) 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; McMullen Lumber Co. v. Strother (1905) 136 Fed. 295, 69 C. C. A. 433.

A state statute, which confers equity jurisdiction in cases where "the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law," does not extend the jurisdiction of the federal courts even in suits removed from the state courts. Hunton v. Equitable Life Assur. Soc. of the United States (C. C. 1891) 45 Fed. 661; Peters v. Same (C. C. 1906) 149 Fed. 290.

31. Assignments.—The federal courts have jurisdiction to enforce, on behalf of a creditor in another state, the remedy, provided by Rev. St. Mo. § 354, providing that a voluntary assignment of property, made by a debtor or to any one in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims. Clapp v. Dittman (C. C. 1884) 21 Fed. 15; Bernheim v. Birnbaum (C. C. 1887) 3 Fed. 885 (following Jaffrey v. Brown [C. C. 1886] 29 Fed. 476); Wyman v. Mathews (C. C. 1893) 53 Fed. 678.

32. Cancellation of instruments.—Under a state statute providing that losses on wagers may be recovered, equity will cancel a deed of trust given for losses in gambling transactions in cotton. Williamson v. Majors (1909) 169 Fed. 754, 95 C. C. A. 186, writ of certiorari denied Majors v. Williamson (1909) 30 Sup. Ct. 399, 215 U. S. 59, 54 L. Ed. 342.

A federal court of equity will not follow the practice of state court in entertaining a suit to cancel insurance policies for fraud, where there is an adequate remedy at law. Niagara Fi

Ins. Co. of New York v. Adams (1912) 198 Fed. 822, 117 C. C. A. 464.

33. **Creditors' proceedings—After execution levy or return.**—The fact that by statute in Virginia a complainant in a creditors' bill obtains priority of payment does not give him such priority when the suit is brought in the federal circuit court within such state. Talley v. Curtain (1893) 54 Fed. 43, 4 C. C. A. 177, reversing decree in part Curtain v. Talley (C. C. 1891) 46 Fed. 580.

As attachments and executions may be levied on equitable interests in real estate in Michigan, a bill in aid of an execution or attachment so levied will be entertained in the federal courts of equity sitting in that state. Lant v. Manley (1896) 75 Fed. 627, 21 C. C. A. 457.

A state statute, which authorizes the filing of a creditors' bill upon every judgment for the payment of money after an execution has been returned nulla bona whether the original cause of action was in contract or tort, gives a remedy which will be administered by the federal courts. Lorman v. Clarke (C. C. 1841) Fed. Cas. No. 8,-516; Suydam v. Beals (C. C. 1845) Fed. Cas. No. 13,653; Wilkinson v. Yale (C. C. 1853) Fed. Cas. No. 17,-678; Jahn v. Champagne Lumber Co. (C. C. 1908) 157 Fed. 407, decree affirmed Champagne Lumber Co. v. Jahn (1909) 168 Fed. 510, 93 C. C. A. 532.

A federal court sitting in equity will not enforce a state statute providing for supplementary proceedings in aid of execution, which are designed to provide a statutory remedy at law as a substitute for a creditors' bill, but will leave the creditor to enforce his rights by the recognized equitable procedure. Byrd v. Badger (C. C. 1858) Fed. Cas. No. 2,266; Regina Music Box Co. v. F. G. Otto & Son (C. C. 1903) 124 Fed. 747.

Where a cause begun in the state courts to enforce an enlarged equitable remedy in favor of general creditors having no judgments and nulla bona returns is removed to the federal court, a statutory rule of state practice, which operates as a condition attached to the right given by the statute, will be enforced after the removal, in order to preserve the liens of the creditors as they are fixed by the statute. Flash v. Wilkerson (C. C. 1885) 22 Fed. 689.

34. —— **Before issuance of execution, but after judgment.**—The issuance of an execution is not necessary to entitle a judgment creditor to maintain a suit in equity to subject property fraudulently transferred by the debtor, where, by statute, the judgment is made a lien on all the defendant's property. Lazarus Jewelry Co. v. Steinhardt (1901) 112 Fed. 614, 50 C. C. A. 393.

Where the property of a judgment debtor is so incumbered by liens and taxes that, although the judgment is a lien thereon under the laws of the state, such lien cannot be effectively enforced by execution, the creditor may maintain a suit in equity for the adjustment of the rights and priorities of the several lienholders. Huff v. Bidwell (1907) 151 Fed. 563, 81 C. C. A. 43.

35. —— **Before judgment.**—A suit in equity cannot be brought in the federal courts to set aside fraudulent conveyances, and subject the property to payment of a simple contract debt, on which a judgment at law has not been recovered, under a state statute giving the state courts of chancery jurisdiction of bills of creditors, who have not obtained judgments at law, to set aside fraudulent conveyances, and to subject the property to their demands; since Const. Amend. 7, gives the right of trial by jury in suits at law, and since R. S. § 723, ante, § 1244, provides that suits in equity cannot be sustained in the United States courts where a remedy at law may be had. Scott v. Neely (1891) 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen (1893) 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Hollins v. Brierfield Coal & Iron Co. (1893) 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Morrow Shoe Manuf'g Co. v. New England Shoe Co. (1894) 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417; Hall v. Gambrill (1899) 92 Fed. 32, 34 C. C. A. 190 (affirming decree [C. C. 1898] 88 Fed. 709); Harrison v. Farmers' Loan & Trust Co. of New York (1899) 94 Fed. 728, 36 C. C. A. 443; Davidson-Wesson Implement Co. v. Parlin & Orendorff Co. (1905) 141 Fed. 37, 72 C. C. A. 525; England v. Russell (C. C. 1896) 71 Fed. 818; Peacock, Hunt & West Co. v. Williams (C. C. 1901) 110 Fed. 917; Jacobs v. Mexican Sugar Co. (C. C. 1904) 130 Fed. 589; Mathews Slate Co. v. Mathews (C. C. 1906) 148 Fed. 490; Smith v. Lloyd (D. C. 1913) 207 Fed. 815. But see, also, under a state statute which confers on contract creditors the right to enforce their claims as against transfers or liens fraudulent or void as to creditors, no prior judgment on the claims, nor resort to legal remedies, is required in order to establish such creditor's interest. Hahn v. Salmon (C. C. 1884) 20 Fed. 801; Buford v. Holley (C. C. 1886) 28 Fed. 680; Lilienthal v. Drucklieb (C. C. 1897) 80 Fed. 562; In re H. G. Andrae Co. (D. C. 1902) 117 Fed. 561.

And on right to enforce creditors' and stockholders' bills against an insolvent corporation, see Atlanta & F. R. Co. v. Western Ry. Co. of Alabama (1892) 50 Fed. 790, 1 C. C. A. 676; United States Shipbuilding Co. v. Conklin (1903) 126 Fed. 132, 60 C. C. A. 680; Land Title & Trust Co. of America v. Asphalt Co.

of America (1903) 127 Fed. 1, 62 C. C. A. 23; McGraw v. Mott (1910) 179 Fed. 646, 103 C. C. A. 204; D. A. Tompkins Co. v. Catawba Mills (C. C. 1897) 82 Fed. 780; Jones v. Mutual Fidelity Co. (C. C. 1903) 123 Fed. 506; Jacobs v. Mexican Sugar Co. (C. C. 1904) 130 Fed. 589; Morrill v. American Reserve Bond Co. of Kentucky (C. C. 1907) 151 Fed. 305.

See, also, "Effect of statutes creating remedy at law," post.

36. Determination of corporate power under franchise.—A state statute provided that when it is alleged that the private rights of individuals or corporations are injured by any corporation claiming a franchise to do the act from which the injury results, the court may inquire whether such corporation does in fact possess such franchise, and, if it does not, may enjoin it from committing the injurious acts. Held, that this equitable right may be administered in a federal court, by inquiring whether a corporation organized under the general railroad law is not intended for a purely private purpose. Weidenfeld v. Sugar Run R. Co. (C. C. 1892) 48 Fed. 615.

37. Garnishment.—A garnishment proceeding authorized by a state statute, being one at law, cannot be entertained by a federal court in equity, whether or not it can be entertained by the state courts on their equity side. U. S. v. Swan (1895) 65 Fed. 647, 13 C. C. A. 77.

38. Injunction against cutting timber.—A state statute providing that in all applications to enjoin the cutting of timber, or boxing the same for turpentine purposes, it shall not be necessary to aver or prove insolvency, may be administered by the equity courts of the United States. Lanier v. Alison (C. C. 1887) 31 Fed. 100.

39. Injunction against illegal tax.—A state statute authorizing suits to enjoin the illegal levy of taxes or assessments or the collection thereof, may be enforced on the equity side of the federal courts. Lander v. Mercantile Nat. Bank of Cleveland, Ohio (1902) 118 Fed. 785, 55 C. C. A. 523 (affirming judgment Mercantile Nat. Bank of Cleveland, Ohio, v. Lander [C. C. 1901] 109 Fed. 21); Humes v. City of Little Rock (C. C. 1898) 138 Fed. 929; Illinois Life Ins. Co. v. Newman (C. C. 1905) 141 Fed. 449.

40. Mortgage foreclosure.—Where a mortgagee has an adequate remedy at law, by an action for damages to his mortgage security, a suit in equity, though permitted by state laws, should not be entertained by a federal court. Clapp v. City of Spokane (C. C. 1892) 53 Fed. 515.

41. Partition suits.—A state statute provides that tenants in common and coparceners shall be compellable to make partition, and the circuit court of a county wherein the estate, or any part thereof, may be, shall have jurisdiction in cases of partition, and in the exercise thereof may take cognizance of all questions of law affecting the legal title that may arise in any such proceeding. Held, that such section was available in a suit for partition in a federal court sitting in West Virginia to authorize the court in that suit to determine all questions of law affecting the title. Klever v. Seawall (1895) 65 Fed. 393, 12 C. C. A. 661 (reversing judgment [1894] 65 Fed. 373, 12 C. C. A. 653); Ex parte Biddle (C. C. 1822) Fed. Cas. No. 1,391; Woods v. Woods (C. C. 1910) 184 Fed. 159.

A federal court of equity cannot entertain a suit for partition of lands where the plaintiff's title is denied, though a state statute permits courts of equity to take cognizance of questions of title in partition suits. American Ass'n v. Eastern Kentucky Land Co. (C. C. 1894) 68 Fed. 721.

42. Passing title to real estate by decree.—Federal equity courts will follow a state statute which provides that "courts of equity may pass the title to real estate by decree, without any act of the respondent, * * * and such decree when recorded shall be as effectual as the deed of respondent." A. & W. Sprague Mfg. Co. v. Hoyt (C. C. 1886) 29 Fed. 421.

43. Quieting title—Complainant in possession.—One holding legal title and possession may sue in equity in the federal circuit court to quiet title under a state statute without prior adjudication of the title at law. Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 21, 207 U. S. 1, 52 L. Ed. 65 (affirming United States Min. Co. v. Lawson [1904] 134 Fed. 769, 67 C. C. A. 587); Gillis v. Downey (1898) 85 Fed. 483, 29 C. C. A. 286; Kraus v. Congdon (1908) 161 Fed. 18, 88 C. C. A. 182; New Jersey & N. C. Land & Lumber Co. v. Gardner-Lacy Lumber Co. (1910) 178 Fed. 772, 102 C. C. A. 220 (reversing order [C. C. 1908] 161 Fed. 768); Grand Rapids & I. R. Co. v. Sparrow (C. C. 1888) 36 Fed. 210, 211, 1 L. R. A. 480; North Carolina Min. Co. v. Westfeldt (C. C. 1907) 151 Fed. 290, decree reversed Westfeldt v. North Carolina Min. Co. (1909) 166 Fed. 706, 92 C. C. A. 378, motion to modify denied (1910) 177 Fed. 132, 100 C. C. A. 552, and writ of certiorari denied North Carolina Min. Co. v. Westfeldt (1909) 29 Sup. Ct. 697, 214 U. S. 516, 53 L. Ed. 1064, appeal dismissed (1909) 30 Sup. Ct. 404, 215 U. S. 586, 54 L. Ed. 339. See, also, Clark v. Smith (1839) 13 Pet. 195, 202, 10 L. Ed. 123.

A state statute providing that an "action" may be brought by any person in possession against any person who

claims an interest or estate therein adverse to him, for the purpose of determining such adverse claim, dispenses with the necessity of establishing a right at law before suing to determine such adverse claims, as the term "action" in that state includes proceedings both at law and in equity. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625 (affirming decree [C. C. 1907] 156 Fed. 989, and writ of certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); Bayerque v. Cohen (C. C. 1856) Fed. Cas. No. 1,134; Starr v. Stark (C. C. 1870) Fed. Cas. No. 13,316; Central Pac. R. Co. v. Dyer (C. C. 1871) Fed. Cas. No. 2,552; Lamb v. Farrell (C. C. 1884) 21 Fed. 5; Smith Oyster Co. v. Darbee & Immel Oyster & Land Co. (C. C. 1906) 149 Fed. 555.

Under the Iowa statute empowering a person in possession of land to bring a bill in equity to quiet title, such a bill is not demurrable because it shows that defendants, who are nonresidents of the state, have sued complainant in ejectment for the land, and that such ejectment suit is still pending. Langstraat v. Nelson (C. C. 1889) 40 Fed. 783.

Under the statute of Nevada relating to actions to quiet title to real property, plaintiff, in bringing a suit in equity for that purpose in the federal court of Nevada, need not set out specifically the character of his own title, or of the alleged title of the defendant, but need only allege that plaintiff is the owner and in possession of the property, describing it, and that the defendant is unlawfully asserting a claim thereto adverse to him. Union Mill & Mining Co. v. Warren (C. C. 1897) 82 Fed. 519.

44. —— **Unoccupied land.**—Suits to quiet title under state statutes may be maintained in the federal equity courts where both parties are out of possession. Clark v. Smith (1839) 38 U. S. (13 Pet.) 195, 10 L. Ed. 123; Parker v. Overman (1855) 59 U. S. (18 How.) 137, 15 L. Ed. 318; Holland v. Challen (1883) 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Reynolds v. First Nat. Bank (1884) 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; U. S. v. Wilson (1886) 6 Sup. Ct. 991, 118 U. S. 86, 30 L. Ed. 110; Gormley v. Clark (1890) 10 Sup. Ct. 554, 557, 134 U. S. 338, 33 L. Ed. 909; Bardon v. Land & River Imp. Co. (1895) 157 U. S. 327, 15 Sup. Ct. 650, 39 L. Ed. 719 (affirming [C. C. 1891] 45 Fed. 706); Johnston v. Kramer Bros. & Co. (D. C. 1913) 203 Fed. 733.

A right given by state statutes to a claimant of vacant lands to sue to quiet title may be enforced in the federal courts. Bigelow v. Chatterton (1892) 51 Fed. 614, 2 C. C. A. 402; Sage v. Winona & St. P. R. Co. (1893) 58 Fed. 297, 7 C. C. A. 237; Prentice v. Duluth Storage & Forwarding Co. (1893) 58 Fed. 437, 7 C. C. A. 293 (affirming decree Duluth Storage & Forwarding Co. v. Prentice [C. C. 1892] 50 Fed. 878; American Ass'n v. Williams (1908) 166 Fed. 17, 93 C. C. A. 1; Golden Cycle Mining Co. v. Christmas Gold Mining Co., 204 Fed. 939, 123 C. C. A. 261; Johnson v. North Star Lumber Co. (1913) 206 Fed. 624, 125 C. C. A. 118 (affirming decree North Star Lumber Co. v. Johnson [D. C. 1912] 196 Fed. 56); Grand Rapids & I. R. Co. v. Sparrow (C. C. 1888) 36 Fed. 210, 1 L. R. A. 480; Southern Pac. R. Co. v. Stanley (C. C. 1892) 49 Fed. 263; Willitt v. Baker (C. C. 1904) 133 Fed. 937; Farr v. Hobe-Peters Land Co. (C. C. 1911) 188 Fed. 10, 110 C. C. A. 160 (reversing decree Hobe-Peters Land Co. v. Farr [C. C. 1908] 170 Fed. 644); Baum v. Longwell (D. C. 1912) 200 Fed. 450.

A federal equity court has jurisdiction of a suit to quiet title to land, although the complainant is not in possession, where such suit is authorized by a state statute, and it appears from the record that the defendant is not in possession, so that an action in ejectment would lie. Southern Pine Co. v. Hall (1900) 105 Fed. 84, 44 C. C. A. 363 (writ of certiorari denied [1901] 21 Sup. Ct. 921, 180 U. S. 639, 45 L. Ed. 711); Grand Rapids & I. R. Co. v. Sparrow (C. C. 1888) 36 Fed. 210, 1 L. R. A. 480. See, also, Lamb v. Farrell (C. C. 1884) 21 Fed. 5; Southern Pac. R. Co. v. Stanley (C. C. 1892) 49 Fed. 263.

A suit brought in a federal court under a state statute to determine an adverse claim to unoccupied lands, should be by bill in equity, and the pleadings and practice should conform as nearly as may be to the pleadings and practice in equity in the federal courts. Bigelow v. Chatterton (1892) 51 Fed. 614, 2 C. C. A. 402.

See, however, the following cases:

Independent of a statute of a state where the land lies, a bill to remove a cloud will not lie where complainant is not in actual possession. American Ass'n v. Williams (1908) 166 Fed. 17, 93 C. C. A. 1.

Under the rule of the federal courts, it is essential to the right to maintain a bill to remove a cloud upon title that complainant should be in possession; and such rule is not modified locally by the fact that a contrary rule, established by decision, prevails in the courts of the state, where defendant is not in possession. Peck v. Ayers & Lord Tie Co. (1902) 116 Fed. 273, 53 C. C. A. 551.

See, also, "Effect of statutes creating remedy at law," post.

45. —— **Defendant in possession.**—An averment of possession in the complainant, or that both parties are out of possession, is essential to the main-

tenance of a bill to quiet title in a federal court, although otherwise under the state practice. Whitehead v. Shattuck (1891) 11 Sup. Ct. 276, 138 U. S. 146, 34 L. Ed. 873 (distinguishing Holland v. Challen [1884] 3 Sup. Ct. 495, 110 U. S. 15, 28 L. Ed. 52); Reynolds v. Crawfordsville First Nat. Bank (1884) 5 Sup. Ct. 213, 112 U. S. 405, 28 L. Ed. 733; Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co. (1903) 23 Sup. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; Id. 23 Sup. Ct. 440, 188 U. S. 645, 47 L. Ed. 634; Same v. Chile Gold Min. Co., Id. See, also, U. S. v. Wilson (1886) 6 Sup. Ct. 991, 118 U. S. 86, 30 L. Ed. 110; Sanders v. Devereux (1894) 60 Fed. 311, 8 C. C. A. 629.

In view of R. S. 723, ante, § 1244, a state statute authorizing the legal owner of real estate to maintain an equitable action to quiet his title against one in possession cannot confer jurisdiction of such a suit on a federal court. Hanley v. Beatty (1902) 117 Fed. 59, 54 C. C. A. 445; Childs v. Missouri, K. & T. Ry. Co., 221 Fed. 219, 136 C. C. A. 629; Chamberlain v. Marshall (C. C. 1881) 8 Fed. 398; Southern Pac. R. Co. v. Goodrich (C. C. 1893) 57 Fed. 879; Gordan v. Jackson (C. C. 1896) 72 Fed. 86; Gombert v. Lyon (C. C. 1897) 80 Fed. 305; Taylor v. Clark (C. C. 1898) 89 Fed. 7; Davidson v. Calkins (C. C. 1899) 92 Fed. 230; Morrison v. Marker (C. C. 1899) 93 Fed. 692; United States Min. Co. v. Lawson (C. C. 1902) 115 Fed. 1005; Giberson v. Cook (C. C. 1903) 124 Fed. 986; Illinois Life Ins. Co. v. Newman (C. C. 1905) 141 Fed. 449; Union Pac. R. Co. v. Cunningham (C. C. 1909) 173 Fed. 90. But see U. S. v. Leslie (C. C. 1909) 167 Fed. 670.

46. Review of state railroad commission's order.—In a suit in the United States Circuit Court to enjoin the enforcement of an order of the railroad commissioners of South Dakota, where there was diversity of citizenship, the defendants answered and filed a cross-bill to enforce the order. Held, that the circuit court on the hearing and the court of appeals on appeal had the same power to determine the original question and to do justice in the premises as was conferred on the state court by Rev. Pol. Code S. D. § 449, regulating commerce. Platt v. Lecocq (1907) 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558, reversing decree (C. C. 1906) 150 Fed. 391.

47. Specific performance.—Federal equity courts may enforce remedies given under a state statute, so as to grant proper relief to a complainant asking for specific performance of a contract to convey real estate. Single v. Scott Paper Mfg. Co. (C. C. 1893) 55 Fed. 553, 557.

48. Tax cases.—Where a state expressly gives a remedy by injunction against the assessment and collection of taxes on the ground of illegality, such statutory remedy may be afforded by the federal courts sitting in equity. Cummings v. Merchants' National Bank (1879) 101 U. S. 153, 157, 25 L. Ed. 903; Grether v. Wright (1896) 75 Fed. 742, 23 C. C. A. 498.

49. Vendor's lien.—The federal courts enforce a vendor's lien under the general rule in equity, when not in contravention of the jurisprudence of the state in which the suit is brought, or when given by a state statute. Fisher v. Shropshire (1893) 13 Sup. Ct. 201, 203, 147 U. S. 133, 37 L. Ed. 109; Slide & Spur Gold Mines v. Seymour (1894) 14 Sup. Ct. 842, 844, 153 U. S. 509, 38 L. Ed. 802; Wilson v. Plutus Mining Co. (1909) 174 Fed. 317, 98 C. C. A. 189.

50. Water rights.—That the boundaries of shore lands of different riparian owners, if projected beyond low-water mark, would intersect, held not to raise a question of disputed boundary to be settled by action at law under the law of Oregon, depriving a court of equity of jurisdiction to protect water frontage rights by injunction. Oregon Coal & Navigation Co. v. Anderson (1913) 206 Fed. 404, 124 C. C. A. 286.

A state statute which provides that in actions for the protection of water rights the plaintiff may make any or all persons who have diverted water from the same stream or source parties, and the court may in one judgment settle the relative priorities and rights of all parties to the action, establishes a procedure substantially consistent with the ordinary modes of proceeding in chancery, and the rights thereby given may be enforced by a federal court of equity having jurisdiction of the suit by reason of diversity of citizenship. Ames Realty Co. v. Big Indian Min. Co. (C. C. 1906) 146 Fed. 166.

(C) Effect of statutes blending equitable and legal claims

51. Obliteration of distinction between action at law and suit in equity.—The distinction between equitable and legal remedies in the federal courts cannot be obliterated by state legislation. Bennett v. Butterworth (1850) 52 U. S. (11 How.) 669, 13 L. Ed. 859; Thompson v. Central Ohio R. Co. (1867) 6 Wall. 134, 137, 18 L. Ed. 765; Mississippi Mills v. Cohn (1893) 14 Sup. Ct. 75, 76, 150 U. S. 202, 37 L. Ed. 1052; Hollins v. Brierfield Coal & Iron Co. (1893) 14 Sup. Ct. 127, 128, 150 U. S. 371, 37 L. Ed. 1113; Lindsay v. First Nat. Bank (1895) 15 Sup. Ct. 472, 475, 156 U. S. 485, 39 L. Ed. 505; Gravenberg v. Laws (1900) 100 Fed. 1, 40 C. C. A. 240; Fletcher v. Burt (1903) 126 Fed. 619, 63 C. C. A. 201;

Gray v. Grand Trunk Western Ry. Co. (1907) 156 Fed. 736, 741, 84 C. C. A. 392 (certiorari denied [1907] 28 Sup. Ct. 260, 207 U. S. 594, 52 L. Ed. 356); Butler v. Young (C. C. 1872) Fed. Cas. No. 2,245; Gudger v. Western N. C. R. Co. (C. C. 1884) 21 Fed. 81; Hudson v. Wood (C. C. 1903) 119 Fed. 764; Kansas City Southern Ry. Co. v. Quigley (C. C. 1910) 181 Fed. 190; Shuford v. Cain (D. C. 1869) Fed. Cas. No. 12,823.

Because the statutes of a state have abolished the distinction between legal and equitable remedies, this section does not require that the United States courts should do so and award the plaintiffs that recovery which the facts in any form of action would warrant. McCollum v. Eager (1844) 43 U. S. (2 How.) 61, 11 L. Ed. 179; Thompson v. Central Ohio R. Co. (1867) 73 U. S. (6 Wall.) 134, 18 L. Ed. 765; Walker v. Dreville (1870) 79 U. S. (12 Wall.) 440, 20 L. Ed. 429; Heine v. Board of Levee Com'rs (1873) 19 Wall. 655, 660, 22 L. Ed. 223; Brown v. Lanyon (1906) 148 Fed. 838, 78 C. C. A. 528 (certiorari denied [1907] 27 Sup. Ct. 787, 204 U. S. 672, 51 L. Ed. 673); Potts v. Accident Ins. Co. of North America (C. C. 1888) 35 Fed. 566; Hale v. Hardon (C. C. 1898) 89 Fed. 283, 285 (reversed [1899] 95 Fed. 747, 37 C. C. A. 240); Hill v. Northern Pac. Ry. Co. (C. C. 1900) 104 Fed. 754; U. S. v. United Surety Co. (D. C. 1912) 192 Fed. 992.

The adoption of the state practice in circuit courts of the United States does not allow a suit to enjoin collection of taxes—an equitable suit—to be brought therein on the law side of the court, though in the state court no distinction is made between the legal and equitable sides. Lindsay v. First Nat. Bank (1895) 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505.

The distinction between actions at law and suits in equity in courts of the United States is matter of substance and not of form only. McKemy v. Supreme Lodge A. O. U. W. (1910) 180 Fed. 961, 104 C. C. A. 117.

52. Blending equitable and legal claims in one suit.—Act Aug. 7, 1888, § 4 (section 10083, post), directing the attorney general to take "proper proceedings" to enforce the rights of the United States in telegraphic property connected with the Pacific railroads, did not authorize the joinder of legal and equitable matters in one proceeding. Union Pac. Ry. Co. v. U. S. (1894) 59 Fed. 813, 8 C. C. A. 282, reversing U. S. v. Western Union Tel. Co. (C. C. 1892) 50 Fed. 28.

This section in terms excludes equity cases, and legal and equitable claims cannot be blended together in one suit in a federal court. Thompson v. Central Ohio R. Co. (1867) 6 Wall. 134, 137, 18 L. Ed. 765; Cherokee Nation v. Southern Kan. R. Co. (1890) 10 Sup. Ct. 965, 969, 135 U. S. 641, 34 L. Ed. 295; Scott v. Armstrong (1892) 13 Sup. Ct. 148, 152, 146 U. S. 499, 36 L. Ed. 1059; Hill v. Northern Pac. Ry. Co. (1902) 113 Fed. 914, 51 C. C. A. 544; Highland Boy Gold Min. Co. v. Strickley (1902) 116 Fed. 852, 54 C. C. A. 186; Goodyear Shoe Machinery Co. v. Dancel (1902) 119 Fed. 692, 56 C. C. A. 300; Fletcher v. Burt (1903) 126 Fed. 619, 621, 63 C. C. A. 201; Schurmeier v. Connecticut Mut. Life Ins. Co. (1905) 137 Fed. 42, 69 C. C. A. 22; Cook v. Foley (1907) 152 Fed. 41, 81 C. C. A. 237 (writ of certiorari denied [1908] 28 S. Ct. 570, 209 U. S. 543, 52 L. Ed. 919); Platte Valley Cattle Co. v. Bosserman-Gates Live Stock & Loan Co. (1912) 202 Fed. 692, 121 C. C. A. 102, 45 L. R. A. (N. S.) 1137; Butler v. Young (C. C. 1872) Fed. Cas. No. 2,245; Hall v. Yahoola River Min. Co. (C. C. 1873) Fed. Cas. No. 5,955; Kenton Furnace R. & Mfg. Co. v. McAlpin (C. C. 1880) 5 Fed. 737, 740; Berkey v. Cornell (C. C. 1898) 90 Fed. 711; Jones v. Mutual Fidelity Co. (C. C. 1903) 123 Fed. 506; York City School Dist. v. Ætna Indemnity Co. (C. C. 1904) 131 Fed. 131; Beatty v. Wilson (C. C. 1908) 161 Fed 453; American Creosote Works v. C Lembcke & Co. (C. C. 1908) 165 Fed. 809; Shuford v. Cain (D. C. 1869) Fed. Cas. No. 12,823.

See Act March 3, 1915, §§ 1251a, 1251b, ante.

53. Equitable defenses to action at law.—Equitable defenses are inadmissible in actions at law in United States courts, although state practice allows them. Jones v. McMasters (1857) 61 U. S. (20 How.) 8, 15 L. Ed. 805; Burnes v. Scott (1885) 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; Scott v. Armstrong (1892) 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; Davis v. Davis (1896) 72 Fed. 81, 18 C. C. A. 438; Owens v. Heidbreder (1897) 78 Fed. 837, 24 C. C. A. 362; Schoolfield v. Rhodes (1897) 82 Fed. 153, 27 C. C. A. 95; Lee v. Wysong (1904) 128 Fed. 833, 63 C. C. A. 483; McManus v. Chollar (1904) 128 Fed. 902, 63 C. C. A. 454; Levi v. Mathews (1906) 145 Fed. 152, 76 C. C. A. 122; Mead v. Chesebrough Bldg. Co. (1907) 151 Fed. 998, 81 C. C. A. 184; Same v. Gallatin (1907) 151 Fed. 1006, 81 C. C. A. 192; Pacific Mut. Life Ins. Co. of California v. Webb (1907) 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752; Seefeld v. Duffer (1910) 179 Fed. 214, 103 C. C. A. 32 (writ of certiorari denied Duffer v. Seefeld [1911] 31 Sup. Ct. 720, 220 U. S. 616, 55 L. Ed. 611); Parsons v. Denis (C. C. 1881) 7 Fed. 317; Gudger v. Western North Carolina R. Co. (C. C. 1884) 21 Fed. 81; Snyder v. Pharo (C. C. 1885) 25 Fed. 398; Myrick v. Heard (C. C. 1887) 31 Fed. 97; Church v. Spiegelburg (C. C. 1887) 31 Fed. 601; Herklotz v. Chase (C. C. 1887) 32 Fed. 423; Johnson v. Merry Mount Granite

Co. (C. C. 1892) 53 Fed. 569; Platt v. Larter (C. C. 1899) 94 Fed. 610; Daniel v. Felt (C. C. 1900) 100 Fed. 727; Hill v. Northern Pac. Ry. Co. (C. C. 1900) 104 Fed. 754; Jewett Car Co. v. Kirkpatrick Const. Co. (C. C. 1901) 107 Fed. 622; Pettus v. Smith (C. C. 1902) 117 Fed. 967; Tegarden v. Le Marchel (C. C. 1904) 129 Fed. 487; Sturges v. Portis Mining Co. (D. C. 1913) 206 Fed. 534.

In ejectment in the federal courts, the legal title must prevail as against a mere equity. Bouldin v. Phelps (C. C. 1887) 30 Fed. 547. But see Cheatham v. Edgefield Mfg. Co. (C. C. 1904) 131 Fed. 118, and cases cited, holding that facts constituting an equitable estoppel may be pleaded as a defense to an action of ejectment in the federal courts.

The above decisions have apparently been rendered obsolete by Act March 3, 1915 (section 1251b, ante).

54. Action at law on equitable title.—The practice of permitting ejectment to be based, in some of the states, on equitable title, can in no wise confer jurisdiction on the courts of the United States to try ejectment on such titles. Fenn v. Holme (1858) 62 U. S. (21 How.) 481, 16 L. Ed. 198; Hooper v. Scheimer (1859) 64 U. S. (23 How.) 235, 16 L. Ed. 452; Sheirburn v. De Cordova (1860) 65 U. S. (24 How.) 423, 16 L. Ed. 741; Kircher v. Murray (C. C. 1893) 54 Fed. 617, judgment affirmed (1894) 60 Fed. 48, 8 C. C. A. 448.

See Act March 3, 1915 (section 1251a, ante).

(D) Effect of statutes creating remedy at law in state courts

55. General rule.—In determining whether there is an adequate remedy at law, which will defeat equitable jurisdiction, the inquiry is whether, by the principles of common law and equity, as distinguished and defined in this country and England at the time of the adoption of the constitution of the United States, the relief sought was obtainable at law, or is such as only a court of equity was fully competent to give. Sheffield Furnace Co. v. Witherow (1893) 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Mississippi Mills v. Cohn (1893) 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052 (reversing [C. C. 1889] 39 Fed. 865); Empire Circuit Co. v. Sullivan (C. C. 1909) 169 Fed. 1009; Richardson v. Pennsylvania Coal Co. (D. C. 1913) 203 Fed. 743, and authorities cited; Crown Orchard Co. v. Dennis (D. C. 1915) 220 Fed. 516. See Robinson v. Campbell (1818) 3 Wheat. 212, 221, 4 L. Ed. 372; Barber v. Barber (1858) 21 How. 583, 592, 16 L. Ed. 226; Taylor v. Louisville & N. R. Co. (1898) 88 Fed. 350, 31 C. C. A. 537; Morrison v. Marker (C. C. 1899) 93 Fed. 692.

The test of the equitable jurisdiction of a federal court is the presence or absence of an adequate remedy at law in such court, and not the presence or absence of such a remedy in a state court. National Surety Co. v. State Bank of Humboldt, Neb. (1903) 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; Barber Asphalt Pav. Co. v. Morris (1904) 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761; Borden's Condensed Milk Co. v. Baker (1910) 177 Fed. 906, 101 C. C. A. 186 (reversing decree [C. C. 1909] 168 Fed. 111); Jones v. Mutual Fidelity Co. (C. C. 1903) 123 Fed. 506.

The jurisdiction of a federal court of equity is not ousted because a state statute has given complainant a remedy by an action at law in the state courts. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625 (affirming decree [C. C. 1907] 156 Fed. 989; and writ of certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); H. B. Claflin Co. v. Furtick (C. C. 1902) 119 Fed. 429, 433. See Barber v. Barber (1858) 21 How. 582, 592, 16 L. Ed. 226; Fitch v. Creighton (1860) 24 How. 159, 162, 16 L. Ed. 596; Smyth v. Ames (1898) 18 Sup. Ct. 418, 422, 169 U. S. 466, 42 L. Ed. 819; North British & Mercantile Ins. Co. v. Lathrop (1895) 70 Fed. 429, 432, 17 C. C. A. 175; United States Life Ins. Co. v. Cable (1900) 98 Fed. 761, 39 C. C. A. 264; Peck v. Ayers & Lord Tie Co. (1902) 116 Fed. 273, 53 C. C. A. 551; Colorado Eastern R. Co. v. Chicago, B. & Q. Ry. Co. (1905) 141 Fed. 898, 73 C. C. A. 132; Gordon v. Hobart (C. C. 1836) Fed. Cas. No. 5,609; Cropper v. Coburn (C. C. 1855) Id. 3,416; Fletcher v. New Orleans N. E. R. Co. (C. C. 1884) 20 Fed. 345; Fitzhugh v. McKinney (C. C. 1890) 43 Fed. 461; De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co. (C. C. 1891) 46 Fed. 829; Indianapolis Water Co. v. American Strawboard Co. (C. C. 1893) 53 Fed. 970; Sowles v. First Nat. Bank (C. C. 1900) 100 Fed. 552; Schmidt v. West (C. C. 1900) 104 Fed. 272; Niagara Fire Ins. Co. v. Cornell (C. C. 1901) 110 Fed. 816; Barrett v. Twin City Power Co. (C. C. 1902) 118 Fed. 861 (decree affirmed Twin City Power Co. v. Barrett [1903] 126 Fed. 302, 61 C. C. A. 288);

56. Application to particular statutes—Creditors' proceedings.—A suit which is substantially a creditors' bill to subject to a judgment property belonging to the judgment debtor, but which fraudulently stands in the name of a third person, is within the equity jurisdiction of the federal courts, although the state statutes give a remedy at law. U. S. v. Howland (1819) 17 U. S. (4 Wheat.) 108, 4 L. Ed. 526; Mississippi Mills v. Cohn (1893) 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052 (reversing

[C. C. 1889] 39 Fed. 865); Feidler v. Bartleson (1908) 161 Fed. 30, 88 C. C. A. 194 (affirming decree Bartleson v. Feidler [C. C. 1906] 149 Fed. 299); Burt v. Keyes (C. C. 1861) Fed. Cas. No. 2,212; Frazer v. Colorado Dressing & Smelting Co. (C. C. 1880) 5 Fed. 163; First Nat. Bank v. Peavey (C. C. 1895) 69 Fed. 455; Brown v. French (C. C. 1897) 80 Fed. 166; Regina Music Box Co. v. F. G. Otto & Son (C. C. 1903) 124 Fed. 747.

Code provisions in the several states authorizing the examination of defendants and the compulsory production of books and papers, though aids to methods of procedure in the federal court in actions at law, are not entire substitutes for bills of discovery and relief in equity in federal practice. McMullen Lumber Co. v. Strother (1905) 136 Fed. 295, 69 C. C. A. 433.

See, also, "Effect of statutes creating new rights and remedies," etc., ante.

57. —— **Mechanic's lien cases.**—Proceedings to enforce a mechanic's lien in courts of the United States must be by suit in equity, notwithstanding that by the state statute in which the lien is created its enforcement may be by action at law. Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co. (1913) 208 Fed. 976, 126 C. C. A. 64; De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co. (C. C. 1891) 46 Fed. 829.

Though a state law gives a right of action at law for the enforcement of a mechanic's lien, a federal court sitting in equity has jurisdiction to entertain a bill for that purpose. Healey Ice Mach. Co. v. Green (C. C. 1910) 181 Fed. 890 (decree affirmed Same v. Greene [1911] 191 Fed. 1004, 111 C. C. A. 668). See, also, Sheffield Furnace Co. v. Witherow (1893) 13 Sup. Ct. 936, 938, 149 U. S. 574, 37 L. Ed. 853; Schmulbach v. Caldwell (1912) 196 Fed. 16, 115 C. C. A. 650; Gilchrist v. Helena Hot Springs & Smelter R. Co. (C. C. 1893) 58 Fed. 708.

58. —— **Mortgage foreclosure.**—A deed absolute in form, given as security for a loan of money, may be foreclosed as a mortgage, by a suit in equity in a federal court, notwithstanding that Code provisions give a special remedy at law; for the equity jurisdiction of the federal courts cannot be limited by state legislation. Ray v. Tatum (1896) 72 Fed. 112, 18 C. C. A. 464, affirming decree Tatum v. Ray (C. C. 1895) 69 Fed. 682.

59. —— **Quieting title.**—A state statute, providing for ejectment against the actual occupant if any, and, if none, against any person claiming an interest therein or exercising acts of ownership at the commencement of the action, does not oust original jurisdiction of equity where the land is unoccupied. Smyth v. Ames (1898) 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; American Ass'n v. Williams (1908) 166 Fed. 17, 93 C. C. A. 1; Warren v. Oregon & Washington Realty Co. (C. C. 1907) 156 Fed. 203.

See, also, "Effect of statutes conferring new rights and remedies," etc., ante.

60. —— **Tax cases.**—The collection of illegal taxes has been enjoined, notwithstanding a remedy at law existed in the state courts, in the following cases: Cummings v. National Bank (1879) 101 U. S. 153, 25 L. Ed. 903; Western Union Tel. Co. v. Trapp (1911) 186 Fed. 114, 108 C. C. A. 226; Oliver v. Omaha (C. C. 1875) Fed. Cas. No. 10,499; First Nat. Bank v. Hungate (C. C. 1894) 62 Fed. 548; Brinkerhoff v. Brumfield (C. C. 1899) 94 Fed. 422; Burlington Sav. Bank v. City of Clinton, Iowa (C. C. 1901) 106 Fed. 269.

61. **Remedy at law in federal courts arising from state statute.**—State legislation changing substantive law, by which a new right is given, which may be enforced by an action at law in either a state or federal court, may by such remedy supersede an equitable remedy theretofore existing in the federal courts. Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo. (1915) 222 Fed. 651, 138 C. C. A. 175, denying rehearing (1914) 217 Fed. 540, 133 C. C. A. 392. See, also, Singer Sewing Mach. Co. of New Jersey v. Benedict (1913) 33 Sup. Ct. 942, 229 U. S. 481, 57 L. Ed. 1288.

Where the statutes of a state provide for proceedings in a court of law to set aside a judgment rendered by such court on the ground of fraud, or unavoidable casualty or misfortune preventing the party from appearing or defending, such provisions, by force of the conformity act, afford a plain and adequate remedy at law, which excludes the jurisdiction of equity. Travelers' Protective Ass'n v. Gilbert (1901) 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538.

(E) Effect of limitation statutes

62. **Application of laches in conformity with limitation statutes.**—While a federal court of equity is not bound by a state statute of limitations, on a question of laches it is proper for it to follow that statute, unless facts are shown which render its application inequitable. Rugan v. Sabin (1892) 53 Fed. 415, 3 C. C. A. 578 (approving Parker v. Kuhn [1887] 32 N. W. 74, 21 Neb. 413; Wright v. Davis [1889] 44 N. W. 490, 28 Neb. 479); Hayden v. Thompson (1895) 71 Fed. 60, 17 C. C. A. 592 (reversing decree [C. C. 1895] 67 Fed. 273); Nash v. Ingalls (1900) 101 Fed. 645, 41 C. C. A. 545 (affirming decree [C. C. 1897] 79 Fed. 510); Stevens v. Grand Cen-

tral Min. Co. (1904) 133 Fed. 28, 67 C. C. A. 284; Frank v. Butler County, Neb. (1905) 139 Fed. 119, 71 C. C. A. 571; Clapp v. Leavens (1908) 164 Fed. 318, 90 C. C. A. 250; Cunningham v. Pettigrew (1909) 169 Fed. 335, 94 C. C. A. 457; Armstrong Cork Co. v. Merchants' Refrigerating Co. (1910) 184 Fed. 199, 107 C. C. A. 93 (modifying decree [C. C. 1909] 171 Fed. 778); Kentucky Coal & Timber Development Co. v. Kentucky Union Co. (1911) 187 Fed. 945, 110 C. C. A. 93; Davey v. Dodge (1914) 213 Fed. 722, 130 C. C. A. 236; Sullivan v. Ellis (1915) 219 Fed. 694, 135 C. C. A. 366; Smith v. Smith (1915) 224 Fed. 1, 139 C. C. A. 465 (affirming decree [D. C. 1914] 210 Fed. 947); Clarke v. Southwick (C. C. 1852) Fed. Cas. No. 2,863; Dannmeyer v. Coleman (C. C. 1882) 11 Fed. 97; Phelps v. Elliott (C. C. 1888) 35 Fed. 455 (decree reversed [1891] 11 Sup. Ct. 1026, 140 U. S. 694, 35 L. Ed. 745); Naddo v. Bardon (C. C. 1891) 47 Fed. 782 (decree affirmed [1892] 51 Fed. 493, 2 C. C. A. 335); Frishmuth v. Farmers' Loan & Trust Co. (C. C. 1899) 95 Fed. 5, 10; Potts v. Alexander (C. C. 1902) 118 Fed. 885; Miller v. Wattier (C. C. 1908) 165 Fed. 359. But see Bank of U. S. v. Daniel (1838) 12 Pet. 32, 56, 9 L. Ed. 989; Thompson v. German Ins. Co. (C. C. 1896) 76 Fed. 892, and cases cited.

Where the defendants, in a suit in a federal court to quiet the title to unoccupied lands and for the cancellation of certain conveyances as clouds upon complainant's title, claim through conveyances based upon sales for taxes, some of which were executed 25 years before the commencement of the suit, and the latest 9 years before, the court will refuse relief to the complainant on the ground of laches, without regard to the state statute of limitations, and although fraud is charged, where no adequate excuse is shown for the delay. Guarantee Trust & Safe-Deposit Co. v. Delta & Pine-Land Co. (1900) 104 Fed. 5, 43 C. C. A. 396, writ of certiorari denied (1901) 21 Sup. Ct. 919, 180 U. S. 636, 45 L. Ed. 710.

63. Application of laches before statutory period has expired.—A state statute permitting suits to be brought against heirs, devisees, and distributees of a decedent within two years after final settlement, by any creditor out of the state, does not prevent a federal court from applying the bar of laches resulting from delay within the statutory time. Continental Nat. Bank v. Heilman (1898) 86 Fed. 514, 30 C. C. A. 232, affirming (C. C. 1897) 81 Fed. 36, and certiorari denied (1898) 19 Sup. Ct. 884, 171 U. S. 690, 43 L. Ed. 1180.

The equitable doctrine of laches does not necessarily follow the statute of limitations, and a complainant may be denied relief in equity although less than the statutory period of limitations has run against his claim. Pooler v. Hyne (1914) 213 Fed. 154, 129 C. C A. 506.

The fact that a state statute of lim itations allows 10 years for the bring ing of an action for the recovery o land does not preclude a federal cour of equity from denying relief becaus of laches in a suit to set aside a con veyance, and recover the land on th ground of fraud, which is cognizabl only in equity, although the suit wa commenced within the 10 years. Kes ler v. Ensley Co. (C. C. 1903) 123 Fe 540.

64. Where action at law is barred-Claims against decedents' estates.—state statute which provides tha where a claim against the estate of decedent is not filed in the probate o fice as therein authorized, "the claim ant may have remedy against the hei or devisees of the estate within on year after it becomes due," is a statut of limitations applicable to all claim founded upon a legal demand, in what ever court they may be asserted, stat or federal, and whether in an action a law, which is recognized by the practic of the state as a proper remedy, o whether cognizable in a federal cou of equity, independent of statute. Hal v. Coffin (1903) 120 Fed. 470, 57 C. C A. 528 (affirming decree [C. C. 1902 114 Fed. 567); Pulliam v. Pulliam (C C. 1881) 10 Fed. 53; New Orlean Canal & Banking Co. v. Reynolds (C C. 1889) 39 Fed. 373, 375.

Where a contingent claim against decedent's estate did not become absc lute until after the assets had bee distributed, and the time for provin the same in the probate proceeding under the state statute, had expire the creditor, though never having file claim in the probate proceedings, wa entitled to recover thereon in equit from the distributees to the extent o assets distributed to them. Rankin v City of Big Rapids (1904) 133 Fe 670, 66 C. C. A. 568.

The federal courts have jurisdictio of suits by creditors to charge heir devisees, and legatees, to the extent o the assets taken by descent or devis with ancestral debts, and they are no restricted therein by state statutes lim iting the time for bringing such suit Johnston v. Roe (C. C. 1880) 1 Fe 692; Chewett v. Moran (C. C. 1883 17 Fed. 820; Heaton v. Thatcher (C C. 1893) 59 Fed. 731; Continental Na Bank v. Heilman (C. C. 1897) 81 Fe 36, decree affirmed (1898) 86 Fed. 514 30 C. C. A. 232.

65. —— Interests in land.—Where state statute created a vendor's lien, federal equity court must follow th local law barring such lien after th statute of limitations had run agains the debt. Dupree v. Mansur (1909 29 Sup. Ct. 548, 214 U. S. 161, 53 L Ed. 950. And see Higgins Oil & Fue Co. v. Snow (1902) 113 Fed. 433, 5 C. C. A. 267; Brown v. John V. Far

well Co. (C. C. 1896) 74 Fed. 764; Darnold v. Simpson (C. C. 1902) 114 Fed. 368. See, also, Hall v. Russell (C. C. 1875) Fed. Cas. No. 5,943 holding that a state statute prescribing a limitation as to a suit in equity to affect a title to land is not binding upon the federal court.

66. —— Concealed fraud.—In a suit in equity in a federal court to open a settlement on the ground of fraud, the court will follow the statute of limitations of the state where the action is brought, except that the established rule of equity, that time will not run in favor of defendant until the discovery of the fraud, or until, with reasonable diligence it might have been discovered, will be applied, irrespective of the provisions of the state statute. Kirby v. Lake Shore & M. S. R. Co. (1887) 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; Bisbee v. Evans (C. C. 1883) 17 Fed. 474; Tice v. School Dist. No. 18, Id. 283.

(F) Effect of statutes restricting jurisdiction in probate matters

67. Probate of will.—A federal court of equity is without jurisdiction of a suit to set aside the probate of a will, unless by the law of the state a suit in equity for the purpose may be maintained in a state court, in which case a similar suit may be maintained in a federal court, where the requisite diversity of citizenship and other jurisdictional facts exist. Carrau v. O'Calligan (1903) 125 Fed. 657, 60 C. C. A. 347 (reversing judgment O'Callaghan v. O'Brien [C. C. 1902] 116 Fed. 934, and judgment affirmed [1905] 25 Sup. Ct. 727, 199 U. S. 89, 50 L. Ed. 101); Cilley v. Patten (C. C. 1894) 62 Fed. 498.

A federal court may enforce the rights and remedies of a state statute in an action between citizens of diverse states to set aside the probate of a will, and it makes no difference whether the right exists in law or in equity. Wart v. Wart (C. C. 1902) 117 Fed. 766; McDermott v. Hannon (D. C. 1913) 203 Fed. 1015.

68. Creditors' claims.—The ancient jurisdiction of courts of equity in administration suits and in creditors' bills, brought against executors or administrators, or, after distribution, against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payment of his debts, belongs to the federal court unaffected by the statutes of the various states. Borer v. Chapman (1886) 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532; Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; McClellan v. Carland (1911) 187 Fed. 915, 110 C. C. A. 49; Spencer v. Watkins (1909) 169 Fed. 379, 94 C. C. A. 659 (writ of certiorari denied [1909] 30 Sup. Ct. 406, 215 U. S. 605, 54 L. Ed. 346); Newberry v. Wilkinson (1912) 199 Fed. 673, 118 C. C. A. 111 (affirming decree [C. C. 1911] Newbery v. Same, 190 Fed. 62); Carter v. Treadwell (C. C. 1843) Fed. Cas. No. 2,480; Pulliam v. Pulliam (C. C. 1879) 10 Fed. 23; Partee v. Thomas (C. C. 1882) 11 Fed. 769; Hartman v. Fishbeck (C. C. 1883) 18 Fed. 291; Cook v. Cook (C. C. 1888) 34 Fed. 249; Rich v. Bray (C. C. 1889) 37 Fed. 273, 2 L. R. A. 225; Hershberger v. Blewett (C. C. 1892) 55 Fed. 170; Crider v. Shelby (C. C. 1899) 95 Fed. 212; Hale v. Tyler (C. C. 1902) 115 Fed. 833.

No state has the power to pass a statute which will impair the general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person, within its jurisdiction. Hayes v. Pratt (1893) 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279. But see Sowles v. First Nat. Bank (C. C. 1893) 54 Fed. 564, holding that the jurisdiction of the probate courts of Vermont in settlement of estates being exclusive, assets cannot be brought into chancery for distribution by equitable claimants thereof, and such exclusive jurisdiction is recognized by the federal courts.

While federal equity jurisdiction extends to the administration of decedents' estates as between citizens and residents of different states, a court in exercising such jurisdiction administers the law of the state of the domicile, and is governed by the local rules and regulations applicable to the adjustment of claims. Schwarz v. Harris (D. C. 1913) 206 Fed. 936.

(G) Effect of usury statutes

69. Enforcing usury statute when repugnant to general equitable principles.—A state statute abrogating the equity rule that a borrower, seeking relief from a usurious contract, must tender the loan with legal interest, as condition of relief, is binding on the federal courts in that state. Missouri, K. & T. Trust Co. v. Krumseig (1899) 19 Sup. Ct. 179, 182, 172 U. S. 351, 43 L. Ed. 474; Union Mortgage Banking & Trust Co. v. Hagood (C. C. 1899) 97 Fed. 360; Olds v. Curlette (C. C. 1905) 145 Fed. 661. And see, also, Laws v. Fleming (C. C. 1910) 177 Fed. 450, decree reversed Fleming v. Laws (1911) 191 Fed. 283, 112 C. C. A. 27.

70. Enforcing usury statute outside enacting state.—A statute of New York which authorizes a borrower to obtain a cancellation of securities without payment, upon the ground of usury, cannot bind a court of equity, out of the state, in dealing with a bond and mortgage made and delivered within the state. Matthews v. Warner (C. C.

1881) 6 Fed. 461, decree affirmed on other grounds (1884) 112 U. S. 600.

IV. PROCEDURE IN TRIAL COURT

71. Limitations and time to sue.—A proceeding in rem in admiralty against a vessel for the negligent death of a human being, for which a right of action is given by a state statute, cannot be maintained after the expiration of the time limited by such statute for the bringing of the action. The Harrisburg (1886) 7 Sup. Ct. 140, 119 U. S. 199, 30 L. Ed. 358, reversing (D. C. 1883) 15 Fed. 610.

Statutes of limitation, even in personal actions, including actions on judgments, were "laws of the several states," which under Judiciary Act Sept. 24, 1789, and before Act June 1, 1872, c. 255, § 5, must be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply, "except where otherwise provided by the constitution, treaties, or statutes." Michigan Ins. Bank v. Eldred (1889) 9 Sup. Ct. 690, 691, 130 U. S. 693, 32 L. Ed. 1080.

72. Conditions precedent to suit, action, or proceeding.—A federal court cannot enforce the statutory liability of a nonresident stockholder of a foreign corporation at the suit of a receiver of its assets, where the latter has not first taken the steps which the statutes of the state, as construed by its courts, make a prerequisite to any action against an individual stockholder. Evans v. Nellis (1902) 23 Sup. Ct. 74, 187 U. S. 271, 47 L. Ed. 173.

A state legislature has no power to deny a person or corporation access to the federal courts in the state unless he or it shall comply with certain laws of the state regulating its business. Barling v. Bank of British North America (1892) 50 Fed. 260, 1 C. C. A. 510, affirming judgment Bank of British North America v. Barling (C. C. 1890) 44 Fed. 641.

A state statute (Code Civ. Proc. Cal. § 1502) providing that on the death of a defendant in a pending action the plaintiff must present his claim to the executor or administrator for allowance or rejection, and that no recovery shall be had in the action without proof of such presentation, is not made applicable by the conformity act to an action by the United States in a federal court against a surety on the bond of an officer which surety dies pending suit, since laches is not imputable to the government, nor can its rights in a governmental matter, prescribed by its own statutes, be affected by state enactments. Pond v. U. S. (1901) 111 Fed. 989, 49 C. C. A. 582.

A state statute requiring leave of court to enable a party to sue upon a judgment rendered in any court of the state is not applicable to the federal circuit court. Phelps v. O'Brien County (C. C. 1873) Fed. Cas. No. 11,078 Union Trust Co. v. Rochester & P. F Co. (C. C. 1886) 29 Fed. 609.

A state statute which requires tha every corporation doing business i such state shall file an agreement tha service of process upon its agent in th state shall be taken and held as serv ice upon the corporation applies to pro cess of the federal court; and servic upon an agent, under such a statute, i sufficient to give jurisdiction to th federal circuit court. Knott v. Soutl ern Life Ins. Co. (C. C. 1874) Fed. Ca No. 7,894.

A federal court should not issue mandamus ordering the mayor of a cit to collect a tax for the payment of judgment against the city, without a execution having first been issued an returned unsatisfied in whole or in par where the statutes of the state in whic the court is held only permit a mands mus to be issued by state courts afte an execution has been so returne Laird v. Mayor of De Soto (C. C. 188 25 Fed. 76.

Failure of a foreign corporation file a copy of its charter with the of cers of a state, as required by the stat laws, does not affect its right to sue the federal courts in the state, wha ever effect the omission may have, b the state decisions, upon the right sue in the state courts. Columbia Wi Co. v. Freeman Wire Co. (C. C. 189 71 Fed. 302.

Rev. St. Ohio, §§ 3170—1 to 3170— provides that every partnership, wi certain exceptions, transacting busine in Ohio under a fictitious name n showing the names of the partner must file in the county of its princip place of business a certificate stati the name and residence of each par ner, and, in case of its failure to so, shall not commence or maintain action on any contracts made in the partnership name in any court in t state. Held, that a partnership's fa ure to comply with such act did not i pair or restrict the jurisdiction of t federal courts. In re Farmers' Su ply Co. (D. C. 1909) 170 Fed. 502.

73. Preliminary proceedings. — T provision of the New York Code Civil Procedure, whereby a defendar before answer, may be discharged fro liability to either plaintiff or a thi party making a demand against him f the debt, by payment of the amou into court, has been adopted into t practice of the United States cour for the districts of New York, by th section. Harris v. Hess (C. C. 188 10 Fed. 263.

The taking of a bail bond for appea ance to answer to suit is governed the rules of practice in the feder courts, and not by those of the sta courts. Lane v. Townsend (D. C. 183 Fed. Cas. No. 8,054.

In an action of debt in a federal cou in New York against a foreign consul f

money received in a fiduciary capacity, defendant is subject to arrest under Code Proc. N. Y. § 179, made applicable by Acts Feb. 28, 1839, and Jan. 14, 1841. McKay v. Garcia (D. C. 1873) Fed. Cas. No. 8,844.

74. Form of action or proceeding.— The remedies in the courts of the United States are to be at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity as distinguished and defined in England, whence we derive our knowledge of those principles. Robinson v. Campbell (1818) 16 U. S. (3 Wheat.) 212, 4 L. Ed. 372.

Where a state statute makes trespass a remedy for trying titles to land, the federal courts should conform in their mode of proceeding to the law of the state. Sears v. Eastburn (1850) 10 How. 187, 189, 13 L. Ed. 381.

An action at law to recover money from a township on railroad aid bonds or interest coupons attached may be maintained in the United States circuit court, although, by the laws of the state in which the court is held, the remedy is by mandamus against the proper officer to require him to do his duty under the law; as the United States courts proceed by mandamus only in aid of existing jurisdiction. Davenport v. Dodge County (1881) 105 U. S. 237, 26 L. Ed. 1018; Chickaming Tp. v. Carpenter (1883) 106 U. S. 663, 1 Sup. Ct. 620, 27 L. Ed. 307.

A proceeding under Code Civ. Proc. Colo., to ascertain the compensation for land taken for public use, is a suit at law, within the meaning of the constitution, and the acts of congress conferring jurisdiction on federal courts, notwithstanding the provision of the Code for the appointment, by the court, of a commission of three freeholders to assess damages unless defendant demand a jury. Searl v. School Dist. No. 2 (1888) 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415.

Questions relating to the form of the action are local questions in respect to which the settled rule of decision in the state court is controlling. Lowndes v. Board of Trustees of Town of Huntington (1894) 14 Sup. Ct. 758, 759, 153 U. S. 1, 38 L. Ed. 615.

The conformity "as near as may be" does not prevent a federal court, under the broad powers conferred by section 1239, ante, from framing its process and writs so as to give the full relief in one action by way of the forfeiture and penalties prescribed by R. S. § 4965, in case of the infringement of a copyright in engravings, although the state practice may afford no form of action in which this double remedy may be enforced. Hills & Co. v. Hoover (1911) 31 Sup. Ct. 402, 220 U. S. 329, 55 L. Ed. 485, Ann. Cas. 1912C, 562.

A state statute, abolishing forms of action and requiring plaintiff to insert in his complaint a statement of the facts constituting his cause of action, will be followed by the federal courts sitting in that state. Chicago & N. W. Ry. Co. v. De Clow (1903) 124 Fed. 142, 143, 61 C. C. A. 34.

The appropriate form of action at common law to recover an amount due on a judgment is an action of debt, and although under a state practice such an action may be brought in assumpsit, the principles applicable thereto are those applicable to a common-law action of debt. Du Bois v. Seymour (1907) 152 Fed. 600, 81 C. C. A. 590, 11 Ann. Cas. 656.

Under Code Civ. Proc. N. Y. § 481, which provides that a complaint shall contain a plain and concise statement of the facts and a demand of the judgment to which plaintiff supposes himself entitled and which by this section is made applicable to the federal courts in that state, it is not fatal to a recovery for work done under a contract that plaintiff declares on the contract when he should have declared on a quantum meruit, where his complaint fully sets out the facts. N. P. Pratt Laboratory v. Buffalo Forge Co. (1911) 184 Fed. 287, 106 C. C. A. 429.

The Washington rule, that in case of refusal of the treasurer of a municipal corporation to pay a municipal warrant the holder may not maintain an action to recover a judgment on the warrant, but is limited to mandamus to compel the levy of a tax sufficient to pay his claim, is not binding on the federal courts sitting in that state, in which the holder, if entitled to sue therein, may recover a judgment at law as preliminary to the enforcement of its warrants by mandamus. First Nat. Bank of Central City v. City of Port Townsend, Wash. (1911) 184 Fed. 574, 106 C. C. A. 554.

The circuit courts adopt the local remedies of the respective states. Strachen v. Clyburn (C. C. 1843) Fed. Cas. No. 13,520.

The federal courts may in their discretion adopt any part or all of the remedies provided by the state legislature. Dobbin v. Allegheny (C. C. 1860) Fed. Cas. No. 3,941.

Under the Code of Georgia, which abolishes forms of action and simply requires the plaintiff to set forth in his petition the facts which constitute his cause of action, a petition in an action by the holder of bills of lading to recover the value of the goods represented thereby is sufficient to sustain a recovery, where it alleges facts which raised a duty on the part of defendant to deliver such goods, which were in its possession, only in accordance with the terms of such bills of lading, and shows a breach of such duty by their delivery to another, by reason of which they were lost to plaintiff; and it is not material whether such petition be regarded as one in assumpsit on the contract or for conversion. Atlanta

Nat. Bank v. Southern Ry. Co. (C. C. 1901) 106 Fed. 623.

In an action on a foreign judgment in a federal court, the form of action is governed by the practice of the state within which the court takes jurisdiction. Cruz v. O'Boyle (D. C. 1912) 197 Fed. 824.

In an action against a national bank to recover the penalty for taking usurious interest, the form of the suit, including the proper party plaintiff, must be determined by the law of the place where the action is brought. Osborn v. First Nat. Bank (1896) 175 Pa. 494, 34 Atl. 858, 38 Wkly. Notes Cas. 341.

75. Notice of lis pendens.—In the case of a suit in relation to real estate, pending in the federal court in Virginia, the lis pendens need not be recorded, as required by Code Va. 1873, c. 182, § 5, to render a purchase invalid as against plaintiff. Rutherglen v. Wolf (C. C. 1876) Fed. Cas. No. 12,-175.

One who obtains possession of premises after entry of final judgment in ejectment against a prior possessor cannot rely on the failure to file a lis pendens, under Code Civ. Proc. S. C., § 153, as the suit was merged in the judgment, which became notice to all the world, before he obtained possession. Wesley v. Tindal (C. C. 1897) 81 Fed. 612.

A statute authorizing the filing of a notice of lis pendens, and declaring its effect, should be construed as applying only to suitors in state courts. Majors v. Cowell (1876) 51 Cal. 478.

76. Parties.—As the laws of Louisiana permit a suit on a promissory note executed by a partnership consisting of three persons to be maintained against two of the partners when the third is out of the jurisdiction, the federal courts sitting for Louisiana will give judgment on such a suit against the two partners. Breedlove v. Nicolet (1833) 32 U. S. (7 Pet.) 413, 8 L. Ed. 731.

A statute of Mississippi, authorizing a joint action against the makers and indorsers of a promissory note, has no force or effect in the courts of the United States; and such action cannot be sustained in those courts. Keary v. Farmers' & Merchants' Bank (1842) 41 U. S. (16 Pet.) 89, 10 L. Ed. 897.

Code Civ. Proc. N. Y. § 449, authorizing a person with whom or in whose name a contract is made with another to sue thereon in his own name, is by this section made applicable to the federal courts. Albany & Rensselaer Iron & Steel Co. v. Lundberg (1887) 121 U. S. 451, 7 S. Ct. 958, 30 L. Ed. 982.

Where a state court of appeals has held that under a state statute an agent of a corporation, to whom, as executive agent of the company, a promise is made to pay money, is a person with whom or in whose name contract is made for the benefit of ar other, and may therefore sue in hi own name on the promise, the rule thu established is applicable to actions a law in the courts of the United State held within that state. Id.

Under this section, where an assigne of a chose in action cannot sue thereo in his own name in the courts of state, the same rule is obligatory o the federal courts held within suc state. Nederland Life Ins. Co. v. Ha (1898) 84 Fed. 278, 27 C. C. A. 390.

A married woman suing in a feder court for a personal injury, in a stat by whose laws she is permitted t maintain such action in her own nam cannot be compelled to join her hu band as plaintiff. Texas & P. Ry. C v. Humble (1899) 97 Fed. 837, 38 C. A. 502.

A state statute providing for a joi action against principal and suret furnishes the rule of practice for th federal courts. St. Louis Brewir Ass'n v. Hayes (1899) 97 Fed. 859, 3 C. C. A. 449.

Where the local practice in a stat permits a lessor to sue an assignee the lessee at law for rent, upon a co tract of assumption in the assignmen such practice will be followed by th federal courts in the state. Adams Shirk (1901) 105 Fed. 659, 44 C. C. 653, denying rehearing (1900) 104 Fe 54, 43 C. C. A. 407.

The North Carolina statute express authorizing the prosecution of a su by a pendente lite assignee of the d mand in the name of the original plai tiff, his assignor, will be followed in th federal courts sitting in that stat City of Greensboro v. Southern Pav. Const. Co. (1909) 168 Fed. 880, 94 C. A. 292, writ of certiorari deni Southern Pav. & Const. Co. v. Green boro (1910) 30 Sup. Ct. 693, 217 U. 602, 54 L. Ed. 898.

The question of a plaintiff's rightf status as a party in an action at la for the purpose of determining th right of removal is to be determined the law of the state. Turk v. Illino Cent. R. Co. (1914) 218 Fed. 315, 13 C. C. A. 111.

In the Southern district of New Yor a married woman is not disqualified reason of coverture from bringing ar maintaining a suit in her own nam without joinder of her husband, f the infringement of a patent with the state of New York. Lorillard Standard Oil Co. (C. C. 1880) 2 Fe 902.

Where the state statute provides th no action shall be defeated on accou of the misjoinder of parties, if th matter in controversy can be proper dealt with and settled between the pa ties before the court, and that th court may order any party improper joined to be stricken out, the san practice will be adopted by the Unit States courts held in that state. Per

v. Mechanics' Mut. Ins. Co. (C. C. 1882) 11 Fed. 478.

Property covered by many different insurance policies was destroyed through the negligence of a railroad company, and a few of the insurers paid their proportion of the loss, taking an assignment of a proportional part of the claim against the railroad company. One of the insurers, which had paid, sued the railroad company on its assigned cause of action. Held, that another of the insurers, which had also paid, could not intervene, and assert a right to be joined, either as plaintiff or defendant, under Code Civ. Proc. S. C. § 143, providing that "when complete determination of a controversy cannot be made without the presence of other parties the court must cause them to be brought in," as this section must be read in connection with section 140, which provides that "of the parties to an action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained he may be made defendant"; and by thus reading them it is apparent that their provisions were derived from the practice in equity, and therefore can have no application to an action at law in a federal court. Springfield Fire & Marine Ins. Co. v. Richmond & D. R. Co. (C. C. 1891) 48 Fed. 360.

Code Wash., providing that a cause of action assigned in writing may be sued on by the assignee notwithstanding that the assignor retains an interest therein, governs the federal courts sitting in the state, in actions at law. Dexter, Horton & Co. v. Sayward (C. C. 1892) 51 Fed. 729.

Though the federal courts may not be bound by a state law authorizing an action to foreclose a mortgage to be maintained against the administrator of a deceased mortgagor without joining his widow and heirs, they will not, in an action to quiet title, overturn a title acquired under a foreclosure in the state courts, to which the widow and heirs were not parties. Hearfield v. Bridge (C. C. 1895) 67 Fed. 333.

Congress having provided that where some of the defendants are not inhabitants of the district, and cannot be found therein, the court may proceed to trial without them (section 1032, ante), this legislation is controlling in the federal courts to the exclusion of state legislation inconsistent therewith on the same subject. Allnut v. Lancaster (C. C. 1896) 76 Fed. 131.

The question whether the beneficial interest in a chose in action created by an act of congress is assignable is controlled by the federal law, independent of the state laws. But the question whether the assignee may maintain an action thereon in his own name is a question of procedure, depending on the state laws. Edmunds v. Illinois Cent. R. Co. (C. C. 1897) 80 Fed. 78.

This section does not authorize the maintenance of an action at law, exclusively cognizable in the federal courts, by any one except the owner of the legal title to the cause of action, notwithstanding a state statute requiring all actions to be brought in the name of the real party in interest. New York Continental Jewell Filtration Co. v. City of Sullivan (C. C. 1901) 111 Fed. 179.

In proceedings to establish claims against the estates of deceased persons, the federal court follows and administers the local law, and it is only necessary in such a proceeding in that court to serve those whom it would be necessary to serve if the proceeding were in the state court; and such parties only are indispensable parties defendant either in the state or federal court. Farmers' Bank of Cuba City, Wis., v. Wright (C. C. 1908) 158 Fed. 841.

The administrator of one of several joint contracting parties cannot be jointly sued with the survivors, either at the common law, or under the statute of Alabama which governs in actions in a federal court sitting in that state. U. S. v. Bullard (D. C. 1900) 103 Fed. 256.

In a suit on a contractor's bond in the federal court, sitting in Washington, the principals were not indispensable parties, under Rem. & Bal. Code Wash. § 192. Columbia Digger Co. v. Rector (D. C. 1914) 215 Fed. 618.

77. Death of party and revival of action.—An action in a federal court for the penalty provided by R. S. § 4965, for the infringement of a copyright, abates by the death of defendant, though the statutes of the state in which the action was brought allows suits on state penal statutes to be prosecuted after the death of the offender, since such state statutes can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of congress. Ex parte Schreiber (1884) 3 S. Ct. 423, 110 U. S. 76, 28 L. Ed. 65.

State statutes, allowing suits on state penal statutes to be prosecuted after the death of the offender, can have no effect on suits in the federal courts for the recovery of penalties imposed by an act of congress. Id.

Whether, on the death of a plaintiff, another party may be substituted after judgment before suing out a writ of error to the supreme court of the United States, is question of state practice, as to which the determination of the state court is conclusive. Renaud v. Abbott (1885) 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629.

Where a cause of action survives in favor of or against the personal representatives of a deceased person, the practice, pleadings, and procedure in

the courts of the state may be resorted to under this section in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Gerling v. Baltimore & Ohio R. Co. (1894) 14 Sup. Ct. 533, 540, 151 U. S. 673, 38 L. Ed. 311.

Where a cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the state may be resorted to in the federal courts for the purpose of keeping the suit alive and bringing in proper parties. U. S. v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145.

The mode of procedure of the state may be resorted to for the purpose of continuing a suit on the death of a party. Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257.

The judiciary act of 1789 governs the federal courts in matters of revival, to the exclusion of the provisions of any state law on the subject, and equity rule No. 56 is declarative not only of the practice of the court, but of the provisions of the statute. Fitzpatrick v. Domingo (C. C. 1882) 14 Fed. 216.

Ejectment, in Ohio, involves questions of title; and though such action, pending in a federal court in that state, when abated by the death of a party, cannot be revived under sections 1592 and 1593, post, which apply only to personal actions, it may be revived under the provisions of the Code of Civil Procedure of Ohio, by virtue of this section. McArthur v. Williamson (C. C. 1891) 45 Fed. 154.

Recourse cannot be had to a state statute to determine whether or not a cause of action given by a federal statute survives. Walsh v. New York, N. H. & H. R. Co. (C. C. 1909) 173 Fed. 494.

Under R. S. § 955, post, § 1592, providing that, when either of the parties in any suit in any court of the United States dies before final judgment, his executor or administrator may, if the cause of action survive, prosecute or defend to final judgment, does not determine the plaintiff's right of revivor on death of defendant; that being governed by the law of the state where the suit is brought and prosecuted. Spaeth v. Sells (C. C. 1909) 176 Fed. 797.

While the federal practice will probably follow the local practice, if it allows revivor of the action against the receiver of a dissolved corporation, and the action may be revived, an action based on an act of Congress must be governed by the federal statutes, and, as they do not allow revivor against a receiver, none can be had. In re People's Surety Co. of New York (1913) 144 N. Y. Supp. 131, 82 Misc. Rep. 518.

78. Commencement of action.—In the federal courts jurisdiction does not attach, under the general rule, by the filing of a complaint and the issuance of summons, but only upon the service of process, and this rule is not controlled by the provisions of state statutes. United States v. Eisenbeis (1901) 112 Fed. 190, 50 C. C. A. 179.

Where the first action was prosecuted in the state court and failed other than on the merits, a new action may be maintained, under Civ. Code Kan. § 23, in the federal court. Harrison v. Remington Paper Co. (1905) 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, writ of certiorari denied (1905) 26 S. Ct. 747, 199 U. S. 607, 50 L. Ed. 331.

An action at law is commenced in the Circuit Court of the United States for the Western District of Texas, by filing a petition in the office of the clerk under Rev. St. Tex. 1895, art. 1177, providing that all civil suits in the district and county courts shall be commenced by petition filed in the office of the clerk of such court. International Bank & Trust Co. v. Scott (1908) 159 Fed. 58, 86 C. C. A. 248.

79. Process—Nature, issuance, and requisites.—A state law abolishing the writ of right previously adopted as a process by the acts of Congress did not repeal it as a process in the federal courts. Homer v. Brown (1853) 16 How. 354, 365, 14 L. Ed. 970.

A summons commanding the marshal to summon defendants to answer in a certain court a complaint filed against them in said court by certain named plaintiffs sufficiently sets forth the nature of the complaint, under Mansf. Dig. Ark. § 4868. Eddy v. Lafayette (1896) 16 S. Ct. 1082, 163 U. S. 456, 41 L. Ed. 225, affirming judgment (1892) 49 Fed. 807, 1 C. C. A. 441.

Where a suit to recover money only on contract was instituted in the federal Circuit Court sitting in West Virginia by notice and motion, as authorized by Code W. Va. 1906, c. 121, §§ 6, 7, 8, but the notice did not show facts essential to confer federal jurisdiction, and there was nothing in the record when a motion to quash the notice was made to show that federal jurisdiction existed, the court erred in refusing to dismiss the action on the theory that such jurisdiction might be subsequently shown and appear from the record as finally made. West Fork Glass Co. v. Innes-Weld Glass Co. (1910) 178 Fed. 205, 101 C. C. A. 525.

Under this section and Code Civ. Proc. Cal. § 406, where a summons was issued by the clerk within a year after the filing of the complaint, the fact that it was not delivered to a marshal for service until after the year had expired was not ground for dismissal. Perris Irr. Dist. v. Turnbull (C. C. A. 1914) 215 Fed. 562; Same v. Escher, Id. 566.

The act of June 1, 1872, adopting state practice, etc., does not authorize the commencement of an action at law in the circuit court by a summons

in the name of plaintiff's attorney, according to the New York procedure. Martin v. Criscuola (C. C. 1872) Fed. Cas. No. 9,159.

A summons in a common-law action in the federal circuit court in New York must be signed by the clerk, and be under the seal of the court, notwithstanding section 1534, ante. Peaslee v. Haberstro (C. C. 1879) Fed. Cas. No. 10,884.

This section does not abrogate the provisions of section 1534, ante, relating to sealing and testing writs. The two must be so construed as to stand together. Dwight v. Merritt (C. C. 1880) 4 Fed. 614; Middleton Paper Co. v. Rock River Paper Co. (C. C. 1884) 19 Fed. 252, 253.

Const. S. C. art. 4, § 31, provides that all "processes" shall run in the name of the state of South Carolina. Held, that the courts of South Carolina having decided that a summons is not a "process" within its constitution, and that therefore it need not be in the name of the state, a summons issued in South Carolina by the circuit court of the United States need not be in the name of the United States, in order to conform to the procedure of that state. Chamberlain v. Mensing (C. C. 1891) 47 Fed. 435.

R. L. Vt. § 1730, requiring the clerk or magistrate signing the writ to enter upon it a minute of the day of its signature, being expressly made applicable only to actions mentioned in that chapter, does not apply to a suit for a penalty or forfeiture given to the treasury of the United States. U. S. v. Banister (C. C. 1895) 70 Fed. 44.

This section applies to the forms of process for the commencement of suits, except as to the signature; and a provision of a state statute that but one citation shall be issued to each county in which defendants reside is one in the interests of economy, and entirely practicable to be followed by the federal courts. Gillum v. Stewart (C. C. 1901) 112 Fed. 30.

A plaintiff in a federal court in an action at law, who prays for the "usual process," has a right to rely on the presumption that such process will conform to that provided by the state statutes, unless the court has altered the form to meet conditions different from those existing in the state courts; and he is not estopped to object to the taxation of costs for the issuance of process not authorized by such statutes because it has been the practice of the clerk to issue the same. Id.

Under Code Va. 1887, § 3211, authorizing a judgment on a contract to be obtained on motion after 15 days' notice to defendant, and the practice thereunder, which is for the plaintiff or his attorney to sign the notice and serve the same on defendant such a notice is not a "process issuing from the court"; and under the conformity act an action may be instituted by such a notice in a federal court in Virginia in accordance with the state practice. Leas & McVitty v. Merriman (C. C. 1904) 132 Fed. 510.

This section does not require the federal court in the District of Connecticut, in an action against a town, to deviate from its long-established practice, under which service is made by the marshal by having copies of the process made and attested by the clerk, and to follow Gen. St. Conn. 1902, § 571, which provides that in actions against towns a true and attested copy of the process, including the declaration or complaint, shall be served on the clerk or a selectman of the defendant, and which, under the decisions of the state courts, requires the copies to be attested by the officer making the service. Elson v. Town of Waterford (C. C. 1905) 135 Fed. 247.

In habeas corpus against a jailer for the release of a federal officer arrested for the killing of a citizen while in the discharge of his duty as an officer, notice to those who represent the state, as required by the local authorities, is not essential. Ramsey v. Jailer of Warren County (D. C. 1879) Fed. Cas. No. 11,547.

The practice of indorsing the process in suits for penalties given by statute to any person suing therefor was adopted by Act Sept. 29, 1789, as a part of the "forms of writs" and "modes of process" to be used in the federal courts, and independently of this section process so indorsed was the proper process to be used in such case. Brown v. Pond (D. C. 1880) 5 Fed. 31, 37.

Actions for penalties brought in the name of the United States correspond with those brought by the state in the name of "The People of the State of New York"; and by this section the provisions of the New York Code of Procedure, in regard to such actions by "The People," etc., are applicable to similar actions brought here in the name of "The United States," and the summons served must therefore be indorsed with a general reference to the statute by which the action for the penalty is given. U. S. v. Rose (D. C. 1882) 14 Fed. 681.

80. —— Service in general.—Under this section the mode of service of process is governed by the state law and practice. Amy v. City of Watertown (1889) 9 Sup. Ct. 530, 531, 130 U. S. 301, 32 L. Ed. 946; Perkins v. Watertown (C. C. 1873) Fed. Cas. No. 10,991; Kaufman v. Garner (C. C. 1909) 173 Fed. 550; Brown-Ketcham Iron Works v. George B. Swift Co. (Ind. App. 1913) 100 N. E. 584, 860. CONTRA, Leonard v. Lycoming Fire Ins. Co. (C. C. 1877) Fed. Cas. No. 8,258; Chamberlain v. Lyell (1855) 3 Mich. 448.

The law of the United States providing that the form of writs, execu-

tions, and other processes, "and the forms and modes of proceeding in suits of common law shall be same as are now used," in the state courts respectively, do not impose on United States officers an obligation to conform their conduct to the state law in serving process of attachment, and committing, for want of bail, a person arrested on a writ sued out by the United States to recover a penalty for violating a federal law. Palmer v. Allen (1813) 7 Cranch, 550, 564, 3 L. Ed. 436.

The Indiana statute requires 10 days' personal notice of a proceeding to revive a judgment unless the adverse party "be absent or nonresident, or cannot be found, when service of notice may be made by publication, as in an original action, or in such manner as the court shall direct." Burns' Rev. St. 1894, § 687 (Rev. St. 1881, § 675). Held, that in the case of a nonresident who may be found the court may direct personal service on him by a marshal or deputy, and such service in another state is valid. Crawford v. Foster (1898) 84 Fed. 939, 28 C. C. A. 576.

While the national courts may follow the methods of service prescribed by the states for similar writs issued by the state courts, they are not restricted to those methods, but may prescribe their own ways, and cause them to be followed according to the course of the common law. Collin County Nat. Bank v. Hughes (1907) 152 Fed. 414, 81 C. C. A. 556, rehearing denied (1907) 155 Fed. 389, 83 C. C. A. 661.

Under the provision that where the only ground for the jurisdiction of the federal courts is the citizenship of the parties, the defendant may be sued in the district of plaintiff's residence, service on defendant in that district is sufficient, though made while he was passing from a ferry boat to a railroad train, en route to his home in another state, with no intention of remaining in the district; such service being sufficient according to the practice of the state courts therein, which the federal court follows. Jewett v. Garrett (C. C. 1891) 47 Fed. 625.

One W., a citizen and resident of Pennsylvania, was plaintiff in a suit pending in a federal court in Missouri against a Missouri corporation. Pursuant to the advice of his counsel that his presence was necessary, W. went to Missouri to attend the trial of the case. On the day for which the case was set down for hearing, it was adjourned one day, on account of the illness of defendant's counsel, and as W. was leaving the courthouse a summons was served upon him in a suit instituted against him, in a state court, by a citizen of Illinois, through the same attorneys who appeared for the defendant in W.'s suit. Another summons in the same case was served upon him later in the day, at his hotel. W. removed the case into the federal court, appearing specially for that purpose, and moved to set aside the service of the summons on the ground that he was exempt from such service. Held, that the service should be set aside, notwithstanding the courts of Missouri hold service made under similar circumstances to be good. Hale v. Wharton (C. C. 1896) 73 Fed. 739.

Following the rule of the state courts, a federal court in Pennsylvania will not receive extrinsic evidence to impeach the return of a marshal which is good on its face, in support of a motion to set it aside. Trimble v. Erie Electric Motor Co. (C. C. 1898) 89 Fed. 51.

It is the practice of the federal courts to dispose of objections to the sufficiency of the service summarily on a motion to quash the return, rather than by a jury trial on a plea in abatement, regardless of the state practice. Benton v. McIntosh (C. C. 1899) 96 Fed. 132. See, also, Wall v. Chesapeake & O. Ry. Co. (1899) 95 Fed. 398, 37 C. C. A. 129; Rubel v. Beaver Falls Cutlery Co. (C. C. 1884) 22 Fed. 282; U. S. v. American Bell Tel. Co. (C. C. 1886) 29 Fed. 17; American Cereal Co. v. Eli Pettijohn Cereal Co. (C. C. 1895) 70 Fed. 276; Scott v. Stockholders' Oil Co. (C. C. 1903) 122 Fed. 835; Electric Vehicle Co. v. Craig Toledo Motor Co. (C. C. 1907) 157 Fed. 316; Higham v. Iowa State Travelers' Ass'n (C. C. 1911) 183 Fed. 845.

Whether a return of substituted service of process in federal courts can be amended is a question of the power of the court, with reference to which it is not bound by state decisions. King v. Davis (C. C. 1903) 137 Fed. 198, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348.

Where a case is removed from a state court, and defendant appears specially, for the purpose of removal only, and objects to the sufficiency of the service, the Circuit Court must determine such objection for itself, and will not necessarily be controlled by the state law. West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1909) 170 Fed. 349.

Validity of the service of a summons must be determined by a federal court on general principles of jurisprudence in the absence of statute or established judicial rule in the state. Kaufman v. Garner (C. C. 1909) 173 Fed. 550.

In the absence of statute, the federal court is not required by the conformity act to follow the state practice of determining the sufficiency of the service of process. Higham v. Iowa State Travelers' Ass'n (C. C. 1911) 183 Fed. 845.

Since common-law actions can only be brought in a federal court in the district in which the defendant is an inhabitant, or in which he is found at

the time of the serving of the process, unless he voluntarily appears, an action cannot be maintained by the United States against a nonresident in a federal court by attaching defendant's property within the jurisdiction, without personal service of summons, notwithstanding this section, and section 1539, post, since an attachment cannot take the place of initial process, but is merely an incident of the suit. U. S. v. Brooke (D. C. 1910) 184 Fed. 341.

In view of the Louisiana practice, where there was diversity of citizenship between members of a firm and plaintiff, service on one of the members was sufficient to confer federal jurisdiction on the firm and the partner served. Empire Rice Mill Co. v. K. & E. Neumond (D. C. 1912) 199 Fed. 800.

In the absence of a state statute on the subject, the question of privilege of suitors and witnesses from service of process must be determined by the United States court as a question of general jurisprudence by the exercise of its independent judgment. Roschynialski v. Hale (D. C. 1913) 201 Fed. 1017.

Whether a summons in an action in a federal court may be served within a federal district must be determined by the law of the United States. Colosino v. Pittsburgh & L. E. R. Co. (D. C. 1914) 210 Fed. 550.

Where the state practice authorized the commencement of actions, legal or equitable, by summons, the federal court acquires jurisdiction upon the issuance of the summons in conformity to state practice, though the plaintiff thereafter files a bill in equity. Wilson v. Waldo (D. C. 1915) 221 Fed. 505.

Under this section and section 1311, ante, and Code Civ. Proc. N. Y. § 425, a summons from a federal court sitting in New York need not be served by the marshal. U. S. v. Mitchell (D. C. 1915) 223 Fed. 805.

When defendant's presence within the jurisdiction of the court is not in dispute, a service in accordance with the state statute is good. The federal courts must determine for themselves the fact of defendant's presence within the jurisdiction, and may or may not follow the rulings of the state courts. State statutes creating a constructive presence within the jurisdiction for the service of process apply to the service of process of the United States courts. Nickerson v. Warren City Tank & Boiler Co. (D. C. 1915) 223 Fed. 843.

Service of summons on a nonresident coming into the state to attend a trial in a federal court as a party and witness, made while such case is on trial and a witness is on the stand, will be set aside, the state statute governing exemptions from service of process applying to state courts only. Granite Brick Co. v. Titus (1913) 78 S. E. 540, 95 S. C. 47.

81. —— Service on corporation.—A foreign corporation may be sued for a personal tort committed abroad, in a federal court in New York, by serving process upon the agents conducting its business there, though, by the state statutes, service upon such agents would not be sufficient to bring the corporation within the jurisdiction of the state courts. Barrow S. S. Co. v. Kane (1898) 18 Sup. Ct. 526, 170 U. S. 100, 42 L. Ed. 964.

The return of the sheriff of the state court is not conclusive upon the question of the validity of service of process, where the cause has been removed to a federal circuit court by a defendant who raises by plea to the jurisdiction the objection that it was a foreign corporation not doing business within the state, and that the person served with process was not its agent at that time. Mechanical Appliance Co. v. Castleman (1910) 30 Sup. Ct. 125, 128, 215 U. S. 437, 54 L. Ed. 272.

A mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is recognized by the local courts as valid, will receive the same recognition by the federal courts, subject to the limitation that such courts will determine for themselves whether the mode prescribed violates the fundamental rights of the defendant not to be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction without a fair and reasonable notice. McCord Lumber Co. v. Doyle (1899) 97 Fed. 22, 38 C. C. A. 34.

A state statute, requiring foreign corporations to file an agreement for accepting service within the state, applies to process from federal courts. Knott v. Southern Life Ins. Co. (C. C. 1874) Fed. Cas. No. 7,894; Schollenberger v. Forty-Five Foreign Insurance Companies (C. C. 1878) Fed. Cas. No. 12,475a.

The rules of procedure prescribed by a state for obtaining service upon a foreign corporation doing business therein govern the federal courts, and service in the manner prescribed confers upon them jurisdiction over such corporation. Brownell v. Troy & B. R. Co. (C. C. 1880) 3 Fed. 761; Eaton v. St. Louis Shakspear Mining & Smelting Co. (C. C. 1881) 7 Fed. 139; Van Dresser v. Oregon Ry. & Nav. Co. (C. C. 1891) 48 Fed. 202.

Service of process of the United States court on an agent of a foreign insurance company, appointed under the Maryland statute requiring such company to execute a power of attorney and appoint an agent on whom process might be served, is valid, though the action was one of which the state courts could not take jurisdiction, because of an act of the legislature restricting their jurisdiction in suits against foreign corporations to cases where the plaintiff is a citizen or

the cause of action has accrued within the state. Carstairs v. Mechanics' & Traders' Ins. Co. (C. C. 1882) 13 Fed. 823.

The circuit court for the district of Indiana, having adopted the state statutes relating to service of process in actions at law, is bound by the construction placed on them by the state supreme court to the effect that the sheriff's return, showing that he has made service as prescribed by statute, is conclusive as against collateral attack by a resident of the state, both as to facts in the personal knowledge of the officer and facts which he must ascertain from others. Joseph v. New Albany Steam Forge & Rolling Mill Co. (C. C. 1892) 53 Fed. 180.

Service of a summons on a station agent, in accordance with the provisions of the statute of the state in which the district is located (Code Iowa, § 2611), will vest the federal courts with jurisdiction in a suit against a foreign railroad corporation. Dinzy v. Illinois Cent. R. Co. (C. C. 1894) 61 Fed. 49.

The New York statute providing that service of process upon a foreign corporation can be effected by serving a resident managing agent, only when the corporation has property in the state (Code Civ. Proc. § 432), applies to service of process of a federal court sitting in the state. Union Associated Press v. Times Printing Co. (C. C. 1897) 83 Fed. 822.

Under Act March 3, 1897, c. 395, 29 Stat. 695, which authorizes a suit for infringement to be brought in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business, although not a resident of such district, service in such case to be made "upon the agent or agents engaged in conducting such business in the district in which suit is brought," a service of process in such a suit against a nonresident corporation, upon one shown only to be the designated agent of the corporation under a state statute, is not sufficient to give the court jurisdiction. United States Gramophone Co. v. Columbia Phonograph Co. (C. C. 1901) 106 Fed. 220.

The act of the state of Colorado relative to service of process is not applicable to a suit against a corporation brought in a federal court in the district of Colorado, where the corporation is not an inhabitant of such district; and in such case service must be had according to the acts of congress. Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502.

Defendant, a railroad corporation, was sued in Georgia on a cause of action arising in Kentucky. Defendant had no tracks in Georgia and did no business there, except that it had a commercial agent, whose only duty was to solicit business, without authority to issue bills of lading, sell passenger tickets, or make contracts. Held, that defendant was not doing business in Georgia, so that service on such agent would confer jurisdiction over the corporation so far as federal courts were concerned, though the state courts had decided the contrary. West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1909) 170 Fed. 349.

However broad the rule in a state may be, it is the rule of the federal courts that service of process on a foreign corporation, to be valid, must be made on an agent who can be said fairly to represent such corporation in the state. Michigan Aluminum Foundry Co. v. Aluminum Castings Co. (C. C. 1911) 190 Fed. 879.

Congress not having fixed any rule with regard to the mode of serving mesne process on corporations in suits in the federal courts, the state law and practice will be followed. Lemon v. Imperial Window Glass Co. (D. C. 1912) 199 Fed. 927.

Service on an officer of a foreign corporation in a personal action in a state court against the corporation, although good under the state statute, is not necessarily good in the federal courts, which follow the general law. Ostrander v. Deerfield Lumber Co. (D. C. 1913) 206 Fed. 540.

82. Appearance.—The provision of the state statutes that a special appearance for the purpose of objecting to the service of process becomes a general appearance to the next term of the court is not controlling upon the United States circuit court sitting in that state, whose jurisdiction is defined by acts of congress; and hence a party sued therein, who appears specially to object to the jurisdiction, and, when his objection is overruled, pleads to the merits, does not thereby submit himself to the jurisdiction of the court, or waive his right to a review of its action thereupon. Southern Pac. Co. v. Denton (1892) 13 Sup. Ct. 44, 46, 146 U. S. 202, 36 L. Ed. 942; Mexican Cent. Ry. Co. v. Pinkney (1893) 13 Sup. Ct. 859, 865, 149 U. S. 194, 37 L. Ed. 699; Galveston, H. & S. A. Ry. Co. v. Gonzales (1894) 14 Sup. Ct. 401, 402, 151 U. S. 496, 38 L. Ed. 248; Davidson Bros. Marble Co. v. U. S. ex rel. Gibson (1909) 29 Sup. Ct. 324, 327, 213 U. S. 10, 53 L. Ed. 675.

The filing by defendant of a petition for a removal of the cause from a Mississippi court to a federal district court, and a special appearance in the federal court by a plea to the jurisdiction over the person of the defendant, raising the question of the validity of the service of process, do not, because of this section, amount to a general appearance which shall be considered a waiver of any objection to the jurisdiction, although, by Code Miss. 1906,

§ 3946, all appearances are general, even though process be invalidly served. Cain v. Commercial Pub. Co. (1914) 34 Sup. Ct. 284, 232 U. S. 124, 58 L. Ed. 534.

Under the New York practice followed by the federal courts in that state in actions at law, a defendant does not waive his right to object to the jurisdiction by including in his answer every defense upon which he relies. Leonard v. Merchants' Coal Co. (1908) 162 Fed. 885, 89 C. C. A. 575.

In an action in the United States court by a citizen of one state against a citizen of another, the defendant, answering to the merits after alleging that he has no knowledge or information sufficient to form a belief as to plaintiff's citizenship, waives any objection to the jurisdiction, regardless of the state statute providing for dilatory defenses, and that objection to the jurisdiction may be taken by answer, and this section. Cuthbert v. Galloway (C. C. 1888) 35 Fed. 466.

The rule of law of a state that a special appearance to quash service of summons is converted into a general appearance, and a waiver of defects in service, where defendant appeals after trial on the merits, must be taken as the law in an action in a federal court on a judgment against a nonresident. Chinn v. Foster-Milburn Co. (D. C. 1912) 195 Fed. 158, judgment affirmed Foster Milburn Co. v. Chinn (C. C. A. 1913) 202 Fed. 175.

83. Attachment and garnishment.—See, also, § 1539, post, and notes thereunder.

The rule established by the supreme court of Kansas that an order to a garnishee to pay over to the attaching creditor is not in the nature of a judgment which can be enforced by execution, but merely vests in the attaching creditor, whatever right the garnishee has, is a rule of practice, within this section. Atlantic & P. R. Co. v. Hopkins (1876) 94 U. S. 11, 24 L. Ed. 48.

Gen. St. Kan. 1889, par. 4290, provides that, where plaintiff desires to take issue on the answer of a garnishee, he shall give notice thereof, "in which case the issue shall stand for trial as a civil action," etc. Held that, though it is begun by attachment, the proceeding is a "civil cause," within this section. Citizens' Bank v. Farwell (1893) 56 Fed. 570, 6 C. C. A. 24.

A dissolution of an attachment in the federal court by an accepted cession of property to creditors under state insolvency law may be pleaded by the insolvents or by interveners who claim the attached property as purchasers prior to the cession, as well as by the syndic. Shwartz v. H. B. Claflin Co. (1893) 60 Fed. 676, 9 C. C. A. 204.

As to whether the notice required by Gen. St. Kan. 1897, c. 95, § 232, to be given by the plaintiff in garnishment, where he desires to take issue on the garnishee's answer, raises an issue between the plaintiff and garnishee without the filing of further pleadings, is a question of pleading and practice governed by the statutes of the state, under this section; and therefore the federal courts will adopt the practice of the state courts in respect to such notice. Logan v. Goodwin (1900) 104 Fed. 490, 43 C. C. A. 658.

Although Act March 3, 1887 (section 1033, ante), authorizes an original suit brought in the circuit court, where jurisdiction is founded on the fact of diverse citizenship solely, to be brought in the district of the residence of either plaintiff or defendant, and the statutes of Connecticut permit the attachment of the property, located in the state, of a nonresident defendant, without personal service on him, and, in the absence of voluntary appearance, the subjection of such property to a judgment in rem, this section and section 1539, post, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings in rem against the property of a nonresident defendant, who has not been personally served or appeared. Harland v. United Lines Tel. Co. (C. C. 1889) 40 Fed. 308, 6 L. R. A. 252.

Though, under the decisions of the Texas state courts, an affidavit for garnishment is not amendable, this section does not require a federal court to follow such decisions, as section 1580, post, authorizes an amendment of any process where the amendment will not injure the party against whom the process issues, and section 1591, post, authorizes the court at any time to permit either party to amend any defect in the process or pleadings on such conditions as it shall, in its discretion, prescribe. Booth v. Denike (C. C. 1894) 65 Fed. 43.

84. Continuance.—A continuance because of the absence of material witnesses rests within the discretion of the circuit court, without regard to the practice of the state courts, notwithstanding this section, because the mode of summoning witnesses and taking testimony in the courts of the United States is regulated by statutes of the United States. Texas & P. Ry. Co. v. Nelson (1892) 50 Fed. 814, 1 C. C. A. 688.

It is not error for a federal court in an action at law to deny a motion for continuance on account of the absence of a witness, where the adverse party admits, in accordance with a state statute, that the witness, if present, would testify as stated in the application. Texas & P. Ry. Co. v. Humble (1899) 97 Fed. 837, 38 C. C.

A. 502, affirmed (1901) 21 Sup. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

The state statute limiting the time for the allowance of a continuance by an administrator (Civ. Code Or. § 34) applies to actions in the federal courts. Barker v. Ladd (C. C. 1874) Fed. Cas. No. 990.

85. **Summoning and impaneling jurors in civil causes.**—Former conformity acts as to jury, see §§ 1252, 1253, ante.

This section does not render Code Civ. Proc. Kan. § 270, enacting that prior service as a talesman in the same court and term shall be sufficient ground for challenge, binding on federal courts, it being otherwise provided by section 1263, ante. Walker v. Collins (1892) 50 Fed. 737, 1 C. C. A. 642.

A federal court is not required by this section to follow the state practice of trying the question of the sufficiency of the service of the summons to a jury on a plea in abatement, where such practice is not statutory, but was established by decision of the state supreme court as the proper mode of procedure under the common law. Wall v. Chesapeake & O. Ry. Co. (1899) 95 Fed. 398, 37 C. C. A. 129.

This section has no reference to the designation or selection of jurors. U. S. v. Gardner (C. C. 1873) Fed. Cas. No. 15,187.

86. **Pleading—In general.**—The federal courts will follow the decisions of the state courts on questions of pleading. Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514; Taylor v. Brigham (C. C. 1876) Fed. Cas. No. 13,781.

A state statute providing that pleadings shall be liberally construed, will be followed in the federal court. U. S. v. Parker (1887) 7 Sup. Ct. 454, 120 U. S. 89, 30 L. Ed. 601.

In actions at law in the federal courts the sufficiency of the pleadings to support the judgment must be determined by the laws regulating the practice and pleadings in the state courts, as determined by the state decisions. Rush v. Newman (1893) 58 Fed. 158, 7 C. C. A. 136.

The federal courts may look to the state statutes upon the question of the construction of pleadings in actions at law. Bryson v. Gallo (1910) 180 Fed. 70, 103 C. C. A. 424.

A pleading in a suit at law which is not authorized in a like suit in the state court will be set aside on motion. Lewis v. Gould (C. C. 1875) Fed. Cas. No. 8,324.

The common-law forms of pleading are no longer necessary in the federal courts in New York state. Id.

Pleadings in a federal court in an action at law, which are not in the form of those required by the state practice, but which are substantially a compliance with it, are good. Hein v. Westinghouse Air Brake Co. (C. C. 1909) 168 Fed. 766.

The sufficiency and scope of pleadings in actions at law are matters in which the circuit courts of the United States are governed by the practice of the courts of the state in which they are held. Ohman v. New York (C. C. 1909) 168 Fed. 953.

This section applies especially to the form and order of pleading. Brown v. Cumberland Telephone & Telegraph Co. (C. C. 1909) 181 Fed. 246.

An action in the United States district court for southern New York against the consul general of Spain for damages for false imprisonment and malicious prosecution in proceedings for the extradition of plaintiff being a common-law action, the sufficiency of the pleadings upon the demurrer is to be determined according to the New York Code of Procedure. Castro v. De Uriarte (D. C. 1882) 12 Fed. 250, 251.

Pleadings in an action on a foreign judgment are governed by the practice of the state within which the federal court takes jurisdiction. Cruz v. O'Boyle (D. C. 1912) 197 Fed. 824.

87. —— **Amendment.**—Since by R. S. § 954, post, § 1591, authorizing federal courts to allow amendment of pleadings, Congress has legislated generally on the subject, the federal courts in granting such amendments are not governed by the state laws or practice. Lange v. Union Pac. R. Co. (1903) 126 Fed. 338, 62 C. C. A. 48, writ of certiorari denied (1904) 24 S. Ct. 853, 193 U. S. 671, 48 L. Ed. 841; Truckee River General Electric Co. v. Benner (1914) 211 Fed. 79, 127 C. C. A. 503; Erie R. Co. v. Schmidt (1915) 225 Fed. 513, 140 C. C. A. 655.

Congress having itself legislated on amendments to pleadings by section 1591, post, federal courts are not bound to follow state courts in construing local statutes regulating amendment in suits at law. Manitowoc Malting Co. v. Fuechtwanger (C. C. 1909) 169 Fed. 983, judgment reversed Feuchtwanger v. Manitowoc (1911) 187 Fed. 713, 109 C. C. A. 461.

Section 1591, post, authorizing the trial court to permit amendments, must govern, if the amendment is forbidden by the state statutes. Mexican Cent. R. Co. v. Duthie (1903) 23 Sup. Ct. 610, 189 U. S. 76, 47 L. Ed. 715.

In the matter of the amendment of pleadings, congress has conferred on the federal courts plenary power, and whether amendments when authorized and made work a waiver of substantial rights or a release of errors must be determined by the principles obtaining in the federal courts, and not by those prevailing in state tribunals. Williamson v. Liverpool & London & Globe Ins. Co. (1905) 141 Fed. 54, 72 C. C. A. 542.

Where an action has been removed from a state court to the federal circuit court, the latter may, in accordance with the state practice, grant the plaintiff leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts. West v. Smith (1879) 101 U. S. 263, 25 L. Ed. 809.

The law as to amendment of pleadings in a state court will be followed in the federal court in an action on the common-law side of the court. Henderson v. Louisville & N. R. Co. (1887) 8 Sup. Ct. 60, 61, 123 U. S. 61, 31 L. Ed. 92.

Where it is in accordance with the practice of the state, a federal court should permit amendments of pleadings in actions at law in furtherance of justice. Hodges v. Kimball (1899) 91 Fed. 845, 34 C. C. A. 103.

The several provisions of the law now embodied in this section and sections 1544, 1591, post, being in pari materia, and included in the codification of June 22, 1874, must be construed together, and full effect should, as far as possible, be given to each of them, and, when so construed, this section does not compel a circuit court to conform in subordinate details to state practice as to the allowance of amendments to pleadings, where such conformity would result in substantial injustice to litigants; nor, where such result would follow, are its powers limited or affected by a judicial interpretation by a state court of a state statute relating to such matters, though it has by rule adopted the state practice, but not such judicial interpretation, as its own. Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282.

Rev. St. Ill. c. 7, § 1, authorizing amendments to pleadings, either in form or substance, for the furtherance of justice, at any time before judgment, will not be followed by the federal courts to the extent of permitting amendments which involve the formation of new issues after verdict. North Chicago St. Ry. Co. v. Burnham (1900) 102 Fed. 669, 42 C. C. A. 584.

A federal court has power under the statute of New Jersey in the exercise of its discretion, to permit a bill of particulars in an action of ejectment to be amended on the trial. Lamar v. Spalding (1907) 154 Fed. 27, 83 C. C. A. 111.

This section includes the state practice with reference to amendment of pleadings, unless otherwise directed by statute. Leman v. Baltimore & O. R. Co. (C. C. 1904) 128 Fed. 191.

The provision of Rev. Laws Mass. c. 173, § 121, that the allowance by the court of an amended declaration shall be conclusive evidence of the identity of the cause of action stated therein with that relied on in the original declaration, is not made binding on a federal court in that state by this section; the allowance of amendments in such courts being governed by section 1591, post. De Valle Da Costa v. Southern Pac. Co. (C. C. 1909) 167 Fed. 654.

Where an action at law is instituted in a federal court sitting in New York, the rights of the parties with reference to amendment of pleadings are governed by the New York Code of Civil Procedure and the rules and practice of the Supreme Court of that state. Hannum v. Jerome (C. C. 1911) 184 Fed. 179.

Under section 542 of the New York Code, as applied, by this section, to the practice and pleading in the circuit and district courts within the state of New York, a complaint is amendable by the party at any time within 20 days after a demurrer thereto. Rosenbach v. Dreyfuss (D. C. 1880) 1 Fed. 391, 393.

88. —— **Complaint, declaration, or petition.**—Where, in a case in the district court of the United States in Mississippi, there were general and special counts in the declaration, and a demurrer was filed which affected only the special counts, and the party went to trial upon the general issue plea to the general counts, it was held that a verdict and judgment so obtained would not be set aside because the demurrer was undisposed of, especially as there is a statute of Mississippi allowing one good count to sustain a judgment. Townsend v. Jemison (1849) 48 U. S. (7 How.) 706, 13 L. Ed. 194.

The Circuit Court of Appeals will follow the state practice in the matter of the sufficiency of the declaration and the statement of the several causes of action relating to an injury arising from a single occurrence in one and the same count, and also in the manner and method of making defense. J. W. Bishop Co. v. Shelhorse (1905) 141 Fed. 643, 72 C. C. A. 337.

The practice act of the state of New Jersey (sections 103, 104) requires the plaintiff to file his declaration against the defendant within 30 days after being returned "summoned," and the defendant his plea within 30 days after the expiration of the time limited or granted for filing the declaration, and provides (section 110) that if any party shall not file his pleading in the cause within the time required by law, and shall file the same after the expiration of such time, he shall give the adverse party notice in writing of the time of filing such pleading, and that the adverse party shall not be required to plead in reply thereto until ruled so to do. Held, under such statute, where a declaration was not filed within the time required by law, but within the time in which the defendant consented that it might be filed, that the defendant was not required to plead until so

ruled by the plaintiff. Ricard v. Inhabitants of New Providence Tp. (C. C. 1881) 5 Fed. 433, 434.

The provision of the Missouri practice act, that, where three petitions filed in a case have been adjudged insufficient upon demurrer or motion to strike out, no further petition shall be filed, is obligatory on federal tribunals in the state, and applies in a case where the first petition had been held insufficient on a motion to make more definite, and the other two on demurrers. Woodward v. Gould (C. C. 1886) 28 Fed. 736.

As actions for infringing patents are within the exclusive jurisdiction of the federal courts, the pleadings therein are governed by section 9466, post, and a declaration in such an action, conforming to a common-law declaration in an action on the case, is sufficient, though a different form is prescribed by the statutes of the state where the court is held, and that the answer in such an action should comply with the common-law pleadings in actions on the case in form covering one or more of the defenses permitted in section 9466. Myers v. Cunningham (C. C. 1890) 44 Fed. 346.

Where the bar of limitations may be invoked under state statutes by demurrer, the petition or complaint must contain a statement of any matter relied on to avoid the running of the statute. An allegation in plaintiff's petition in an action against a railroad company, based on section 2 of the interstate commerce act, to recover damages for discrimination in rates, in effect, that defendant announced publicly at the time of the shipments complained of that it made no discrimination in rates, and that plaintiff did not learn of the falsity of such statement until shortly before the action was commenced, does not state sufficient facts to suspend the running of limitations against the action, under the provision of Rev. St. Mo. 1899, § 4290, which extends the time when the action was prevented by some improper act of defendant, where there is no allegation that plaintiff believed and relied on defendant's announcement, or that he exercised diligence to ascertain the facts. Ratican v. Terminal R. Ass'n of St. Louis (C. C. 1902) 114 Fed. 666.

Under Code Civ. Proc. N. Y. § 483, which governs in actions at law in federal courts in that state, each cause of action relied on must be stated separately in the complaint, and each must contain in itself facts sufficient to sustain such cause of action, irrespective of any averments in other counts. Moore Bros. Glass Co. v. Drevet Mfg. Co. (C. C. 1907) 154 Fed. 737.

Under the practice in Kentucky permitting damages claimed as the natural consequence of the injuries complained of to be stated in general terms, a petition for treble damages for an unlawful combination to monopolize interstate commerce in violation of Sherman Anti-Trust Act, § 7 (post, § 8829), alleging that, by virtue of defendant's alleged unlawful acts, plaintiff had sustained damages in the sum of $500,000 sufficiently charges general damages, under this section. Monarch Tobacco Works v. American Tobacco Co. (C. C. 1908) 165 Fed. 774.

Under the Kentucky practice, it is not essential for plaintiff, in an action for wrongful death, to state any more in his petition than that the death of his intestate was caused by defendant's negligence, a specification of the acts constituting the negligence being unnecessary. Beck v. Johnson (C. C. 1909) 169 Fed. 154.

Upon statutory actions for penalties brought under section 9447, post, for stamping patented articles without consent of the patentees, etc., the pleader, in accordance with the state practice adopted by this section, is not required to allege the stamping to have been on a precise day, as at common law. An averment that it was done "in or about June, 1886," is sufficient on demurrer. Fish v. Manning (D. C. 1887) 31 Fed. 340.

In an action in a federal court in Ohio to recover penalties for marking unpatented articles as patented, plaintiff alleged, in substance, that defendant, on a certain date, and each and every working day thereafter until the commencement of the suit, did "mark upon 1,500 spring-balance computing scales the words and figures, 'Patented Feb. 13—94,'" and asked judgment for $150,000. Held, that each marking, or at least the markings done on each day or time of marking, constituted a separate cause of action, and defendant was entitled under the Ohio statute to have the different causes of action separately stated and numbered. Hoyt v. Computing Scale Co. (D. C. 1899) 96 Fed. 250.

In determining whether an action involves a separable controversy, the federal courts will follow the state rule as to whether a cause of action is entire. Beckwith v. Chicago, M. & St. P. Ry. Co. (D. C. 1915) 223 Fed. 858.

89. —— **Plea or answer in general.**—Code Iowa, § 2715, provides that, "in pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he performed all the conditions on his part." Section 2717 provides that, "if either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated." Held that, as these acts control the federal practice, where a plaintiff alleges general performance by him of

his obligations under a contract, a denial in the answer of "each and every allegation in the petition," will not put in issue a condition precedent without performing which plaintiff would have had no right of action. Halferty v. Wilmering (1885) 5 Sup. Ct. 364, 112 U. S. 713, 28 L. Ed. 858.

All defenses are open to a defendant in the circuit court of the United States under any form of plea or answer which would have been open to him under like pleading in the courts of the state within which the circuit court is held. Roberts v. Lewis (1892) 12 Sup. Ct. 781, 144 U. S. 653, 36 L. Ed. 579.

The federal courts will adopt a state statute providing that an answer denying each and every material allegation in the complaint is sufficient to put the plaintiff upon proof of every fact that was essential in establishing the cause of action. Old Wayne Mutual Life Ass'n v. McDonough (1906) 27 Sup. Ct. 236, 239, 204 U. S. 8, 51 L. Ed. 345.

The decision of the highest court of a state upon the question whether or not the state statutes require claims for damages because of poor quality of material for the purchase price of which a note was given to be set up in an action on the note, so as to be concluded by the judgment, is binding on the federal courts. Virginia-Carolina Chemical Co. v. Kirven (1909) 30 Sup. Ct. 78, 80, 215 U. S. 252, 54 L. Ed. 179.

An answer should be construed according to the local practice. School Dist. No. 11 v. Chapman (1907) 152 Fed. 887, 82 C. C. A. 35, certiorari denied (1907) 27 Sup. Ct. 792, 205 U. S. 545, 51 L. Ed. 923.

Under United States circuit court rule 44 for the districts of Michigan, Michigan circuit court rule 7, providing that the facts stated in a notice attached to a plea shall be treated as admissions and need not be proved, was applicable to an action tried in the federal Circuit Court in that state. McIntyre v. Modern Woodmen of America (1912) 200 Fed. 1, 121 C. C. A. 1.

Section 9464, post, and this section, are construed together, and the pleadings in an action for damages for infringement should be in the state form, except as modified by section 9466, post, providing that in such action defendant may plead the general issue, and, having given notice, may prove certain special matters. Celluloid Mfg. Co. v. American Zylonite Co. (C. C. 1888) 34 Fed. 744.

Provisions of the Washington Code, which, by this section operate as rules of practice in actions at law in the federal courts in that state, require that a complaint shall contain a plain and concise statement of the facts constituting the cause of action, and allow defendant to demur to the complaint if it appears on its face that the court has no jurisdiction of the parties or of the subject-matter, and, if the defect does not affirmatively appear on the face of the complaint, it may be pleaded in the answer; and defendant may, in an answer, traverse the complaint by a general denial, or by a specific denial of the particular allegations which he wishes to controvert. Held, that an allegation, in a complaint in ejectment in the United States circuit court, as to the value of the property in controversy, was material, and, when denied in the answer, raised an issue; and that consequently, to sustain a judgment for plaintiff, the court must, where the action was tried without a jury, specially find that the value exceeded $2,000. Greene v. City of Tacoma (C. C. 1892) 53 Fed. 562.

Mill. & V. Code Tenn. § 2452, allowing a champertous agreement to be set up in a plea in abatement in the action to which it relates, not being a rule of practice and procedure within this section, is not binding on federal courts. Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. 1893) 55 Fed. 44, judgment modified (1894) 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693.

This section and R. S. § 4969, providing that in all actions arising under the laws respecting copyrights the defendant may plead the general issue and give special matter in evidence, are to be construed together, and full effect given to both. Johnston v. Klopsch (C. C. 1898) 88 Fed. 692.

This section does not require a federal court to allow the defense that plaintiff is a trust or combination, within Anti-Trust Act Ill. 1891, so that defendant, buying from it, is not liable for the price, to be set up in an action for the price, without a prior determination, in a direct proceeding, of plaintiff's status, though such a defense was set up in an action in the state court without the right to do so being questioned or considered. Lafayette Bridge Co. v. City of Streator (C. C. 1900) 105 Fed. 729.

The liberal construction of pleadings required by the Codes renders it immaterial what name is given to a pleading, and, although pleas in abatement are abolished by the Montana Code, which provides (sections 680, 684) that objections on the ground of a defect or misjoinder of parties, not appearing on the face of the complaint, may be taken by answer, a rule of the circuit court of the United States in that district, requiring all matters in abatement to be set up by a separate preliminary answer, is not inconsistent with such provision, and a plea in abatement filed in that court will be treated as such an answer, where it is the same in substance, and will be considered on its merits. Whelan v. Rio Grande Western Ry. Co. (C. C. 1901) 111 Fed. 326.

The federal court is not bound to adopt any mode of procedure which will preclude a defendant from specially

pleading a defense, and force him to trial on the general issue. English v. Ralston (C. C. 1901) 112 Fed. 272.

Under the rule of the federal courts that contributory negligence is a matter of special defense, the facts constituting such negligence must be set out, and, where the answer contains only a general averment, a motion will lie to require it to be made more specific, when under the practice of the state in which the court is sitting, as in Louisiana, such motion would lie as to any matter of special defense. Gadonnex v. New Orleans Ry. Co. (C. C. 1904) 128 Fed. 805.

On a rule for judgment for want of a sufficient affidavit of defense, the state practice will be followed, allowing judgment for such portions of the plaintiff's claim as to which the affidavit is found insufficient, without prejudice to the right to present for the balance of the claim. Harding, Whitman & Co. v. York Knitting Mills (C. C. 1905) 142 Fed. 228.

While the burden of proving contributory negligence is on the defendant in the federal courts, the question as to whether he must plead it specially or not depends on the practice of the state in which the court is sitting. Under the practice in the state courts in Minnesota, contributory negligence may be proved under a general denial; and in a federal court in that state a general allegation of contributory negligence in the answer is sufficient. Hardy v. Chicago, St. P., M. & O. R. Co. (C. C. 1909) 172 Fed. 454.

A defendant, sued for personal injuries in the federal courts, need not plead contributory negligence, but may avail himself of it, whether brought out by plaintiff's evidence or his own. Bowker v. Donnell (D. C. 1915) 226 Fed. 359.

90. —— **Plea to jurisdiction.**—A federal court is without jurisdiction of an action at law where the answer contains a general denial, which under the state practice puts in issue the jurisdictional allegations of the complaint, and there is no proof to sustain them. Yocum v. Parker (1904) 130 Fed. 770, 66 C. C. A. 80.

Rev. St. Mo. 1899, § 596 [Ann. St. 1906, p. 622], provides that the only plea on the part of the defendant is a demurrer or answer. Section 604 declares that the answer shall contain, first, a general or special denial; and second, a statement of any new matter constituting a defense or counterclaim. Section 605 authorizes a defendant to set forth, by answer, as many defenses and counterclaims as he may have. Held, that since the enactment of this section it is not necessary for a defendant in a suit in a federal court sitting in Missouri to raise the question of jurisdiction by plea in abatement, but that an answer containing a general denial, etc., was effective to put in issue the allegations of diverse citizenship. Cole v. Carson (1907) 153 Fed. 278, 82 C. C. A. 408.

State codes of procedure are intended for courts of general jurisdiction, and the provisions that objections to the jurisdiction shall be taken by answer is not applicable to federal courts, they being courts of limited jurisdiction. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, writ of certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

Prior to Conformity Act June 1, 1872, embodied in this and other sections of the Revised Statutes, the jurisdiction of federal courts could only be challenged by a separate plea presenting the question clearly for actual litigation, and this act does not change the practice. Id.

In a code state, where a general denial puts in issue every material allegation of the complaint not specifically admitted, which rule of pleading is made applicable in the federal courts by this section, a general denial puts in issue an allegation of diverse citizenship made in a complaint in a federal court, and imposes on the plaintiff the burden of proving the same to sustain the jurisdiction. Lindsay-Bitton Live Stock Co. v. Justice (1911) 191 Fed. 163, 111 C. C. A. 525.

A plea denying title of plaintiff in a suit on a promissory note, and alleging that the note is the property of another, is not demurrable in the United States court held in a state, the statute of which provides that a party cannot inquire into the title of the holder of a note except for his protection, or to let in some defense. Lanning v. Lockett (C. C. 1882) 10 Fed. 451.

Notwithstanding the practice conformity act of 1872 and the judiciary act of 1875, and notwithstanding the practice in Ohio of traversing all the averments of the petition by general denial, it remains the law that a plea to the jurisdiction of the court denying the averments of the diverse citizenship must be, in the federal courts of Ohio, by a special plea of abatement, separately pleaded and tried. Imperial Refining Co. v. Wyman (C. C. 1889) 38 Fed. 574, 3 L. R. A. 503.

Though a defendant be permitted by the state practice to unite a plea to the jurisdiction with pleas to the merits, he need not necessarily do so, but he may present his objections to the jurisdiction before pleading to the merits; and the fact that such a plea is called a "plea in abatement," though properly designated, under the state practice, as an "answer," is no reason for striking it out. Jones v. Rowley (C. C. 1896) 73 Fed. 286.

Where an objection goes to the jurisdiction of the court over the subject-matter, the defense, in Code

states, may be put in on the general issue. Peper Automobile Co. v. American Motor Car Sales Co. (C. C. 1910) 180 Fed. 245.

Under this section, to which there is but the one exception that the defense that the court has no jurisdiction of defendant must be set up by special plea in abatement, a plea to the jurisdiction, taking issue with the averment of the petition that plaintiff is a resident of Ohio, where the action is brought, and insisting that he is a resident of Michigan, of which state defendant is also a citizen, is not permissible. Gen. Code Ohio, § 11309 (Rev. St. § 5061), permits this question, when appearing on the face of the petition, to be raised by demurrer; section 11311 (section 5063) permits it, when not so appearing, to be raised by answer; and no other method for raising it is known to the practice of that state. Kimball v. Detroit, M. & T. S. L. Ry. (C. C. 1910) 189 Fed. 409.

91. —— Plea of limitations as defense.—The action of a federal court in striking out a plea of the statute of limitations before trial held within its discretion under the New Jersey practice, where all the facts appeared from the pleading. Snare & Triest Co. v. Friedman (1909) 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367, writ of certiorari denied (1909) 29 Sup. Ct. 700, 214 U. S. 518, 53 L. Ed. 1065.

In an action at law in a federal court in New Jersey for the maintenance of a nuisance, a plea of the state statute limiting actions for nuisance to a period of six years is good, it being necessary to plead the statute in order to limit the recovery to that time. Whitenack v. Philadelphia & R. R. Co. (C. C. 1893) 57 Fed. 901.

Under R. S. § 4920, post, § 9466, the statute of limitations may be pleaded specially in the federal courts, either with or without the general issue, regardless of the state practice. Kulp v. Snyder (C. C. 1899) 94 Fed. 613.

92. —— Pleading set-off or counterclaim.—A set-off may be pleaded as a defense to an action brought in the United States courts in any state where that plea is permissible by the laws of the state. Partridge v. Phœnix Mut. Life Ins. Co. (1872) 82 U. S. (15 Wall.) 573, 21 L. Ed. 229; Frick v. Clements (C. C. 1887) 31 Fed. 542.

The rule as to set-off in questions arising exclusively under the laws of the United States is not influenced by any local law or usage. U. S. v. Robeson (1835) 9 Pet. 319, 325, 9 L. Ed. 142.

The right of set-off, except as it is enforced in equity, is a matter of local legislation; and the federal courts, sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state. Charnley v. Sibley (1896) 73 Fed. 980, 20 C. C. A. 157.

Where the state statute of set-off, as in Illinois, does not authorize a set-off, in action on contract, of unliquidated damages arising out of contracts or torts, not connected with the subject-matter of the suit, there can be no set-off, in an action at law, of such damages, even as against an insolvent or nonresident plaintiff. Id.

A defendant cannot plead an indebtedness of plaintiff as a set-off or counterclaim in an action at law for conversion in a federal court. Van Zandt v. Hanover Nat. Bank (1906) 149 Fed. 127, 79 C. C. A. 23.

Under the Code of Civil Procedure of North Carolina, as construed by its Supreme Court, which governs the procedure in the federal courts in that state in actions at law, by virtue of this section, the fact that an answer pleads a counterclaim for conversion does not preclude a recovery thereon, although the evidence shows that it is founded in contract, and not in tort. Davis v. Bessemer City Cotton Mills (1910) 178 Fed. 784, 102 C. C. A. 232.

Under Code Va. 1904, § 3304, providing that if plaintiff be the person with whom the contract sued on was originally made, or the personal representative of such person, the jury shall ascertain the amount to which defendant is entitled and apply it as a set-off against plaintiff's demand, and if the amount be more than plaintiff is entitled to, shall ascertain the excess, fix the time from which interest will be computed, and render judgment for plaintiff for such excess with interest, set-offs and counterclaims of a legal character are available to defendant in an action at law in the federal courts, even to the extent of enabling defendant to recover judgment against plaintiff. Dotson v. Kirk (1910) 180 Fed. 14, 103 C. C. A. 368.

Where the defendant has filed a plea of set-off, if the plaintiff voluntarily dismisses his suit, as he may under the Tennessee statute, the defendant may elect to proceed on his plea of set-off in the capacity of plaintiff, and the cause will be tried as if he had brought an independent suit on his counterclaim. Meyer v. Gateus (C. C. 1880) 4 Fed. 35.

Rev. Laws Mass. c. 170, §§ 2, 3, providing that if an action is brought by a nonresident, or one who cannot be found or served in the state, he shall be held to answer in any action brought against him therein by the defendant in the former action, if the demands are such that the judgments may be set off, and authorizing service of the writ in the cross-action on the attorney, who appeared for the plaintiff in the original action, being treated as an enlargement of the right to set-off, was applicable to a suit in the federal courts sitting in Massachusetts against

a foreign corporation, which had previously brought suit in such court against the plaintiff in the second action. Arkwright Mills v. Aultman & Taylor Machinery Co. (C. C. 1904) 128 Fed. 195.

93. —— **Replication and reply.**—Under Code Iowa 1897, § 3552, in force in the federal District Court for the Southern District of Iowa by virtue of this section and rule 3, subd. 4, of such court, the striking out of a reply filed without leave after trial has commenced is within the discretion of the court, and its action is reviewable only for a gross abuse of discretion. Hartley v. Lapidus & Holub Co. (C. C. A. 1914) 216 Fed. 92.

The state law permitting a prior action suspending the running of limitations to be pleaded by way of reply is binding on the United States District Court. Boatmen's Bank of St. Louis, Mo., v. Fritzlen (1915) 221 Fed. 145, 137 C. C. A. 45.

The state practice having been adopted by the standing rules of the district court of the Southern district of New York, plaintiff may obtain leave to file a double replication to defendant's plea. Valarino v. Thompson (D. C. 1857) Fed. Cas. No. 16,810a.

94. —— **Demurrer.**—As in Mississippi a plea of non est factum not supported by affidavit is demurrable, the circuit court will conform to the practice, though ordinarily a demurrer only lies to an insufficient pleading, and the affidavit is no part of the plea. Bell v. City of Vicksburg (1859) 64 U. S. (23 How.) 443, 16 L. Ed. 572.

Decisions of the courts of Wisconsin that the state Code of Procedure allows the objection of the statute of limitations to be taken by demurrer, where the complaint shows that the statutory time has run, whether the suit is of legal or equitable cognizance, held obligatory on the circuit court of the United States sitting in that state. Chemung Canal Bank v. Lowery (1876) 93 U. S. 72, 23 L. Ed. 806.

All defenses are open to a defendant in the circuit court under any form of demurrer which would have been open under a like pleading in the state in which court is held. Roberts v. Lewis (1892) 12 Sup. Ct. 781, 144 U. S. 653, 36 L. Ed. 579.

Where the statement of plaintiff's cause of action shows that plaintiff could not under any circumstances avoid the defense of limitations, such defense may be set up by demurrer in an action pending in Connecticut. Davis v. Mills (1903) 121 Fed. 703, 58 C. C. A. 123.

Under the conformity act, federal courts in determining a demurrer to a declaration in an action at law will be governed by the decisions of the highest court of the state. Norfolk & Portsmouth Traction Co. v. Rephan (1911) 188 Fed. 276, 110 C. C. A. 254.

Although a state practice requires a court to decide on demurrer all questions which may be so raised, a federal court is not required to adopt such practice where no substantial right of the demurrant will be denied by a postponement of their determination until the trial. Kent v. Bay State Gas Co. (C. C. 1899) 93 Fed. 887.

The bar of limitations may be invoked by demurrer in a federal court in an action at law in all cases where it could be done under the statutes of the state. Ratican v. Terminal R. Ass'n of St. Louis (C. C. 1902) 114 Fed. 666.

The rule that a demurrer does not admit legal conclusions pleaded obtains in the federal courts. General Electric Co. v. Westinghouse Electric & Mfg. Co. (C. C. 1906) 144 Fed. 458.

The question of jurisdiction of a federal court may be raised by demurrer. Hagstoz v. Mutual Life Ins. Co. of New York (C. C. 1910) 179 Fed. 569.

This section includes conformity to the state statute as to the form of a demurrer. Brown v. Cumberland Telephone & Telegraph Co. (C. C. 1910) 181 Fed. 246.

A demurrer is a pleading, and should conform to the rules regulating demurrers contained in the state statute. Rosenbach v. Dreyfuss (D. C. 1880) 1 Fed. 391, 393.

The practice in the state courts as to notice of hearing on demurrer is applicable to the federal courts. Rosenbach v. Dreyfuss (D. C. 1880) 2 Fed. 23.

95. —— **Verification.**—State laws as to verification of pleadings control in the federal court. St. Louis, I. M. & S. Ry. Co. v. Knight (1887) 7 Sup. Ct. 1132, 122 U. S. 79, 30 L. Ed. 1077.

The Indiana statute requiring that the general issue which denies the execution of an instrument sued on must be sworn to is adopted as a rule of practice by the federal circuit court. McClintick v. Cummins (C. C. 1840) Fed. Cas. No. 8,698.

Under this section the pleadings in an action brought in Oregon must be verified as provided in section 79, Code Civ. Proc. Or. Cottier v. Stimson (C. C. 1883) 18 Fed. 689.

The law of the state requiring the answer of a domestic corporation to be verified by one of its officers must be followed in the federal courts in actions at law. Simon v. American Tobacco Co. (C. C. 1911) 192 Fed. 662.

96. —— **Issues, proofs, and variance.**—Under the laws of Georgia, requiring the invalidity of a statute, if relied on, to be alleged by special plea, and this section an interstate railroad was not entitled to offer evidence to show that Civ. Code Ga. 1895, § 2222, requiring the checking of trains on approaching public crossings in time to avoid injuring any person or thing on the crossing, was invalid as an unreasonable regulation of interstate commerce, where such ob-

jection was not pleaded. Southern Ry. Co. v. King (1908) 160 Fed. 332, 87 C. C. A. 284, judgment affirmed (1910) 30 Sup. Ct. 594, 217 U. S. 524, 54 L. Ed. 868.

Under the rule of pleading in Virginia that the declaration must allege the facts upon which plaintiff relies as constituting his cause of action, that defendant may be advised of the issue he is required to meet, which rule governs the federal courts in that state by virtue of this section, a declaration in an action against a street railroad company which alleges that after plaintiff had boarded one of defendant's cars as a passenger, and was standing on the step, defendant's employés negligently ran another car against him by which he was injured, is not supported by evidence that the car on which plaintiff was standing was moving while the other car was standing still at the time of the injury, and an instruction permitting a recovery on such state of facts was erroneous. Norfolk & A. Terminal Co. v. Rotolo (1910) 179 Fed. 639, 103 C. C. A. 197.

Under the rule in Ohio that a plea to the jurisdiction, denying averments of diverse citizenship, must be by special plea of abatement, separately pleaded and tried, if there is no plea in abatement raising the question of jurisdiction, no evidence on the subject of citizenship is admissible. Imperial Refining Co. v. Wyman (C. C. 1889) 38 Fed. 574, 3 L. R. A. 503.

97. —— **Defects, objections, and waiver.**—The ruling of the highest court of a state that the failure of declaration in suit under the federal Employers' Liability Act to show that employé was engaged in interstate commerce when injured, was cured by a charge in the plea and admission in the replication, is binding on federal Supreme Court. Central Vermont R. Co. v. White (1915) 35 Sup. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment White v. Central Vermont R. Co. (1914) 89 A. 618, 87 Vt. 330.

The rule of practice in Missouri that the filing of an amended petition in compliance with an erroneous order, which struck out parts of the original petition, is a waiver of the error is not binding upon the federal courts in that state. Williamson v. Liverpool & London & Globe Ins. Co. (1905) 141 Fed. 54, 72 C. C. A. 542, 5 Ann. Cas. 402.

The practice of objecting to the introduction of any evidence in a cause on the ground that the petition or complaint does not state a cause of action is very objectionable, and is not recognized in the federal courts, even though it may be permitted in the courts of the state. United Kansas Portland Cement Co. v. Harvey (C. C. A. 1914) 216 Fed. 316.

Where the rule of practice of the state court, rigidly observed, is that "all pleas in abatement in the superior court must be filed on or before the opening of the court on the day following the return day of the writ," a failure to file such plea within the time specified is a waiver of his right to take advantage in that court of defective or insufficient service. Werthein v. Continental Ry. & T. Co. (C. C. 1882) 11 Fed. 689.

Where plaintiff alleges in his complaint that he is a citizen of Pennsylvania and defendant of New York, and defendant in answer thereto denies "any knowledge or information sufficient to form a belief," and then answers to the merits, he waives his plea to the jurisdiction and the same is properly disregarded; and this rule is not altered by Code Civ. Proc. N. Y. § 513, recognizing and providing for the verification of dilatory defenses, section 488, providing for a demurrer when want of jurisdiction or of capacity of plaintiff to sue, appears on the face of the complaint, and section 498, providing that the objection may be taken by answer when it does not so appear, as applied to the practice of the federal courts by this section. Cuthbert v. Galloway (C. C. 1888) 35 Fed. 466, 468.

98. **Dismissal or nonsuit before trial.**—Plaintiff's refusal to comply with an order requiring him to separately paragraph his different causes of action, according to the local practice, justifies a dismissal of his case. Thompson v. Gatlin (1893) 58 Fed. 534, 7 C. C. A. 351.

Rev. St. Mo. 1899, § 639 (Ann. St. 1906, p. 658), provides that plaintiff shall be allowed to dismiss or take a nonsuit at any time before the suit is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards. Held, that under this section plaintiffs in a suit on a fire policy in the federal court, after reversal and remand for new trial, were entitled as of right to take a nonsuit on the case being reached on the trial court calendar for new trial. Connecticut Fire Ins. Co. v. Manning (1910) 177 Fed. 893, 101 C. C. A. 107.

It is a general rule in the federal courts, subject to special exceptions, that a plaintiff at law or a complainant in equity may discontinue his action or dismiss his bill as of course at any time before the hearing, on payment of costs; and especially should such rule be followed where the action is at law, and the plaintiff is given such right by the law of the state. McCabe v. Southern Ry. Co. (C. C. 1901) 107 Fed. 213.

Court's right to dismiss case for plaintiff's failure to appear when reached for trial held not limited by rule in state courts allowing dismissal when later issues had been tried. Watts v. S. M. Hamilton Coal Co. (D. C. 1915) 219 Fed. 1003.

99. **Evidence.**—In the federal courts the burden of proof of plaintiff's con-

tributory negligence, alleged as a defense, is on the defendant. Clark v. Kansas City, Ft. S. & M. R. Co. (1904) 129 Fed. 341, 64 C. C. A. 19; Bowker v. Donnell (D. C.) 226 Fed. 359.

Exemplification of deed conveying land in more than one county, but recorded only in one, held properly admitted in evidence in circuit court, where such practice had been followed in the courts of the state where the land lay. McKeen v. Delancy (1809) 5 Cranch, 22, 33, 3 L. Ed. 25.

Under this section, in an action of covenant in the state of Illinois, as, under the common-law rules of pleading, a parol contract could not be set up in the declaration, evidence of such contract is inadmissible. Phillips & Colby Const. Co. v. Seymour (1875) 91 U. S. 646, 23 L. Ed. 341.

It is competent for Congress to declare the rules of evidence which shall prevail in the federal courts, not affecting rights of property; and where it has declared the rule the state law is silent. Connecticut Mutual Life Ins. Co. v. Schaefer (1876) 94 U. S. 457, 458, 24 L. Ed. 251.

When the statutes of the United States make special provisions as to the competency or admissibility of testimony, they must be followed in the courts of the United States, and not the laws or the practice of the state in which the court is held, if they are different. Whitford v. Clark County (1886) 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500.

Neither the certificate of location issued by the register of the local land office nor the receiver's receipt on final proof are sufficient evidence of title to support ejectment in the United States courts, though a different rule may prevail in the state courts by statute. Langdon v. Sherwood (1888) 8 Sup. Ct. 429, 431, 124 U. S. 74, 31 L. Ed. 344.

A state law requiring the courts of the state to take judicial notice of a private act is binding on the federal courts. Case v. Kelly (1890) 10 Sup. Ct. 216, 220, 133 U. S. 21, 33 L. Ed. 513.

In a suit by a client against an attorney who has received money for his client under an award against the United States, the question whether the award and the receipt for the money paid under it are admissible in evidence depends either upon the local or general law of evidence, and presents no federal question. Sherman v. Grinnell (1892) 144 U. S. 198, 12 Sup. Ct. 574, 36 L. Ed. 403.

Copies of acts of parliament, which are sufficiently authenticated to be admissible in evidence in the courts of New Hampshire, are admissible in a federal court sitting therein. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co. (1903) 23 Sup. Ct. 517, 518, 189 U. S. 221, 47 L. Ed 782.

Where a plaintiff is not entitled to maintain its action in the circuit cour unless it was a corporation of Missis sippi, it became necessary under the rules of practice and pleading in Nortl Carolina, where the corporation at tempted to sue, to prove that it wa a corporation of Mississippi. W. L Wells Co. v. Gastonia Cotton Mfg. Co (1904) 25 Sup. Ct. 640, 642, 198 U S. 177, 49 L. Ed. 1003.

In actions at law in the federal court the rules and law of evidence generall of the state within which such court are held prevail. Hinds v. Keith (1893 57 Fed. 10, 6 C. C. A. 231.

In accordance with Gen. St. Minn 1894, § 2275, making the certificate o protest of a notary public of any stat evidence of the facts therein certifie such a certificate is competent evi dence, in a federal court in Minnesota of the presentment, demand, dishonor and notice of dishonor, of a note drawn in Minnesota, and payable an protested in Connecticut. Nelson v First Nat. Bank (1895) 69 Fed. 798 16 C. C. A. 425.

The statute of Arkansas (Sand. & H Dig. 1894, §§ 2578–2580) requiring eac party in an action of ejectment to fil with his pleading copies of all deeds o other written instruments of title o which he relies, and providing that th adverse party shall, by his pleading except to any of such documentar evidence to which he may wish to ob ject, which exceptions shall be passe on by the court, and that all objection not so taken shall be waived, pre scribes a statutory rule of evidence which will be enforced by the feder courts in the state; and a party wh after filing exceptions to a deed or oth er document set out by his adversar withdraws the same, waives any righ to object to such document on th trial. Alexander v. Gordon (1900) 10 Fed. 91, 41 C. C. A. 228.

In a proceeding under a state statut to contest a probated will, the cou will follow the state practice as to th burden of proof. Sawyer v. Whit (1903) 122 Fed. 223, 58 C. C. A. 58

Rev. St. Ohio, § 5242a, which author izes the admission in evidence of th testimony given by a witness on a for mer trial of the same case when th witness is dead or beyond the jurisdic tion of the court, is in conformity wit the rule recognized at common law which permits the use of such evidenc generally where it is impossible to ob tain a viva voce examination of th witness, and is not in conflict with R S. § 861, ante, § 1468, and may proper ly be applied in an action at law in federal court sitting within the stat where the witness is without the dis trict, and more than 100 miles distan from the place of trial. Toledo Trac

tion Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28.

The federal courts, in determining questions of presumption and burden of proof, must apply federal law, whether sitting in bankruptcy or administering state law by reason of diverse citizenship. Young v. Lowry (1912) 192 Fed. 825, 113 C. C. A. 149.

The rule of the federal courts is that contributory negligence to constitute a defense in an action for injury must have directly and proximately contributed to the injury, and a rule of state courts, adopted as a rule of evidence, that a less degree of negligence may be considered in mitigation of damages, is not binding on the federal courts. Southern Ry. Co. v. Smith (1914) 214 Fed. 942, 131 C. C. A. 238.

New Jersey crossing statute, relative to failure of traveler at protected crossing to stop, look, and listen, held to state rule of evidence, which federal courts should follow. Delaware, L. & W. R. Co. v. Welshman (1916) 229 Fed. 82, 143 C. C. A. 358.

Copies of accounts certified by notary public, though admissible by law in state court, held inadmissible in federal court. Bell v. Davidson (C. C. 1818) Fed. Cas. No. 1,248.

A state statute authorizing the official acts of notaries to be given in evidence is not binding upon the federal court. Craig v. Brown (C. C. 1819) Fed. Cas. No. 3,330.

Affidavits taken by justices of the peace and masters in chancery of the state of Arkansas are good in the circuit court of the United States. Gray v. Tunstall (C. C. 1847) Fed. Cas. No. 5,730.

The rule of the Vermont statutes, prohibiting the disclosure by listers, or the production by the town clerks, of the sworn inventories of taxpayers, will be enforced in an action in the United States circuit court for the district of Vermont. Witters v. Sowles (C. C. 1887) 32 Fed. 130.

This section does not affect section 1468, ante, relating to the mode of proof. Shellabarger v. Oliver (C. C. 1894) 64 Fed. 306.

Where a contract is in writing and complete in itself, its terms cannot be added to by parol, in an action at law in a federal court. Harding, Whitman & Co. v. York Knitting Mills (C. C. 1905) 142 Fed. 228.

A federal court sitting in Delaware will not take judicial notice of the course of the practice and procedure of the courts of Ohio. Irvine v. Elliott (D. C. 1913) 203 Fed. 82.

Rebuttal testimony taken in Pennsylvania on a legal holiday, in a suit for patent infringement, would not be expunged for that reason; the holiday statutes of Pennsylvania not being controlling on federal courts. American Automotoneer Co. v. Porter (D. C. 1913) 205 Fed. 105.

Admissibility of testimony is determined by the laws of the states as it was when the federal courts were established by Judiciary Act 1789. U. S. v. Gwynne (D. C. 1914) 209 Fed. 993.

100. —— Decisions of state courts.— Decisions of state courts construing common-law rules of evidence are not obligatory on the federal courts. Union Pac. Ry. Co. v. Yates (1897) 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553.

In an action at law a federal court will follow the decisions of the highest court of the state in which it is sitting as to the rules of evidence. Stewart v. Morris (1898) 89 Fed. 290, 32 C. C. A. 203, denying rehearing (1898) 88 Fed. 461, 32 C. C. A. 7.

Where, in an action to recover for negligence resulting in death, the defendant claims contributory negligence, it is the rule of the United States courts, irrespective of the decisions in the courts of the state where the federal courts are held, that the burden is on defendant to show that the deceased was negligent and that his negligence contributed to the injury which resulted in his death. Hemingway v. Illinois Cent. R. Co. (1902) 114 Fed. 843, 52 C. C. A. 477.

The rule that the burden of proof is on a defendant to show that deceased was negligent and that his negligence contributed to his death governs in the federal courts, irrespective of the rulings of the state court. Hemingway v. Illinois Cent. R. Co. (1902) 114 Fed. 843, 849, 52 C. C. A. 477.

The present rule in Maine, settled by the later decisions, that in civil suits the fact that the alleged right of recovery is grounded on an act of defendant which constitutes a crime, does not require any different measure of proof from that required in ordinary suits, applied. Pooler v. U. S. (1904) 127 Fed. 519, 62 C. C. A. 317.

Decisions of state courts that instruments, though unstamped, as required by War Revenue Act June 13, 1898, c. 448, § 14, 30 Stat. 455, were admissible in evidence, have no application to federal courts. Sackett v. McCaffrey (1904) 131 Fed. 219, 65 C. C. A. 205.

Under this section decisions of state courts, unless construing local statutes, have never been regarded as controlling, and neither under this section nor section 1538, post, are state decisions construing the common-law rules of evidence obligatory on such courts. Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560.

The federal circuit courts will follow the decision of the highest state court as to the admissibility of evidence and the force and effect of deeds defectively acknowledged. Wright v. Taylor (C. C. 1871) Fed. Cas. No. 18,096.

The federal court is not bound by the decisions of the state court of the state over which it has jurisdiction, allowing a parol agreement to limit the effect of a written contract, but will follow the

contrary rule, as established in the federal courts. Van Vleet v. Sledge (C. C. 1890) 45 Fed. 743.

101. Witnesses. — Competency, see ante, § 1464, and notes.

A witness whose evidence is admissible under section 1464, ante, may be allowed to testify, although a law of the state in which the federal court is held would exclude him. Potter v. National Bank (1880) 102 U. S. 163, 165, 26 L. Ed. 111.

There is no ground for the suggestion that this section may be construed as relating to the competency of witnesses rather than to the principles of evidence. Connecticut Mut. Life Ins. Co. v. Union Trust Co. (1884) 5 Sup. Ct. 119, 122, 112 U. S. 250, 28 L. Ed. 708.

Whether the relation of physician and patient so existed as to exclude the former's testimony, under Code Civ. Proc. N. Y. §§ 834, 836, involves a question of the construction of a state statute, on which the decisions of the highest state court will be accepted on a writ of error from the Supreme Court of the United States to that court. Supreme Lodge K. P. v. Meyer (1905) 25 S. Ct. 754, 198 U. S. 508, 49 L. Ed. 1146, affirming judgments Meyer v. Supreme Lodge K. P. (1904) 70 N. E. 111, 178 N. Y. 63, 64 L. R. A. 840, and (1903) 81 N. Y. S. 813, 82 App. Div. 359.

A subpœna duces tecum authorized in a state court may be issued in the federal court. Palmer v. Mahin (1903) 120 Fed. 737, 57 C. C. A. 41.

The Massachusetts rule allowing the former testimony of a witness to be introduced for the purpose of impeaching his subsequent testimony without his attention having been first called to the former testimony, will be followed by the federal courts sitting in that state. American Agricultural Chemical Co. v. Hogan (1914) 213 Fed. 416, 130 C. C. A. 52.

The competency of witnesses and mode of examination are for the federal courts, under section 1468, ante. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554, 555.

In determining the meaning of the words "personal transaction" and "communication" in Code W. Va. 1906, c. 130, § 23 (sec. 3945), prohibiting a witness to testify to personal transactions or communications with a person since deceased, the federal courts will be governed by the decisions of the Supreme Court of Appeals of the state. McBride v. Kirkpatrick (D. C. 1913) 207 Fed. 893.

102. Depositions.—This section does not authorize the taking of the deposition of one of the parties under the provisions of Code Civ. Proc. N. Y. § 870, since that section is inconsistent with sections 1468, 1470, 1472–1474, 1477–1481, ante. Hanks Dental Ass'n v. International Tooth Crown Co. (1904) 24 Sup. Ct. 700, 702, 194 U. S. 303, 48 L. Ed. 989.

Sections 1470–1481, ante, are so complete as to constitute the exclusive law regulating the use of depositions in the federal courts and a state statute authorizing the taking of depositions of parties, not authorized by these sections, is not applicable in federal courts, notwithstanding this section and section 1538, post. Id.

A state statute requiring every deposition intended to be read on the trial to be filed at least one day before the day of trial does not apply in the federal courts. Walker v. Collins (1893) 59 Fed. 70, 8 C. C. A. 1, judgment reversed (1897) 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76.

The right to take testimony by depositions in common-law causes pending in the United States courts depends upon the statutes of the United States, and not the statutes of the states in which such courts are held; but, when such right does exist under the United States statutes, the parties may follow, as to the mere mode of procuring the deposition, at their election, either the provisions of the state law or of the act of congress. McLennan v. Kansas City, St. J. & C. B. R. Co. (C. C. 1884) 22 Fed. 198.

Depositions taken to be used in an action in a state court which has been discontinued cannot be used in an action afterwards brought in a federal court between the same parties for the same cause of action, although the state practice allows depositions taken in a pending suit to be used in a renewed suit between the same parties for the same cause. Seeley v. Kansas City Star Co. (C. C. 1896) 71 Fed. 554.

Section 1476, ante, is supplementary to this section, so as to secure a uniformity in the mode of taking proof, which this section was intended to secure, but which it failed to secure under the judicial construction given to it. International Tooth-Crown Co. v. Hanks Dental Ass'n (C. C. 1900) 101 Fed. 306, 307.

Where a commission is issued by a federal court, it is not governed by the statutes of any state, but by section 1477, ante. U. S. v. Pings (D. C. 1880) 4 Fed. 714.

This section does not require a federal court to follow a state statute as to the manner of taking depositions in a proceeding in rem by the United States for the forfeiture of merchandise under the customs revenue laws, (1) because there are no "like causes" in the state courts; and (2) because the provision does not apply to the evidence of witnesses, either as to its character or competency, or the mode of taking it. U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601.

103. Examination of party, production of evidence, or view before trial.—The practice in the federal courts does

not permit plaintiff in an action at law to file, with his complaint, interrogatories to be answered by defendant. Ex parte Fisk (1885) 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Pierce v. Union Pac. Ry. Co. (C. C. 1891) 47 Fed. 709; Tabor v. Indianapolis Journal Newspaper Co. (C. C. 1895) 66 Fed. 423.

The state laws in relation to the examination of an adverse party before trial, and the production of books and papers, do not obtain in the federal courts, congress having specially legislated on such subjects. Easton v. Hodges (C. C. 1877) Fed. Cas. No. 4,-258; Schatz v. Winton Motor Carriage Co. (D. C. 1912) 197 Fed. 777.

This section does not apply to a physical examination of plaintiff before trial in an action for personal injuries. Union Pac. Ry. Co. v. Botsford (1891) 11 Sup. Ct. 1000, 1003, 141 U. S. 250, 35 L. Ed. 734.

This section does not apply to interrogatories addressed to the opposite party under Pub. St. Mass. c. 167, since the matter is regulated by sections 1468, 1472–1481, ante. National Cash-Register Co. v. Leland (1899) 94 Fed. 502, 37 C. C. A. 372.

The examination of an adverse party as a witness, before trial, as provided by state law, not followed by federal court. Beardsley v. Littell (C. C. 1877) Fed. Cas. No. 1,185.

Sections 1472–1474, ante, are not repealed by this section. Sage v. Tauszky (C. C. 1877) Fed. Cas. No. 12,214.

Interrogatories, authorized by a state statute, may be filed in a federal court, in an action at law, in lieu of a bill of discovery. Such remedy is cumulative merely, and not adopted as a substitute for a bill of discovery. Bryant v. Leyland (C. C. 1881) 6 Fed. 125.

Section 1469, ante, alone controls the practice as to discovery of books and papers in the federal courts, to the exclusion of the state practice. Gregory v. Chicago, M. & St. P. R. R. (C. C. 1882) 10 Fed. 529; U. S. v. National Lead Co. (C. C. 1896) 75 Fed. 94.

A federal court, being only authorized by section 1469, ante, to grant discovery of books and papers at the trial of an action at law, could not grant an inspection before trial under Rev. Laws Minn. 1905, § 4729. Kaiser v. Chicago, St. P., M. & O. Ry. Co. (D. C. 1912) 192 Fed. 1013.

A plaintiff may, in an action at law in a federal court, obtain an order for the examination of the defendant, to enable the plaintiff to frame his complaint, where such an order is provided for by the state Code of Procedure. Anderson v. Mackay (C. C. 1891) 46 Fed. 105.

Inasmuch as the circuit court of the United States is vested with exclusive jurisdiction to try cases involving the validity of patents issued by the United States, the rule that the pleadings and practice shall conform to the practice in like cases in the state court does not apply, and in such a case the plaintiff cannot avail himself of the provisions of the Ohio statute (Code, §§ 5099–5101), by attaching to his petition interrogatories to be answered by defendant on pain of being defaulted, and thereby compel him to disclose testimony which is important in the trial of the cause. Marvin v. C. Aultman & Co. (C. C. 1891) 46 Fed. 338.

The practice in the federal courts in relation to the inspection of papers for the purpose of aiding a party in preparing for trial, as distinguished from inspection of papers "to be used on the trial," is regulated by the practice prevailing in the state courts. Frescole v. City of Lancaster (C. C. 1895) 70 Fed. 337.

Plaintiff, in an action at law on contract, is entitled, under the Pennsylvania practice, for the purpose of completing his pleadings and preparing for trial, to an inspection of "plans" constituting part of the agreement sued on, where he shows that there is but one complete copy thereof, which is in defendant's possession. Id.

Section 372, p. 107, Court and Practice Act R. I. 1905, which requires a defendant to allow a reasonable inspection of its premises, is applicable to actions at law for a personal injury in a federal court within the state, and violates no constitutional right of a defendant. Mills v. Providence Belting Co. (C. C. 1906) 145 Fed. 447.

P. L. N. J. 1903, p. 537, § 140, providing that either party to a suit at law may submit interrogatories to the other concerning matters material to the issue, and that written answers shall be made thereto within 30 days, which answers shall only be evidence in the cause if offered by the party proposing the interrogatories, is inapplicable to federal courts sitting in New Jersey. Smith v. International Mercantile Co. (C. C. 1907) 154 Fed. 786.

Where interrogatories were served on defendant, to be answered by him and used at the trial of the cause in a federal court, under P. L. N. J. 1903, p. 537, § 140, authorizing such practice, which was inapplicable to the federal courts, defendant was not required to wait until the answers were offered in evidence before objecting thereto, but was entitled to raise the question of their regularity by a motion to strike. Id.

This section, while applicable to the jurisdiction over patent cases, does not change the methods of trial of an issue at law under section 1468, ante, which, requires a motion under section 1469, ante, or a bill of discovery to obtain an inspection of property in the possession of the adverse party; Code Civ. Proc. N. Y. § 803, not being available for that purpose in the federal courts. Cheatham Electric Device Co.

v. Transit Development Co. (C. C. 1911) 190 Fed. 202.

Law of New York authorizing examination before trial does not apply to actions in federal courts in that state. Barnes v. Trees (D. C. 1912) 194 Fed. 230.

A federal court in New York may, in conformity to Code Civ. Proc. N. Y. § 803, require the defendant in an action by a servant for a personal injury alleged to have been caused by a defective appliance to produce such appliance for plaintiff's inspection, which is in the nature of a discovery. Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88.

A federal court cannot compel a party in an action at law to produce books or papers before the trial, either under section 1469, ante, or under a state practice; the only remedy of the party desiring such production being by a bill of discovery in equity. Cheatham Electric Switching Device v. American Automatic Switch Co. (D. C. 1912) 198 Fed. 496.

Defendant, in an action at law for infringement of a patent, held not entitled to an examination of the plaintiff before answer. Fischer v. Automobile Supply Mfg. Co. (D. C. 1912) 199 Fed. 191.

Interrogatories calling for detailed information regarding the cause of action stated in the complaint are not available in the federal courts. Wetmore v. Goodwin Film & Camera Co. (D. C. 1915) 226 Fed. 352.

104. Trial—Time of trial.—In the absence of a state statute and rule of court prescribing the time when an issue of law could be called up for hearing, a rule of the circuit court authorizing it to be called up upon five days' notice is valid, notwithstanding the practice in the state courts does not permit it to be heard until the next term. Osborne v. City of Detroit (C. C. 1886) 28 Fed. 385.

105. —— Mode of trial.—In Act July 11, 1890 (26 Stat. 268), which incorporates the North River Bridge Company, gives it power to condemn lands, and provides that the compensation therefor shall be ascertained according to the laws of the state in which they are situated, the provision of section 4, that the condemnation proceedings in the federal circuit court shall conform "as nearly as may be to the practice in the courts of the state," must, like this section, be construed to be an adoption of the state laws only when they are consistent with the federal legislation; and therefore a circuit court should not follow the provisions of the New Jersey statutes requiring the condemnation commissioners appointed by the court to file the report of their assessment in the county clerk's office, but the same should be filed in the clerk's office of the circuit court; and, if a trial by jury should be had by way of appeal, as allowed by the state statutes, such trial must likewise be had in the circuit court. Luxton v. North River Bridge Co. (1893) 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194.

While an action at law in the federal courts may be instituted under this section by complaint, as distinguished from a formal declaration, the federal court will not in all respects be governed in the conduct of the case by the pleadings, forms, and mode of procedure prescribed by the state law, especially with reference to questions pertaining to the method of trial, when inconsistent with federal statutes. Swift & Co. v. Jones (1906) 145 Fed. 489, 76 C. C. A. 253, remanding case to court below (C. C. 1905) 135 Fed. 437, which is affirmed Same v. Ruffin (1907) 154 Fed. 1005, 83 C. C. A. 243.

Notwithstanding this section the constitution and laws of the United States require all issues of fact in common-law cases to be determined by a jury, unless the same is waived in writing by the parties. Lanning v. Lockett (C. C. 1882) 11 Fed. 814.

Where a defendant, in an action brought in a circuit court of the United States, files several pleas, the court may direct the issues of fact arising on one of the pleas to be tried first, according to the law of the state where the court sits, by virtue of this section. Norton v. City of Portsmouth (C. C. 1887) 31 Fed. 326.

Under sections 1584, 1587, post, making all issues of fact in the circuit court triable by jury except in proceedings in equity, bankruptcy, admiralty, and in cases of maritime jurisdiction, an action of book account can be tried only by a jury, notwithstanding this section, and the action mentioned is triable under the state practice only by auditors. Sulzer v. Watson (C. C. 1889) 39 Fed. 414.

106. —— Order of trial.—Where a defendant, in an action brought in a circuit court of the United States, files several pleas, the court may direct the issues of fact arising on one of the pleas to be tried first, according to the law of the state where the court sits, by virtue of this section. Norton v. City of Portsmouth (C. C. 1887) 31 Fed. 326.

107. —— Reception of evidence.—Under the rule of the federal courts, an offer to prove certain facts may be made without first propounding a question to a witness as a basis for such offer, and, if the offer is rejected, error may be assigned thereon where there is nothing to indicate that the offer was not made in good faith, or that the proof would not have been produced if permitted. Missouri Pac. Ry. Co. v. Castle (1909) 172 Fed. 841, 97 C. C. A. 124.

108. —— Dismissal or nonsuit at trial, and direction of verdict.—Whether

a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff on his own case shows no cause of action, is a question of "practice, pleadings, and forms and modes of proceeding," as to which the federal courts are required by this section to conform as near as may be to those existing in the courts of the state within which the trial is had. Central Transp. Co. v. Pullman's Palace Car Co. (1891) 11 Sup. Ct. 478, 481, 139 U. S. 24, 35 L. Ed. 55.

The granting of a nonsuit for want of sufficient evidence in an action at law, in accordance with the practice in the state courts, under this section, is not an infringement of the constitutional right of trial by jury. Coughran v. Bigelow (1896) 17 Sup. Ct. 117, 119, 164 U. S. 301, 41 L. Ed. 442.

Under Code Civ. Proc. Kan. § 397, plaintiff may dismiss his action without prejudice before its final submission to the jury, or to the court. Ætna Life Ins. Co. v. Township of Lakin (1894) 59 Fed. 989, 8 C. C. A. 437.

This section does not change the rule that the court may direct a verdict for defendant where the evidence is insufficient to warrant a verdict for plaintiff. Sloss Iron & Steel Co. v. South Carolina & G. R. Co. (1898) 85 Fed. 133, 29 C. C. A. 50.

Under this section and Rev. St. Mo. 1899, § 639, providing that plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury or to the court, it was not error for the United States court sitting in Missouri to grant plaintiff's motion for a nonsuit, made subsequent to the announcement by the court of its intention to direct a verdict in favor of defendant, but before the jury had retired from the court room or returned a verdict. Chicago, M. & St. P. Ry. Co. v. Metalstaff (1900) 101 Fed. 769, 41 C. C. A. 669.

Where a voluntary nonsuit was permitted by the state practice, it was within the discretion of a federal court to refuse to allow a nonsuit after plaintiff had concluded his evidence, and a motion by defendant for direction of a verdict had been submitted and sustained, on the grounds both of the insufficiency of the complaint and of the evidence to sustain it. Huntt v. McNamee (1905) 141 Fed. 293, 72 C. C. A. 441.

In a state where a plaintiff is entitled to take a nonsuit as a matter of right, such right must be exercised in a federal court before the cause has been submitted for decision either to the court or jury. On the making of a motion by defendant for direction of a verdict, plaintiff is required to elect whether or not he will take a nonsuit, and, if he submits the cause for determination on the motion, it is within the discretion of the court to grant the motion and to refuse to permit a nonsuit, although such discretion should be so exercised as not to work an injustice to plaintiff. Parks v. Southern Ry. Co. (1906) 143 Fed. 276, 74 C. C. A. 414.

Under this section it was error for the federal Circuit Court, sitting in Illinois, in an action tried to a jury, to refuse plaintiff's motion for leave to take a nonsuit, after the judge had announced his decision sustaining a motion for a directed verdict. Meyer v. National Biscuit Co. (1909) 168 Fed. 906, 94 C. C. A. 335.

Under the federal practice, it is the duty of the trial court to direct a verdict when the evidence is undisputed, or is of such a conclusive character that the court would, in the exercise of a sound judicial discretion, be compelled to set aside a verdict rendered in opposition to it. Louisville & N. R. Co. v. Roberts (1910) 177 Fed. 922, 101 C. C. A. 202.

This section applies to Civ. Code Prac. Ky. § 371, permitting a plaintiff to dismiss without prejudice before final submission of the case to the jury. Under these acts, and under Civ. Code Prac. Ky. § 371, permitting a plaintiff to dismiss without prejudice before final submission of the case to the jury, it was error to refuse to allow plaintiff to dismiss without prejudice before peremptory instruction for defendant, though motion was made after the judge stated he would sustain defendant's motion for verdict. Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514.

Hurd's Rev. St. Ill. 1909, c. 110, § 70, amending the practice act by providing that "every person desirous of suffering a nonsuit shall be barred therefrom, unless he do so, * * * if the case is tried before the court without a jury, before the case is submitted for final decision," if applicable in any case in a federal court, does not affect the right of the court to grant a nonsuit after a finding has been made, where it has been set aside. Southern Pac. Co. v. Kelley (1911) 187 Fed. 937, 109 C. C. A. 659.

A compulsory nonsuit is not allowed in the courts of the United States except where a statute of the state authorizes it; the practice of directing a verdict for the defendant when the evidence is clearly insufficient to support a verdict for plaintiff having taken its place. Board of Com'rs of City and County of Denver v. Home Savings Bank (1912) 200 Fed. 28, 118 C. C. A. 256.

Where the state law permits a court to grant an involuntary nonsuit on the ground that the evidence with all the inferences to be drawn therefrom would not sustain a verdict for the

plaintiff, a federal court may do likewise. Shank v. Great Shoshone & Twin Falls Water Power Co. (1913) 205 Fed. 833, 124 C. C. A. 35. But, if the evidence is sufficient to sustain the cause of action, a motion for nonsuit should be denied. Russo-Chinese Bank v. National Bank of Commerce of Seattle, Wash. (1911) 187 Fed. 80, 109 C. C. A. 398.

Where a motion had been made to instruct a verdict for defendant at the close of plaintiff's testimony, it was then too late for plaintiff to take a voluntary nonsuit, though such practice might be authorized in the state courts. Cogdill v. Whiting Mfg. Co. (1914) 212 Fed. 658, 129 C. C. A. 194.

It is a rule of decision in the federal courts that in disposing of a motion to direct a verdict the trial judge cannot weigh the evidence. Shadoan v. Cincinnati, N. O. & T. P. Ry. Co. (1915) 220 Fed. 68, 135 C. C. A. 638.

The irregularity, if any, in entering a compulsory nonsuit in accordance with the state practice, instead of directing a verdict for defendant, was one of form only. Dominion Trust Co. v. National Surety Co. (1915) 221 Fed. 618, 137 C. C. A. 342.

Under section 243 of the Oregon Code, the plaintiff in an action can only become nonsuited before the trial commences, or afterwards, with the consent of the defendant; and this is considered the later and better rule generally. U. S. v. Humason (C. C. 1881) 8 Fed. 71.

When the commission retained for services in negotiating a loan is so large as to be usurious on its face, it is the duty of the court, in the absence of explanatory proof, to say so. It is not, in the federal courts, a question for the jury. Sherwood v. Roundtree (C. C. 1887) 32 Fed. 113.

The federal court will allow plaintiff, before verdict, in an action removed from a state court in Georgia, to discontinue his suit as to part of the amount sued on, which he could do before removal under Code Ga. § 3479, authorizing amendments at any stage of the cause as matter of right. Nussbaum v. Northern Ins. Co. (C. C. 1889) 40 Fed. 337.

The right of a plaintiff in a federal court to take a nonsuit is governed by the state statutes. Gassman v. Jarvis (C. C. 1899) 94 Fed. 603; Drummond v. Louisville & N. R. Co. (C. C. 1901) 109 Fed. 531.

Practice Act Pa. April 22, 1905 (P. L. 286), provides that "whenever upon the trial of any issue a point requesting binding instructions has been reserved or declined the party presenting the point may * * * move the court to have all the evidence duly certified and filed so as to become part of the record and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new tria to so certify the evidence and to ente such judgment as should have been en tered upon that evidence." As con strued by the Supreme Court of th state, such statute does not infring upon the province of the jury, bu merely gives the court the same powe after verdict that it had before to di rect a verdict for either party upon th whole evidence. Held, that such prac tice was adaptable to the federa courts; and one which the Circui Courts within the state were require to follow by this section. Fries-Bres lin Co. v. Bergen (C. C. 1909) 168 Fed 360, judgment affirmed (1909) 176 Fed 76, 99 C. C. A. 384, writ of certiorar denied Fries-Breslin Co. v. Berga (1910) 30 Sup. Ct. 410, 215 U. S. 60 54 L. Ed. 347.

Under this section a federal court i required to conform to the laws of th state in which the court is held, as t the time within which plaintiff ma move for a nonsuit. Whitted v. South western Telegraph & Telephone Co (D. C. 1914) 217 Fed. 835.

109. —— Instructions and control o deliberations of jury.—This section doe not require federal judges to confor to state regulations in the submissio of cases and the control of the delibera tions of juries; such proceedings bein governed by the common law. Nudd v Burrows (1875) 91 U. S. 426, 441, 44 23 L. Ed. 286; Indianapolis & St. L. R Co. v. Horst (1876) 93 U. S. 291, 30 23 L. Ed. 898; Western Union Tel. Co v. Burgess (1901) 108 Fed. 26, 47 C C. A. 168 (writ of certiorari denie [1901] 21 Sup. Ct. 924, 181 U. S. 62 45 L. Ed. 1031); Liverpool & L. & G Ins. Co. v. N. & M. Friedman Co (1904) 133 Fed. 713, 66 C. C. A. 54 U. S. v. Train (C. C. 1882) 12 Fed. 85

Judges of federal courts are not con trolled, in charging juries, by state stat utes requiring that all instructions o the court to the jury shall be in writin Lincoln v. Power (1894) 151 U. 436, 14 Sup. Ct. 387, 38 L. Ed. 22 Mexican Cent. Ry. Co. v. Glover (1901 107 Fed. 356, 46 C. C. A. 334; Steer v. U. S. (1911) 192 Fed. 1, 112 C. C A. 423.

A trial judge in a federal court is no prohibited from expressing his opinio on the facts. Mead v. Darling (190 159 Fed. 684, 86 C. C. A. 552; Young Corrigan (D. C. 1912) 208 Fed. 431.

This section does not apply to th manner of giving instructions in th United States courts. Abbott v. Cu tis & Co. Mfg. Co. (C. C. 1885) 2 Fed. 402; U. S. v. Oppenheim (D. 1915) 228 Fed. 220.

In those states in which the practi prevails for the judge to express h opinion on the facts of a case in h charge to the jury, the courts of th United States may follow the sam

practice. Mitchell v. Harmony (1851) 54 U. S. (13 How.) 115, 14 L. Ed. 75.

The personal conduct and administration of the judge in the discharge of his separate functions are not "practice, pleadings, and forms and modes of proceedings," within this section. Nudd v. Burrows (1875) 91 U. S. 426, 442, 23 L. Ed. 286; W. B. Grimes Dry-Goods Co. v. Malcolm (1896) 17 Sup. Ct. 158, 160, 164 U. S. 483, 41 L. Ed. 524.

A state constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact. St. Louis, I. M. & S. Ry. Co. v. Vickers (1887) 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161.

This section does not apply to the practice of requiring exceptions to the charge to be made while the jury is at the bar, and before it retires; and a state statute dispensing with this requirement will not be followed. Consumers' Cotton-Oil Co. v. Ashburn (1897) 81 Fed. 331, 26 C. C. A. 436.

Where a fact was proved from which two inferences could be drawn, one tending to establish fraud and the other innocence, it was within the province of the trial judge in a federal court to call the jury's attention to the latter probability or possibility. Mead v. Darling (1908) 159 Fed. 684, 86 C. C. A. 552.

This section does not apply to the personal conduct and administration of the judge in discharging his separate functions; and hence state statutes and constitutions forbidding, judges in instructing to express an opinion on the facts do not bind federal courts, nor does the statute apply to provisions requiring written instructions to be taken by the jury on retiring or permitting papers read in evidence to be taken by them or requiring written instructions, or forbidding separation of the jury, or requiring exceptions to the charge to be made before the jury retires. Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514.

Gen. Code Ohio, § 11452, and practice thereunder as to instructions, in the absence of the parties, after the retirement of the jury, held not rendered applicable to federal courts by this section. Yates v. Whyel Coke Co. (1915) 221 Fed. 603, 137 C. C. A. 327.

State decisions in relation to charges to the jury are not binding on federal courts. Hankin v. Squires (C. C. 1870) Fed. Cas. No. 6,025.

A federal judge is not a mere arbitrator to rule on objections to evidence and to charge the jury on the law, but he is an essential part of the machinery whereby just conclusions of fact are reached and may properly control the inquiry and assist the jury to a just determination. Young v. Corrigan (D. C. 1912) 208 Fed. 431.

While a federal court is authorized to call to the jury's attention portions of evidence deserving special consideration, it is the duty of the jury to determine the weight of the evidence and questions of fact independent of the opinion of the court. U. S. v. Reid (D. C. 1913) 210 Fed. 486.

110. —— Verdict and submission of special issues.—This section does not include statutes requiring the jury to be directed to find specially upon particular questions of fact. Indianapolis & St. L. R. Co. v. Horst (1876) 93 U. S. 291, 23 L. Ed. 898; McElwee v. Metropolitan Lumber Co. (1895) 69 Fed. 302, 16 C. C. A. 232; U. S. v. Train (C. C. 1882) 12 Fed. 852; Dwyer v. St. Louis & S. F. R. Co. (C. C. 1892) 52 Fed. 87.

This section applies to the form and effect of verdicts. Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514; Ohman v. New York (C. C. 1909) 168 Fed. 953. CONTRA, Toledo, St. L. & W. R. Co. v. Reardon (1908) 159 Fed. 366, 86 C. C. A. 366; Abbott v. Curtis & Co. Mfg. Co. (C. C. 1885) 25 Fed. 402.

As the manner of entering the findings of the jury in the state courts is a mere matter of practice, no obligation rests upon the United States courts to conform to such practice. Long v. Palmer (1842) 41 U. S. (16 Pet.) 65, 10 L. Ed. 888.

The force and effect of a verdict rendered in the circuit court of the United States for the eastern district of Louisiana depend upon the rules of the common law and the acts of congress, and not upon the Louisiana Code of Practice. Parks v. Turner (1851) 53 U. S. (12 How.) 39, 13 L. Ed. 883.

A statute of a state, providing that a verdict returned on several counts shall not be set aside or reversed if one count is sufficient, governs proceedings in cases tried in the federal courts within that state, and is applicable to judgments lawfully rendered without a verdict. Bond v. Dustin (1884) 5 Sup. Ct. 296, 299, 112 U. S. 604, 28 L. Ed. 835.

In an action in the federal court on an accident insurance policy, for the death of the policyholder, alleged to have been accidentally caused in a certain manner, refusal to submit a special verdict as to whether the death was caused in that manner is not error, though the submission of special verdicts on request is required by the rules of practice in the state where the court is held, as such refusal is neither pleading, practice, nor form or mode of proceeding, within this section. United States Mut. Acc. Ass'n v. Barry (1889) 9 Sup. Ct. 755, 131 U. S. 100, 33 L. Ed. 60, affirming judgment Barry v. United States Mut. Acc. Ass'n (C. C. 1885) 23 Fed. 712.

The local practice as to right of jurors to impeach their own verdict does not, because of this section, control federal courts. McDonald v. Pless (1915) 35 S. Ct. 783, 238 U. S. 264, 59

L. Ed. 1300, affirming judgment (1913) 206 Fed. 263, 124 C. C. A. 131.

Judgment under federal Employers' Liability Act April 22, 1908, as amended April 5, 1910, will not be reversed because the jury was not required to specify in its verdict the amount given for decedent's conscious suffering and that for pecuniary loss sustained, where the verdict seems in harmony with local practice. Kansas City Southern R. Co. v. Leslie (1915) 35 Sup. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478, reversing judgment (1914) 167 S. W. 83, 112 Ark. 305.

The federal courts in Missouri are not required to follow the statute of that state (Laws 1895, p. 168) which requires juries, in cases in which exemplary damages are allowed, to assess such damages separately. Times Pub. Co. v. Carlisle (1899) 94 Fed. 762, 36 C. C. A. 475.

Where a jurisdictional allegation in a plaintiff's pleading in an action at law in a federal court is denied by the answer, and the code practice of the state requires matters in abatement to be pleaded by answer, an issue of fact is thus joined, which is to be tried with the other issues, although it should be submitted to the jury for a separate finding distinct from that on the other issues. Roberts v. Langenbach (1902) 119 Fed. 349, 56 C. C. A. 253.

A general verdict on several counts in a complaint and several counterclaims in an answer is sufficient in a national court in an action at law, although several or special verdicts are required in such cases in the courts of the state in which the trial is had. City of St. Charles v. Stookey (1907) 154 Fed. 772, 85 C. C. A. 494, writ of certiorari denied (1908) 28 Sup. Ct. 569, 208 U. S. 617, 52 L. Ed. 647.

Where, in an action in a federal court to recover from a building contractor for a breach of contract by alleged defective work, the jury under proper instructions as to the measure of damages returned a special verdict finding the amount of damages caused by the failure of defendant to perform its contract, a general verdict for plaintiff for such amount less the amount of a final payment which would have been due defendant under the contract if properly performed was consistent with the special verdict and proper, regardless of the technical rules of procedure governing the local courts of the state. General Fireproofing Co. v. L. Wallace & Son (1910) 175 Fed. 650, 99 C. C. A. 204, writ of certiorari denied (1910) 30 Sup. Ct. 697, 217 U. S. 607, 54 L. Ed. 900.

In view of the seventh amendment, a federal court may not follow a state practice in interfering with verdicts based on a state statute. Suravitz v. Pristasz (1912) 201 Fed. 335, 119 C. C. A. 573.

Federal courts are not bound by the rules obtaining in local courts, for interpreting special verdicts; the general rule being that in determining what judgment shall be entered on a special verdict, the court will not look to the evidence nor beyond the pleadings and the judge's record. Spokane & I. E. R. Co. v. Campbell (1914) 217 Fed. 518, 133 C. C. A. 370.

III. —— **Trial by court.**—The practice in Louisiana that, where neither party claims a trial by jury, the whole case is decided by the court governs in an action at law in the federal court for a district of Louisiana. Bond v. Brown (1851) 12 How. 254, 256, 13 L. Ed. 977.

Though the laws of a state authorize a submission of a law case to the court without the intervention of a jury, such laws cannot regulate the proceedings of a federal court sitting in the state, so as to authorize it to depart from the modes of proceedings prescribed by the acts of congress in such a case. Kelsey v. Forsyth (1858) 62 U. S. (21 How.) 85, 16 L. Ed. 32.

The Illinois statute, providing that in an action at law tried without a jury, propositions of law may be submitted to the court, and a ruling required, in order to lay a foundation for a writ of error, is not made applicable to trials in the federal courts by this section since the practice in such cases is prescribed by sections 1587, 1668, post. U. S. v. Indian Grave Drainage Dist. (1898) 85 Fed. 928, 29 C. C. A. 578.

On trial of a cause in a Circuit Court without a jury, as provided in R. S. §§ 649, 700, post, §§ 1587, 1668, the procedure is governed by the provisions of such statute; and the court may, at its option, make either general or special findings. It cannot be required to rule on specific propositions of law presented by the parties in accordance with a state practice. Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190.

The making of special findings by a federal Circuit Court on waiver of a jury, and the effect thereof, is governed by R. S. §§ 649, 700, post, §§ 1587, 1668, and not by state statutes. Jones v. U. S. (1905) 135 Fed. 518, 68 C. C. A. 68.

A state law requiring a judge to give his decision in writing upon every issue made by the pleadings is not binding on the federal courts. Martindale v. Waas (C. C. 1882) 11 Fed. 551.

Provisions of the Washington Code, which, by this section operate as rules of practice in actions at law in the federal courts in that state, require that a complaint shall contain a plain and concise statement of the facts constituting the cause of action, and allow defendant to demur to the complaint if it appears on its face that the court has no jurisdiction of the parties

or of the subject-matter, and, if the defect does not affirmatively appear on the face of the complaint, it may be pleaded in the answer; and defendant may, in an answer, traverse the complaint by a general denial, or by a specific denial of the particular allegations which he wishes to controvert. Held, that an allegation, in a complaint in ejectment in the United States circuit court, as to the value of the property in controversy, was material, and, when denied in the answer, raised an issue; and that consequently, to sustain a judgment for plaintiff, the court must, where the action was tried without a jury, specially find that the value exceeded $2,000. Greene v. City of Tacoma (C. C. 1892) 53 Fed. 562.

112. New trial.—This section does not require conformity to the state practice by the federal courts in respect to motions for a new trial, and, where a motion for new trial was filed and disposed of in accordance with a rule of court, it is immaterial that the requirements of the state practice were not observed. Indianapolis & St. L. R. Co. v. Horst (1876) 93 U. S. 291, 301, 23 L. Ed. 898; Missouri Pac. R. Co. v. Chicago & A. R. Co. (1889) 10 Sup. Ct. 65, 132 U. S. 191, 33 L. Ed. 309; Fishburn v. Chicago, M. & St. P. Ry. Co. (1890) 11 Sup. Ct. 8, 137 U. S. 60, 34 L. Ed. 585; Tullis v. Lake Erie & W. R. Co. (1901) 105 Fed. 554, 44 C. C. A. 597; City of Manning v. German Ins. Co. (1901) 107 Fed. 52, 46 C. C. A. 144 (reversing order German Ins. Co. v. Town of Manning [C. C. 1900] 100 Fed. 581); Francisco v. Chicago & A. R. Co. (1906) 149 Fed. 354, 79 C. C. A. 292, 9 Ann. Cas. 628; Yost v. Union Pac. R. Co. (1906) 151 Fed. 1023, 81 C. C. A. 683; St. Louis Cordage Co. v. Missouri, K. & T. Ry. Co. (1907) 151 Fed. 1021, 81 C. C. A. 682; Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514; Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314; U. S. v. Train (C. C. 1882) 12 Fed. 852, 853; Lowry v. Mt. Adams & Eden Park Incline Plane Ry. Co. (C. C. 1895) 68 Fed. 827; U. S. v. Seufert Bros. Co. (C. C. 1897) 78 Fed. 520; Duke v. St. Louis & S. F. R. Co. (C. C. 1909) 172 Fed. 684; Latchtimacker v. Jacksonville Towing & Wrecking Co. (C. C. 1910) 181 Fed. 276.

A state statute allowing defendant in ejectment a new trial on payment of costs is binding in the federal court. Equator Mining & Smelting Co. v. Hall (1882) 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; Smale v. Mitchell (1892) 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90; Hiller v. Shattuck (C. C. 1872) Fed. Cas. No. 6,504.

Where a new trial is granted as of course in a state court under the state statute, the party cannot abandon the special remedy, and proceed in the federal court. Fraser v. Weller (C. C. 1853) Fed. Cas. No. 5,064.

A bill in chancery brought to vacate a judgment obtained in a court of law, and to order a new trial, takes the place of the ordinary petition for a new trial, provided for by the Code of Civil Procedure of this state, and must be brought within one year from the rendition of the judgment sought to be vacated. Tice v. School Dist. of Adams County (C. C. 1883) 14 Fed. 886.

This section does not disturb the settled law of the federal courts with respect to granting or refusing new trials, and a state statute providing that a new trial shall not be granted on account of the smallness of damages is not binding on a federal court. If applicable to the federal court, it would be in violation of the seventh amendment to the federal constitution. Hughey v. Sullivan (C. C. 1897) 80 Fed. 72.

The federal circuit court has the same power to grant a new trial in a case of conflicting evidence as under other circumstances. Boudrot v. Cochrane Chemical Co. (C. C. 1901) 110 Fed. 919.

The rules which prevail in the federal courts with reference to setting aside verdicts of juries on the ground that they are against the evidence, or the weight of the evidence, commented on, explained, and applied. Morse v. St. Paul Fire & Marine Ins. Co. (C. C. 1903) 124 Fed. 451.

Where a verdict awarding damages for a personal injury returned in a federal court is excessive, the court has power in its discretion to require a remittitur of a stated sum as a condition to the overruling of a motion for a new trial. Daigneau v. Grand Trunk Ry. Co. (C. C. 1906) 153 Fed. 593.

Practice Act Pa. April 22, 1895 (P. L. 286), authorizing a motion for a new trial is applicable to actions at law tried in the federal courts sitting in that state. Troxell v. Delaware, L. & W. R. Co. (C. C. 1910) 180 Fed. 871, judgment reversed Delaware, L. & W. R. Co. v. Troxell (1910) 183 Fed. 373, 105 C. C. A. 593, and writ of certiorari denied Troxell v. Delaware, L. & W. R. Co. (1911) 31 S. Ct. 469, 219 U. S. 584, 55 L. Ed. 346.

113. Reference.—The legislature of a state cannot change radically the mode of proceeding prescribed for the federal courts, or direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. Bank of Hamilton v. Dudley (1829) 2 Pet. 492, 525, 7 L. Ed. 496.

Under this section, a reference to hear, try, and determine may be ordered, upon consent of parties, in accordance with the provisions of the

New York Code of Civil Procedure; and, upon the failure of a referee so appointed to file his report within 60 days after the final submission of the case to him, the reference may be terminated as provided in section 1019 of said Code, and thereafter the referee has no jurisdiction to make a report, nor can any judgment be entered upon one if made. Parker v. Ogdensburgh & L. C. R. Co. (1897) 79 Fed. 817, 25 C. C. A. 205.

Where a state statute requires a referee to return the evidence with his report, the legal presumption on appeal, in the absence of evidence to the contrary, is that he complied with the statute. Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314.

Though the statute of a state required exceptions to the report of a referee in actions at law to be filed within four days after the filing of the report, the federal court may extend the time for filing exceptions for a defeated party, where no notice of a filing is received within the four days, for seven days, and consider exceptions filed within the extension of time. Id.

Where a cause is referred under the authority of a state statute, the referee and the trial court should follow the local practice and modes of proceeding as near as may be. Tiernan v. Chicago Life Ins. Co. (1914) 214 Fed. 238, 131 C. C. A. 284.

A reference under state statutes not being recognized by the federal courts, a stipulation to confess judgment for the amount reported by the referee will not be enforced therein. Denny v. Brown (C. C. 1844) Fed. Cas. No. 3,805.

State statutes authorizing and regulating references have no application to federal courts. Id.

The federal courts will not entertain questions on a referee's report, but will regard and treat it as an award by arbitration. Id.

Following the practice of the state courts, the judgment upon a referee's report in the federal courts may be entered without an application to the court. Fourth Nat. Bank v. Neyhardt (C. C. 1876) Fed. Cas. No. 4,991.

The circuit court of the United States has no authority to refer a suit at common law to a referee for trial, without the consent of both parties, although, in the state court, such a suit is referable without consent. Howe Mach. Co. v. Edwards (C. C. 1878) Fed. Cas. No. 6,784.

A reference by consent of an action at law in the federal circuit court, being regarded as referring to the practice of the courts of the state, is lawful, and after a trial before the referee the court may grant a new trial. Robinson v. Mutual Ben. Life Ins. Co. (C. C. 1879) Fed. Cas. No. 11,961.

Under Rev. St. Idaho 1887, §§ 4414, 4419–4421, authorizing a reference by consent in actions at law, which, by virtue of this section, are applicable in actions in the federal courts, or at least may be made so by consent of the parties, and which provide that in case of such reference the referee shall try all the issues whether of fact or law, and "report a finding and judgment thereon," which must stand as the finding of the court, and "may be excepted to and reviewed in like manner as if made by the court," the court has no power on exceptions filed to a referee's findings of fact to review the evidence, but can only do so on a motion for a new trial, as in case of a finding by the court or the verdict of a jury; the office of the exceptions provided for being merely to bring in question the conduct of the referee, the regularity of the proceedings, or the sufficiency of the findings under the order of reference or to meet the issues. U. S. v. Ramsey (C. C. 1907) 158 Fed. 488.

The state practice may be followed according to stipulation in a reference of an action at law in a federal court. Alder v. Edenborn (D. C. 1912) 198 Fed. 928.

A federal court, of its own motion or on motion of either party, may refer the issues to a referee as an officer of the court, to simplify the issues by a preliminary investigation prior to actual trial by jury. U. S. v. Wells (D. C. 1913) 203 Fed. 146.

Issues in an action at law in the federal court, independent of statute, may be referred by consent of parties to a referee, whose report, when accepted by the court, may be a proper foundation of judgment. Id.

Under sections 1584, 1587, post, a federal court has no authority to grant a compulsory reference in an action at law, though the issues involved an accounting, and though such procedure is authorized by a state statute. Id. CONTRA, Eaken v. U. S. (D. C. 1822) Fed. Cas. No. 4,235.

114. Receivers.—A state statute prohibiting the appointment of nonresidents of the state as receivers applies only to its own courts, and cannot control the action of a federal court. Judgment, McGonigale v. City of Defiance (C. C. 1905) 140 Fed. 621, affirmed. City of Defiance v. McGonigale (1907) 150 Fed. 689, 80 C. C. A. 425, writ of certiorari denied (1907) 28 Sup. Ct. 254, 207 U. S. 585, 52 L. Ed. 352.

115. Motions in general.—All motions, in a suit at common law, which are required, by the practice of the state courts of New York, to be made at a special term of a state court, may be made at a stated term of a federal court. Emma Silver Min. Co. v. Park (C. C. 1878) Fed. Cas. No. 4,467.

116. Damages.—In the absence of any state statute on the subject, the

measure of damages for breach of a contract to convey land is a matter of general law upon which the federal courts exercise their independent judgment. Clark v. Belt (1915) 223 Fed. 573, 138 C. C. A. 1.

117. Requisites, record, and effect of judgment.—Practice Act Pa. April 22, 1895 (P. L. 286), authorizing a motion for a judgment non obstante veredicto, is applicable to actions at law tried in federal courts sitting in that state. Smith v. Jones (1910) 181 Fed. 819, 104 C. C. A. 329; Keiper v. Equitable Life Assur. Society of United States (C. C. 1908) 159 Fed. 206 (judgment reversed Equitable Life Assur. Society of United States v. Keiper [1908] 165 Fed. 595, 91 C. C. A. 433, and writ of certiorari denied [1909] 30 Sup. Ct. 406, 215 U. S. 606, 54 L. Ed. 346); Troxell v. Delaware, L. & W. R. Co. (C. C. 1910) 180 Fed. 871 (judgment reversed Delaware, L. & W. R. Co. v. Troxell [1910] 183 Fed. 373, 105 C. C. A. 593, and writ of certiorari denied [1911] 31 Sup. Ct. 469, 219 U. S. 584, 55 L. Ed. 346).

The act of Mississippi authorizing a judgment by motion against a sheriff for failing to pay over moneys collected on an execution was adopted by congress by the process act of 1828, so as to make it applicable to proceedings in the United States courts against marshals in like case. Gwin v. Breedlove (1844) 43 U. S. (2 How.) 29, 11 L. Ed. 167.

Where there are special and general counts in a declaration, and a demurrer is filed, which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment will not be set aside because the demurrer was undisposed of; a statute of the state where the cause was tried allowing one good count to sustain a judgment. Townsend v. Jemison (1849) 7 How. 706, 722, 12 L. Ed. 880.

Although, according to the laws and practice of Pennsylvania, certain docket minutes of the result of a suit, entered by way of note, e. g. "new trial refused and judgment on verdict," may be a good record, it does not follow that it is good in the courts of the United States. Reeside v. Walker (1850) 52 U. S. (11 How.) 272, 287, 13 L. Ed. 693.

State laws holding a judgment by default in an action of contract for a fixed sum to be merely interlocutory and not final, and postponing such judgment to a subsequent deed made before the judgment is affirmed by the court, are not binding on the courts of the United States, on a question arising on such a judgment of the circuit court of the United States. Clements v. Berry (1850) 52 U. S. (11 How.) 398, 13 L. Ed. 745.

The act of 1824 adopting to a certain extent the practice of the state courts has no reference to a provision in the constitution of a state requiring the judges in the courts thereof to give the reasons on which their judgments are founded, and the provision is inconsistent with the practice and modes of proceeding in the courts of the United States. Parks v. Turner (1851) 12 How. 39, 46, 13 L. Ed. 883.

The state practice as to judgment against one coparty held to furnish the rule of practice in the federal court. Sawin v. Kenny (1876) 93 U. S. 289, 290, 23 L. Ed. 926.

A statute of a state providing that a verdict returned on several counts shall not be set aside or reversed if one count is sufficient governs proceedings in case tried in the federal courts within that state, and is applicable to judgments lawfully rendered, without a verdict. Bond v. Dustin (1884) 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835.

In view of a local statute authorizing a plaintiff in ejectment to recover against defendants or either of them the whole of the premises or any part thereof, or any interest therein, according to the rights of the parties, the federal court in a suit in ejectment has authority to render judgment for only part of the land in controversy. Morgan v. Eggers (1888) 8 Sup. Ct. 1041, 1042, 127 U. S. 63, 32 L. Ed. 56.

The dismissal of a petition in a state court, if not there a bar to a new petition, is not a bar to a petition in the federal court. King v. McLean Asylum of Massachusetts General Hospital (1894) 64 Fed. 331, 12 C. C. A. 145.

In the absence of any established practice of the state otherwise, a judgment notwithstanding the verdict can be granted only on the record, and the court in disposing of the motion therefor is not authorized to look to the evidence. U. S. v. Gardner (1904) 133 Fed. 285, 66 C. C. A. 663.

The provision of Practice Act Pa. April 22, 1905 (P. L. 286), which imposes upon a court refusing a motion for judgment non obstante veredicto, properly made thereunder, the duty of certifying the evidence and granting an exception to the party against whom the ruling is made, under this section is applicable to the federal courts in that state, and no separate request for such exception is necessary. Baltimore & O. R. Co. v. McCune (1909) 174 Fed. 991, 98 C. C. A. 561.

This section applies to the mode of entering and recording judgments, including provisions for entering judgments against one or more defendants. Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514.

A federal court may on motion for judgment non obstante veredicto order that all the evidence taken on the trial by an official stenographer becoming under Act Pa. May 1, 1907 (P. L. 135), an officer of the court, be certified and filed so as to become a part of the rec-

ord. Cornette v. Baltimore & O. R. Co. (1912) 195 Fed. 59, 115 C. C. A. 61.

The practice of rendering judgment non obstante veredicto does not prevail in the federal courts. Pacific Mills v. Farish (1914) 213 Fed. 448, 130 C. C. A. 95.

Where a motion is made to set aside a general verdict in a federal court, and to render judgment for defendant on special findings, the matter is to be determined by the common law and not by the state statute. City of Detroit v. Grummond (1914) 216 Fed. 273, 132 C. C. A. 417.

Under the acts of 1789 and 1792, the lien upon land, created by judgments in the federal courts, and the mode of obtaining satisfaction of judgments, are regulated by the state law. Koning v. Bayard, Jr. (C. C. 1829) Fed. Cas. No. 7,924. See post, § 1606.

The clerk of a United States circuit court has no authority to enter judgment for any other sum than the verdict and statute call for. Robostelli v. New York, N. H. & H. R. Co. (C. C. 1888) 34 Fed. 507.

It results from this section that the question as to the judgment which must follow dismissal of a case by plaintiffs must be determined by the state law. Lapp v. Ritter (C. C. 1898) 88 Fed. 108, 109.

The jurisdiction of the federal court over its terms and over its clerk is sufficient to cover the actual entry of judgment, though the court exercises no discretion beyond ordering judgment to be entered in the manner determined by the referee. Alder v. Edenborn (D. C. 1912) 198 Fed. 928.

Where the amount and date of entry of judgment is fixed by stipulation, notice of entry of judgment thereunder in the federal District Court of Minnesota need not be given under Gen. St. Minn. 1913, §§ 7742, 7745, 7749, 7793, providing for notice of subsequent proceedings to defendants after appearance filed, and this section. Nelson v. McMillan (Iowa, 1916) 156 N. W. 327.

118. Vacation of judgment.—Authority of federal courts to set aside, vacate, and modify judgments after the term at which they were rendered can neither be conferred upon nor withheld from them by the statutes of a state or the practice of its courts. Bronson v. Schulten (1881) 104 U. S. 410, 417, 26 L. Ed. 797; U. S. v. Mayer (1914) 35 S. Ct. 16, 235 U. S. 55, 59 L. Ed. 129; Tryon v. Pennsylvania R. Co. (D. C. 1914) 213 Fed. 49.

Where the statutes of a state provide for proceedings in a court of law to set aside a judgment rendered by such court on the ground of fraud, or unavoidable casualty or misfortune preventing the party from appearing or defending, such provisions, by force of this section, are applicable to and govern procedure in the federal courts. Travelers' Protective Ass'n v. Gilbert (1901) 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538.

The power conferred on judges by Code N. C. 1883, § 274 (Revisal 1905, §§ 512, 513), to set aside a judgment after the term at which it was rendered, and within one year, when rendered against a party through his mistake, inadvertence, surprise, or excusable neglect, by virtue of this section, may be exercised by a federal court sitting in that state in an action of ejectment McDowell, District Judge, dissenting holds that such power is an equitable one and can only be exercised by a federal court through a plenary suit in equity. Virginia, T. & C. Steel & Iron Co. v. Harris (1907) 151 Fed. 428, 80 C. C. A. 658.

The right of a federal court to set aside, vacate, or modify its earlier rulings or judgment in a cause at any time during the term is inherent and unaffected by the provisions of a statute regulating practice in the state courts Southern Pac. Co. v. Kelley (1911) 187 Fed. 937, 109 C. C. A. 659.

The court's inherent power to set aside a default judgment is limited by Code W. Va. 1906, c. 125, § 47. Wylie Permanent Camping Co. v. Lynch (1912) 195 Fed. 386, 115 C. C. A. 288 writ of certiorari denied (1912) 32 S. Ct. 839, 225 U. S. 707, 56 L. Ed. 1266

The practice of a state court in opening decrees by default after the term at which they became absolute will not be observed in a federal court, under this section. Austin v. Riley (C. C 1893) 55 Fed. 833.

A federal law court has no power to vacate its judgment of a former term founded on a false, but apparently valid, return of service of process. King v. Davis (C. C. 1905) 137 Fed. 222 judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348

Code Civ. Proc. S. C. § 195, which permits a court at any time within a year to relieve a party from a judgment taken against him through mistake, has no application to a judgment of forfeiture on a recognizance in the federal court, where the defendant was represented by an attorney, and the only mistake alleged is that his attorney failed to make defense. U. S. v Wallace (D. C. 1891) 46 Fed. 569.

This section does not render a state statute, empowering its courts to set aside their judgments at any time within one year after their rendition, applicable to the federal courts, and in general such courts have no power to entertain a motion to set aside a judgment after the term at which it was rendered. Wellman v. Bethea (D. C 1914) 213 Fed. 367.

District Court held to have no power to open defaults after the term at which they were entered, notwithstanding Gen. St. Conn. 1902, § 748. Loewe v. Union Savings Bank (D. C. 1915 222 Fed. 342.

119. Execution and proceedings after judgment.—This section does not extend to the means of enforcing or revising a decision once made by the circuit court. In re Chateaugay Ore & Iron Co. (1888) 9 Sup. Ct. 150, 152, 128 U. S. 544, 32 L. Ed. 508; U. S. v. Train (C. C. 1882) 12 Fed. 852.

Assessment of damages after default judgment should be according to practice of state courts. Johnson v. Bridgeport Deoxidized Bronze & Metal Co. (C. C. 1903) 125 Fed. 631; Loewe v. Union Savings Bank of Danbury (D. C. 1915) 226 Fed. 294.

The act of 1828, re-enacted August 2, 1842, having provided that the forms of mesne process, and the forms and modes of proceedings in the federal courts in states admitted since September 29, 1789, in those of common law, shall be the same in each of said states, respectively, as are now used in the highest state court of original and general jurisdiction, the effect of the act admitting Kansas, providing that all the laws of the United States, not locally inapplicable, shall have the same force and effect therein as in other states, and constituting the state a judicial district, was to re-enact, as respects Kansas, the provision of the act of 1828, and so the federal courts thereof have a right to issue execution, and the marshal there has a right to execute it, but a sale by him not conforming, as to the mode of proceeding in levying execution and making the sale, to the state practice, was irregular and void, and his deed on such sale conveyed no title. Smith v. Cockrill (1867) 6 Wall. 756, 757, 18 L. Ed. 973.

Under Act May 26, 1824, a sale of land, under execution from the federal courts in the state of Louisiana, which does not conform to the state laws, will be set aside. Moncure v. Zunts (1870) 78 U. S. (11 Wall.) 416, 20 L. Ed. 181.

Section 1587, post, which requires a stipulation in writing waiving a jury to authorize trial of issues of fact by the court alone, is not applicable to default cases, and in an action of replevin brought in a federal court within the state of Illinois, in which the defendant makes default, the court is authorized to assess the damages without a jury under Practice Act Ill. (3 Starr & C. Ann. St. 1896, c. 110, par. 41). Midland Contracting Co. v. Toledo Foundry & Machine Co. (1907) 154 Fed. 797, 83 C. C. A. 489.

The federal courts held required to conform to procedure prescribed by Act Pa. April 22, 1905 (P. L. 286), giving a party requesting binding instructions which have been refused the right to move the court to have all the evidence certified and filed so as to become part of the record, and for judgment non obstante veredicto on the whole record. Cornette v. Baltimore & O. R. Co. (1912) 195 Fed. 59, 115 C. C. A. 61.

The adoption of a state statute, as part of the final process of the federal court to enforce judgments against counties, held valid. Dobbin v. Allegheny (C. C. 1860) Fed. Cas. No. 3,941.

The jurisdiction of the federal court is not exhausted by the rendition of a judgment. It may enforce its collection, and for this purpose adopt the process of the state courts. Pollock v. Lawrence County (C. C. 1860) Fed. Cas. No. 11,255.

A circuit court sitting in Massachusetts, and having jurisdiction of an action on a note by a citizen of New York against a citizen of Massachusetts, is bound to issue such an execution as the courts of that state would issue in like circumstances; in this case an execution against the property, and not against the body of the defendant. Low v. Durfee (C. C. 1880) 5 Fed. 256, 259.

The statute of a state provided, among other things, that when, upon the recovery of a judgment against a municipal corporation and the levy of an execution thereunder, sufficient property is not found to satisfy the same, a copy of such process shall be served on the collector and assessor, who shall then make an assessment and levy the required amount. Held, that a writ of mandamus, commanding the city council to provide for the payment of the judgment, will not be granted, in the absence of proof that the requirements of the statute have been complied with. Moran v. City of Elizabeth (C. C. 1881) 9 Fed. 72.

A motion for an adjudication by the court that the cause of action arose from the willful and malicious act of the defendants, and that they ought to be confined in close jail, and for a certificate thereof upon the execution, according to V. S. 1751, cannot prevail, as this section applies to those for procuring the judgment, and not to those subsequent thereto, and section 1540, post, entitling the party recovering a judgment in a common-law cause to similar remedies upon it to those of the state "to reach the property of the judgment debtor," applies to property, and not to the person. Friedly v. Giddings (C. C. 1902) 119 Fed. 438, judgment affirmed Giddings v. Freedley (1904) 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327.

120. Fees and costs in general.—The attorney's fees for procuring the dissolution of the injunction cannot be allowed as an element of damages on an injunction bond given in a federal court, notwithstanding the fact that by the local law of the state in which the bond was executed such fees could be recovered in a suit on the bond. Tullock v. Mulvane (1902) 22 Sup. Ct. 372, 184 U. S. 497, 46 L. Ed. 657, reversing judgment (1900) 60 P. 749, 61 Kan. 650.

The rule of the federal courts must govern as to the allowance of attorney's fees on an injunction bond given in a federal court, though the action on the bond is brought in a state court. Mis-

souri, K. & T. Ry. Co. v. Elliott (1902) 22 Sup. Ct. 446, 184 U. S. 530, 46 L. Ed. 673, reversing judgment Elliott v. Missouri, K. & T. Ry. Co. (1899) 77 Mo. App. 652.

The Supreme Court will not, in absence of a controlling decision by the state courts, limit to natural persons the benefits of Acts Tex. 31st Leg. c. 47, allowing attorney's fee to successful plaintiff in action against railroad for loss or injury to freight or killing of stock, where claim was not paid within 30 days. Missouri, K. & T. Ry. Co. of Texas v. Cade (1914) 34 Sup. Ct. 678, 233 U. S. 642, 58 L. Ed. 1135.

This section does not authorize an award of costs against the United States. Carlisle v. Cooper (1894) 64 Fed. 472, 12 C. C. A. 235.

Costs are recoverable in pursuance of state statutes, when there is no act of congress prescribing a different rule. Shreve v. Cheesman (1895) 69 Fed. 785, 788, 16 C. C. A. 413, writ of certiorari denied (1896) 16 Sup. Ct. 1206, 163 U. S. 704, 41 L. Ed. 320.

Under Pub. St. Mass. c. 161, § 24, providing that "original writs * * * in which the plaintiff is not an inhabitant of the commonwealth shall, before entry thereof, be indorsed by some sufficient person who is such inhabitant," who shall be liable for costs, the indorser of a writ is liable for costs incurred in a federal court after removal to it of a suit from a state court, as well as for the costs in the state court. Washburn v. Pullman's Palace Car Co. (1896) 76 Fed. 1005, 21 C. C. A. 598, affirming Pullman's Palace Car Co. v. Washburn (C. C. 1895) 66 Fed. 790.

Where suit is commenced in a state court to recover, from a collector of internal revenue, taxes illegally assessed and collected, and the same is removed by certiorari to the circuit court of the United States, and on appeal to the circuit court of appeals the judgment of the circuit court for defendant is reversed, and the cause remanded for new trial, plaintiff is entitled to recover his costs on the appeal, if under the practice of the state courts costs are allowed to the prevailing party, although rule 31, § 4 (31 C. C. A. clxix, 90 Fed. clxix), provides that no costs shall be allowed in the circuit court of appeals for or against the United States. De Bary v. Carter (1900) 102 Fed. 130, 42 C. C. A. 209.

Where the state practice in respect to the compensation of an auditor is such that it cannot be followed by a federal court, as where a statute provides for his payment by the county, the court may direct the expense of the auditor trial to be borne by either or both the parties, in its discretion, as in case of masters in chancery, having regard to all the circumstances of the particular case. Fenno v. Primrose (1903) 119 Fed. 801, 56 C. C. A. 313.

Although the Revised Statutes only mention a fee of 20 cents a folio of 100 words for taking and certifying depos tions to be allowed a clerk of the Uni ed States courts or a commissioner a circuit court, and no act of congre prescribes any fee for any other offic authorized to take depositions, t courts will tax the same fees allow by congress to clerks and commissio ers for that service to any state offic taking the deposition, and not the fe allowed by the state law for a simil service. Jerman v. Stewart (C. 1882) 12 Fed. 271.

Where, by the practice and procedu of the state courts of record within t district, the costs and expenses of vie ing the ground by the jury in civil a tions are allowed, such costs and e penses may be allowed in courts the United States held within such di trict, in civil suits other than suits equity or admiralty, under this sectio Huntress v. Town of Epsom (C. 1883) 15 Fed. 732.

This section has no application the subject of costs, because that su ject is covered by other provisions the federal laws. Pentlarge v. Kirb (C. C. 1884) 20 Fed. 898, 899.

The federal statutes regulate the ma ter of fees and costs in the courts the United States, and the statutes a practice of the state are not binding matters comprehended by the feder statute. Hence any state practice indulgence of credit for the fees of li gation until final judgment for cos does not obtain in the federal cour where the act of congress prescrib a specific regulation on the subje The Tennessee practice of giving cre it for fees until final judgment, and r turn of nulla bona against the losi party, is a voluntary indulgence by t persons entitled to the fees, and n perhaps, a strict right under the st utes of the state. O'Neil v. Kans City, S. & M. R. Co. (C. C. 1887) Fed. 663.

In view of this section the cle of the United States circuit court New Jersey is entitled to collect fr plaintiff in an action at law fees f recording the proceedings and jud ment therein in favor of plaintiff, se tion 76 of the Practice Act of that st providing that when any civil acti shall not have been determined t clerk of the court shall enter all t proceedings, including the judgment, a book of records to be kept for th purpose. Morrison v. Bernards Tp. C. 1888) 35 Fed. 400.

Under the Missouri practice of not e pressing the amount of costs in a jud ment, and Rev. St. Mo. § 1019, requ ing the clerk to make an itemized sta ment of the debt and costs on the ba of the execution, a judgment for a c tain sum, and costs of the action, claring a lien on the land therefor, a directing that the land be sold in sat faction thereof, is a sufficient judgme in fact awarding costs. Flynn v. E wards (C. C. 1888) 36 Fed. 873.

In an action for the recovery of excessive customs duties illegally exacted, which is brought in a state court and removed into a federal circuit court by defendant, and in which plaintiffs recover less than $50, neither plaintiffs nor defendant is entitled to costs. Richter v. Magone (C. C. 1889) 47 Fed. 192.

Protest fees are taxable costs, within R. S. § 983, post, § 1624, providing that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials" shall be taxed as costs; and though Comp. St. Neb. c. 41, § 6, provides that the holder of a note may bring "an action for principal, damages, and interest, and charges of protest," yet such fees for protest cannot be considered as part of the "matter in dispute" within Act March 3, 1887, § 1 (24 Stat. 552), as corrected by Act Aug. 13, 1888 (25 Stat. 434), restricting the jurisdiction of the United States circuit court to suits "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000." Baker v. Howell (C. C. 1890) 44 Fed. 113.

This section and Code Va. § 3539, providing that in any suit, except those wherein plaintiff sues in forma pauperis, there may be a suggestion on the record in court, or on the rule docket if the case be at rules, by a defendant or any officer of the court, that plaintiff is not a resident of the state, and that security for costs is required of him. do not impose a restriction on the constitutional right of nonresidents to sue in the United States courts, and that such security may be required in such courts from a nonresident plaintiff. Miller's Adm'r v. Norfolk & W. R. Co. (C. C. 1891) 47 Fed. 264, judgment affirmed Van Gunden v. Virginia Coal & Iron Co. (1892) 52 Fed. 838, 3 C. C. A. 294.

Code Civ. Proc. N. Y. § 779, providing that all proceedings of a party in default for nonpayment of costs of a motion shall be stayed until payment of such costs, does not prevent the removal of the case to the federal court by a party so in default, who complies with the federal statutes, and who has not secured in the state court a benefit which he should not repudiate. Hulbert v. Russo (C. C. 1894) 64 Fed. 8.

This section does not adopt the state fee bill, either for costs or for official fees. Swancoat v. Rensen (C. C. 1896) 76 Fed. 950.

Witness fees and mileage of officers of a corporation which is a party will be taxed as costs in the federal courts, where such is the practice of the state courts, and there is no settled practice relative thereto in the federal courts of the district. Nead v. Millersburg Home Water Co. (C. C. 1897) 79 Fed. 129.

Prior to Act Feb. 26, 1853 (10 Stat. 161), the taxation of costs in the federal courts in the various districts conformed to the practice of the state in which the district was situated, and the same since its enactment, as to all items of costs not specially covered thereby. Primrose v. Fenno (C. C. 1902) 113 Fed. 375.

While the federal courts in taxing costs are to follow the local practice, except so far as modified by statute or by special usages, they are not so far bound thereby as to be embarrassed in doing justice. Id.

The fees of a referee appointed by an order of the United States Circuit Court must be controlled by the allowance of the court, if not agreed on by the parties, and are not affected by the statutory fees prescribed by the state. New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach (C. C. 1910) 179 Fed. 973.

Where acts of Congress make specific provision for costs, they are controlling; but, if no provision for certain kinds of costs is made, the federal courts may follow the state statutes, if they do not result in injustice in the particular case. Michigan Aluminum Foundry Co. v. Aluminum Co. of America (C. C. 1911) 190 Fed. 903.

The prevailing party, in actions at common law in the United States courts, has a right to recover costs in all cases except where otherwise provided by some law of congress. The laws of the states no longer affect either the right to costs or the rates. U. S. v. Treadwell (D. C. 1883) 15 Fed. 532.

Under the settled rule of practice in Pennsylvania an attorney's commission, stipulated for in a bond and mortgage in case of foreclosure, is subject to the control of the court, which may reduce the amount of such commission in its discretion, and such rule will be followed by a court of bankruptcy in that state, and, where the mortgaged property has been sold by the trustee in bankruptcy, under its order, the mortgagee will be allowed such part of the commission as will fairly compensate his attorney for the services actually rendered in the matter. In re Wendel (D. C. 1907) 152 Fed. 672.

121. Security for costs.—In the absence of a federal statute or rule of court on the subject, a state statute requiring security for costs is to be followed by a federal court. Silvas v. Arizona Copper Co. (1915) 220 Fed. 116, 136 C. C. A. 208, reversing judgment (D. C. 1914) 213 Fed. 504. But Act Ariz. April 1, 1913, § 257, providing that no guardian shall be required to give security for costs, is not made applicable to the federal courts by this section; the entire subject being covered by section 1626 et seq., post, regulating suits in forma pauperis. Silvas v. Arizona Copper Co. (D. C. 1914) 213 Fed. 504. But see,

S. C. (1915) 220 Fed. 116, 136 C. C. A. 208.

Security for costs will not be required where the motion is made before answer; the practice of the state as to security for costs not applying to the federal court. Thannhauser v. Cortes Co. (C. C. 1881) 9 Fed. 225. But see Sutro v. Simpson (C. C. 1882) 14 Fed. 370; Hugunin v. Thatcher (C. C. 1883) 18 Fed. 105; Simpkins v. Lake Shore & M. S. Ry. (C. C. 1883) 19 Fed. 802; Miller's Adm'r v. Norfolk & W. R. Co. (C. C. 1891) 47 Fed. 264 (affirmed Van Gunden v. Virginia Coal & Iron Co. [1892] 52 Fed. 838, 3 C. C. A. 294); O'Brien v. Hearn (C. C. 1903) 125 Fed. 95.

Code Va. § 3539, designating no particular time when the motion for security for costs shall be made, the rule may be entered at any time when no prejudice to plaintiff is caused by defendant's delay in moving therefor. Miller v. Norfolk & W. R. Co. (C. C. 1891) 47 Fed. 264, judgment affirmed Van Gunden v. Virginia Coal & Iron Co. (1892) 52 Fed. 838, 3 C. C. A. 294.

On motion therefor, defendants, sued by a nonresident receiver of a national bank, are entitled to require plaintiff to give security for costs, where such security would be required by the laws of the state under the conformity statute, unless plaintiff by a certificate filed brings himself within the provisions of section 1661, post. Schofield v. Palmer (C. C. 1904) 134 Fed. 753.

A stipulation that a referee shall receive a reasonable compensation for his services, under practice in the United States courts adopting the procedure of the state, is not only within the control of the court, but should be presented to the court for determination, if the parties do not agree what is a reasonable amount. New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach (C. C. 1910) 179 Fed. 973.

A motion for security for costs in a federal court sitting in the Northern District of New York is governed by the provisions of Code Civ. Proc. N. Y. § 3268 et seq. Winkley Co. v. Bowen Mfg. Co. (C. C. 1910) 180 Fed. 624.

In the absence of any federal statute relating to the matter of requiring plaintiff to give security for costs, a federal court may properly follow a state statute on the subject. Handy Varnish Co. v. Midland Linseed Oil Co. (C. C. 1911) 191 Fed. 256.

V. PROCEDURE IN APPELLATE COURT

122. Practice in general.—This section is not applicable to the appellate courts of the United States, the practice in which is governed by the constitutional, statutory, and common-law provisions applicable to writs of error in actions at law in such courts and the rules thereof. Bayard v. Lombard (1850) 50 U. S. (9 How.) 530, 13 L. Ed. 245; Richmond & D. R. Co. v. McGee (1892) 50 Fed. 906, 2 C. C. A. 81; Logan v. Goodwin (1900) 104 Fed. 490, 43 C. C. A. 658; City of Manning v. German Ins. Co. (1901) 107 Fed. 52, 46 C. C. A. 144 (reversing order German Ins. Co. v. Town of Manning [C. C. 1900] 100 Fed. 581); Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (1901) 111 Fed. 81, 49 C. C. A. 229 (reversing decree [C. C. 1900] 99 Fed. 180); West v. East Coast Cedar Co. (1902) 113 Fed. 737, 51 C. C. A. 411 (affirming decree [C. C. 1901] 110 Fed. 725); Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307; Francisco v. Chicago & A. R. Co. (1906) 149 Fed. 354, 79 C. C. A. 292, 9 Ann. Cas. 628; Yost v. Union Pac. R. Co. (1906) 151 Fed. 1023, 81 C. C. A. 683; St. Louis Cordage Co. v. Missouri, K. & T. Ry. Co. (1907) 151 Fed. 1021, 81 C. C. A. 682; Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. (1908) 165 Fed. 162, 91 C. C. A. 196; Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314; McBride v. Neal (C. C. A. 1914) 214 Fed. 966; Western Union Telegraph Co. v. Aldridge (1914) 219 Fed. 836, 135 C. C. A. 506; Alder v. Edenborn (D. C. 1912) 198 Fed. 928; Farmer v. Atlantic Coast Line R. Co. (D. C. 1913) 205 Fed. 319.

The Circuit Courts may adopt the forms of pleading and practice of the state courts, but no state legislation can be applied to the practice of the Supreme Court and the mode in which cases shall be brought into it for review. Graham v. Bayne (1855) 18 How. 60, 61, 15 L. Ed. 265.

The agreement of parties cannot authorize the Supreme Court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a state regulating proceedings of its own courts authorize a district or circuit court sitting in the state to depart from the modes of proceedings and rules prescribed by the acts of Congress. So, where parties in ejectment agreed to waive a jury and submit to the court both matters of law and fact, and a bill of exceptions is brought up to the Supreme Court to all the rulings and decisions below, it cannot look into errors of fact or law alleged to have been committed in such an irregular proceeding, and the judgment will be affirmed. Kelsey v. Forsyth (1858) 21 How. 85, 16 L. Ed. 32.

The proceeding for the review of a judgment of a circuit court is had in the supreme court, and is not within the operation of this section. Oregon-

ian R. Co. v. Oregon R. & Nav. Co. (C. C. 1886) 27 Fed. 277, 284, reversed (1890) 10 Sup. Ct. 1072, 136 U. S. 646, 34 L. Ed. 552.

The state practice does not govern the mode of bringing cases into the Supreme Court for review. Graham v. Bayne (1855) 18 How. 60, 15 L. Ed. 265.

123. —— Appeal or writ of error.—The decisions of a state court as to the sufficiency of an appeal in a special proceeding are controlling upon the federal courts. New York, N. H. & H. R. Co. v. Cockcroft (C. C. 1892) 49 Fed. 3.

The rules of the New York Code of Practice have no application to writs of error in the United States courts. Whalen v. Sheridan (C. C. 1880) 5 Fed. 436.

Review on writ of error, as established by the United States statute, is so far different from an appeal under the state Code that the provisions of the state statute do not govern the proceedings. Id.

On a writ of error in an action at law, the Circuit Court is governed on questions of practice by rules prevailing in the courts of the state in which the case was tried. Day v. Atlantic Coast Line R. Co. (1910) 179 Fed. 26, 102 C. C. A. 654, writ of certiorari denied (1911) 31 Sup. Ct. 720, 220 U. S. 617, 55 L. Ed. 611.

Though the practice act of Arkansas, regulating the practice of state courts of original jurisdiction, is obligatory on the federal courts held in that state and in the Indian Territory, the rules of practice of the supreme court of that state are not adopted by the circuit court of appeals in cases coming from either the state or the territory. McClellan v. Pyeatt (1892) 50 Fed. 686, 1 C. C. A. 613.

The New Jersey practice, whereby the action of the state courts in appointing condemnation commissioners, as well as the award of damages made by the commissioners, may be reviewed by the state supreme court on certiorari, is inapplicable to condemnation proceedings in the federal circuit court; and such proceedings can only be reviewed by a writ of error taken from a final judgment. Luxton v. North River Bridge Co. (1893) 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194.

Where a proceeding, resulting in a verdict sustaining an attachment, and a verdict and judgment on the merits, are separate under the state statute, they may be separately considered on error, under this section and section 1538, post. Fitzpatrick v. Flannagan (1882) 106 U. S. 648, 1 Sup. Ct. 369, 27 L. Ed. 211.

Whether an equity case shall come up to this court by error or by appeal is to be regulated by the established practice of this court, not by any territorial law. Brewster v. Wakefield (1859) 63 U. S. (22 How.) 118, 16 L. Ed. 301.

The supreme court, on writ of error from the United States circuit court for the district of Louisiana, can only review questions of law, though in Louisiana the state supreme court reviews questions of fact as well as of law, and where the validity of a verdict of the jury is brought into question, the practice in the state courts of Louisiana is not applicable in the courts of the United States. Parks v. Turner (1851) 12 How. 39, 42, 13 L. Ed. 883. Nor will any statement of facts be considered which is not made a part of the record. U. S. v. King (1849) 48 U. S. (7 How.) 833, 12 L. Ed. 934.

The distinction between writs of error and appeals cannot be overthrown by agreement of counsel in the court below that all the evidence in the cause shall be introduced and considered as a statement of the facts. Minor v. Tillotson (1844) 2 How. 392, 393, 11 L. Ed. 312.

124. —— Jurisdiction.—By the laws of Mississippi, in a joint action on a bond, separate judgments may be taken against the several defendants, or the plaintiff may discontinue as to some of them, and take judgment against the rest; but a final judgment entered before the case is finally disposed of as to all the defendants is erroneous. Hence, a writ of error from the supreme court of the United States to reverse a judgment rendered by a district court of the United States for Mississippi against three out of four joint defendants, in an action on a bond, must be dismissed for want of jurisdiction, and the case remanded. U. S. v. Girault (1850) 52 U. S. (11 How.) 22, 13 L. Ed. 587.

Act Pa. April 18, 1874 (P. L. 64), provides that, where plaintiff is entitled to and is refused judgment for want of a sufficient affidavit of defense, he may take a writ of error to the state Supreme Court. Held, that these provisions do not give the Circuit Court of Appeals for the Third Circuit jurisdiction to review an interlocutory order refusing judgment for want of a sufficient affidavit of defense. This section is inapplicable to a subsequently created appellate court for a circuit composing several states, or to matters of jurisdiction. Shumaker v. Security Life & Annuity Co. of America (1908) 159 Fed. 112, 86 C. C. A. 302.

125. —— Decisions reviewable.—The rule that the granting or refusal or a new trial rests in the sound discretion of the court to which the motion is addressed and is not subject to review on writ of error was not abrogated by this section. Indianapolis & St. L. R. Co. v. Horst (1876) 93 U. S. 291, 23 L. Ed. 898; Newcomb v. Wood (1878) 97 U. S. 581, 584, 24 L. Ed. 1085; James P. Witherow Co. v. De Bardeleben Coal &

Iron Co. (1900) 99 Fed. 670, 40 C. C. A. 65; Louisville & N. R. Co. v. White (1900) 100 Fed. 239, 40 C. C. A. 352.

The question of the finality of a judgment or decree for the purpose of review by writ of error or appeal in the federal courts is not affected by the procedure in the state courts, but is governed by the rules established by federal legislation, and by decisions of the federal courts. Elder v. McClaskey (1895) 70 Fed. 529, 17 C. C. A. 251 (reversing decree McClaskey v. Barr [C. C. 1891] 47 Fed. 154); Menge v. Warriner (1903) 120 Fed. 816, 57 C. C. A. 432.

Under Act May 19, 1828, adopting the forthcoming bond in Mississippi on levy of an execution as a part of the final process of the state at the time of the passage of the act, a statute of Mississippi taking away the right to a writ of error in the case of a forfeited forthcoming bond cannot influence the right to a writ of error to the circuit court of the United States on such a forfeiture. Amis v. Smith (1842) 41 U. S. (16 Pet.) 303, 10 L. Ed. 973.

It is doubtful whether this section authorizes the supreme court to review cases tried in the circuit courts by referee in states where such a practice exists. Boogher v. New York L. Ins. Co. (1880) 103 U. S. 90, 95, 96, 26 L. Ed. 310.

On a writ of error to a district court in Iowa, its ruling on a motion to the jurisdiction may be reviewed under Act June 1, 1872, § 5, making the practice of the state courts applicable to the federal courts. Nazro v. Cragin (C. C. 1874) Fed. Cas. No. 10,062.

126. —— Presentation of questions in trial court.—A state statute making errors in written charges to jurors reviewable on appeal, though not excepted to (Pen. Code Cal. § 1176), does not control a court of the United States sitting in the state. St. Clair v. U. S. (1894) 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

The Illinois statute, providing that, in an action at law tried without a jury, propositions of law may be submitted to the court, and a ruling required, in order to lay a foundation for a writ of error, is not made applicable to trials in the federal courts by this section, since the practice in such cases is prescribed by sections 1587, 1668, post. U. S. v. Indian Grave Drainage Dist. (1898) 85 Fed. 928, 29 C. C. A. 578.

Motion for new trial, indispensable under the state practice, is not essential to review of the rulings of the trial court under the federal practice. Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314.

Exception to refusal to set aside verdict, under Code Civ. Proc. N. Y. § 999, presents nothing for review in a federal appellate court. Great Atlantic & Pacific Tea Co. v. Carey (C. C. A. 1915) 220 Fed. 454.

127. —— Proceedings to transfer cause.—This section does not include statutes governing the manner or time of taking a case from one federal court to another by writ of error, bill of exceptions, or appeal. Hudson v. Parker (1895) 15 Sup. Ct. 450, 452, 156 U. S. 277, 39 L. Ed. 424; U. S. v. Train (C. C. 1882) 12 Fed. 852.

The mode of removing a case from an inferior to an appellate court of the United States is regulated by acts of congress, and does not depend on the laws or practice of the state in which the court may happen to be held. Hudgins v. Kemp (1855) 18 How. 530, 537, 15 L. Ed. 511.

In the federal courts everything after after judgment, looking to a review by an appellate court, is regulated solely by the acts of Congress, the practice at common law, and the rules and decisions of such courts, and is not within the scope of this section. Detroit United Ry. v. Nichols (1908) 165 Fed. 289, 91 C. C. A. 257.

128. —— Effect of transfer of cause.—The decision of the supreme court of Illinois that no amendment of its record in derogation of its final judgment must be made after the expiration of a term is binding on the supreme court of the United States. Fielden v. Illinois (1892) 143 U. S. 452, 12 Sup. Ct. 528, 36 L. Ed. 224.

A writ of error from the United States supreme to the circuit court is not a proceeding under the state code, but at common law, as modified by the Revised Statutes, and it does not have the effect, pending the proceeding, to suspend the operation of the judgment of the circuit court as a bar or an estoppel. Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. (C. C. 1886) 27 Fed. 277, judgment reversed Oregon Ry. & Nav. Co. v. Oregonian Ry. Co. (1890) 10 Sup. Ct. 1072, 136 U. S. 646, 34 L. Ed. 552.

Under the rule of decision in California binding on the federal courts, the perfecting of an appeal from a judgment suspends such judgment for all purposes, and deprives it of its effect as an estoppel. Contra Costa Water Co. v. City of Oakland (C. C. 1904) 165 Fed. 518.

Under this section and section 1540, post, in common-law actions, the district court has power to suspend the lien of a judgment upon lands of the judgment debtor during appeal or writ of error, and to cause the docket of the judgment to be so marked, in accordance with the provisions of the state practice. The lien of a judgment upon land of a judgment debtor, depending upon the state statutes and practice as adopted under the United States laws, may be modified or suspended in accordance with the state practice, in the discretion of the court. U. S. v. Sturgis (D. C. 1883) 14 Fed. 810.

129. —— Record.—The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the supreme court, and the adoption of this rule by the court of the United States, includes only cases where an appeal, technically speaking, lies, and not cases which are carried to an appellate court by writ of error. Phillips v. Preston (1847) 46 U. S. (5 How.) 278, 12 L. Ed. 152.

On appeal to the supreme court of Montana, the record contained a statement, prepared for the purpose of a motion for a new trial, of all the proceedings at the trial, which was approved by counsel and authenticated by the judge as a correct statement of the proceedings. Held that, as this practice was authorized by the Montana statutes, the statement is sufficient to enable the United States supreme court, on error to the territorial supreme court, to review the rulings of the trial court. Montana Ry. Co. v. Warren (1890) 137 U. S. 348, 11 Sup. Ct. 96, 34 L. Ed. 681, affirming (1887) 6 Mont. 275, 12 Pac. 641.

This section does not apply to appellate proceedings, so as to require a determination on the merits on a record which would permit it in the appellate court of the state. Kentucky Life & Acc. Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42.

Proceedings preparatory to a review of rulings in federal courts, including questions of when an exception need be taken, and how motions and rulings not a part of the record may be made such, are regulated by federal statutes, and, if they are silent, by the common law. Ghost v. U. S. (1909) 168 Fed. 841, 94 C. C. A. 253.

What shall constitute the final record in an ejectment suit is regulated by the state laws, to which the federal courts must conform. Smith v. McIntyre (C. C. 1897) 84 Fed. 721.

130. —— Bills of exceptions.—This section does not require conformity to the state practice in respect to bills of exceptions. In re Chateaugay Ore & Iron Co. (1888) 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Missouri Pac. R. Co. v. Chicago & A. R. Co. (1889) 10 Sup. Ct. 65, 132 U. S. 191, 33 L. Ed. 309; Fishburn v. Chicago, M. & St. P. R. Co. (1890) 11 Sup. Ct. 8, 137 U. S. 60, 34 L. Ed. 585; New York & N. E. R. Co. v. Hyde (1893) 56 Fed. 188, 5 C. C. A. 461; Prichard v. Budd (1896) 76 Fed. 710, 22 C. C. A. 504; Tullis v. Lake Erie & W. R. Co. (1901) 105 Fed. 554, 44 C. C. A. 597; City of Manning v. German Ins. Co. (1901) 107 Fed. 52, 46 C. C. A. 144 (reversing order German Ins. Co. v. Town of Manning [C. C. 1900] 100 Fed. 581); Green v. Fitchburg R. Co. (1903) 119 Fed. 872, 56 C. C. A. 402; Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514; Whalen v. Sheridan (C. C. 1880) 5 Fed. 436; Preble v. Bates (C. C. 1889) 40 Fed. 745.

Code Civ. Proc. Cal. § 631, permitting waiver of a jury trial in actions at law by oral consent in open court entered in the minutes, does not apply to federal courts sitting in California as a substitute for a written waiver of a jury within sections 1587, 1668, post, providing, in case of a written waiver, rulings of the court duly excepted to and presented by bill of exceptions, if finding is special, may be reviewed on writ of error. Erkel v. U. S. (1909) 169 Fed. 623, 95 C. C. A. 151.

A bill of exceptions by the referee is not essential to a review in the United States Circuit Court of his rulings in an action in Missouri, because the Missouri statutes require the referee to set forth such exceptions and return all the evidence taken. Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314.

131. —— Mandate and proceedings in lower court.—The provision of Mansf. Dig. Ark. § 1311 (Ind. T. Ann. St. 1899, § 813) adopted and in force in the Indian Territory, which requires an appellate court, upon the affirmance of a judgment for the payment of money, which has been superseded, to award against the appellant 10 per cent. damages on the amount superseded, is obligatory on the United States court of appeals for the Indian Territory. Missouri, K. & T. Ry. Co. v. Truskett (1902) 22 Sup. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259, affirming judgment (1900) 104 Fed. 728, 44 C. C. A. 179; Missouri, K. & T. Ry. Co. v. Elliott (1900) 102 Fed. 96, 42 C. C. A. 188, judgment affirmed (1902) 22 Sup. Ct. 937, 184 U. S. 695, 46 L. Ed. 763.

Whether a state appellate court may correct its interlocutory decision upon the first appeal when the case comes before it again is a question of local law as to which the state decisions control. Moss v. Ramey (1916) 36 Sup. Ct. 183.

The purpose of rule 30 of the circuit court of appeals (see notes under § 1114, ante) is to give to suitors, whose decrees for the payment of money are affirmed, interest thereon from the date of their entry until paid, if by the state law interest might have been allowed in the state courts in a similar case, and at the rate provided by the state law, but it was not the intention to adopt state rules of practice in reference to the necessity of an express provision in the judgment or decree appealed from for the allowance of such interest. Hagerman v. Moran (1896) 75 Fed. 97, 21 C. C. A. 242.

This section held not to make it obligatory on a federal court to follow St. Wis. 1898, § 3072, relating to procedure after reversal and remand of a cause by the Supreme Court. Manitowoc

Malting Co. v. Feuchtwanger (D. C. 1912) 196 Fed. 506.

132. —— **Liabilities on bonds.**—Code Ala. § 3661, provides that, on affirmation by the supreme court of a judgment of the court below, judgment shall be rendered against the obligors on the appeal bond for the amount of the affirmed judgment. Held, that in the absence of anything to the contrary in the statutes of the United States, and in view of this section, summary judgment on motion may be entered against the sureties on a supersedeas bond on the affirmation of the judgment of the circuit court for a district of Alabama, and the filing of the mandate therein. Gordon v. Third Nat. Bank (1893) 56 Fed. 790, 6 C. C. A. 125, affirming Third Nat. Bank v. Gordon (C. C. 1892) 53 Fed. 471.

Where the statutes of a state authorize a summary judgment against the sureties on an appeal or supersedeas bond, the Circuit and District Courts of the United States in that state may render such judgment. Egan v. Chicago Great Western Ry. Co. (C. C. 1908) 163 Fed. 344.

A suit in a federal court on a supersedeas bond given under the Pennsylvania statute of May, 1897, regulating practice on appeals to the supreme and superior courts, is governed by the laws and decisions of that state. Commonwealth of Pennsylvania v. Fidelity & Deposit Co. of Maryland (C. C. 1909) 180 Fed. 292.

CITED WITHOUT DEFINITE APPLICATION

Knickerbocker Ins. Co. v. Comstock (1872) 16 Wall. 258, 267, 21 L. Ed. 493; New Jersey R. & Transp. Co. v. Pollard (1874) 22 Wall. 341, 342, 348, 350, 22 L. Ed. 877; Ex parte French (1875) 91 U. S. 423, 425, 23 L. Ed. 249; Phillips & C. Const. Co. v. Seymour (1875) 91 U. S. 646, 655, 23 L. Ed. 341; Yznaga del Valle v. Harrison (1876) 93 U. S. 233, 234, 23 L. Ed. 892; Hodges v. Easton (1882) 1 Sup. Ct. 307, 309, 106 U. S. 408, 27 L. Ed. 169; Krippendorf v. Hyde (1884) 4 Sup. Ct. 27, 32, 110 U. S. 276, 28 L. Ed. 145; Phelps v. Oaks (1886) 6 Sup. Ct. 714, 715, 117 U. S. 236, 29 L. Ed. 888; Whitford v. Clark County (1886) 7 Sup. Ct. 306, 308, 119 U. S. 522, 30 L. Ed. 500; Rosenbaum v. Bauer (1887) 7 Sup. Ct. 633, 640, 120 U. S. 450, 30 L. Ed. 743; Robertson v. Perkins (1889) 9 Sup. Ct. 279, 129 U. S. 233, 32 L. Ed. 686; Glenn v. Sumner (1889) 10 Sup. Ct. 41, 132 U. S. 152, 33 L. Ed. 301; In re Louisville Underwriters (1890) 10 Sup. Ct. 587, 589, 134 U. S. 488, 33 L. Ed. 991; Cooke v. Avery (1893) 13 Sup. Ct. 340, 346, 147 U. S. 375, 37 L. Ed. 209; Luxton v. North River Bridge Co. (1893) 13 Sup. Ct. 356, 147 U. S. 337, 37 L. Ed. 194; Campbell v. Haverhill (1895) 1 Sup. Ct. 217, 220, 155 U. S. 610, 3 L. Ed. 280; Coughran v. Bigelo (1896) 17 Sup. Ct. 117, 119, 164 U. S 301, 41 L. Ed. 442; Shepard v. Adam (1898) 18 Sup. Ct. 214, 215, 168 U S. 618, 42 L. Ed. 602; Chicago Bd. o Trade v. Hammond Elevator C (1905) 25 Sup. Ct. 740, 742, 198 U. S 424, 49 L. Ed. 1111; Burlington In Co. v. Miller (1894) 60 Fed. 254, 25 8 C. C. A. 612; Hamilton v. She wood (1894) 64 Fed. 103, 110, 11 C. C. A. 507; U. S. ex rel. Mudsill Mi Co. v. Swan (1895) 65 Fed. 647, 65 13 C. C. A. 77; Wheeling Bridge Terminal Ry. Co. v. Cochran (1895) 6 Fed. 141, 144, 15 C. C. A. 321; Fire man's Fund Ins. Co. v. Norwoo (1895) 69 Fed. 71, 16 C. C. A. 136 People's Bank v. Ætna Ins. Co. (1896 74 Fed. 507, 512, 20 C. C. A. 63 Marks v. Northern Pac. R. Co. (1896 76 Fed. 941, 943, 22 C. C. A. 63 Green v. Underwood (1898) 86 Fe 427, 430, 30 C. C. A. 162; Fenno Primrose (1903) 119 Fed. 801, 56 C. A. 313; U. S. v. Honolulu Plantatio Co. (1903) 122 Fed. 581, 58 C. C. A 279; Jacobs v. Van Sickle (1903) 12 Fed. 62, 61 C. C. A. 598; Bryant Bro Co. v. Robinson (1906) 149 Fed. 32 79 C. C. A. 259; Cassatt v. Mitche Coal & Coke Co. (1907) 150 Fed. 32, 8 C. C. A. 80, 10 L. R. A. (N. S.) 9 Ex parte Crawford (1907) 154 Fe 769, 83 C. C. A. 474; U. S. v. Sarge (1908) 162 Fed. 81, 89 C. C. A. 8 Atlantic Coast Line R. Co. v. U. (1909) 168 Fed. 175, 94 C. C. A. 3 Weber v. Grand Lodge of Kentuck F. & A. M. (1909) 169 Fed. 522, 9 C. C. A. 20 (rehearing denied and wr of error and supersedeas denied [190 171 Fed. 839, 96 C. C. A. 410, certiora denied [1909] 30 Sup. Ct. 406, 21 U. S. 606, 54 L. Ed. 346); Mechanic Ins. Co. v. C. A. Hoover Distilling C (1910) 182 Fed. 590, 105 C. C. A. 12 31 L. R. A. (N. S.) 873; Steers v. U S. (1911) 192 Fed. 1, 112 C. C. A. 42 Lamon v. Speer Hardware Co. (1912 198 Fed. 453, 119 C. C. A. 1; Stea Stone-Cutter Co. v. Sears (C. C. 188 9 Fed. 8, 9; Brown v. Philadelphi Wilmington & Baltimore R. Co. (C. 1881) 9 Fed. 183, 188; Perry Mechanics' Mut. Ins. Co. (C. C. 188 11 Fed. 478, 482; Wilkinson v. Tilde (C. C. 1882) 14 Fed. 778, 781; Gr velle v. Minneapolis & St. L. Ry. C (C. C. 1882) 16 Fed. 435, 436; Par hurst v. Hosford (C. C. 1884) 21 Fe 827, 833; Brewer v. Jacobs (C. 1884) 22 Fed. 217, 234; Colgate Compagnie Francaise du Telegraphe d Paris a N. Y. (C. C. 1885) 23 Fe 82, 83; New Hampshire Land Co. Tilton (C. C. 1887) 29 Fed. 764, 76 Gunther v. Liverpool & L. & G. Ins. C (C. C. 1888) 34 Fed. 501; Robostelli New York, N. H. & H. R. Co. (C. 1888) 34 Fed. 719, 720; Imperial Re fining Co. v. Wyman (C. C. 1889) 3

Fed. 574, 575, 3 L. R. A. 503; Wolf v. Cook (C. C. 1889) 40 Fed. 432, 437; President ex rel. Moran v. Elizabeth (C. C. 1889) 40 Fed. 799, 804; Richter v. Magone (C. C. 1889) 47 Fed. 192, 193, 194, 195; Comstock v. Tracey (C. C. 1891) 46 Fed. 162, 169; O'Donnell v. Atchison, T. & S. F. R. Co. (C. C. 1892) 49 Fed. 689, 692; Third Nat. Bank v. Gordon (C. C. 1892) 53 Fed. 471, 473 (affirmed [1893] 56 Fed. 790, 6 C. C. A. 125); Stroheim v. Deimel (C. C. 1896) 73 Fed. 430 (reversed [1897] 77 Fed. 802, 23 C. C. A. 467); Bowen v. Needles Nat. Bank (C. C. 1896) 76 Fed. 176, 177; National Cash-Register Co. v. Leland (C. C. 1896) 77 Fed. 242, 243; Atlas Glass Co. v. Ball Bros. Glass Mfg. Co. (C. C. 1898) 87 Fed. 418, 419; The Westminster (C. C. 1899) 96 Fed. 766; Scott v. Hoover (C. C. 1900) 99 Fed. 247, 248; Hale v. Coffin (C. C. 1902) 114 Fed. 567 (affirmed [1903] 120 Fed. 470, 57 C. C. A. 528); Judson v. U. S. (C. C. 1903) 120 Fed. 637, 57 C. C. A. 99; Mahr v. Union Pac. R. Co. (C. C.) 140 Fed. 921 (affirmed [1909] 170 Fed. 699, 96 C. C. A. 19); Whelan v. Enterprise Transp. Co. (C. C. 1908) 164 Fed. 95; Sanderson v. Bishop (C. C. 1909) 171 Fed. 769; U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 172 Fed. 271; Stone v. Speare (C. C. 1910) 175 Fed. 584 (affirmed [1912] 193 Fed. 375, 113 C. C. A. 301); U. S. v. Pings (D. C. 1880) 4 Fed. 714, 715; Same v. Brawner (D. C. 1881) 7 Fed. 86, 90; Same v. Griswold (D. C. 1882) 11 Fed. 807, 810; Same v. Treadwell (D. C. 1883) 15 Fed. 532, 533; Schreiber v. Sharpless (D. C. 1883) 17 Fed. 589, 590; Hat-Sweat Manuf'g Co. v. Davis Sewing-Mach. Co. (D. C. 1887) 31 Fed. 294; Pearson v. The Alsalfa (D. C. 1890) 44 Fed. 358; In re Barrett (D. C. 1904) 132 Fed. 362; U. S. v. Atlantic Coast Line R. Co. (D. C. 1907) 153 Fed. 918 (affirmed [1909] 168 Fed. 175, 94 C. C. A. 35); In re Ward (D. C. 1908) 161 Fed. 755; U. S. v. Rogers (D. C. 1908) 164 Fed. 520; Wilson v. New England Navigation Co. (D. C. 1912) 197 Fed. 88; Fischer v. Automobile Supply Mfg. Co. (D. C. 1912) 199 Fed. 191; American Confectionery Co. v. North British & Mercantile Ins. Co. (D. C. 1912) 199 Fed. 195; The Titanic (D. C. 1913) 206 Fed. 500.

See, also, notes to § 1534, ante.

§ 1538. (R. S. § 721.) Laws of the States; rules of decision.

The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92.

Notes of Decisions

I. Laws as Rules of Decision

1. State laws governing practice and procedure.
2. State laws governing attachments.
3. State laws governing executions.
4. State laws as to rights of bona fide occupants of lands.
5. State laws fixing interest on judgments.
6. State laws governing lien of judgments.
7. Applicability of state laws in proceedings in vindication of civil rights.
8. State laws as authority in federal courts.
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21. —— Administration of estates and construction of wills.
22. —— Restraining nuisance.
23. —— Laws or regulations affecting corporations.
24. —— Liens and mortgages.
25. —— Liabilities of counties and municipal corporations.
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I. LAWS AS RULES OF DECISION

1. State laws governing practice and procedure.—See ante, § 1537, and notes.

2. State laws governing attachments.—See post, §§ 1539, 1559, and notes.

3. State laws governing executions.—See post, § 1540, and notes.

4. State laws as to rights of bona fide occupants of lands.—See post, § 1541, and notes.

5. State laws fixing interest on judgments.—See post, § 1605, and notes.

6. State laws governing lien of judgments.—See post, §§ 1606, 1608, and notes.

7. Applicability of state laws in proceedings in vindication of civil rights.—See post, § 1542, and notes.

8. State laws as authority in federal courts.—The efficacy of state laws in the courts of the United States depends on the laws of congress, and congress may adopt state laws directly by a substantive enactment, or may confide the authority to adopt them to the courts. Beers v. Haughton (1835) 9 Pet. 329, 359, 9 L. Ed. 145.

State statutes with the interpretation given by the highest court of the

state become the rules of decision in the federal courts. Richmond v. Smith (1872) 15 Wall. 429, 438, 21 L. Ed. 200.

While state statutes by their own force are not applicable in the courts of the United States, they may be, and in many instances have been, adopted by acts of Congress as federal laws. Kentucky Coal & Timber Development Co. v. Kentucky Union Co. (1911) 187 Fed. 945, 110 C. C. A. 93.

State laws do not constitute a rule of decision to United States courts sitting as courts of equity. Burt v. Keyes (C. C. 1861) Fed. Cas. No. 2,212.

A federal court, when determining the rights of parties under a state law, will never in a doubtful case, adjudge such law to be in conflict with the constitution of the state, unless sustained in so doing by some distinct adjudication of the highest court of the state. Smith v. City of Fond du Lac (C. C. 1881) 8 Fed. 289.

Under title 26, R. S. (title 26, this compilation), the circuit court is given jurisdiction at certain elections to appoint supervisors to scrutinize the election, and, under title 70, "Crimes" (title 70, this compilation), to try criminal violations of the laws of the United States relating to the elections of members of congress; but it nowhere appears that congress has adopted the election and registration laws of any state. Norton v. Brewster (C. C. 1884) 23 Fed. 840.

The federal Circuit Courts in the exercise of their concurrent jurisdiction are for practical purposes courts of the states in which they sit; their functions being to enforce the rights of parties according to the laws of the states and the United States, and the courts of the states and the federal courts thereby constituting a single judicial system. F. W. Cook Brewing Co. v. Garber (C. C. 1909) 168 Fed. 942.

Federal courts cannot go beyond federal authority, and adopt special privileges or restrictions enforced by states, in their courts. Compania Azucarera Cubana v. Ingraham, Maxwell & Beals (C. C. 1910) 180 Fed. 516.

In common-law causes the federal court follows the laws of the states wherein the courts are held. Gaugler v. Chicago, M. & P. S. Ry. Co. (D. C. 1912) 197 Fed. 79.

9. —— Exception of questions involving federal government, constitution, or laws.—When supplies are furnished to a vessel in her home port, the validity of the liens must be determined by the local law; but when they have been furnished in a foreign port, or in the port of a state other than the one to which the vessel belongs, the liens are to be regarded as admiralty liens, which are unaffected by any limitations of the local law. The Hilarity (D. C. 1829) Fed. Cas. No. 6,480; Harper v. The New Brig (D. C. 1835) Fed. Cas. No. 6,090; The Chusan (C. C. 1843) Fed. Cas. No. 2,717; The Active (D. C. 1846) Fed. Cas. No. 34; Carroll v. The Leathers (D. C. 1853) Fed. Cas. No. 2,455; Nall v. The Illinois (C. C. 1855) Fed. Cas. No. 10,005; Bauduc's Syndics v. Nicholson (1832) 4 La. 81; Hursey v. Hassam (1871) 45 Miss. 133.

Laws of the state cannot prevail over an express law of congress. Brown v. Van Braam (1797) 3 Dall. 344, 350, 1 L. Ed. 629.

The general government, though limited as to its objects, is supreme with respect to such objects, and the constitution and laws of the United States and treaties are the supreme law of the land. Cohens v. Virginia (1821) 6 Wheat. 264, 381, 5 L. Ed. 257.

Questions of set-off in the federal courts arise exclusively under the acts of congress, and no local law or usage can have any influence in their determination. U. S. v. Robeson (1835) 34 U. S. (9 Pet.) 319, 9 L. Ed. 142; Watkins v. U. S. (1869) 76 U. S. (9 Wall.) 759, 19 L. Ed. 820.

The statutes of a state regulating navigation have no force in the federal courts, and the rule for decision of the federal courts is derived from the general admiralty law modified by congress. The New York v. Rae (1855) 18 How. 223, 225, 15 L. Ed. 359.

Rules of decision, established by the Supreme Court for its own government and that of subordinate courts, are unaffected by state legislation. Noonan v. Lee (1862) 2 Black, 499, 509, 17 L. Ed. 278.

The laws of the state are only to be regarded as rules of decision in the courts of the United States where the constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. Connecticut Mutual Life Ins. Co. v. Schaefer (1876) 94 U. S. 457, 458, 24 L. Ed. 251.

This section did not render valid the provision of the acts of Virginia of 1882 and 1884 that no action should be brought against the tax collector, in cases where he has refused to receive coupons for taxes, other than an action to recover back money paid for taxes under protest, which were contrary to the federal constitution, and therefore not laws of the state. Poindexter v. Greenhow (1885) 114 U. S. 270, 5 Sup. Ct. 903, 921, 962, 29 L. Ed. 185; White v. Same (1885) 114 U. S. 307, 5 Sup. Ct. 923, 962, 29 L. Ed. 199; Chaffin v. Taylor (1885) 114 U. S. 309, 5 Sup. Ct. 924, 962, 29 L. Ed. 198; Allen v. Baltimore & O. R. Co. (1885) 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. Ed. 200; Chaffin v. Taylor (1886) 116 U. S. 567, 6 Sup. Ct. 518, 29 L. Ed. 727.

Since, in the exercise of their admiralty and maritime jurisdiction, the federal courts are governed solely by

the legislation of congress and the general principles of the maritime law, a court of admiralty in determining the question of the allowance of interest in a libel upon a contract of marine insurance, is not to be guided by state statutes as to the method of ascertaining the proportions of a general average loss and as to the allowance of interest on contracts. New Zealand Ins. Co. v. Earnmoor S. S. Co. (1897) 79 Fed. 368, 24 C. C. A. 644, affirming judgment Earnmoor S. S. Co. v. New Zealand Ins. Co. (D. C. 1896) 73 Fed. 867.

Act La. No. 5, Ex. Sess. 1870, which prohibits the granting of a mandamus for the collection of judgments against the city of New Orleans, is not binding upon the federal courts, which derive their power to enforce their judgments in such cases by mandamus from R. S. § 716, ante, § 1239. U. S. v. Capdevielle (1902) 118 Fed. 809, 55 C. C. A. 421, writ of certiorari denied Capdevielle v. U. S. ex rel. Kilpatrick (1903) 23 Sup. Ct. 850, 189 U. S. 510, 47 L. Ed. 923.

An action in admiralty for wrongful death, based on Civ. Code La. art. 2315, is governed by the local law, with respect to the defense of contributory negligence. Quinette v. Bisso (1905) 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303, writ of certiorari denied Bisso v. Quinette (1905) 26 Sup. Ct. 746, 199 U. S. 606, 50 L. Ed. 330.

Code Iowa, § 2423, prohibiting the maintenance of actions for the recovery of intoxicating liquor or its value, with certain exceptions, is inapplicable to actions in the national courts and ineffective to prevent their maintenance. Mechanics' Ins. Co. of Philadelphia v. C. A. Hoover Distilling Co. (1910) 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873.

The laws of the several states cannot be regarded as rules of decision in trials for offenses against the United States. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,694.

A state law cannot take away rights and privileges secured by the constitution and laws of the United States. U. S. v. Rathbone (C. C. 1828) Fed. Cas. No. 16,121.

The federal criminal laws are to be enforced by the federal judiciary without any regard to the criminal laws of the state in which the court is sitting, or the nature of the crime under the state laws. Charge to Grand Jury (C. C. 1854) Fed. Cas. No. 18,250.

State statutes in relation to the proof of claims against decedents' estates are not binding on the United States in the collection of their debts. U. S. v. Backus (C. C. 1855) Fed. Cas. No. 14,491.

R. S. § 2326, post. § 4623, provides that a suit upon an adverse claim to a mining location must be begun within 30 days after the claim is filed. Gen. St. Colo. 1883, p. 673, § 18, provides that, in case of failure of a new suit from certain causes, the plaintiff may renew his suit at any time within one year. Held, that the fact that an adverse suit had failed for a reason within the purview of said state statute did not authorize the plaintiff to begin another suit after the expiration of such 30 days, since said United States statute could not be affected by state legislation. Steves v. Carson (C. C. 1890) 42 Fed. 821.

In determining whether the use for which private property is taken is a public use, and hence not contrary to the United States constitution, federal courts are not bound by the declaration of the state legislature authorizing such taking that the use for which the appropriation of the property is authorized is not a public use. Bradley v. Fallbrook Irr. Dist. (C. C. 1896) 68 Fed. 948, judgment reversed Fallbrook Irr. Dist. Bradley (1896) 17 Sup. Ct. 56, 164 U. S. 112, 41 L. Ed. 369.

A state law which merely authorizes a change of venue, in the discretion of the court, on the ground of local prejudice, without giving to a defendant the right to remove the cause, does not affect in any way his right to remove it into the circuit court. City of Tacoma v. Wright (C. C. 1898) 84 Fed. 836.

An island in a navigable river, which had been surveyed prior to the admission of the state, so long as it remained undisposed of by the United States, was governed by the rules of the common law with respect to riparian rights and the effect of erosion or submergence, and not by the law of the state. Widdicombe v. Rosemiller (C. C. 1902) 118 Fed. 295.

A state statute giving a defendant in ejectment the right to recover the value of improvements made by him in good faith under color of title cannot be applied in a case in which the plaintiff claims under a patent issued by the United States after the improvements were made, since the power of the United States to dispose of its public lands is absolute, and the right of its grantee to possession on receiving the legal title cannot be obstructed or affected by any claim made under a law of the state. Tegarden v. Le Marchel (C. C. 1904) 129 Fed. 487.

Criminal proceedings in the federal courts are not governed by the laws of the several states, except as provided by act of congress. U. S. v. Shepard (D. C. 1870) Fed. Cas. No. 16,273.

This section applies to cases in which the jurisdiction arises by reason of the citizenship of the parties, but not where it arises because a federal question is involved, since state legislatures can exercise no authority over the latter. Schreiber v. Sharpless (D. C. 1883) 17 Fed. 589.

The right of the United States to maintain an action against an executor to recover the value of timber alleged

to have been unlawfully cut and removed from public lands by his testator is not limited or affected by a state statute, requiring all claims against the estate of a decedent to be first presented to the executor for allowance. U. S. v. Bean (D. C. 1903) 120 Fed. 719.

This section does not require the recognition of state statutes in an examination before an immigration officer to determine the right of an alien to enter or to remain in the United States under our immigration statutes. Section 3636, Rev. Laws Minn. 1905, providing that the word "minor" shall mean a male under 21 or a female under 18 years of age, is not binding in determining whether an alien female attains her majority when she reaches the age of 18 years; but such officer should follow the common-law rule, which fixes the age of majority at 21 for both sexes. Ex parte Petterson (D. C. 1908) 166 Fed. 536.

The liability of a surety on an injunction bond given in a suit in a federal court pursuant to federal statutes is governed by the principles applied by the federal courts in such cases, and not by the state law. Umbreit v. American Bonding Co. of Baltimore (1911) 129 N. W. 789, 144 Wis. 611.

10. Determination of state law.—The local law of a state is to be ascertained, if possible, from the decisions of its courts of last resort, but otherwise the United States courts will form an independent opinion and decision upon the principles and doctrines of general jurisprudence. Triumph Electric Co. v. Patterson (1914) 211 Fed. 244, 127 C. C. A. 612.

11. What state law governs.—In determining the validity of chattel mortgages, a court of bankruptcy is governed by the settled law of the state in which they were given. In re Antigo Screen Door Co. (1903) 123 Fed. 249, 59 C. C. A. 248; In re First Nat. Bank (1905) 135 C. C. A. 62, 67 C. C. A. 536; In re Beede (D. C. 1905) 138 Fed. 441.

In ejectment, the supreme court of the United States will follow the law of the state where the land lies. Davis v. Mason (1828) 26 U. S. (1 Pet.) 503, 7 L. Ed. 239.

The federal court in Tennessee will enforce, with respect to a tort committed in Mississippi, the constitutional provision (section 193) of the latter state that knowledge by any injured employé of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for the injury caused thereby, it not being opposed to the policy of the laws of Tennessee. Illinois Cent. R. Co. v. Ihlenberg (1896) 75 Fed. 873, 21 C. C. A. 546, 34 L. R. A. 393.

An action by a married woman for a personal injury, brought in the state where the injury occurred, is governed by the laws of such state as to the right of recovery and the damages recoverable, regardless of the place of plaintiff's domicile. Texas & P. Ry. Co. v. Humble (1899) 97 Fed. 837, 38 C. C. A. 502.

Where a cross-bill was filed to foreclose a deed of trust on land in Mississippi in a suit pending there, and such deed was given to secure a debt contracted by wagering transactions in cotton, whether the deed was enforceable must be determined by the laws of Mississippi. Williamson v. Majors (1909) 169 Fed. 754, 95 C. C. A. 186, writ of certiorari denied Majors v. Williamson (1909) 30 Sup. Ct. 399, 215 U. S. 597, 54 L. Ed. 342.

The liability of a railroad company for an injury resulting from its negligence, in the absence of any controlling federal statute relating to interstate commerce, is governed by the law of the state where the injury occurred, whether statutory or the common law as construed by its courts. Weir v. Rountree (1909) 173 Fed. 776, 97 C. C. A. 500, 19 Ann. Cas. 1204, appeal dismissed (1910) 30 Sup. Ct. 418, 216 U. S. 607, 54 L. Ed. 635.

Where a guaranty was made in New York, it must be construed in bankruptcy proceedings against the guarantor, according to the New York law, most favorably to the guarantee, though subject to the rule that, when the meaning of the words used has been ascertained, the guarantor's liability is strictissimi juris, and not to be extended beyond its precise import. In re Merrill & Baker (1911) 186 Fed. 312, 108 C. C. A. 390.

Defendants, who conducted a bucket shop in Ohio, with agencies in other states, held, on the facts shown, subject to an action in Ohio, under Rev. St. Ohio 1908, § 4270, by a resident of Kentucky to recover losses sustained and paid through such an agency in Indiana; the money having been remitted by the local bank in which it was first deposited to defendants in Ohio. Farless v. Morehead (1912) 201 Fed. 310, 119 C. C. A. 548.

The allegations and testimony of the plaintiff, in an action to recover margins paid to defendants as brokers on alleged gambling contracts on the future prices of stocks, held to show that the contracts were made at a branch office of defendants in Iowa and governed by the law of that state by which money so lost is not recoverable. Lamson Bros. & Co. v. Bane (1913) 206 Fed. 253, 124 C. C. A. 121, 46 L. R. A. (N. S.) 650.

The general statute of limitations of the state where a tort is committed is not applicable to an action brought in the courts of another state, to which the injured party has lawfully removed

while the right of action in the former state subsisted. Kansas City Southern Ry. Co. v. Maynor (1913) 209 Fed. 611, 126 C. C. A. 433.

An action in the federal District Court of New York for death of miner in Pennsylvania is governed by Bituminous Mining Acts of Pennsylvania, as construed by courts of Pennsylvania. Vagaszki v. Consolidation Coal Co. (1915) 225 Fed. 913, 141 C. C. A. 37.

If the circuit courts have jurisdiction of personal rights and duties because of diverse citizenship, or the alienage of a party, then, on application of a citizen of a foreign country residing without the United States for a writ of habeas corpus to have awarded to him the custody of his child, as against its mother and grandmother, who are citizens of the state of New York, the court will be governed in its decision by the law of New York as determined by its statutes and decisions. In re Barry (C. C. 1844) 42 Fed. 113, 34 L. Ed. 503, note.

The Wisconsin rule that, to uphold a contract for a sale and delivery of grain at a future date, it must affirmatively appear that it was made with an actual view to the delivery and receipt of grain, and not as an evasion of the Wisconsin statute against gambling transactions, does not apply to an action in the federal courts in that state by a broker, resident in Illinois, to recover advances and commissions growing out of orders given him by a citizen of Wisconsin, to be executed on the floor of the Chicago Board of Trade. The rights of the parties to such a suit are governed by the laws of Illinois. Ward v. Vosburgh (C. C. 1887) 31 Fed. 12.

In proceedings in the federal courts for the establishment of a claim by a nonresident creditor against his debtor's estate, the law of the state of the debtor's residence will be applied. Alice E. Mining Co. v. Blanden (C. C. 1905) 136 Fed. 252.

Where an employment contract was made in New York and broken there, if broken at all by the employer's insolvency, a federal court administering the insolvent's estate in New York would follow the New York rule as to what constitutes a breach of such contract. Ely v. Van Kannel Revolving Door Co. (C. C. 1911) 184 Fed. 459.

The question whether a cause of action was assignable so as to entitle the assignee to maintain a suit thereon in a federal court is to be determined by the law of the state where the transactions took place. Commonwealth S. S. Co. v. American Shipbuilding Co. (D. C. 1912) 197 Fed. 780.

The law of the state wherein a contract of sale or pledge is made and is to be performed must govern in the bankruptcy court in determining its validity. In re East End Mantel & T Co. (D. C. 1913) 202 Fed. 275.

In an action in courts sitting in Del ware by an Ohio receiver to enfor double liability of a Delaware stoc holder in an Ohio corporation, the a plicable statutes of pure limitations a those of Delaware, and not of Oh Irvine v. Elliott (D. C. 1913) 2 Fed. 82.

12. Judicial notice of state laws. The United States courts take judici notice of the statutes of the sever states. Course v. Stead (1800) 4 Da 22, 27, 1 L. Ed. 724; Owings v. Hu (1835) 34 U. S. (9 Pet.) 607, 9 L. E 246; Harpending v. Reformed Protes ant Dutch Church (1842) 41 U. S. (Pet.) 455, 10 L. Ed. 1029; Cheever Wilson (1869) 9 Wall. 108, 121, 19 Ed. 604; Junction R. Co. v. Bank Ashland (1870) 79 U. S. (12 Wall 226, 20 L. Ed. 385; Gormley v. Bu yan (1891) 11 Sup. Ct. 453, 138 U. 623, 34 L. Ed. 1086; Loree v. Abn (1893) 57 Fed. 159, 6 C. C. A. 30 Merchants' Exch. Bank v. McGra (1894) 59 Fed. 972, 8 C. C. A. 42 Western & A. R. Co. v. Robers (1894) 61 Fed. 592, 9 C. C. A. 64 Andruss v. People's Building, Loan Savings Ass'n (1899) 94 Fed. 575, C. C. A. 336; Mutual Life Ins. Co. New York v. Hill (1899) 97 Fed. 26 38 C. C. A. 159; Denver & R. G. Co. v. Wagner (1909) 167 Fed. 75, C. C. A. 527; Bohlander v. Heik (1909) 168 Fed. 886, 94 C. C. A. 29 Ritterbusch v. Atchison, T. & S. Ry. Co. (1912) 198 Fed. 46, 117 C. A. 164; Holly v. McDowell Coal Coke Co. (1913) 203 Fed. 668, 122 C. A. 64; Leary v. Jersey City (191 208 Fed. 854, 126 C. C. A. 12; Sa doval v. Priest (C. C. A. 1914) 2 Fed. 814; Mather v. Stokely (191 218 Fed. 764, 134 C. C. A. 442; Bal more & O. R. Co. v. Reed (1915) 2 Fed. 689, 139 C. C. A. 192; Vagasz v. Consolidation Coal Co. (C. C. 1915) 225 Fed. 913; Gordan v. Hoba (C. C. 1836) Fed. Cas. No. 5,60 Woodworth v. Spafford (C. C. 184 Fed. Cas. No. 18,020; Jasper v. Po ter (C. C. 1841) Fed. Cas. No. 7,22 Nelson v. Foster (C. C. 1857) Fe Cas. No. 10,105; Union Horse Sh Works v. Lewis (C. C. 1870) Fed. Ca No. 14,365; Taylor v. Holmes (C. 1882) 14 Fed. 498; Swann v. Swa (C. C. 1884) 21 Fed. 299; Knower Haines (C. C. 1887) 31 Fed. 51 Breed v. Northern Pac. R. Co. (C. 1888) 35 Fed. 642; Newberry v. Ro inson (C. C. 1888) 36 Fed. 841; L'E gle v. Gates (C. C. 1896) 74 Fed. 5 (following Hanley v. Donoghue [188 6 Sup. Ct. 242, 116 U. S. 1, 29 L. E 535); Hathaway v. Mutual Life In Co. of New York (C. C. 1900) 99 Fe 534; Irvine v. Elliott (D. C. 191 203 Fed. 82; Edwards v. Smith (Te Civ. App. 1911) 137 S. W. 1161; Ge

ling v. Baltimore & Ohio R. Co. (1894) 14 Sup. Ct. 533, 535, 151 U. S. 673, 38 L. Ed. 311.

A municipal ordinance is not a law of which a court will take judicial notice. Robinson v. Denver City Tramway Co. (1908) 164 Fed. 174, 90 C. C. A. 160; Choctaw, O. & G. R. Co. v. Hamilton (C. C. 1910) 182 Fed. 117.

The circuit courts of the United States are created to administer the laws of all the states in cases to which they respectively apply, and the circuit court must take judicial notice of the laws of a state. Owings v. Hull (1835) 9 Pet. 607, 625, 9 L. Ed. 246.

A judgment in an action on an insurance policy held not based on a state statute, and therefore upon a cause of action not pleaded, but that such statute of which the court was bound to take judicial notice, was applicable only to the defense pleaded, and, that defense being rendered by the statute insufficient, the judgment was based upon the untraversed allegations of the complaint. Mutual Life Ins. Co. of New York v. Dingley (1900) 100 Fed. 408, 40 C. C. A. 459.

Where a petition disclosed a cause of action on a special statute of a territory, the Circuit Court of Appeals would notice an amendment to such statute. Denver & R. G. R. Co. v. Wagner (1909) 167 Fed. 75, 92 C. C. A. 527.

Courts of the United States, being required to take judicial notice of the laws of the various states, whether depending on statutes or judicial opinions, such courts may look to the whole of a statute which it is required to apply, though merely a portion thereof is pleaded. Bond v. John V. Farwell Co. (1909) 172 Fed. 58, 96 C. C. A. 546.

State statutes and judicial precedents are admissible in the federal courts as evidence of the law of the state without special plea or proof of witnesses. Evans v. Cleveland & P. R. Co. (C. C. 1864) Fed. Cas. No. 4,557.

The federal court can take judicial notice of the laws of the several states of the Union, and in construing the constitution and statutes of a state, and the laws which regulate the rights of property in a state, it will be governed by the decisions of the highest court of the state. Taylor v. Holmes (C. C. 1882) 14 Fed. 498, decree affirmed (1888) 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179.

On consideration of a motion to remand a cause to the state court because the petition for removal was not filed in time, the federal court cannot take judicial notice of a rule of the state court by which the time in which pleadings may be filed is extended beyond the date fixed by the general statute of the state. Yarnell v. Felton (C. C. 1900) 104 Fed. 161.

While the federal courts take judicial notice of the laws of the state in which they are sitting affecting procedure, they do not take judicial notice of the rules of such state courts, and such rules, if relied on, must be specially pleaded. Randall v. New England Order of Protection (C. C. 1902) 118 Fed. 782.

Pierce's Code Wash. § 408, provides that in pleading any ordinance of a city or town it shall be sufficient to state the title of such ordinance and the date of its passage, whereupon the court shall take judicial notice of the existence of such ordinance and the tenor and effect thereof. Held that, in a suit to restrain a city and its officers from repealing a certain railway franchise ordinance, the court will take judicial notice of the charter of the city, though pleaded by its title only. Seattle, R. & S. Ry. Co. v. City of Seattle (C. C. 1911) 190 Fed. 75.

The courts of the United States take judicial notice of the statutes and judicial decisions of the several states, so that, where a declaration for a tort committed here and resulting in death in Maryland bases the right of the plaintiff to recover "upon the statutes in such cases made and provided," the lower court should take judicial notice of the Maryland and District of Columbia statutes giving a remedy in case of death by negligent act. Moore v. Pywell (1907) 29 App. D. C. 312, 9 L. R. A. (N. S.) 1078.

13. Proof of existence of state laws. Under this section and section 905, R. S., section 1519, ante, the printed copies of the statute laws of Nebraska, purporting to be published under its authority, are prima facie evidence of the passage and existence of the laws therein contained, in the courts of the United States. City of Beatrice v. Edminson (1902) 117 Fed. 427, 54 C. C. A. 601.

14. Limitation to actions at law.— This section has no application to criminal offenses against the United States. U. S. v. Central Vermont Ry. (C. C. 1907) 157 Fed. 291; Clark v. Allen (D. C. 1902) 114 Fed. 374, affirmed (1903) 126 Fed. 738, 62 C. C. A. 58.

This section does not apply to crimes against the United States, and cannot be extended beyond civil cases at common law as contradistinguished from suits in equity, and so far as concerns rights of property it is the only rule that could be adopted by the courts of the United States and the only one that Congress had the power to establish. U. S. v. Reid (1851) 12 How. 361, 363, 13 L. Ed. 1023.

The federal courts are not concluded in a matter of general equity jurisdiction by a decision of the state court. Flagg v. Mann (C. C. 1837) Fed. Cas. No. 4,847.

State laws do not constitute a rule of

decision to United States courts sitting as courts of equity. Burt v. Keyes (C. C. 1861) Fed. Cas. No. 2,212.

While this section in terms applies only to actions at law, yet actions in equity are fully within its principle. Hobe-Peters Land Co. v. Farr (C. C. 1908) 170 Fed. 644, reversed (1911) 188 Fed. 10, 110 C. C. A. 160.

15. Questions governed by state laws —In general.—A right arising under, or a liability imposed by, either the common law or the statute of a state, may, where the action is transitory, be asserted and enforced in any circuit court having jurisdiction of the subject-matter and the parties. Dennick v. Central R. Co. (1880) 103 U. S. 11, 26 L. Ed. 439.

What constitutes a misnomer in a criminal complaint or warrant for violation of the laws of the state is a local question, as to which the federal courts will follow the settled rule of the state courts, in the absence of any statute. O'Halloran v. McGuirk (1909) 167 Fed. 493, 93 C. C. A. 129.

There is no principle of the common law which pervades the Union, and exits independently of the laws of the states. This rule is found as adopted and modified by the laws and judicial decisions of the respective states. Lorman v. Clarke (C. C. 1841) Fed. Cas. No. 8,516.

The United States, in cases where congress has not provided adequate remedies for injuries to public property, may resort to those of common-law origin or those provided by the laws of the state. U. S. v. Ames (C. C. 1845) Fed. Cas. No. 14,441.

1 Rev. St. Mo. 1879, §§ 1791, 1793, 1794, providing that members of the grand jury may be compelled to disclose the names of witnesses who have appeared before it, and the evidence heard in the grand jury room, only (1) to show whether the testimony of a witness on trial is consistent with or different from that given before the grand jury; and (2) on trial for perjury committed before that body—establish much more than a rule of evidence. They declare the public policy of the state, and so are binding on the federal courts sitting in the state. Fotheringham v. Adams Exp. Co. (C. C. 1888) 34 Fed. 646.

As to questions not involving the constitution or laws of the United States, or affecting the commercial intercourse or business of the country at large, but relating solely to a subject-matter within state control, the federal courts should follow the rules adopted by the state courts. Kowalski v. Chicago G. W. Ry. Co. (C. C. 1898) 84 Fed. 586, judgment affirmed Chicago G. W. Ry. Co. v. Kowalski (1899) 92 Fed. 310, 34 C. C. A. 1.

Where Congress has not seen fit to legislate on a subject involving no federal question, and the case presenting such subject is in the federal court merely by reason of diversity of citizenship of the parties, the court will determine the question in accordance with the declared policy of the state in which it sits, as found either in its statutes or the decisions of its highest tribunal. Blackwell v. Southern Pac. Co. (C. C. 1910) 184 Fed. 489.

The federal courts consider the policy of the state in which they are situated in determining the enforceability of the statutes of another state. Gallagher v. Florida East Coast Ry. Co. (D. C. 1912) 196 Fed. 1000.

16. —— Contracts in general.—Under the laws of Louisiana and the decisions of the state courts, which govern the United States court, a mark to an instrument by a person who is unable to write his name is of the same effect as a signature. Zacharie v. Franklin (1838) 12 Pet. 151, 162, 9 L. Ed. 1035.

Contracts in evasion or fraud of the laws of any state are invalid in the federal court. Green v. Collins (C. C. 1871) Fed. Cas. No. 5,755.

A federal court in equity will enforce at the suit of the beneficiary, a contract made for his benefit by another person, where, under the jurisprudence and laws of the state, want of privity is not an obstacle to such enforcement. Benjamin v. Cavaroc (C. C. 1875) Fed. Cas. No. 1,300.

A federal court will not refuse to enforce a valid contract, harmless in itself, which is nonenforceable in the state courts merely on account of noncompliance with state administrative regulations. Eastern Building & Loan Ass'n v. Bedford (C. C. 1898) 88 Fed. 7

17. —— Insurance contracts.—Since Rev. St. Ind. § 3770, relating to foreign insurance companies, provides that no condition in a fire insurance policy shall be valid which prohibits the bringing of a suit thereon after the expiration of any period less than three years, a condition in a policy in violation thereof will be held void by the federal courts. Small v. Westchester Fire Ins. Co. (C. C. 1892) 51 Fed. 789

In an action in a federal court on a fire insurance policy issued within the state, and on property there situated by a foreign insurance company, it will be presumed, nothing appearing to the contrary, that the company has complied with the statutes prescribing the conditions upon which foreign insurance companies may do business within the state; and the validity of conditions contained in the policy must therefore be determined by the state law. Id.

18. —— Bonds, notes, and loan contracts.—The validity and effect of a guaranty of a note made in Alabama is governed by the statute of frauds of that state when sued on in the federal

courts; for that statute is such a law of the state as has been declared to be a rule of decision in the courts of the United States. Moses v. National Bank (1893) 13 Sup. Ct. 900, 901, 149 U. S. 298, 37 L. Ed. 743.

The Minnesota doctrine, that one suing to cancel a Minnesota contract for usury need not offer to repay the money loaned, will be applied in the federal court, where the suit was commenced in the state court, and removed on the ground of diverse citizenship. Missouri, K. & T. Trust Co. v. Krumseig (1899) 19 Sup. Ct. 179, 172 U. S. 351, 43 L. Ed. 474, affirming decree (1896) 77 Fed. 32, 23 C. C. A. 1.

Where a stockholder in a building and loan association becomes also a borrower, his contract as such is governed by the local law; and where by such law it is usurious, in a settlement on the winding up of the association in insolvency, before the maturity of his loan, he should be charged with interest on the sum borrowed at a legal rate and credited with all sums paid as premiums and interest; but the local law does not govern as to payments made by him as dues on his stock, which are made under his contract as a stockholder. Coltrane v. Blake (1902) 113 Fed. 785, 51 C. C. A. 457.

A suit on a bond given in the federal court will be sustained in such court if the state court would be compelled under the statutes to sustain the same suit. Deakin v. Lea (C. C. 1879) Fed. Cas. No. 3,695.

19. —— Questions affecting transfers, title, or interest in property.— A state statute enacting that a judgment in ejectment, provided the action be brought in a form which gives precision to the parties and land claimed, shall be a bar to any other action between the same parties on the same subject-matter, is a rule of property as well as of practice, and, being conclusive on title in the courts of the state, is conclusive, also, in those of the United States. Miles v. Caldwell (1864) 69 U. S. (2 Wall.) 35, 17 L. Ed. 755.

A state statute, with rules of practice of state courts framed for enforcement of it, declaring a right of redemption of mortgaged property on foreclosure, is a rule of property, and is obligatory on federal courts deciding on claims and interests in real property within the state. Brine v. Hartford Fire Ins. Co. (1877) 96 U. S. 627, 24 L. Ed. 858.

A statute of a state, enacting that two concurring verdicts and judgments in ejectment shall be conclusive of the title, establishes a rule of property in land within the state, and binds the courts of the United States. Britton v. Thornton (1884) 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816.

Though the federal courts ordinarily decline to declare against the title to land on the ground that it is strictly within the province of the state courts, yet in a suit by a railway corporation, resident in one state, against citizens of another state, seeking to recover from defendants land awarded to the corporation in violation of the state law that a railway corporation can only hold land for the purposes for which it is organized, the federal court will hold title to the land invalid according to the provisions of the state law. Case v. Kelly (1889) 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513.

The federal courts will construe the grants of the general government without reference to the rules adopted by the states for their grants, but whatever incidents or rights attach to its ownership will be determined by the states, subject to the condition that the rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. Northern Pac. R. Co. v. Townsend (1903) 23 Sup. Ct. 671, 672, 190 U. S. 267, 47 L. Ed. 1044.

Whether the patentee of the United States to land bounded on a nonnavigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies. Hardin v. Shedd (1903) 23 Sup. Ct. 685, 190 U. S. 508, 47 L. Ed. 1156.

A rule of local law that the owner of land bordering on a river owns to the center of the channel enures to the benefit of a patentee from the United States as against one claiming to enter as a homestead an unsurveyed island in such river, where the omission to survey the island was not due to fraud or mistake, and subsequent applications for a survey have been refused by the land department. Whitaker v. McBride (1905) 25 Sup. Ct. 530, 197 U. S. 510, 49 L. Ed. 857, affirming judgment McBride v. Whitaker (1902) 90 N. W. 966, 65 Neb. 137.

Whether a contract under which goods were delivered to a bankrupt was one of conditional sale, and valid without record, are questions on which a court of bankruptcy follows the local law. Bryant v. Swofford Bros. Dry Goods Co. (1909) 29 Sup. Ct. 614, 618, 214 U. S. 279, 53 L. Ed. 997.

The rights of a riparian owner on a navigable stream are governed by the laws of the state in which the stream is situated, subject to the paramount public right of navigation. Weems Steamboat Co. of Baltimore City v. People's Steamboat Co. (1909) 29 Sup. Ct. 661, 663, 214 U. S. 345, 53 L. Ed. 1024, 16 Ann. Cas. 1222.

On a question affecting the validity and effect of a contract made and to be performed in a state concerning land therein, the laws of the state govern in proceedings in the federal court within the state to enforce the contract.

In re Roche (1900) 101 Fed. 956, 959, 42 C. C. A. 115.

Federal courts, in cases involving the title to land, will enforce the law of the state in which the land is situated in so far as it governs descent and alienation and the construction of conveyances. Thompson v. Sloss-Sheffield Steel & Iron Co. (1914) 209 Fed. 840, 126 C. C. A. 564.

Whether a conveyance is fraudulent as to creditors must be determined in a federal court by the local law. Williams v. Adler-Goldman Commission Co. (1915) 227 Fed. 374, 142 C. C. A. 70.

On questions touching the tenure of real estate the federal courts are governed by the laws of the country where such real estate is situated. Newman v. Keffer (C. C. 1836) Fed. Cas. No. 10,177; In re Zug (C. C. 1877) Fed. Cas. No. 18,222.

The federal courts follow the state law and the precedents of the state courts in deciding questions as to the validity of transfers of property as against creditors. Heydock v. Stanhope (C. C. 1853) Fed. Cas. No. 6,-445.

The statutes of the several states as to realty, enacted in conformity with the constitutions of the respective states, are rules of property and rules of decisions of the courts of the United States, unless the constitution, treaties, or statutes of the United States otherwise require or provide. Griswold v. Bragg (C. C. 1880) 48 Fed. 519, 520.

State statutes relating to the removal of clouds from title to land are obligatory upon the federal courts, and a uniform and stable body of judicial decisions on that subject from the court of last resort of the state is equally obligatory. Lamb v. Farrell (C. C. 1884) 21 Fed. 5.

A state statute regulating the rights of the parties where a conveyance is set aside, as fraudulent, at the instance of creditors of the grantor, will be applied in the federal courts sitting in that state, in respect to property in that state. Claflin v. Lisso (C. C. 1886) 27 Fed. 420, decree reversed Bradley v. Claflin (1889) 10 Sup. Ct. 125, 132 U. S. 379, 33 L. Ed. 367.

In controversies concerning the title to real property, the federal court always administers the law as if it was sitting as a local court of the state. Hewitt v. Storey (C. C. 1889) 39 Fed. 719, 721.

Grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the lands lie. Hobart v. Hall (C. C. 1909) 174 Fed. 433, judgment affirmed Hall v. Hobart (1911) 186 Fed. 426, 108 C. C. A. 348.

Whenever property rights are concerned, held, that such rights are to be established according to laws o state. Barker v. Eastman (C. C. 1911) 192 Fed. 659.

On an issue as to whether a contrac for the sale of a machine was a leas or a contract of conditional sale, court of bankruptcy will follow th state law. In re Sheets Printing & Mfg. Co. (D. C. 1905) 136 Fed. 989 judgment affirmed Unitype Co. v. Lon (1906) 143 Fed. 315, 74 C. C. A. 453 which is reversed (1906) 149 Fed. 196 79 C. C. A. 154.

In a proceeding against a bankrupt' trustee to recover certain goods alleg ed to have been bailed and not sold t the bankrupt, whether the contrac constituted a bailment or a sale i governed by the local law. In re Heck athorn (D. C. 1906) 144 Fed. 499.

Where a seller of goods to a bank rupt claims the right to retake then under a conditional sale made in Geor gia, the validity of such contracts mus be determined in accordance wit the law of such state applicable there to. In re Burke (D. C. 1909) 16 Fed. 994.

The United States Supreme Cour will administer the law prevailing i the particular state, when passing upo the extent of a government grant bor dered or intersected by navigable wa ters. Hill v. Newell (1915) 149 P 951, 86 Wash. 227.

A state statute as to ownership o property will control the federal court unless affected by the peculiar provi sions of the bankruptcy acts itself Mishawaka Woolen Mfg. Co. v. Teas dale (1911) 129 N. W. 671, 145 Wis 73.

20. —— Liability for negligence o torts.—The provision of the Code o South Dakota (Comp. Laws Dak. 1887 § 4603) fixing the measure of the dam ages recoverable for wrongful conver sion of personal property as the val ue of the property at the time of con version, with interest, or, where th action has been prosecuted with rea sonable diligence, the highest marke value of the property at any time be tween the conversion and the verdict without interest at the option of plain tiff governs in actions in the federa courts within the state, and is applica ble to an action for trespass upon mining claim, where the only damag claimed or litigated is the value of th ore removed therefrom and converte by defendant; the action being in ef fect, though not in form, one for th conversion of personal property. Gold en Reward Min. Co. v. Buxton Min Co. (1899) 97 Fed. 413, 38 C. C. A 228.

Plaintiff's intestate, who was a fire man on the defendant railway, wa killed while on duty in the state o Indiana. The intestate belonged to relief department conducted by the de fendant company in Baltimore, and, b

the terms of the contract, it was to be governed by the laws of Maryland. A rule of the department required that, in case the member was killed through the company's negligence, the benefit would not be paid until a release was executed by the parties entitled to sue, relieving the company from all liability. Held, that the question whether a release executed by plaintiff as the widow and beneficiary of deceased barred an action by her as administratrix of his estate must be determined by the laws of Indiana, since it is for the state where the negligent act occurred to prescribe when and under what circumstances a cause of action resulting therefrom shall arise against a corporation operating within its limits. Cowen v. Ray (1901) 108 Fed. 320, 47 C. C. A. 352.

Whether an action to recover pecuniary damages for trespass to real estate is real and local, or is personal and transitory, is essentially a matter of state policy or local law, and must be determined by the view taken of the nature of the action in the state in which it is brought. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651.

In an action in a federal court for injuries to a servant of a railroad company, whether plaintiff and the engineer, by whose negligence plaintiff was injured, were fellow servants, depends on the law of the state where the accident occurred. Atlantic Coast Line R. Co. v. Farmer (1909) 176 Fed. 692, 100 C. C. A. 244.

The statute of New York permitting the assignment of rights of action for torts is applicable to causes of action in a federal court arising in that state. Hartford Fire Ins. Co. v. Erie R. Co. (C. C. 1909) 172 Fed. 899.

21. —— **Administration of estates and construction of wills.**—The federal courts must look to the law of the state for the rules governing the descent, alienation, or transfer of real estate situated in the state, and for the effect and construction of wills and other conveyances. De Vaughn v. Hutchinson (1897) 17 Sup. Ct. 461, 462, 165 U. S. 566, 41 L. Ed. 827; Simpson County v. Wisner-Cox Lumber & Mfg. Co. (1909) 170 Fed. 52, 95 C. C. A. 227.

The circuit court of the United States sitting in Pennsylvania is bound by the same rules as would govern the local tribunals in that state, and, on distributing assets of an estate, would require a devisee to give security to refund in case debts should afterwards be proved against the testator, as provided by the statute of Pennsylvania. Aspden v. Nixon (1846) 45 U. S. (4 How.) 467, 11 L. Ed. 1059.

The circuit courts of the United States, where the parties are citizens of different states, will enforce the same rules and the adjustment of claims against ancillary executors that the local courts administer in favor of their own citizens. Walker v. Beal (1869) 9 Wall. 743, 755, 19 L. Ed. 814.

A foreign creditor may establish his claim in the federal courts against the personal representatives of a decedent, though the state laws limit such right to proceedings in probate courts, but in such case the federal court administers the state laws and is bound by the rules that govern the local tribunals. Schurmeier v. Connecticut Mut. Life Ins. Co. (1909) 171 Fed. 1, 96 C. C. A. 107, writ of certiorari dismissed (1911) 31 Sup. Ct. 470, 219 U. S. 586, 54 L. Ed. 347.

Where a federal court assumes to deal with lands of a decedent as assets for creditors generally, it will be governed by the legislation of the state in which the suit is brought and the lands are situated, which has impressed that character on them, and it must have jurisdiction of the thing as to its situs, and of the parties in whom resides the legal title. McPike v. Wells (1876) 54 Miss. 136.

22. —— **Restraining nuisance.**—The circuit court of the United States has no power to enjoin a nuisance existing under a local law, which does not amount to a national nuisance. Griffing v. Gibb (C. C. 1857) Fed. Cas. No. 5,819.

23. —— **Laws or regulations affecting corporations.**—The federal courts will not aid a corporation to violate a state law and obtain a title which it has no authority to hold. Case v. Kelly (1890) 10 Sup. Ct. 216, 220, 133 U. S. 21, 33 L. Ed. 513.

The Missouri statutes, which forbid unqualified foreign corporations doing business in the state from suing in the courts of the state, do not affect their right to sue in the national courts. Johnson v. City of St. Louis (1909) 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949.

The federal courts will give effect to a state statute concerning shares of stock in corporations. Harris v. Egger (1915) 226 Fed. 389, 141 C. C. A. 219.

Where a statute provides that contracts by foreign corporations shall not be enforced in the courts of the state before compliance with certain requirements, the prohibition will not be extended to suits brought in the federal courts, the contracts not being void. Sullivan v. Beck (C. C. 1897) 79 Fed. 200.

The prohibition in a state statute prohibiting a foreign corporation from doing business in the state without complying with the statute will be observed by the federal courts. In re Monongahela Distillery Co. (D. C. 1910) 186 Fed. 220.

The policy of the state with reference to the regulation of corporations

is for the determination of the state courts. Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co. (D. C. 1912) 197 Fed. 347.

24. —— **Liens and mortgages.**—On foreclosure of a mortgage in the United States court, the mortgagor is entitled to the equity of redemption after sale, as provided by the statutes of the state where the land lies. Orvis v. Powell (1878) 98 U. S. 176, 25 L. Ed. 238; Jackson & Sharp Co. v. Burlington & L. R. Co. (C. C. 1887) 29 Fed. 474.

State laws as to redemption held to control the practice on foreclosure in a federal court. Brine v. Hartford F. Ins. Co. (1877) 96 U. S. 627, 633, 24 L. Ed. 858.

Where lands have been mortgaged, and parcels thereof sold at different times to different purchasers, the statutory rule of the state as to the order in which they shall be subjected to the satisfaction of the mortgage is binding on the federal courts. Orvis v. Powell (1878) 98 U. S. 176, 25 L. Ed. 238.

A state statute provided that, if the mortgagor's right of redemption from foreclosure sale was not exercised within 12 months, a judgment creditor of the mortgagor might after 12 and before 15 months after the sale, redeem the property therefrom by the payment to the purchaser or to the officer for his benefit of the amount for which the premises were sold, with interest from the date of sale at 10 per cent. per annum. The rules of the United States court, designed to follow this practice, provided for payment by the judgment creditor to the purchaser or to the clerk of the court instead of to the officer having the execution. Held an immaterial variation in a matter purely of practice, within the control of the federal court, that did not affect the substantial right and rule of property created by the statute. Connecticut Mut. Life Ins. Co. v. Cushman (1883) 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648.

The law of the state as to the validity of a chattel mortgage reserving the mortgagor's exemptions from execution under the state laws controls the federal courts in the state. Wilson v. Perrin (1894) 62 Fed. 629, 11 C. C. A. 66.

The federal courts recognize no lien at common law in behalf of an attorney, beyond that given by the local law. Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33.

In determining the validity of a mechanic's lien in a bankruptcy proceeding, the federal courts will be governed by the state laws. Morgan v. First Nat. Bank (1906) 145 Fed. 466, 76 C. C. A. 236.

The validity of a deed of trust of personal property as against the grantor's other creditors in bankruptcy depends on the law of the state. Swager v. Smith (1912) 194 Fed. 762, 114 C. C. A. 482.

In determining the validity of chattel mortgages in bankruptcy proceedings, a federal court will follow the settled law of the state. Scandinavian-American Bank v. Sabin (1915) 227 Fed. 579, 142 C. C. A. 211.

Under Comp. Laws Kan. § 3983, no order for the sale of railroad property mortgaged, with a waiver of appraisement, can be made by the court until the expiration of six months after the decree of foreclosure. This statute regulates the transfer of land within the state, and is therefore binding upon the federal courts. Benedict v. St. Joseph & W. R. Co. (C. C. 1883) 19 Fed. 173.

25. —— **Liabilities of counties and municipal corporations.**—Where a municipal corporation is not, under state law, liable for personal injuries caused by defective sidewalks, an action cannot be maintained in the federal courts for such injuries received by a citizen of another state. City of Detroit v. Osborne (1890) 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260, reversing (C. C. 1886) 32 Fed. 36.

An action against a county for infringement of a patent is subject to a state statute requiring a demand against a county for unliquidated damages to be presented to the board of supervisors of the county, and payment demanded, before bringing action upon it. May v. Buchanan County (C. C. 1886) 29 Fed. 469.

26. —— **Condemnation proceedings.**—A nonresident complainant, seeking to enjoin judgments condemning property to the use of a city, can have no greater relief in the federal courts than he could obtain in the state courts, and, if not entitled to equitable relief therein, will be denied it in the federal court. Ewing v. St. Louis (1866) 5 Wall. 413, 419, 18 L. Ed. 657.

The United States, in proceedings to condemn land for governmental purposes, exercises its own right of eminent domain, subject to the limitation of the federal Constitution that private property shall not be taken for public use without just compensation, and does not proceed under the right of the state; and the right to compensation and its measure may be different from that in a state condemnation proceeding with respect to property which had previously been appropriated to public or municipal uses under the laws of the state. Town of Nahant v. U. S. (1905) 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723, modifying decree In re Condemnation of Land at Nahant (D. C. 1904) 128 Fed. 185, and decree modified (1907) 153 Fed. 520, 82 C. C. A. 470.

27. —— **Exemptions to debtors.**—It has always been the policy of congress to exempt to debtors and bankrupts the

property exempt to them under the state law, and creditors suing in the federal courts cannot subject to execution property of their debtor exempt to him by the law of the state. Steele v. Buel (1900) 104 Fed. 968, 44 C. C. A. 287.

28. —— **Discharge of judgment debtors.**—A discharge from imprisonment of a judgment debtor under a law of the state will bar an action of debt on a bond given for the jail liberties. Stearns v. U. S. (C. C.) Fed. Cas. No. 13,341.

29. —— **Statute of frauds.**—The validity and effect of a guaranty of a note made in Alabama is governed by the statute of frauds of that state when sued on in the federal courts; for that statute is such a law of the state as has been declared to be a rule of decision in the courts of the United States by this section. Moses v. Lawrence County Bank (1893) 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743.

Under section 34 of the Judiciary Act of September 24, 1789, the statute of frauds of the state is applicable to the courts of the United States in actions at law. Buhl v. Stephens (C. C. 1898) 84 Fed. 922, 926.

Since the statute of frauds attacks the remedy, the lex fori governs, and the law of the state on such subject is a rule of decision in the federal courts. Ballantine v. Yung Wing (C. C. 1906) 146 Fed. 621.

A contract must be written if there be a local statute of frauds. Purcell Envelope Co. v. U. S. (1913) 48 Ct. Cl. 66.

30. —— **Operation and effect of judgments and lis pendens.**—The federal courts will follow the law of the state where a judgment is rendered as to its effect in merging the original cause of action. Packer v. Whittier (C. C. 1897) 81 Fed. 335, judgment reversed (1899) 91 Fed. 511, 33 C. C. A. 658.

A state statute providing for filing lis pendens does not apply to suits in the federal courts. King v. Davis (C. C. 1905) 137 Fed. 222, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348.

II. DECISIONS OF STATE COURTS

31. **Conclusiveness in federal courts of judgments of state courts and vice versa.**—See Const. art. 3, § 1; art. 4, § 1; art. 6, cl. 2, and notes; and § 1519, ante, and notes.

32. **Authority in general.**—A decision on matters depending exclusively on the law of the state is conclusive. Bush v. Person (1855) 18 How. 82, 83, 15 L. Ed. 273.

Where the federal courts have jurisdiction by reason of the citizenship of the parties, plaintiff has the right to the independent judgment of the courts to determine for themselves what is the law of the state by which his rights are fixed and governed. Carroll County v. Smith (1884) 4 Sup. Ct. 539, 542, 111 U. S. 556, 28 L. Ed. 517.

Decisions by the highest court of the state are not "laws" of the state within this section. Baltimore & O. R. Co. v. Baugh (1893) 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.

Where a decision of the highest court of a state, although based upon the common law, is deemed of an application especially local, its authority in a federal court is almost as great as would be given to it if it construed a state statute, especially if the rule thereby established pertains to real property. Percy Summer Club v. Astle (1908) 163 Fed. 1, 90 C. C. A. 527, rehearing denied (1908) 166 Fed. 1020, 92 C. C. A. 667.

Decision of a state court of last resort on same subject between other parties will not influence federal court, on application for ad interim injunction, where it was rendered after rights of parties to federal suit had become fixed. Jackson Co. v. Gardiner Inv. Co. (C. C. A. 1912) 200 Fed. 113.

A federal court is not bound to follow state court decisions, unless the court to be followed is a court of last resort, particularly where the opinions of the lower courts are neither unanimous, nor so numerous and old as to show a settled rule. United States Telephone Co. v. Central Union Telephone Co. (1913) 202 Fed. 66, 122 C. C. A. 86, affirming decree (C. C. 1909) 171 Fed. 130.

Where a decision of the state supreme court sustaining an order granting defendant a new trial, after which plaintiff dismissed and instituted a new suit in the federal court, was but an estimate of the probative force of certain evidence, it was persuasive, and not conclusive on the federal court. Harrison v. Foley (1913) 206 Fed. 57, 124 C. C. A. 191.

It is only to a settled rule of a state court applicable to the precise facts disclosed by the record that a federal court should yield its own judgment. John Deere Plow Co. v. Mowry (1915) 222 Fed. 1, 137 C. C. A. 539.

An injunction having been issued by a state court and perpetuated by the decree of the supreme court of the state, a similar injunction, granted as between the same parties, with regard to the same subject-matter, in a new suit, by a court of the same state and removed to this court, the matter will be treated by this court as a thing adjudged, and the injunction perpetuated. New Orleans, M. & C. R. Co. v. City of New Orleans (C. C. 1878) 14 Fed. 373.

A federal court is not absolutely bound to follow a single decision of the state court of last resort, especially when the decision has been rendered

since the commencement of the suit in the federal court. Fretts v. Shriver (C. C. 1910) 181 Fed. 279.

This section applies to cases in which the jurisdiction arises by reason of the citizenship of the parties, but not where it arises because a federal question is involved, since state legislatures can exercise no authority over the latter. Schreiber v. Sharpless (D. C. 1883) 17 Fed. 589.

Federal courts are bound to assume that, when a question arose in a state court, it was thoroughly considered by that tribunal, and that the decision rendered by it embodied its deliberate judgment. In re Floyd & Hayes (D. C. 1915) 225 Fed. 262.

A decision of the United States supreme court putting the affirmance of the decree of a state appellate court on a ground different from that taken by the state court in its opinion, does not affect the binding authority of the decision of the state court as a judicial precedent on the questions covered by the affirmance. City of Paterson v. East Jersey Water Co. (1908) 70 A. 472, 74 N. J. Eq. 49, decree affirmed (1910) 78 A. 1134, 77 N. J. Eq. 588.

Though the courts of a state have decided a point of law one way, a state court will not enjoin prosecution in a federal court of an action in which said point is involved, on the ground that the federal court will probably decide the point the other way; said court having full jurisdiction. Town of Thompson v. Norris (N. Y. 1882) 63 How. Prac. 418, 11 Abb. N. C. 163.

33. Construction of state constitutions and statutes—In general.—The federal courts follow the decisions of the highest courts of the states in construing the constitution and laws of the state, unless they conflict with the United States constitution or laws. Provident Institution for Savings v. Massachusetts (1867) 6 Wall. 611, 628, 18 L. Ed. 907; Hamilton Mfg. Co. v. Massachusetts (1867) 6 Wall. 632, 640, 18 L. Ed. 904; South Ottawa v. Perkins (1876) 94 U. S. 260, 267, 24 L. Ed. 154; Gormley v. Clark (1890) 10 Sup. Ct. 554, 556, 134 U. S. 338, 33 L. Ed. 909; City of Beatrice v. Edminson (1902) 117 Fed. 427, 54 C. C. A. 601; Kibbe v. Stevenson Iron Min. Co. (1905) 136 Fed. 147, 69 C. C. A. 145; Harrison v. Remington Paper Co. (1905) 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314 (writ of certiorari denied [1905] 26 S. Ct. 747, 199 U. S. 607, 50 L. Ed. 331); Cheatham v. Evans (1908) 160 Fed. 802, 87 C. C. A. 576; Johnson v. City of St. Louis (1909) 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949; Mudge v. Black, Sheridan & Wilson (1915) 224 Fed. 919, 140 C. C. A. 397; Southern R. Co. v. North Carolina Corp. Commission (C. C. 1900) 99 Fed. 162, 165; Forrester v. Southern Pac. Co. (Nev. 1913) 134 Pac. 753 (rehea ing denied [Nev. 1913] 136 Pac. 705 Louisville & N. R. Co. v. Central Stoc yards Co. (1906) 97 S. W. 778, Ky. Law Rep. 18.

Decisions of the highest court of state construing its laws and constit tion are binding on the federal supren court. Bank of Hamilton v. Dudl (1829) 2 Pet. 492, 521, 7 L. Ed. 49 Luther v. Borden (1849) 7 How. 1, 4 12 L. Ed. 581; Nesmith v. Sheld (1849) 7 How. 812, 818, 12 L. Ed. 92 Stone v. Wisconsin (1876) 94 U. 181, 24 L. Ed. 102; Holly v. McDow Coal & Coke Co. (1913) 203 Fed. 66 122 C. C. A. 64.

It is the province of the supren court of a state to construe its ov constitution and laws; and when it d cides that one of its laws is not a thorized by its constitution, it is n for the federal supreme court to de the correctness of the decision, wh there is no evasion in this way of fe eral authority. Boyd v. Alaban (1876) 94 U. S. 645, 649, 24 L. Ed. 30

As a general rule the United Stat supreme court will accept the interpr tation put by the state courts upon t state constitutions and statutes, b there are exceptions to the rule. Boa of Com'rs of Stanly County v. W. Coler & Co. (1903) 23 Sup. Ct. 81 814, 190 U. S. 437, 47 L. Ed. 1126.

The construction of a state constit tion or statute by the highest court the state is binding upon the feder courts in cases involving rights whi arose after such construction w given. George A. Shaw & Co. v. Clev land, C. C. & St. L. Ry. Co. (190 173 Fed. 746, 97 C. C. A. 520.

The federal court, in obedience the act of congress, conforms as far possible, in common-law actions, the forms and modes of practice of t courts of the state in which it may the time be sitting, and to a certa extent adopts the construction giv by the highest court of such state up its constitution and statutes, and i laws regulating the rights of propert Hurst v. Everett (C. C. 1884) 21 Fe 218.

A decision by a state supreme cou construing the state constitution statutes, rendered after a suit in a fe eral court, involving rights previous accrued or liabilities incurred und such constitution or statutes, has be submitted for decision, is not bindi on such federal court, but it may e ercise its independent judgment. Ch cago, B. & Q. R. Co. v. Board Sup'rs of Appanoose County (C. 1908) 170 Fed. 665, judgment affirm (1910) 182 Fed. 291, 104 C. C. 573, 31 L. R. A. (N. S.) 1117, and d cree affirmed (1910) 182 Fed. 301, 1 C. C. A. 583.

34. —— Constitutions.—Where question of constitutional law aris

wholly under the state constitution, and has been decided by the supreme court of the state, such construction is conclusive on the United States courts. Calder v. Bull (1798) 3 U. S. (3 Dall.) 386, 1 L. Ed. 648; Bank of Hamilton v. Dudley (1829) 27 U. S. (2 Pet.) 492, 7 L. Ed. 496; Luther v. Borden (1849) 48 U. S. (7 How.) 1, 12 L. Ed. 581; Randall v. Brigham (1868) 7 Wall. 523, 541, 19 L. Ed. 285; Gut v. State (1869) 76 U. S. (9 Wall.) 35, 19 L. Ed. 573; Post v. Supervisors (1881) 105 U. S. 667, 669, 26 L. Ed. 1204; Dixon County v. Field (1884) 4 Sup. Ct. 315, 318, 111 U. S. 83, 28 L. Ed. 360; Brown v. State of New Jersey (1899) 20 Sup. Ct. 77, 175 U. S. 172, 44 L. Ed. 119; American Sugar Refining Co. v. Louisiana (1900) 21 Sup. Ct. 43, 44, 179 U. S. 89, 45 L. Ed. 102; In re Brown (1908) 164 Fed. 673, 90 C. C. A. 489; Southern Pac. R. Co. v. Orton (C. C. 1879) 32 Fed. 457; Reclamation Dist. No. 108 v. Hagar (C. C. 1880) 4 Fed. 366 (decree affirmed Hagar v. Reclamation Dist. No. 108 [1884] 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569); Western Union Telegraph Co. v. Julian (C. C. 1909) 169 Fed. 166; In re Bailes (D. C. 1910) 176 Fed. 460.

The determination of a question involving the construction of a state constitution by the highest court of a state is absolutely binding upon the courts of the United States, where no question affecting the constitution of the United States is involved. Nielsen v. Chicago, B. & Q. R. Co. (1911) 187 Fed. 393, 109 C. C. A. 225; Folsom v. Ninety-Six Tp. (C. C. 1893) 59 Fed. 67, 68; McCain v. City of Des Moines (C. C. 1898) 84 Fed. 726 (approving State v. City of Des Moines [Iowa 1896] 65 N. W. 818 and decree affirmed [1899] 19 Sup. Ct. 644, 174 U. S. 168, 43 L. Ed. 936); In re Opinion of the Judges (S. D. 1914) 147 N. W. 729.

35. —— **Statutes.**—Decisions of a state court of last resort construing a state statute will be followed by United States courts. McKeen v. Delancy (1809) 9 U. S. (5 Cranch) 22, 3 L. Ed. 25; Polk v. Wendall (1815) 13 U. S. (9 Cranch) 87, 3 L. Ed. 665; Mutual Assur. Soc. v. Watts (1816) 14 U. S. (1 Wheat.) 279, 4 L. Ed. 91; Shipp v. Miller (1817) 15 U. S. (2 Wheat.) 316, 4 L. Ed. 248; Thatcher v. Powell (1821) 19 U. S. (6 Wheat.) 119, 5 L. Ed. 221; Elmendorf v. Taylor (1825) 23 U. S. (10 Wheat.) 152, 6 L. Ed. 289; McCormick v. Sullivant (1825) 23 U. S. (10 Wheat.) 192, 6 L. Ed. 300; Bell v. Morrison (1828) 26 U. S. (1 Pet.) 351, 7 L. Ed. 174; D'Wolf v. Rabaud (1828) 26 U. S. (1 Pet.) 476, 7 L. Ed. 227; Davis v. Mason (1828) 26 U. S. (1 Pet.) 503, 7 L. Ed. 239; Waring v. Jackson (1828) 26 U. S. (1 Pet.) 570, 7 L. Ed. 266; Fullerton v. Bank of United States (1828) 26 U. S. (1 Pet.) 604, 7 L. Ed. 280; Ross v. Barland (1828) 26 U. S. (1 Pet.) 655, 7 L. Ed. 302; Gardner v. Collins (1829) 27 U. S. (2 Pet.) 58, 7 L. Ed. 347; Beach v. Viles (1829) 27 U. S. (2 Pet.) 678, 7 L. Ed. 559; McCluny v. Silliman (1830) 28 U. S. (3 Pet.) 270, 7 L. Ed. 676; United States v. Morrison (1830) 29 U. S. (4 Pet.) 124, 7 L. Ed. 804; Henderson v. Griffin (1831) 30 U. S. (5 Pet.) 151, 8 L. Ed. 79; Hinde v. Vattier (1831) 30 U. S. (5 Pet.) 398, 8 L. Ed. 168; Ross v. McLung (1832) 31 U. S. (6 Pet.) 283, 8 L. Ed. 400; Green v. Neal (1832) 31 U. S. (6 Pet.) 291, 8 L. Ed. 402; Livingston v. Moore (1833) 32 U. S. (7 Pet.) 469, 8 L. Ed. 751; Brashear v. West (1833) 32 U. S. (7 Pet.) 608, 8 L. Ed. 801; Bank of U. S. v. Daniel (1838) 12 Pet. 32, 54, 9 L. Ed. 989; Harpending v. Dutch Church (1842) 41 U. S. (16 Pet.) 455, 10 L. Ed. 1029; Kinney v. Clark (1844) 43 U. S. (2 How.) 76, 11 L. Ed. 185; Smith v. Kernochen (1849) 7 How. 198, 219, 12 L. Ed. 666; Phalen v. Virginia (1850) 49 U. S. (8 How.) 163, 12 L. Ed. 1030; Murray v. Gibson (1853) 15 How. 421, 425, 14 L. Ed. 755; Rice v. Minnesota & N. W. Railroad Co. (1861) 1 Black, 358, 374, 17 L. Ed. 147; Sumner v. Hicks (1862) 67 U. S. (2 Black) 532, 17 L. Ed. 355; Leffingwell v. Warren (1862) 67 U. S. (2 Black) 599, 17 L. Ed. 261; Lane County v. Oregon (1868) 7 Wall. 71, 74, 19 L. Ed. 101; Morgan v. Town Clerk (1868) 74 U. S. (7 Wall.) 610, 19 L. Ed. 202; City of Richmond v. Smith (1872) 82 U. S. (15 Wall.) 429, 438, 21 L. Ed. 200; Carroll County Sup'rs v. U. S. (1873) 85 U. S. (18 Wall.) 71, 21 L. Ed. 771; Tappan v. Merchants' Nat. Bank (1873) 19 Wall. 490, 505, 22 L. Ed. 189; Aicardi v. Alabama (1873) 86 U. S. (19 Wall.) 635, 22 L. Ed. 215; State Railroad Tax Cases (1875) 92 U. S. 575, 23 L. Ed. 663; Leavenworth County v. Barnes (1876) 94 U. S. 70, 24 L. Ed. 63; Peik v. Chicago & N. W. R. Co. (1876) 94 U. S. 164, 178, 24 L. Ed. 97; East Oakland Tp. v. Skinner (1876) 94 U. S. 255, 257, 24 L. Ed. 125; Adams v. Nashville (1877) 95 U. S. 19, 21, 24 L. Ed. 369; Hall v. De Cuir (1877) 95 U. S. 485, 24 L. Ed. 547; Meister v. Moore (1877) 96 U. S. 76, 82, 24 L. Ed. 826; Lamborn v. Dickinson County Com'rs (1877) 97 U. S. 181, 24 L. Ed. 926; Davie v. Briggs (1878) 97 U. S. 628, 24 L. Ed. 1086; Memphis & C. R. Co. v. Gaines (1878) 97 U. S. 697, 24 L. Ed. 1091; Atlantic & Gulf R. Co. v. Georgia (1878) 98 U. S. 359, 25 L. Ed. 185; New York ex rel. Williams v. Weaver (1879) 100 U. S. 539, 542, 25 L. Ed. 705; Hagar v. Reclamation Dist. No. 108 (1884) 4 Sup. Ct. 663, 665, 111 U. S. 701, 28 L. Ed. 569; German Sav. Bank v. County of Franklin (1888) 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519; Leeper v. State of

Texas (1891) 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; New York L. E. & W. R. Co. v. Pennsylvania (1895) 15 Sup. Ct. 896, 898, 158 U. S. 431, 39 L. Ed. 1043; Illinois Cent. R. Co. v. Illinois (1896) 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107; Fallbrook Irrigation Dist. v. Bradley (1896) 17 Sup. Ct. 56, 164 U. S. 112, 41 L. Ed. 369 (reversing judgment Bradley v. Fallbrook Irr. Dist. [C. C. 1895] 68 Fed. 948); Sanford v. Poe (1897) 17 Sup. Ct. 305, 165 U. S. 194, 41 L. Ed. 683 (affirming decree [1895] 69 Fed. 546, 16 C. C. A. 305); Merchants' & Manufacturers' Nat. Bank v. Commonwealth of Pennsylvania (1897) 17 Sup. Ct. 829, 167 U. S. 461, 42 L. Ed. 236; Missouri, K. & T. Ry. Co. v. McCann (1899) 19 Sup. Ct. 755, 174 U. S. 580, 43 L. Ed. 1093; Brown v. New Jersey (1899) 20 Sup. Ct. 77, 78, 175 U. S. 172, 44 L. Ed. 119; Tullis v. Lake Erie & W. R. Co. (1899) 20 Sup. Ct. 136, 138, 175 U. S. 348, 44 L. Ed. 192; Adirondack Ry. Co. v. New York (1900) 20 Sup. Ct. 460, 464, 176 U. S. 335, 44 L. Ed. 492; Waters-Pierce Oil Co. v. Texas (1900) 20 Sup. Ct. 518, 524, 177 U. S. 28, 44 L. Ed. 657; Clarke v. Clarke (1900) 20 Sup. Ct. 873, 178 U. S. 186, 44 L. Ed. 1028 (affirming appeal of Clarke [1898] 40 Atl. 111, 70 Conn. 483); Rasmussen v. State of Idaho (1901) 21 Sup. Ct. 594, 181 U. S. 198, 45 L. Ed. 820 (affirming judgment, State v. Rasmussen [1900] 59 P. 933, 7 Idaho, 1, 52 L. R. A. 78, 97 Am. St. Rep. 234); Yazoo & M. V. R. Co. v. Adams (1901) 21 Sup. Ct. 729, 181 U. S. 580, 45 L. Ed. 1011 (denying rehearing [1901] 21 Sup. Ct. 240, 180 U. S. 1, 45 L. Ed. 395); Mutual Reserve Fund Life Ass'n v. Phelps (1903) 23 Sup. Ct. 707, 709, 190 U. S. 147, 47 L. Ed. 987; Carstairs v. Cochran (1904) 24 Sup. Ct. 318, 193 U. S. 10, 48 L. Ed. 596 (affirming judgment [1902] 52 Atl. 601, 95 Md. 488); Smiley v. Kansas (1905) 25 Sup. Ct. 289, 290, 196 U. S. 447, 49 L. Ed. 546; Jacobson v. Commonwealth of Massachusetts (1905) 25 Sup. Ct. 358, 197 U. S. 11, 49 L. Ed. 643 (affirming judgment Commonwealth v. Pear [1903] 66 N. E. 719, 183 Mass. 242, 67 L. R. A. 935); Kealoha v. Castle (1908) 28 Sup. Ct. 684, 210 U. S. 149, 52 L. Ed. 998; Murray v. Wilson Distilling Co. (1909) 29 Sup. Ct. 458, 464, 213 U. S. 151, 53 L. Ed. 742; U. S. v. Mason (1909) 29 Sup. Ct. 480, 483, 213 U. S. 115, 53 L. Ed. 725; Old Colony Trust Co. v. City of Omaha (1913) 33 Sup. Ct. 967, 230 U. S. 100, 57 L. Ed. 1410; Price v. People of State of Illinois (1915) 35 S. Ct. 892, 238 U. S. 446, 59 L. Ed. 1400 (affirming judgment People v. Price [1913] 101 N. E. 196, 257 Ill. 587, Ann. Cas. 1914A, 1154); Appolos v. Brady (1892) 49 Fed. 401, 1 C. C. A. 299; Hornsby v. Eddy (1893) 56 Fed. 461, 463, 5 C. C. A. 560; Western Union Telegraph Co. v. Cook (1894) 61 Fed. 624, 628, 9 C. A. 680; Chicago, R. I. & P. Ry. v. Stahley (1894) 62 Fed. 363, 11 C. A. 88 (writ of error dismissed [18 16 Sup. Ct. 1199, 163 U. S. 680, 41 Ed. 313); Bergman v. Bly (1895) Fed. 40, 13 C. C. A. 319, 27 U. App. 650; Sanford v. Poe (1895) Fed. 546, 16 C. C. A. 305 (affirm decree Western Union Tel. Co. v. [C. C. 1894] 64 Fed. 9, and decree firmed Sanford v. Poe [1897] 17 S Ct. 305, 165 U. S. 194, 41 L. Ed. 68 Andrews v. National Foundry & P Works (1896) 76 Fed. 166, 22 C. C. 110, 36 L. R. A. 139 (rehearing den [1897] 77 Fed. 774, 23 C. C. A. 454, L. R. A. 153); Crowther v. Fidelity surance, Trust & Safe-Deposit (1898) 85 Fed. 41, 29 C. C. A. 1; Su erland-Innes Co. v. Village of Ev (1898) 86 Fed. 597, 30 C. C. A. 3 Clark v. Russell (1899) 97 Fed. 9 38 C. C. A. 541; Robinson v. B (1900) 100 Fed. 718, 40 C. C. A. 6 Guaranty Trust Co. of New York Galveston City R. Co. (1901) 107 F 311, 46 C. C. A. 305 (writ of cert rari denied Paul Shean Sanitary Plun ing & Manufacturing Co. v. Guar ty Trust Co. of New York [1901] Sup. Ct. 925, 181 U. S. 622, 45 L. 1032); Colton v. Raymond (1902) Fed. 863, 52 C. C. A. 382; City Beatrice v. Edminson (1902) 117 F 427, 54 C. C. A. 601; American Su Refining Co. v. City of New Orle (1902) 119 Fed. 691, 56 C. C. A. 3 Christie Grain & Stock Co. v. Bo of Trade (1903) 125 Fed. 161, 61 C. A. 11 (reversed [1905] 25 Sup. 637, 198 U. S. 236, 49 L. Ed. 103 York v. Washburn (1904) 129 F 564, 64 C. C. A. 132; Southern Ry. v. Simpson (1904) 131 Fed. 705, C. C. A. 563; Kane v. Erie R. 68 L. R. A. 788 (reversing judgm [C. C. 1904] 128 Fed. 474): Hughes Pflanz (1905) 138 Fed. 980, 71 C. (1904) 133 Fed. 681, 67 C. C. A. 6 A. 234; City of Defiance v. McGo gale (1907) 150 Fed. 689, 80 C. C. 425 (affirming judgment McGonigale City of Defiance [C. C. 1905] 140 F 621, and writ of certiorari den [1907] 28 Sup. Ct. 254, 207 U. S. 5 52 L. Ed. 352); Lyman v. Hillia (1907) 154 Fed. 339, 83 C. C. A. 1 San Jose-Los Gatos Interurban Ry. v. San Jose Ry. Co. (1907) 156 F 455, 84 C. C. A. 265, 13 Ann. Cas. 5 Zeiger v. Pennsylvania R. Co. (190 158 Fed. 809, 86 C. C. A. 69 (affirm judgment [C. C. 1907] 151 Fed. 3 and writ of certiorari denied [1908] Sup. Ct. 684, 212 U. S. 575, 53 L. 657); Hager v. American Nat. Ba (1908) 159 Fed. 396, 86 C. C. A. 3 Same v. Louisville National Bank Co. (1908) 159 Fed. 402, 86 C. C. 340; Joseph Dixon Crucible Co. Paul (1909) 167 Fed. 784, 93 C. C. 204; Simpson County v. Wismer-C Lumber & Mfg. Co. (1909) 170 F

52, 95 C. C. A. 227; Spinello v. New York, N. H. & H. R. Co. (1910) 183 Fed. 762, 106 C. C. A. 189; Malloy v. American Hide & Leather Co. (1911) 185 Fed. 776, 107 C. C. A. 646; Waterman v. Canal-Louisiana Bank & Trust Co. (1911) 186 Fed. 71, 108 C. C. A. 183 (writ of certiorari denied [1911] 31 S. Ct. 724, 220 U. S. 621, 55 L. Ed. 613); Allen v. Francisco Sugar Co. (1912) 193 Fed. 825, 114 C. C. A. 453; In re Huxoll (1912) 193 Fed. 851, 113 C. C. A. 637; Joplin & P. Ry. Co. v. Payne (1912) 194 Fed. 387, 114 C. C. A. 305; Ehmen v. City of Gothenburg, Neb. (C. C. A. 1912) 200 Fed. 564; Westerlund v. Black Bear Mining Co. (1913) 203 Fed. 599, 121 C. C. A. 627; Pittsburgh-Buffalo Co. v. Cheko (1913) 204 Fed. 353, 124 C. C. A. 451 (reversing judgment [D. C. 1912] 199 Fed. 525); Grand Trunk Western Ry. Co. v. Gilpin (1913) 208 Fed. 126, 125 C. C. A. 278; Thompson v. Sloss-Sheffield Steel & Iron Co. (1914) 209 Fed. 840, 126 C. C. A. 564; Lisman v. Knickerbocker Trust Co. (1914) 211 Fed. 413, 128 C. C. A. 85; New York Life Ins. Co. v. Dunlevy (1914) 214 Fed. 1, 130 C. C. A. 473 (affirming judgment Dunlevy v. New York Life Ins. Co. [D. C. 1913] 204 Fed. 670); Wilckens v. Wilckens (1914) 217 Fed. 208, 133 C. C. A. 202; E. A. Kinsey Co. v. Heckermann (1915) 224 Fed. 308, 139 C. C. A. 544; Mellon v. St. Louis Union Trust Co. (C. C. A. 1915) 225 Fed. 693; Iowa Portland Cement Co. v. Lamandola (C. C. A. 1915) 227 Fed. 823; Coates v. Muse (C. C. 1822) Fed. Cas. No. 2,917; Barker v. Jackson (C. C. 1826) Fed. Cas. No. 989; Bank of United States v. Longworth (C. C. 1829) Fed. Cas. No. 923; Thompson v. Phillips (C. C. 1830) Fed. Cas. No. 13,974; Springer v. Foster (C. C. 1842) Fed. Cas. No. 13,266; Boyle v. Arledge (C. C. 1849) Fed. Cas. No. 1,758; Heydock v. Stanhope (C. C. 1853) Fed. Cas. No. 6,445; Foote v. Linck (C. C. 1853) Fed. Cas. No. 4,913; Woolsey v. Dodge (C. C. 1854) Fed. Cas. No. 18,032; Paine v. Wright (C. C. 1855) Fed. Cas. No. 10,676; Richardson v. Curtis (C. C. 1855) Fed. Cas. No. 11,781; Griffing v. Gibb (C. C. 1857) Fed. Cas. No. 5,819 (reversing in [1862] 67 U. S. [2 Black] 519, 17 L. Ed. 353); Coolidge v. Curtis (C. C. 1859) Fed. Cas. No. 3,184; Illius v. New York & N. H. R. Co. (C. C. 1860) Fed. Cas. No. 7,010; Evans v. Pittsburgh (C. C. 1863) Fed. Cas. No. 4,568; Goodrich v. Chicago (C. C. 1864) Fed. Cas. No. 5,542; Loring v. Marsh (C. C. 1864) Fed. Cas. No. 8,514; Id. (C. C. 1865) Fed. Cas. No. 8,515; Van Bokelen v. Brooklyn City R. Co. (C. C. 1866) Fed. Cas. No. 16,830; Blossburg & C. R. Co. v. Tioga R. Co. (C. C. 1867) Fed. Cas. No. 1,563; Merrill v. Portland (C. C. 1870) Fed. Cas. No. 9,470; Olcott v. Fond du Lac County (C. C. 1870) Fed. Cas. No. 10,479; Oliver v. Omaha (C. C. 1875) Fed. Cas. No. 10,499; Hawes v. Contra Costa Water Co. (C. C. 1878) Fed. Cas. No. 6,235; New Hampshire v. Grand Trunk Ry. (C. C. 1880) 3 Fed. 887; Crooks v. Stuart (C. C. 1881) 7 Fed. 800; Smith v. City of Fond du Lac (C. C. 1881) 8 Fed. 289; Davenport Nat. Bank v. Mittelbuscher (C. C. 1883) 15 Fed. 225; Wilson v. Neal (C. C. 1885) 23 Fed. 129; Liebman v. City and County of San Francisco (C. C. 1885) 24 Fed. 705; Raimond v. Parish of Terrebonne (C. C. 1886) 28 Fed. 773 (judgment affirmed [1889] 10 Sup. Ct. 57, 132 U. S. 192, 33 L. Ed. 309); New England Mortgage Security Co. v. Gay (C. C. 1888) 33 Fed. 636 (writ of error dismissed [1892] 12 Sup. Ct. 815, 145 U. S. 123, 36 L. Ed. 646); Berrian v. Rogers (C. C. 1890) 43 Fed. 467; Southern Cotton Oil Co. v. Wemple (C. C. 1890) 44 Fed. 24, 25; Hoey v. Coleman (C. C. 1891) 46 Fed. 221, 222; Jersey City Gaslight Co. v. United Gas Imp. Co. (C. C. 1891) 46 Fed. 264, 267 (affirmed [1893] 58 Fed. 323, 7 C. C. A. 250); Lackawanna Coal & Iron Co. v. Bates (C. C. 1893) 56 Fed. 737, 738; Westerly Waterworks v. Town of Westerly (C. C. 1896) 75 Fed. 181; Lapp v. Ritter (C. C. 1898) 88 Fed. 108; Rummel v. Butler County (C. C. 1899) 93 Fed. 304; German Ins. Co. of Freeport, Ill., v. City of Manning, Iowa (C. C. 1899) 95 Fed. 597; Southern Ry. Co. v. North Carolina Corp. Commission (C. C. 1900) 99 Fed. 162; New York Life Ins. Co. v. Board of Com'rs of Cuyahoga County, Ohio (C. C. 1900) 99 Fed. 846; People's National Bank v. Marye (C. C. 1901) 107 Fed. 570, 581 (modified and affirmed [1903] 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180); Sullivan Timber Co. v. Mobile (C. C. 1901) 110 Fed. 186; Sunset Telephone & Telegraph Co. v. City of Eureka (C. C. 1902) 172 Fed. 755; Jacobs v. Glucose Sugar Refining Co. (C. C. 1905) 140 Fed. 766; Yarrington v. Delaware & Hudson Co. (C. C. 1906) 143 Fed. 565 (judgment affirmed Delaware & Hudson Co. v. Yarrington [1907] 152 Fed. 396, 81 C. C. A. 522); Zeiger v. Pennsylvania R. Co. (C. C. 1907) 151 Fed. 348 (judgment affirmed [1908] 158 Fed. 809, 86 C. C. A. 69, writ of certiorari denied [1908] 29 Sup. Ct. 684, 212 U. S. 575, 53 L. Ed. 657); Fleischmann Co. v. Murray (C. C. 1908) 161 Fed. 162; Debitulia v. Lehigh & Wilkesbarre Coal Co. (C. C. 1909) 174 Fed. 886; Gay v. Hudson River Electric Power Co. (C. C. 1910) 178 Fed. 499; Meader Furniture Co. v. Commercial Nat. Safe Deposit Co. (C. C. 1911) 192 Fed. 616 (appeal dismissed Commercial Nat. Safe Deposit Co. v. Meader Furniture Co. [C. C. A. 1913] 202 Fed. 1021); Barker v. Eastman (C. C. 1911) 192 Fed. 659; Wick v. The Samuel Strong (D. C. 1855) Fed. Cas. No. 17,607; Katzenberger v.

City of Aberdeen (D. C. 1883) 16 Fed. 745, 749 (affirmed [1887] 7 Sup. Ct. 947, 121 U. S. 172, 30 L. Ed. 911); In re Scheier (D. C. 1911) 188 Fed. 744; In re Farrell (D. C. 1914) 211 Fed. 212; Rail & River Coal Co. v. Yaple (D. C. 1914) 214 Fed. 273; In re Heffron Co. (D. C. 1914) 216 Fed. 642; Old Colony Trust Co. v. City of Tacoma (D. C. 1915) 219 Fed. 775; In re Floyd & Hayes (D. C. 1915) 225 Fed. 262; Iowa Telephone Co. v. City of Keokuk (D. C. 1915) 226 Fed. 82; Commonwealth v. International Harvester Co. of America (Ky. 1909) 115 S. W. 703; American Tobacco Co. v. Commonwealth (Ky. 1909) 115 S. W. 755, 756; Levy v. Mentz (1871) 23 La. Ann. 261; Kwilecki v. Holman (1914) 167 S. W. 989, 258 Mo. 624.

36. Decisions by other than supreme courts.—A decision of the Court of Appeals of Missouri as to the construction or effect of a state statute is not binding on a federal court, since the Supreme Court of the state, which is the court of highest jurisdiction, is not concluded thereby, but may, should the same question be presented to it, determine it differently. Federal Lead Co. v. Swyers (1908) 161 Fed. 687, 88 C. C. A. 547; State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1904) 129 Fed. 455, decree reversed Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (1905) 137 Fed. 26, 71 C. C. A. 1.

Where there is no appeal under state laws, the decision of the trial court, as to the validity of a statute under the state constitution, is binding upon the supreme court of the United States. Hallinger v. Davis (1892) 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986.

A fixed and settled rule of decision in a state court of last resort establishes the law of the state in such manner as to bind the federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, while entitled to great respect and regarded as persuasive authority, are not controlling upon the federal courts, because they do not settle the law of the state. Anglo-American Land, Mortgage & Agency Co. v. Lombard (1904) 132 Fed. 721, 68 C. C. A. 89, writ of certiorari denied Lombard v. Anglo-American Land, Mortgage & Agency Co. (1904) 25 Sup. Ct. 793, 196 U. S. 638, 49 L. Ed. 630.

Where the constitutionality, under a state Constitution, of a state law, is questioned in a federal court, and the matter has never been determined by the Supreme Court of the state, and its lower courts are divided on the question, the weight of their authority being in favor of the constitutionality of the act, every possible presumption should be indulged in favor of its validity until its invalidity is shown beyond a reasonable doubt. Kane v. Erie R. Co. (1904) 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788, reversing judgment (C. 1904) 128 Fed. 474.

The decision of the court of last reso of a territory construing a statute that territory is entitled to respect a court of the United States, but it not so controlling, as a like decisi of a state court of last resort. Whi mer v. El Paso & S. W. Co. (1912) 2 Fed. 193, 119 C. C. A. 637.

The federal courts are not bound follow the construction put upon a sta statute by an inferior state court. P tapsco Guano Co. v. Morrison (C. 1876) Fed. Cas. No. 10,792.

The court will follow the ruling of t district court of another state as the construction of a state statut White v. The Cynthia (C. C. 1880) Fe Cas. No. 17,546a.

A ruling of the St. Louis Court of A peals should be followed by Unit States courts, unless it is overrul by the supreme court of Missouri. E ton v. St. Louis Shakspear Mining Smelting Co. (C. C. 1881) 7 Fed. 139.

The only tribunal in Missouri who exposition of a state statute is fin and conclusive upon the federal cour is the supreme court of the sta Freund v. Yaegerman (C. C. 1886) Fed. 248.

A decision of an appellate court of t state construing a state statute will followed by a federal court in determi ing a motion for a preliminary injun tion in a taxpayer's suit, though t question has not been settled by t state court of last resort. Seccomb Wurster (C. C. 1897) 83 Fed. 856.

A federal court sitting in New Yo is not bound to follow decisions of t Appellate Divisions construing a sta statute, because leave to appeal to t Court of Appeals was refused, and lea to prosecute actions was denied. Con nental Securities Co. v. Interborou Rapid Transit Co. (C. C. 1908) 1 Fed. 945.

37. Dicta and decisions on questio not directly involved.—General expre sions in opinions of courts are not a thoritative beyond the questions th were considering and deciding wh they used them. King v. Pomer (1903) 121 Fed. 287, 58 C. C. A. 20 Traer v. Fowler (1906) 144 Fed. 81 75 C. C. A. 540.

General expressions in the opinion an appellate court as to recoverab damage are to be taken in connecti with the facts of the case in whi they occur, and not extended to tho cases which are fairly subject to t operation of a different principle. M son City & Ft. D. R. Co. v. Wolf (190 148 Fed. 961, 78 C. C. A. 589.

Whenever a question fairly arises the course of a trial, and there is a di tinct decision thereon, the court's r ing in respect thereto can in no sen be regarded as mere "dictum." Ne York Cent. & H. R. R. Co. v. Pri

(1908) 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

The rule that a settled construction of a state statute by the highest court of the state is binding upon and will be followed by the federal courts implies that the state decision must have been one based alone upon the statute construed and which did not involve extraneous conditions. Adelbert College of Western Reserve University v. Wabash R. Co. (1909) 171 Fed. 805, 96 C. C. A. 465, 17 Ann. Cas. 1204, writ of certiorari denied (1909) 30 Sup. Ct. 400, 215 U. S. 598, 54 L. Ed. 343.

It is not the practice of courts to rest their decisions upon a single ground, or upon the narrowest possible basis of fact; but, on the contrary, every consideration which is directly controlling of the actual issue tendered is a legitimate ratio decidendi, and any matter of fact or of law thus presented which would defeat the claim of the plaintiff is germane to the issue, and the court's opinion thereon is not obiter dictum, although the opinion also disposes of other questions in a manner which would be determinative of the case. Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa (1910) 182 Fed. 291, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117, affirming judgment (C. C. 1908) 170 Fed. 665.

While the streets and sidewalks differ somewhat from real estate, as to which federal courts are bound to follow the state rule, there is nevertheless a propriety in the federal courts following the settled decisions of the state courts as to streets. Werthner v. Girard Ave. Farmers' Market Co. (1914) 218 Fed. 364, 134 C. C. A. 172.

A federal court should be reluctant to adjudge a state statute in conflict with the state Constitution before it has been passed on by the state courts, especially when the highest court of the state has rendered a decision on the assumption of its validity, although the direct question was not presented or decided. Joseph R. Foard Co. of Baltimore City v. State of Maryland (1914) 219 Fed. 827, 135 C. C. A. 497, affirming decree State of Maryland v. General Stevedoring Co. (D. C. 1914) 213 Fed. 51.

The opinion of a state court upon the construction of a statute of the state is entitled to great weight in the federal courts, even though the question considered was not directly in judgment. National Bank of Oxford v. Whitman (C. C. 1896) 76 Fed. 697, judgment affirmed Whitman v. National Bank of Oxford (1897) 83 Fed. 288, 28 C. C. A. 404, and (1900) 20 Sup. Ct. 477, 176 U. S. 559, 44 L. Ed. 587.

While federal courts follow the construction of a state statute by the state courts, they are not required to adopt a construction based on implications from the language of a judicial opinion. Cæsar v. Capell (C. C. 1897) 83 Fed. 403.

Mere dicta of a state court concerning the construction of a statute of the state are not binding upon the federal court. Matz v. Chicago & A. R. Co. (C. C. 1898) 85 Fed. 180; In re Sullivan (1906) 148 Fed. 815, 78 C. C. A. 505.

While a federal court is bound by the decisions of the highest court of a state construing a state statute, an expression of opinion by such court upon a question not involved in the ascertainment of the right or title in question between the parties, and which is therefore merely a dictum, is not a decision; and, where the question is directly presented to a federal court, it is bound to exercise its independent judgment thereon. Lockhard v. Asher Lumber Co. (C. C. 1903) 123 Fed. 480, judgment reversed Lockard v. Asher Lumber Co. (1904) 131 Fed. 689, 65 C. C. A. 517.

Decisions of the Supreme Court of a state construing and applying an amendment to the state Constitution are not to be construed as determining its validity, or that it was legally adopted, where such question was not raised nor considered; and such decisions do not, therefore, affect the right and duty of a federal court to consider and determine such question in an action in which it is directly presented. Knight v. Shelton (C. C. 1905) 134 Fed. 423.

38. Questions involving licenses or taxation—In general.—The construction of the tax laws of a state enunciated by the supreme court of such state will be followed by the federal courts. Games v. Dunn (1840) 39 U. S. (14 Pet.) 322, 10 L. Ed. 476; Rice v. Jerome (1899) 97 Fed. 719, 38 C. C. A. 388; Brooks v. Memphis (C. C.) Fed. Cas. No. 1,954; Kountze v. Omaha (C. C. 1879) Fed. Cas. No. 7,928; Hodgdon v. Burleigh (C. C. 1880) 4 Fed. 111; Secor v. Singleton (C. C. 1881) 9 Fed. 809; Parks v. Watson (C. C. 1884) 20 Fed. 764.

Whether or not the construction of a railroad owned by a corporation under a statute of a state is a matter in which the public has any interest of such a nature as to warrant taxation by a municipal division of the state in aid of it is not such a question as, being decided by a state court, will bind the supreme court to follow the decision of the state court. Olcott v. Fond du Lac County Sup'rs (1872) 83 U. S. (16 Wall.) 678, 21 L. Ed. 382.

Where tax questions involved arise under the state constitution and laws, the decisions of the highest court of the state are controlling; but where the constitution and laws of the United States are drawn in question, the federal courts must determine the controversy for themselves. Ex parte

Tyler (1893) 13 Sup. Ct. 785, 791, 149 U. S. 164, 37 L. Ed. 689.

The question whether the legislatures regarded the provision for the taxation of real property which had escaped taxation for previous years as so dependent on that for the taxation of personal property under the same circumstances that the unconstitutionality of the latter invalidated the section entirely is one to be determined finally by the state court. Winona & St. P. Land Co. v. Minnesota (1895) 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247.

The supreme court follows the decision of a state court that statutes imposing taxes are not unconstitutional because of defects in the titles. People's National Bank v. Marye (1903) 24 Sup. Ct. 68, 69, 191 U. S. 272, 48 L. Ed. 180.

The United States supreme court will not adjudge a state tax on gross receipts of sleeping car companies in violation of the state Constitution, because not a license tax, in advance of the decision to that effect by the state supreme court. Pullman Co. v. Knott (1914) 35 Sup. Ct. 2, 235 U. S. 23, 59 L. Ed. 105.

Where the sole grounds relied upon by a plaintiff in a suit in a federal court to entitle him to a recovery, as disclosed by his pleading and the opening statement of his counsel, were the invalidity, under the statutes of the state, of certain tax proceedings, and the identical proceedings had been adjudged valid by the supreme court of the state, though not in a suit between the same parties, so as to render the matter res judicata as between them, its decision was nevertheless binding on the federal court as a construction of the local statutes, and the direction of a verdict for defendant by the court, on the conclusion of the plaintiff's opening statement, was not error. Haley Livestock Co. v. Board of Com'rs of Routt County (1899) 94 Fed. 297, 36 C. C. A. 350.

The construction of the Mississippi tax laws, given by the supreme court of that state, is binding on the federal courts in determining questions arising thereunder. Singer Mfg. Co. v. Adams (1909) 165 Fed. 877, 91 C. C. A. 461, appeal dismissed (1910) 30 Sup. Ct. 577, 216 U. S. 617, 54 L. Ed. 639.

Whether any person, property, or business is within a state for purposes of taxation is not a federal question, and must be determined by the state for itself. Dundee Mortgage, Trust & Investment Co. v. School Dist. No. 1 (C. C. 1884) 19 Fed. 359; Same v. Parrish (C. C. 1885) 24 Fed. 197.

The federal courts are bound by the decision of the supreme court of California that a statute of that state is void, because, in disregard of an express constitutional limitation on the power of the legislature, it attempts to impose a tax for municipal purposes. Liverpool & L. & G. Ins. Co. v. Clun (C. C. 1898) 88 Fed. 160.

In determining whether a charge mulct imposed by a state statute upo liquor sellers is a "tax," within th meaning of that term as used in th bankruptcy act, a court of bankrupt will follow the decisions of the highe court of the state construing the sta ute. In re Ott (D. C. 1899) 95 Fe 274.

39. —— Assessments and levy of ta —The question whether or not a stat act describing a particular mode of a sessing taxes upon a particular corp ration has been impliedly repealed b a general revenue act, not in terms r pealing it, is a matter peculiarly withi the province of the highest courts the state, whose acts are the subject of the question, to decide; and, whe such courts have decided the questio their decision is controlling. Bailey Magwire (1874) 89 U. S. (22 Wall 215, 22 L. Ed. 850.

The decision of the supreme court Tennessee that the act of the legisl ture requiring personal property every kind in the state to be listed r peals the previous ordinance of a ci exempting from further taxes certai city bonds, and brings them within th scope of general taxation, and is bin ing on the supreme court of the Uni ed States. Adams v. City of Nashvil (1877) 95 U. S. 19, 24 L. Ed. 369.

A construction of a state statute b a state court on the question of dedu tions for purposes of taxation is bin ing on the supreme court of the Uni ed States. Commercial Nat. Bank Chambers (1901) 21 Sup. Ct. 863, 18 U. S. 556, 45 L. Ed. 1227, affirmin judgment (1900) 61 Pac. 560, 21 Utal 324, 56 L. R. A. 346.

The decision of the highest stat court that, because members of th board levying an assessment for a loc improvement were owners of prope ty abutting on such improvement, an assessable therefor, would, at mos make the assessment voidable, an would not render it subject to co lateral attack, is conclusive on the su preme court of the United States reviewing the decision of the stat court, foreclosing a lien on such asses ment. Hibben v. Smith (1903) 24 Su Ct. 88, 91, 191 U. S. 310, 48 L. E 195.

A state tax, though in form levie upon land conveyed by the Unite States to a corporation for dry doc purposes, with a reserved right in th grantor to the free use of the dry doc and a provision for forfeiture in ca of the continued unfitness of the d dock for use, or the use of the land f other purposes, will be held to create lien upon the company's interest alon where the highest state court so r gards the effect of the tax, althoug it neglects to modify its judgment su taining the tax to conform to its view

Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore (1904) 25 Sup. Ct. 50, 195 U. S. 375, 49 L. Ed. 242, affirming judgment (1903) 54 Atl. 623, 97 Md. 97.

Whether an assessment of benefits from the widening of a street could have been levied if the land had not been sold is a question on which the decision of the state court will be followed by the federal supreme court. Willoughby v. City of Chicago (1914) 35 Sup. Ct. 23, 235 U. S. 45, 59 L. Ed. 123, dismissing writ of error City of Chicago v. Willoughby (1911) 94 N. E. 513, 249 Ill. 249.

A ruling by the supreme court of North Dakota that its state board of equalization was entitled to levy taxes in percentages under the statutes of that state would be followed in the federal courts with respect to land located in that state and sold for taxes there assessed. Paine v. Germantown Trust Co. (1905) 136 Fed. 527, 69 C. C. A. 303.

The decision of the court of appeals of Kentucky construing Act Ky. March, 1906 (Acts 1906, c. 22), relating to the taxation of banks and trust companies, which went into effect June 11, 1906, in so far as it holds that such act was intended to and did apply to assessments made in 1906, and that assessments made for that year after it went into effect were lawfully made thereunder, is binding upon a federal court in a suit by a national bank to restrain the collection of taxes based on such assessment. Hager v. American Nat. Bank (1908) 159 Fed. 396, 86 C. C. A. 334; Same v. Louisville Nat. Banking Co. (1908) 159 Fed. 402, 86 C. C. A. 340.

40. —— Equality and uniformity.—The conclusion of a state court that a tax is uniform, within the meaning of the requirement of the state constitution, when it is equal upon all persons belonging to the described class on which it is imposed, is not open to review upon writ of error from the supreme court of the United States to the state court. Armour Packing Co. v. Lacy (1906) 26 Sup. Ct. 232, 200 U. S. 226, 50 L. Ed. 451, affirmed judgment Lacy v. Armour Packing Co. (1904) 47 S. E. 53, 134 N. C. 567.

A decision by a state supreme court that, under the state statutes, an application to the county boards of equalization is the exclusive remedy for erroneous exercise of the taxing power, except in cases of fraud, is binding on the federal courts. Altschul v. Gittings (C. C. 1898) 86 Fed. 200.

41. —— Collection and payment.—The decision of a state court that the statutes of the state require the collection and payment of taxes to be made in gold and silver coin will be followed by the supreme court. Lane County v. Oregon (1868) 74 U. S. (7 Wall.) 71, 19 L. Ed. 101.

The federal courts are bound to follow state decisions in relation to all proceedings for the collection of state taxes, and the effect to be given to tax deeds, unless it is claimed that some right protected by the federal constitution has been invaded. Lewis v. Monson (1891) 151 U. S. 545, 14 Sup. Ct. 424, 38 L. Ed. 265.

The decisions of the state supreme court relative to the acts of the Virginia legislature relating to the forfeiture of lands for nonpayment of taxes are controlling in the circuit court of appeals. Van Gunden v. Virginia Coal & Iron Co. (1892) 52 Fed. 838, 3 C. C. A. 294, affirming judgment (C. C. 1891) 47 Fed. 264.

Judgment in a state confirming forfeiture of land for unpaid taxes held conclusive against former owner's suit in federal court to quiet title. Snyder v. Upper Elk Coal Co. (C. C. A. 1915) 228 Fed. 21.

It is the duty of the federal courts to follow the decisions of the state courts on state laws regulating proceedings in cases of tax sales. Hodgdon v. Burleigh (C. C. 1880) 4 Fed. 111.

A decision of the supreme court of Georgia enjoining collection of school tax because of the insufficiency of creation of district is controlling on the district court sitting in Georgia, and it will grant similar relief. In re Georgia Steel Co. (D. C. 1915) 224 Fed. 517.

42. —— Tax deeds.—Questions as to the validity of a tax deed arising either on a consideration of the regularity and effect of the proceedings to collect taxes, or the form and efficacy of the deed itself, are matters peculiarly within the jurisdiction of the states, and the decisions of the state courts thereon will be followed by the federal courts. Bardon v. Land & River Imp. Co. (1895) 157 U. S. 327, 15 Sup. Ct. 650, 39 L. Ed. 719.

43. —— Exemptions.—When the question is whether property is exempt from taxation under a construction of the statute of a state, the federal courts should be slow to require an exemption in advance of any decision by the courts of such state. New Orleans v. Stemple (1899) 20 Sup. Ct. 110, 112, 175 U. S. 309, 44 L. Ed. 174.

A judgment of a state court sustaining the exemption claimed by a bank, under its charter, from municipal taxation on its capital stock, which, under the local law of the state, is only res judicata, in respect to the identical taxes litigated in the suit, can be accorded no greater efficacy in the federal courts. Union & Planters' Bank v. City of Memphis (1903) 23 Sup. Ct. 604, 189 U. S. 71, 47 L. Ed. 712, reversing decree (1901) 111 Fed. 561, 49 C. C. A. 455.

Federal supreme court will not disturb decision of the highest New York court that contract exemption from tax

conferred by Laws N. Y. 1894, c. 752, § 35, Laws N. Y. 1896, c. 729, § 4, and Laws N. Y. 1900, c. 616, § 4, on any firm or corporation operating New York city subway as to their interest therein and as to equipment, does not exempt corporation operating the subway from a tax measured by its capital stock and gross earnings under Tax Law N. Y., §§ 182, 184. People of State of New York ex rel. Interborough Rapid Transit Co. v. Sohmer (1915) 35 S. Ct. 549, 237 U. S. 276, 59 L. Ed. 951, affirming orders (1912) 135 N. Y. S. 1135, 151 App. Div. 911 and (1913) 100 N. E. 813, 207 N. Y. 270.

Under the constitution of Georgia, as uniformly construed by the supreme court of the state, which construction is binding on the federal courts, a city has no power to exempt a water company from the payment of an ad valorem tax on its property for municipal purposes, either directly or by commuting such taxes in consideration of certain service to be supplied by the company. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. City of Dawson (C. C. 1903) 130 Fed. 152.

44. —— **Licenses.**—The determination of a state supreme court as to whether a statute imposing a license tax is sufficiently certain upon which to ascertain the amount of such tax is conclusive upon the federal supreme court. Osborne v. State of Florida (1897) 17 Sup. Ct. 214, 164 U. S. 650, 41 L. Ed. 586.

The decisions of the California supreme court that the repeal by Act Cal. March 23, 1901, of the authority conferred on county and municipal legislative bodies to license for revenue abates a suit previously brought to recover a license fee imposed under an ordinance which, under the decisions of that court, must be deemed a revenue measure, will be followed by the federal courts. Flanigan v. Sierra County (1905) 25 Sup. Ct. 314, 196 U. S. 553, 49 L. Ed. 597, reversing judgment (1903) 122 Fed. 24, 58 C. C. A. 340; Wheeler v. Plumas County (1905) 25 Sup. Ct. 316, 196 U. S. 562, 49 L. Ed. 599, reversing judgment (1903) 122 Fed. 1022, 58 C. C. A. 683.

The construction by the highest state court of the tax imposed by Act Ky. March 28, 1906, upon persons engaged in rectifying or blending distilled spirits, as being a license or occupation tax, and not a property tax, will be followed by the federal supreme court. Brown-Forman Co. v. Kentucky (1910) 30 Sup. Ct. 578, 579, 217 U. S. 563, 54 L. Ed. 883.

The decisions of the supreme court of California sustaining the constitutionality of county ordinances imposing license taxes for revenue, enacted pursuant to Act Cal. April 1, 1897 (St. 1897, p. 465), are binding on the federal courts, and will be followed where similar ordinances enacted under the sa statute are involved. Flanigan v. Si ra County (1903) 122 Fed. 24, 58 C. A. 340, reversed (1905) 25 Sup. 314, 196 U. S. 553, 49 L. Ed. 597.

45. **Decisions affecting corporatio stockholders, and officers thereof—Ch ters and organization.**—The banking sociations formed under Act Mi March 15, 1837, and Act Mich. Dec. 1837, amending the former act, havi been declared corporations, within meaning of the constitution of Michig by the supreme court of that state, a those acts having accordingly been clared unconstitutional by said cou the supreme court of the United Sta will adopt and follow that decisi Nesmith v. Sheldon (1849) 48 U. S. How.) 812, 12 L. Ed. 925.

When the question is whether, und the constitution and laws of a state company is legally organized as a c poration, the decision of the supre court of the state settling the questi in the affirmative will be accepted conclusive. Secombe v. Milwaukee St. P. R. Co. (1874) 90 U. S. Wall.) 108, 23 L. Ed. 67; Mooney Humphrey (C. C. 1882) 12 Fed. 6 Fitzgerald v. Missouri Pac. Ry. Co. C. 1891) 45 Fed. 812.

The decision of the supreme court Wisconsin that the charter of the M waukee and Waukesha Railroad Co pany granted by the territory, is subj to repeal or alteration, inasmuch as was not accepted nor was the compa organized, until after the admission the state into the Union, under a c stitution which continued that act force, and provided that all laws for creation of corporations might be alt ed or repealed by the legislature at a time after their passage, held obligat on the national courts. Stone v. W consin (1876) 94 U. S. 181, 24 L. 102.

The decision of the New York co of appeals that "corporation," in wills act, means only corporations c ated by the laws of the state, h obligatory upon the national courts. S. v. Fox (1876) 94 U. S. 315, 24 Ed. 192.

The construction by the highest co of a state of the general incorporati act of the state and of a charter tained in pursuance thereof is bindi on federal courts. Equitable Life sur. Soc. v. Brown (1909) 29 Sup. 405, 409, 213 U. S. 25, 53 L. Ed. 682

The decisions of the highest courts a state. interpreting state statutes der which a corporation was organiz are controlling on the federal cour Consumers' Gas Trust Co. v. Quin (1905) 137 Fed. 882, 70 C. C. A. 2 writ of certiorari denied (1905) 25 S Ct. 803, 198 U. S. 585, 49 L. Ed. 11

The decision of a state court that railroad was not built as authorized its charter is binding on federal cou

within the state, though no judgment or decree was rendered. Cleveland, P. & A. R. Co. v. Franklin Canal Co. (C. C. 1853) Fed. Cas. No. 2,890.

The New York rapid transit act of 1891 having been declared valid under the state constitution by the highest court of the state, such decision is conclusive upon a federal court. Underground R. R. of City of New York v. City of New York (C. C. 1902) 116 Fed. 952, affirmed (1904) 24 Sup. Ct. 494, 193 U. S. 416, 48 L. Ed. 733.

46. —— **Consolidation.**—Decisions of the supreme court of a state as to the validity of an attempted union between two national church organizations are not binding on a federal court sitting in the state, in a suit where the parties are not such as to render the question res judicata. Helm v. Zarecor (D. C. 1913) 213 Fed. 648.

47. —— **Stock and stockholders.**—The federal courts are concluded upon the question as to how an incumbrance by a mining corporation of mining ground in California may be ratified by the stockholders, by a decision of the supreme court of that state that the manner of ratification prescribed by Act Cal. April 30, 1880, is exclusive. Williams v. Gaylord (1902) 22 S. Ct. 798, 186 U. S. 157, 46 L. Ed. 1102, affirming judgment (1900) 42 C. C. A. 401, 102 Fed. 372.

The decision of the supreme court of California that Const. Cal. 1849, art. 4, §§ 32, 36, providing that corporate debts shall be secured by "such individual liability of the corporations, and other means, as may be prescribed by law," and that "each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liability," were not self-executing, and did not furnish a rule by which the amount of a stockholder's individual liability could be fixed, is binding on the federal courts. U. S. v. Stanford (C. C. 1895) 69 Fed. 25, decree affirmed (1895) 70 Fed. 346, 17 C. C. A. 143.

Where the Supreme Court of Kansas held that a stockholder's statutory liability for debts arose at the time of the dissolution of the corporation, and that the date of the maturity of the obligation was immaterial, such decision would be followed in a federal court sitting in another state in a suit to enforce similar liability under the Kansas statute. Ramsden v. Knowles (C. C. 1906) 151 Fed. 718.

Where a contract by delinquent stockholders of a corporation to pay the amount due on their stock was implied from a remedy which the Maryland courts had worked out for the enforcement of the statutory liability imposed by the state on persons who became members of its corporations, the construction given to the statute by the highest court of the state at and before the time at which they became stockholders and creditors determines the meaning of such contract. Republic Iron & Steel Co. v. Carlton (C. C. 1911) 189 Fed. 126.

Where the constitutional and statutory law of the state in which a corporation was incorporated respecting the liability of stockholders, at the time of such incorporation had been clearly and definitely construed and settled by the decisions of the highest court of the state, it will be followed by a federal court in determining the liability of stockholders of such corporation. Babbitt v. Read (D. C. 1914) 215 Fed. 395.

48. —— **Rights, powers, and liabilities.**—Where the highest court of a state has given a decision that a corporation, chartered by the legislature of such state, has violated its charter in taking a certain mortgage, the courts of the United States, in a suit upon the same mortgage, will follow the decision of the state court. Smith v. Kernochen (1849) 48 U. S. (7 How.) 198, 12 L. Ed. 666.

Decisions of New York courts that a foreign corporation cannot avail itself of the state statute of limitations held binding upon the national courts. Tioga R. Co. v. Blossburg & C. R. Co. (1873) 87 U. S. (20 Wall.) 137, 22 L. Ed. 331.

The decision of the highest courts of New York that a foreign corporation cannot avail itself of the statute of limitations of that state, even though it was the lessee of a railroad and had property therein and a managing agent residing there and keeping an office of the company, is binding on the federal courts. Id.

It seems that a decision of the highest court of a state as to the existence of a liability of a corporation is conclusive upon the United States supreme court, as to the existence of such liability, in a suit to charge a director of the corporation therefor under a statute of the state. National Park Bank v. Remsen (1895) 158 U. S. 337, 15 Sup. Ct. 891, 39 L. Ed. 1008.

Whether distinctions recognized under Michigan laws between railroads and street railways were preserved by Pub. Acts Mich. 1907, No. 312, and Pub. Acts 1909, No. 300, and whether provisions of section 7 of these acts applied to both kinds of roads, are foreclosed by decisions of the state court. Michigan Cent. R. Co. v. Michigan R. R. Commission (1915) 35 Sup. Ct. 422, 236 U. S. 615, 59 L. Ed. 750, affirming judgment Michigan R. Commission v. Michigan Cent. R. Co. (1911) 132 N. W. 1068, 168 Mich. 230.

The federal supreme court cannot go behind the ruling of state court that state railroad commission acted in the exercise of the state's power of regulation of a steam railroad and interurban electric railway. Id.

When the highest court of a state has

determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the national courts in all cases involving no question of general or commercial law, and no question of right under the federal constitution. Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America (1897) 82 Fed. 124, 27 C. C. A. 73, decree affirmed (1899) 19 Sup. Ct. 341, 173 U. S. 99, 43 L. Ed. 628.

The decisions of state courts as to the powers of irrigation companies under the provision of the state statutes are binding on the federal courts. San Diego Flume Co. v. Southern (1898) 90 Fed. 164, 32 C. C. A. 548.

The decisions of the supreme court of a state, defining and limiting the powers of corporations created under the statutes of the state, are constructions of such statutes which will be followed by the federal courts. Schofield v. Goodrich Bros. Banking Co. (1899) 98 Fed. 271, 39 C. C. A. 76.

The decision of the supreme court of Minnesota that the fellow servant law of that state (Gen. St. 1894, § 2701) applies to a mining corporation which owns a short line of road to mine its ore is not so clearly beyond the limits of the police power of the state that it must be declared a violation of the constitution of the United States. Kibbe v. Stevenson Iron Min. Co. (1905) 136 Fed. 147, 69 C. C. A. 145.

Rev. Laws Mass. c. 111, § 120, requires railroads to erect and maintain suitable fences on both sides of the entire length of the railroad except at crossings of a public way or any places where the convenient use of the road would be thereby obstructed, that the corporation shall also construct and maintain sufficient barriers where it is necessary and practicable to do so to prevent the entrance of cattle on the road and in case of its neglect shall forfeit not more than $200 for every month during which the neglect continues, and that the supreme judicial court shall have jurisdiction in equity to compel the corporation to comply with the provisions, and to prohibit the crossing of highways, or the use of any land until the provisions are complied with. Held that, since the construction of such section is a local question, a federal court sitting in Massachusetts would accept the construction placed thereon by the supreme judicial court of the state. New York Cent. & H. R. R. Co. v. Price (1908) 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

The scope of a state statute regulating foreign corporations doing business within the state, as determined by the decisions of the highest court of the state, is binding on the federal tribunals. Buffalo Refrigerating Mach. Co. v. Penn Heat & Power Co. (1910) 178 Fed. 696, 102 C. C. A. 196.

Construction of Code Iowa 1897 2056, relating to the liability of r roads for fires, held binding on the f eral courts. Iowa Cent. Ry. Co. Hampton Electric Light & Power (1913) 204 Fed. 961, 123 C. C. A. 2

The decisions of the highest court a state upon the interpretation of statutes of that state granting cert powers to a corporation of its own c ation, though not conclusive upon federal courts sitting in that state, most persuasive. Venner v. Atchis T. & S. F. R. Co. (C. C. 1886) 28 F 581, appeal dismissed (1888) 9 Sup. 804, 131 U. S. 449, 33 L. Ed. 221.

The construction by the supre court of Missouri of Rev. St. Mo 806, concerning the ringing of bells sounding of whistles at railroad cro ings, that it was intended for the be fit of persons at the road crossing approaching it, is binding on the Un ed States circuit court sitting in t state. Pike v. Chicago & A. R. Co. C. 1889) 39 Fed. 754.

A decision of the highest court o state denying a writ of mandamus compel certain action on the part o water company is not an authoritat adjudication of the statutory duties powers of the company which is bi ing on a federal court in a suit in uity arising under similar circumsta es, where, under the statutes of state as previously construed, the co must necessarily have held that a p ceeding in mandamus would not against a corporation of the charac of the defendant. Wiemer v. Lou ville Water Co. (C. C. 1903) 130 F 251.

State statutes, imposing requireme on foreign corporations as a condit precedent to their doing business in state, are valid, if reasonable in th provisions, and will be enforced by federal courts, which will follow construction placed on them by courts of the state. Tennis Bros. v. Wetzel & T. Ry. Co. (C. C. 19 140 Fed. 193, decree affirmed Wetze T. Ry. Co. v. Tennis Bros. Co. (19 145 Fed. 458, 75 C. C. A. 266, 7 A Cas. 426.

The decision of the state supre court that Code Civ. Proc. Neb. § as to the service of process on cor rations, applies to foreign and dom tic corporations, is binding on the f eral courts if the service in pursua thereof is due process of law. Swa v. Christie Grain & Stock Co. (C. 1909) 166 Fed. 338.

The doctrine established by decis by the supreme court of North Ca lina that a railroad company cannot vest itself of its charter duties by lease of its road, and even that a co pany leasing its road is liable for negligence of its lessee in the ope tion of the road resulting in injury an employé, does not go to the ext of making a railroad company wh

has made a valid lease of its road under statutory authority liable contractually for labor performed or material furnished the lessee company in the operation or maintenance of the property, and such liability does not exist under the rule of the federal courts. Empire Trust Co. v. Egypt Ry. Co. (C. C. 1910) 182 Fed. 100.

A decision of the highest court of a state construing a statute of the state governing a domestic corporation binds a federal court sitting in the state on bankruptcy against the corporation. In re Benedict Tea & Coffee Co. (D. C. 1912) 192 Fed. 1011.

The decisions of a state court that contracts made and transactions done in the state by a foreign corporation, which has not complied with the laws of the state, do not constitute interstate transactions, while not conclusive, will be followed in the federal court, in the absence of conflicting and controlling authority in the federal courts. Thomas v. Birmingham Ry., Light & Power Co. (D. C. 1912) 195 Fed. 340.

The decisions of a state court invalidating contracts made in the state by a foreign corporation which has not complied with the laws of the state will be followed by the federal courts. Id.

The effect of the failure of a corporation to pay the annual license fee required by the state statute is a question of local law, upon which the decision of the state court is final. U. S. v. Spokane Mill Co. (D. C. 1913) 206 Fed. 999.

Holding of Kentucky court of appeals that private corporation is joint-stock company, within Civ. Code Prac. Ky. § 51, subsec. 6, as to service of process, held binding on the United States district court. Kirby v. Louismann-Capen Co. (D. C. 1914) 221 Fed. 267.

49. —— **Officers and agents.**—Where the decisions of the court of appeals of New York, so far as they go, do not affirm that so much of Act N. Y. 1848 as imposes a special liability on the trustees and directors of a corporation was incorporated into its charter by force of section 9, or otherwise, the supreme court cannot willingly hold that a provision of a general statute, imposing a personal liability on the trustees or other officers, is incorporated into a special charter by a clause therein declaring that the corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed on corporations organized under such general act. National Park Bank v. Remsen (1895) 15 Sup. Ct. 891, 894, 158 U. S. 337, 39 L. Ed. 1008.

The California act of April 23, 1880 (St. 1880, p. 131, § 1), which provides that "it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, * * * unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation," having been construed by the supreme court of the state to apply to foreign as well as domestic corporations owning mining ground in the state, and to render such ratification, in the manner prescribed by the statute, absolutely essential to the power of the directors to convey or mortgage such mining ground, such construction is binding upon the federal courts. Williams v. Gaylord (1900) 102 Fed. 372, 42 C. C. A. 401, judgment affirmed (1902) 22 Sup. Ct. 798, 186 U. S. 157, 46 L. Ed. 1102.

The decision of the supreme court of California that any person who connects himself with the title of a mining corporation may take advantage of Act Cal. April 30, 1880, prohibiting the directors of mining corporations from selling or incumbering its mining ground unless ratified by the stockholders, is binding on the federal courts. Williams v. Gaylord (1902) 22 S. Ct. 798, 186 U. S. 157, 46 L. Ed. 1102, affirming judgment (1900) 42 C. C. A. 401, 102 Fed. 372. In determining whether an agent of a foreign corporation upon whom federal process is served is a "managing agent" of the corporation, within the meaning of a state statute providing for such service, the court will give full consideration to decisions of the state court construing the statute. Union Associated Press v. Times Printing Co. (C. C. 1897) 83 Fed. 822.

The decision of the Arkansas supreme court that Kirby's Dig. Ark. §§ 848, 859, imposing a personal liability for corporate debts on the president and secretary of a corporation for failure to file annual reports of the corporation's condition, etc., was remedial and not penal, was conclusive on all federal courts. Proctor-Gamble Co. v. Warren Cotton Oil Co. (C. C. 1910) 180 Fed. 543.

50. —— **Insolvency and dissolution.**—The decision of the court of appeals of Kentucky on the question of the right to property in Kentucky of a Connecticut corporation, as between its receiver appointed by a Connecticut court and creditors making attachment in Kentucky after a general assignment to the receiver by the corporation, that the assignment was not a general voluntary assignment, and that therefore the receiver was not entitled to the property, is binding on a federal court in a suit between the receiver and such attaching creditors for the property. Zacher v. Fidelity Trust & Safety Vault Co. (1901) 106 Fed. 593, 45 C. C. A. 480, writ of certiorari denied (1901) 21 Sup. Ct. 924, 181 U. S. 621, 45 L. Ed. 1032.

Where state statutes regulating the dissolution of corporations have been

construed by the highest court of such state, the construction will be adopted by the federal courts in dealing with a corporation subject to such laws. In re Munger Vehicle Tire Co. (1908) 159 Fed. 901, 87 C. C. A. 81.

Decision of state court that corporate assets after termination of corporate existence passed to stockholders held binding on the federal courts. Stearns Coal & Lumber Co. v. Van Winkle (1915) 221 Fed. 590, 137 C. C. A. 314.

51. Questions affecting counties, municipal corporations, townships, or districts—Counties.—In an action on railroad aid bonds, the federal court will follow the decision of the highest court of the state construing the statute under which they were issued. Thomson v. Lee County (1865) 70 U. S. (3 Wall.) 327, 18 L. Ed. 177; Estill County v. Embry (1902) 112 Fed. 882, 50 C. C. A. 573 (order affirmed [1906] 144 Fed. 913, 75 C. C. A. 654, writ of certiorari denied [1907] 28 Sup. Ct. 259, 207 U. S. 593, 52 L. Ed. 355); McCoy v. Washington County (C. C. 1862) Fed. Cas. No. 8,731; First Nat. Bank v. Arlington (C. C. 1879) Fed. Cas. No. 4,-806; Same v. Bennington (C. C. 1879) Fed. Cas. No. 4,807; Bissit v. Kentucky River Nav. Co. (C. C. 1882) 15 Fed. 353.

The question whether Act Ky. March 11, 1869, authorizing a designated portion of Shelby county to subscribe stock, issue bonds, and levy taxes, in effect created a corporation, was one of a purely local nature, and a decision in the affirmative by the highest state court is of conclusive authority in the federal courts. Hancock v. Louisville & N. R. Co. (1892) 145 U. S. 409, 12 Sup. Ct. 969, 36 L. Ed. 755.

Decisions of the supreme court of Missouri to the effect that, under Gen. St. Mo. 1866, c. 63, § 17, the assent of two-thirds of all the registered voters is necessary to render valid an issue of county bonds in aid of a railroad, are not binding upon a federal court so as to require it to declare invalid an issue of bonds made before such decisions were rendered, and approved by two-thirds of those actually voting, being a less number than two-thirds of the registered voters. Knox County v. Ninth Nat. Bank (1893) 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93.

The rights of the holders of county bonds are determinable in a federal court by the law of the state as it was declared by the state court to be at the time the bonds were made and put upon the market. Board of Com'rs of Wilkes County v. Coler (1901) 21 Sup. Ct. 458, 180 U. S. 506, 45 L. Ed. 642.

The validity, under the state laws, of an ordinance adopted by a board of county supervisors, is settled, so far as the federal courts are concerned, by a decision of the highest court of that state upholding a similar ordinance. Flanigan v. Sierra County (1905) 25 Sup. Ct. 314, 196 U. S. 553, 49 L. E 597, reversing judgment (1903) 1 Fed. 24, 58 C. C. A. 340; Wheeler Plumas County (1905) 25 Sup. Ct. 3 196 U. S. 562, 49 L. Ed. 599, reversi judgment (1903) 122 Fed. 1022, 58 C. A. 683.

With respect to the interpretation state statutes regulating the making contracts by counties, the decisions the state courts are binding upon courts of the United States. Thon son v. Searcy County (1893) 57 F 1030, 6 C. C. A. 674, judgment affirm (1895) 66 Fed. 92, 13 C. C. A. 349.

A decision of the highest court o state construing a provision of state constitution limiting the power counties as to the creation of debts binding on the federal courts. Wade Travis County, Tex. (1897) 81 F 742, 26 C. C. A. 589, affirming ju ment (C. C. 1896) 72 Fed. 985; ju ment reversed (1899) 19 Sup. Ct. 7 174 U. S. 499, 43 L. Ed. 1060.

The decision of the supreme court a state that certain bonds issued b county were void for want of power the county, under the state consti tion and statutes, to issue them, binding on a federal court in a suit on the same bonds, although the pla tiff was not a party to the state de sion unless at the time the bonds w issued and sold the constitution or st utes had been given a different c struction. Board of Com'rs of Sta County, N. C., v. Coler (1899) 96 F 284, 37 C. C. A. 484.

Kearny county, Kan., is the mun pal successor of the old township Lakin, in Finney county, and liable the obligations of such township, un the decision of the supreme court the state, which is conclusive on county in a federal court. Board Com'rs of Kearny County, Kan., Vandriss (1902) 115 Fed. 866, 53 C. A. 192, writ of certiorari den (1902) 23 Sup. Ct. 843, 187 U. S. 6 47 L. Ed. 346.

The law of Iowa as established decisions in matters relating to pu drains will be followed by the fede courts. Chicago, B. & Q. R. Co. Board of Sup'rs of Appanoose Cou Iowa (1910) 182 Fed. 291, 104 C. A. 573, 31 L. R. A (N. S.) 1117, firming judgment (C. C. 1908) 170 F 665.

The supreme court of Illinois hav declared void section 20, Act March 1869, authorizing the issuance of bo in aid of the St. Louis & Southea ern Railway Company, which was corporated by the same act, as in v lation of the state constitution, s decision is binding on the federal cou and bonds issued by a county un such provision, being without autho ty of law, are not rendered valid any recitals they contain, and are enforceable in the hands of all holde Zane v. Hamilton County, Ill. (19

104 Fed. 63, 43 C. C. A. 416, affirmed (1903) 23 Sup. Ct. 538, 189 U. S. 370, 47 L. Ed. 858.

The right to sue and the liability to be sued of county commissioners arising under the local law constitute a rule of decision for the federal courts. McLean v. Hamilton County (C. C. 1859) Fed. Cas. No. 8,881.

The decision of the supreme court of the state declaring a law under which bonds were authorized to be issued to be constitutional conclusively settles the question in favor of all purchasers of the bonds. Smith v. Tallapoosa County (C. C. 1874) Fed. Cas. No. 13,-113.

Where plaintiff, in an action in the federal court on county bonds, declares on fictitious bonds in addition to those held by him, merely for the purpose of giving the court jurisdiction of the amount, and takes a voluntary nonsuit, the institution of such suit, and bringing of another suit within one year, as provided by Rev. St. Mo. § 6784, does not arrest the running of the statute of limitations. The equitable construction given the statute allowing a new action after suffering a nonsuit cannot be invoked by one who knowingly practices a fraud on the jurisdiction of the court. Hardin v. Cass County (C. C. 1890) 42 Fed. 652.

A decision of a state supreme court sustaining a statute validating certain county bonds is not binding on a federal court in a suit on other bonds of the same series, when a controlling provision of the state constitution was not called to the attention of the state court, and its decision was based on other grounds. Quaker City Nat. Bank v. Nolan County (C. C. 1894) 59 Fed. 660.

52. —— **Municipal corporations.**—A judgment of the supreme court of Pennsylvania holding that certain acts of the legislature authorizing subscriptions to railroad companies by municipalities were constitutional will be adopted by the supreme court of the United States. Amey v. Alleghany City (1860) 65 U. S. (24 How.) 364, 16 L. Ed. 614.

The rule that, where no federal question is involved, the United States court will follow the construction which has been uniformly given to the constitution or the laws of the state by its highest court, applied to the decisions of the supreme court of Illinois construing the provision of the Illinois constitution of 1870, prohibiting municipal aid to railroads, etc., unless then already voted. Fairfield v. Gallatin County (1879) 100 U. S. 47, 25 L. Ed. 544.

The settled construction given by the courts of New York state to the act of 1852 and similar statutes that they do not authorize an exchange of bonds for shares of stock, and that a purchaser, with notice that such a disposition of the bonds was made by the town officers, cannot recover in a suit brought upon them, followed. Scipio v. Wright (1879) 101 U. S. 665, 25 L. Ed. 1037.

The United States supreme court adheres to the decision of the supreme court of Illinois that the provision in the constitution of that state entitled "municipal subscriptions to railroads," etc., took effect July 2, 1870. Wade v. Walnut (1881) 105 U. S. 1, 26 L. Ed. 1027.

An issue of municipal bonds not originally authorized, but which the legislature might have authorized, and did in fact subsequently ratify, will be held valid in the federal courts, upon the well-settled doctrine of the United States supreme court of the power of a legislature, in the absence of any constitutional provision to the contrary, to ratify acts of a municipal corporation which it might originally have authorized, notwithstanding decisions of the state supreme court adverse to such doctrine, made after the issue of the bonds, and the passage of the curative act. Bolles v. Town of Brimfield (1886) 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786, following Anderson v. Santa Anna Tp. (1886) 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633.

A city ordinance prohibiting the sale of spirituous liquors in quantities of one gallon or more, without first obtaining a license, is local in its application, and involves no federal question or natural rights; and the decision of the state court affirming its validity is therefore conclusive in the federal courts as against a citizen of such state, even though the transaction giving rise to the controversy accrued before the date of such decision. Miller v. Ammon (1892) 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759.

Decisions by a state court, in cases involving railroad corporations created by the state, holding that the construction and maintenance of railroads does not constitute a public purpose, such as will authorize municipal donations in aid thereof under the constitution of the state, are not binding upon the federal courts, in a case involving a railroad company created by the laws of the United States, and subjected by its charter to important public duties, such as becoming a postal route and military road and a means of interstate commerce; especially when the state legislature has declared that for the purposes set forth in the acts of congress under which such company was organized it should be vested within the state with all its rights, powers, privileges, and immunities given by the acts of congress. Roberts v. Northern Pac. R. Co. (1895) 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

A federal court is bound by a decision of the supreme court of a state

holding that, while an act of the legislature extending the boundaries of a city so as to embrace territory formerly included within other municipal corporations was void as in conflict with the state constitution, yet it constituted color of law, and the validity of the city government established thereunder could not be inquired into after it had been organized, and had exercised authority over the annexed territory for a number of years without question, and the prior municipal governments therein had been for that length of time dissolved, and their records surrendered to the city, the question being one purely of local law; nor can the effect of such decision be avoided by allegations in a bill that complainants, as residents of the annexed territory, never acquiesced in or consented to the jurisdiction of the city over them or their property, where they took no steps to test its legality. McCain v. City of Des Moines (1899) 19 Sup. Ct. 644, 174 U. S. 168, 43 L. Ed. 936, affirming decree (C. C. 1898) 84 Fed. 726.

The construction given to Civ. Code La. art. 3540, by the supreme court of that state confining it to unconditional promises to pay a fixed sum of money on a day certain, whether the obligation be negotiable under the law merchant or not, and holding drainage warrants of the city of New Orleans to be neither bills of exchange, promissory notes, nor instruments negotiable by indorsement or delivery, will be followed by the supreme court. New Orleans v. Warner (1899) 20 Sup. Ct. 44, 48, 175 U. S. 120, 44 L. Ed. 96.

The construction given by the highest state court to a municipal ordinance preventing the sale of loaves of bread short in weight is binding on the federal supreme court when determining, on writ of error to a state court, the validity of the ordinance under the due process of law clause of the federal constitution. Schmidinger v. City of Chicago (1913) 33 Sup. Ct. 182, 226 U. S. 578, 57 L. Ed. 364, affirming judgments City of Chicago v. Schmidinger (1909) 90 N. E. 369, 243 Ill. 167 and (1910) 92 N. E. 244, 245 Ill. 317.

Decision of highest state court that city ordinance is within the powers conferred by the legislature is conclusive on the federal supreme court. Reinman v. City of Little Rock (1915) 35 Sup. Ct. 511, 237 U. S. 171, 59 L. Ed. 900, affirming judgment City of Little Rock v. Reinman (1913) 155 S. W. 105, 107 Ark. 174.

The construction given by the highest state court of St. Wis. 1911, § 1862, empowering municipalities to grant use of streets to street railway companies on terms, as not authorizing the contract preventing future exercise of authority by the state to fix rates, will be followed. Milwaukee Electric Ry. & Light Co. v. Railroad Commission Wisconsin (1915) 35 Sup. Ct. 820, U. S. 174, 59 L. Ed. 1254, affirm judgment (1913) 142 N. W. 491, Wis. 592, Ann. Cas. 1915A, 911.

The creation of municipal corpo tions including the changing of mun pal boundaries, is a local subject, respect to which the federal courts low the established local rules. F syth v. City of Hammond (1896) Fed. 443, 453, 18 C. C. A. 175, rev ed (1897) 17 Sup. Ct. 665, 166 U 506, 41 L. Ed. 1095.

A decision of the supreme court a state holding municipal bonds for want of power in the municipa to issue them, the question being depending on the construction of state constitution and the validity state statutes, will be followed b federal court in an action between same parties on the same bo though by reason of a nonsuit ta by plaintiff the decision of the s court did not pass into a final judgm so as to render the question res j cata. Board of Com'rs of Oxford, C., v. Union Bank of Richmond, (1899) 96 Fed. 293, 37 C. C. A. 49

The extent of the powers and lia ties of municipal corporations u the statutes of a state is a questio local law, upon which the decision the courts of the state are binding the national courts. Blaylock v. In porated Town of Muskogee (1902) Fed. 125, 54 C. C. A. 639.

The decision of the supreme cour a state, holding a local improve statute valid under the state const tion, is binding on a federal court suit involving an assessment made er such decision was rendered; and cisions construing and applying its visions, although made after such sessment, will also be followed un under exceptional circumstances. T v. City of Chicago (1904) 130 443, 64 C. C. A. 645, affirming de (C. C. 1903) 125 Fed. 644.

The federal courts, in determi the validity of a legislative act, u which municipal bonds in suit were sued, under the state constitution, follow the construction placed upon constitution by the highest court of state at the time the bonds were sued and sold. Rees v. Olmsted (19 135 Fed. 296, 68 C. C. A. 50.

Where, in a suit to restrain a from constructing and operating wa works, complainant's rights were quired under a municipal contract, not by virtue of any constitutional statutory provision, it was immate that a decision of the highest cour the state construing such constitu and statutes to authorize the city construct and maintain such wa works was filed pending the suit in federal court. City of Sioux Fall Farmers' Loan & Trust Co. (19

136 Fed. 721, 69 C. C. A. 373, reversing decree Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C. 1904) 131 Fed. 890.

Federal courts would not review objection that the state action did not involve a genuine controversy, but was a friendly suit to obtain a favorable interpretation of the constitution to permit the issuance of water bonds. Id.

Where the validity of an alternative submission of the question whether a city should issue bonds for the "construction or purchase" of a system of waterworks was in issue in a suit brought in the state courts to restrain the city from proceeding under such election, and a final judgment in favor of the city was affirmed on appeal to the state supreme court, such decision was conclusive on the federal courts. Id.

The extent of the powers and liabilities of municipal corporations are questions of construction of state constitution and statutes, on which the decisions of the highest judicial tribunal of the state which creates them are controlling. Johnson v. City of St. Louis (1909) 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949.

Where a city public service director rejected complainant's bid for a public improvement and awarded the contract to another, whether a federal court may review the director's action, enjoin the performance of and annul the contract made and compel an award to and the making of a contract with complainant, is a question of local law to be determined on the facts and the statutes involved, as construed by the state's highest tribunal; the federal court having authority to grant complainant any relief to which he may be entitled. U. S. Wood Preserving Co. v. Sundmaker (1911) 186 Fed. 678, 110 C. C. A. 224.

The determination of the supreme court of Texas that Rev. St. Tex. 1895, art. 616 (Acts 24th Leg. c. 109, § 4), providing for the dissolution of municipal corporations, was unconstitutional as imposing other than county duties on the board of county commissioners, would be followed in federal courts. Ringling v. City of Hempstead (1911) 193 Fed. 596, 113 C. C. A. 464.

A decision of a state court of last resort that a municipal corporation, acting through a subordinate statutory department, was liable for negligence in the construction of public works, held binding on a federal court in a similar case. City of Manchester v. Landry (1912) 199 Fed. 882, 118 C. C. A. 330.

A decision of the Alabama supreme court that a provision of an act amending a city charter granting authority to issue bonds for a municipal improvement was within the title of the act is conclusive on the federal court sitting in such state. City of Columbia v. Chicago Title & Trust Co. (1912) 200 Fed. 569, 119 C. C. A. 49.

The decisions of the supreme court of a state construing its state constitution and laws in relation to securities given by municipalities to aid railway companies, are not necessarily binding on the federal courts. Thomas v. Scotland County (C. C. 1874) Fed. Cas. No. 13,909.

A city charter prohibited its council from increasing the public debt unless authorized by two-thirds of its qualified voters. A railroad company executed a deed securing bonds, and the city guaranteed a payment of the bonds without being authorized by a two-thirds vote, and, when the bonds matured, the city paid them and became the holder thereof. In a litigation between the city and other lien creditors of the railroad company, the supreme court of the state in which the railroad lies held that the deeds were a lien on the railroad, notwithstanding the prohibition of the city charter. Held, where their validity was afterwards assailed in a federal court, it would not reopen the question. Hay v. Alexandria & W. R. Co. (C. C. 1884) 20 Fed. 15.

In Waterworks Co. v. Refinery Co. (1883) 35 La. Ann. 1111, the supreme court of Louisiana held that in spite of the charter of the waterworks company, giving that corporation the exclusive privilege of supplying water from the Mississippi to the city and its inhabitants, and reserving to the city council the power to grant persons contiguous to the river the privilege of laying pipes for their own use, the council, under said charter and the general laws of the state, could grant such privilege to persons without regard to their contiguity. In this decision the United States supreme court held that no federal question was involved, the determination of the council's power, under the state laws, being for the state supreme court. New Orleans Waterworks Co. v. Louisiana Sugar Refining Co. (1888) 8 Sup. Ct. 741. Before this ruling, but after the state decision, the United States supreme court, in the case of Waterworks Co. v. Rivers (1885) 6 Sup. Ct. 273, without referring to the state decision, held that the council's grant of such privilege under the provision of the state constitution adopted after the waterworks charter had been granted, which abrogated monopolies, impaired the obligation of the state's contract with the company. Held, that the United States circuit court in Louisiana should be governed by the decision of the state supreme court, the matter being, as conceded by the United States supreme court, one for its determination, and the parties being all of them Louisiana corporations. New Orleans Waterworks Co. v. Southern Brewing

Co. (C. C. 1888) 36 Fed. 833, decree affirmed (1891) 12 Sup. Ct. 986, 145 U. S. 649, 36 L. Ed. 850.

Where land has been dedicated for a public square on the plat of a proposed city, and the control of such square is vested by the Legislature in the common council of the city, after its incorporation, and is afterwards transferred to a board of commissioners, the federal courts are bound by the decisions of the state courts as to the authority of the legislature to make such change. Hoyt v. Gleason (C. C. 1892) 65 Fed. 685.

A judgment of a state court of last resort sustaining the validity of the city ordinance prohibiting the erection of billboards is binding on the federal courts sitting in such state in an action to enjoin the enforcement of the ordinance. Whitmier & Filbrick Co. v. City of Buffalo (C. C. 1902) 118 Fed. 773.

Under the Indiana statute authorizing cities and towns to make street improvements and sewers, and levy a special tax therefor on property benefited (Acts 1889, c. 118, as amended by Acts 1891, c. 118), which requires the council of a city to declare by resolution the necessity for the improvement, designate its kind and location, and publish notice of the time and place of hearing objections from property owners, as such statute has been construed by the supreme court of the state which construction is binding on a federal court, such declaratory resolution is not jurisdictional, and the necessity for the improvement may be declared and an order therefor made in the same resolution, where, as required, notice is given and a hearing had before final assessments are made. Pennsylvania Co. v. Cole (C. C. 1904) 132 Fed. 668.

The construction of the supreme court of Mississippi that Acts Miss. 1872, § 4, known as the "curative act," which confirmed and ratified the acts of transfer authorized in making subscriptions in aid of railroads and issuing security, was intended only to apply to subscriptions made after the adoption of the constitution of Mississippi of 1869, in pursuance of laws enacted under it, is binding on the federal courts. Katzenberger v. City of Aberdeen (D. C. 1883) 16 Fed. 745, judgment affirmed (1897) 7 Sup. Ct. 947, 121 U. S. 172, 30 L. Ed. 911.

53. —— **Townships.**—The supreme court is not bound by a decision of a state supreme court that certain railroad aid bonds in the hands of bona fide holders are void as being issued under a statute repugnant to the state constitution, as decisions of the highest courts of a state will not be respected where they are not satisfactory to the minds of the judges of the United States supreme court. Pine Grove Tp. v. Talcott (1873) 86 U. (19 Wall.) 666, 22 L. Ed. 227.

Under the rule that when the co struction of the constitution or t statutes of a state has been fixed an unbroken series of decisions of highest court, the courts of the Unit States accept and apply it in cases b fore them, held, that the bonds issu April 27, 1869, by the supervisor a town clerk of the township of Elmwoo Illinois, by way of payment for an a ditional subscription of $40,000 stock of the Dixon, Peoria, & Han bal Railroad Company, over and abo the amount authorized by the origin charter of said company, are not bin ing on the township. Elmwood Tp. Marcy (1875) 92 U. S. 289, 23 L. E 710.

The decision of the supreme court Missouri that the provisions of t act of the general assembly of Mar 23, 1868, commonly known as the tow ship aid act, authorizing subscriptio to the capital stock of railroad co panies by a township on an election d ly called, is constitutional, is concl sive upon the question as a rule of co stitutional construction, and is bin ing upon the supreme court of t United States. Cass County v. Joh ston (1877) 95 U. S. 360, 24 L. E 416.

Though the supreme court of t United States may yield against its ov judgment to a state supreme cou and accept as local law its decisi that the fact that an election, held authorize the issue of township bon in aid of a railroad, was presided ov by a moderator chosen by the electo present, instead of by the supervis assessor, and collector as ex offic judges of elections, is such an irreg larity as renders the election void, will not follow the state court in t conclusion drawn therefrom, that t bonds issued in pursuance thereof a void in the hands of bona fide holde Town of Pana v. Bowler (1882) 1 U. S. 529, 2 Sup. Ct. 704, 27 L. E 424.

In determining the validity of tov bonds which came into the hands the owner before that question h been adjudicated by the supreme cou of the state in which the bonds we situated, the supreme court of t United States will not consider its bound by such subsequent adjudicatio unless it regards it as intrinsical sound. Barnum v. Town of Okolo (1893) 148 U. S. 393, 13 Sup. Ct. 63 37 L. Ed. 495.

Under the Illinois decisions, denyi interest on the overdue interest co pons of railroad aid bonds, such i terest is not recoverable in the feder courts. Bolles v. Town of Amboy (C. 1891) 45 Fed. 168.

Where the only question in a suit coupons of township bonds is the a

ority to issue them, a prior decision the state supreme court, in a suit by taxpayer to recover taxes levied for terest on the bonds, is binding on the deral courts. Folsom v. Township of nety-Six (C. C. 1893) 59 Fed. 67, rtified and determined (1895) 16 Sup. . 174, 159 U. S. 611, 40 L. Ed. 278.

54. —— **Districts.**—The construction the state supreme court of Laws ak. 1879, c. 14, as to the power of a hool district to issue warrants for a hool building, being reasonable, will followed by a federal court. Capital ink v. School Dist. No. 26, Barnes unty (1894) 63 Fed. 938, 11 C. C. 514, certiorari denied (1897) 17 p. Ct. 992, 165 U. S. 720, 41 L. Ed. 84.

55. **Construction of statutes relating judgments.**—The power of the inrior courts of a state to make an orr at one term to take effect as of other is of a character so peculiarly cal, and a proceeding so necessarily pendent on the revising tribunal of e state, that this court will conform the decision of the appellate court the state. Bank of Hamilton v. idley's Lessee (1829) 27 U. S. (2 et.) 492, 7 L. Ed. 496.

Under the law of Kentucky as settled decision, the failure of the plaintiff a suit against a defendant construcely summoned and who has not apared to give the bond required by v. Code Prac. Ky. § 410, while it nders the judgment reversible for er, does not render it void. Audas v. ghland Land & Building Co. of Dayn, Ky. (1913) 205 Fed. 862, 125 C. C. 62.

Whether a mere equitable interest in nds becomes impressed with the lien a judgment against the owner of ch interest is a question of local law, regard to which the federal courts ll follow the state decisions. U. S. Eisenbeis (D. C. 1898) 88 Fed. 4.

56. **Construction of statutes relating attachment, injunction, and execun.**—Under this section, where the exution law of a state is in question, e United States supreme court will opt the construction given it by the ghest court of the state. United ates v. Morrison (1830) 29 U. S. (4 et.) 124, 7 L. Ed. 804.

The decisions of the supreme court of e state construing and applying its tachment laws are rules of decision the federal courts in like cases com- from that state. Rice v. Adlerldman Commission Co. (1895) 71 ed. 151, 18 C. C. A. 15.

The courts of the United States are t required by this section to follow ate decisions made on grounds of pub- policy or comity merely; and a sine decision of the supreme court of a ate made in 1828, holding that, as to operty situated in that state, a genal assignment made by a debtor in another state would not be allowed to defeat an attachment of such property by one of its own citizens, which decision has never been repeated, will not be accepted as binding on a federal court in the state. Stowe v. Belfast Sav. Bank (C. C. 1897) 92 Fed. 90.

The decision in an interpleader suit in a state court, that no lien was obtained by a certain attachment levy, is binding upon the federal court to which the original attachment suit has been removed. Montgomery v. McDermott (C. C. 1898) 87 Fed. 374.

Federal courts held not bound by construction placed on state statute by state court of first instance, in passing on an ex parte application for an injunction. James Clark Distilling Co. of Cumberland, Md., v. Western Maryland Ry. Co. (D. C. 1915) 219 Fed. 333.

See, also, notes under § 1537, ante.

57. **Questions involving condemnation proceedings.**—A decision by the supreme court of Wisconsin that Act Wis. June 29, 1848, providing for the improvement of the Fox and Wisconsin rivers, and for connecting the same by a canal, failed to give the landowner a right to institute condemnation proceedings to have his compensation determined, or to make adequate provision for such compensation, is binding on the supreme court of the United States. Kaukauna Water Power Co. v. Green Bay & M. Canal Co. (1891) 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004, affirming (1887) 70 Wis. 635, 35 N. W. 529.

The supreme court is bound to accept the construction placed by the state court upon a statute permitting condemnation proceedings. Baltimore Traction Co. v. Baltimore Belt R. Co. (1894) 14 Sup. Ct. 294, 295, 151 U. S. 137, 38 L. Ed. 102.

The decisions of the highest court of a state on questions of procedure in condemnation proceedings, or as to alleged conflicts between the statute authorizing them and the state constitution, are controlling on the federal courts. Long Island Water Supply Co. v. City of Brooklyn (1897) 17 Sup. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

1 How. Ann. St. Mich. § 3468, provides that, in case an award in condemnation proceedings is set aside on appeal after the amount has been paid, and a new appraisal is had, if the amount is diminished, the difference shall be refunded, and judgment therefor and all costs shall be rendered "against the party so appealing." Under this statute an award was set aside, and a new appraisal had, on an appeal by the plaintiff. The new award being less than the former one, judgment for the difference was entered against the defendants. Held that, though this judgment was not against the party "so appealing," but against the opposite party, the judgment was merely

a construction of the state statute by the state court, and was conclusive upon the federal supreme court. Backus v. Fort St. Union Depot Co. (1898) 18 Sup. Ct. 445, 169 U. S. 557, 42 L. Ed. 853, affirming judgment (1895) 61 N. W. 787, 103 Mich. 556.

Federal supreme court, on writ of error to state court to review judgment dismissing writ of prohibition, will follow rulings of state court as to asserted invalidity of condemnation laws under state constitution, and errors in proceedings under those laws. Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. (1916) 36 Sup. Ct. 234.

The decisions of the supreme court of Illinois that an abutting landowner cannot enjoin the construction of a railroad in the street are binding on the federal courts. Lobenstine v. Union El. R. Co. (1897) 80 Fed. 9, 25 C. C. A. 304.

Decisions by the Indiana supreme court, that the fee to the bed of a canal, constructed by the state, is vested in the state by condemnation proceedings, and that the commissioners to assess damages had authority to consider benefits, will be followed by the federal courts. Kennedy v. Indianapolis (C. C. 1878) Fed. Cas. No. 7,703.

A railroad company procured the assent of the Connecticut railway commissioners to the taking of certain lands, and applied to the judge of the superior court to have the damages assessed. The landowner appealed from the order of the commissioners, and at the same time removed the proceedings for assessment to the federal court. In that court he pleaded in abatement the pendency of the appeal. Before the hearing as to the sufficiency of the plea, the appeal was dismissed by the state court for want of jurisdiction. Held that, while the sufficiency of the plea was to be determined as of the date it was filed, yet the decision by the state court was to be taken as showing what the law was at that time. New York, N. H. & H. R. Co. v. Cockcroft (C. C. 1892) 49 Fed. 3.

The decision of the highest court in the state of New Jersey as to the right of one railroad company to cross the lands of another railroad company in the same state is conclusive, and cannot be reviewed by the United States circuit court in a suit between the same parties, involving the same subject-matter, though a federal question be involved. Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co., (C. C. 1892) 51 Fed. 858.

The decision of a New Jersey circuit court that, on an appeal in a proceeding wherein one railroad company has condemned a right of way across the tracks of another, it has power, under the state statute, to allow an amendment altering the plan of crossing is, while unreversed, binding on the federal courts. Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co. (C. C. 1893) 58 Fed. 929.

Two canal companies in Colorado constructed irrigation ditches, appropriating water from the Arkansas river. The second to commence the work first recorded its plat, in compliance with Act Colo. Feb. 11, 1881, which, under such act, gave it priority of right; but in subsequent litigation between the parties the supreme court of the state held such act, and the amendment thereto of April 20, 1887, unconstitutional and void, because not legally enacted. Held, that such facts did not authorize the federal court to review or reverse such decision, which, as a construction of the constitution of the state, was conclusive. Mohl v. Lamar Canal Co. (C. C. 1904) 128 Fed. 776.

In a condemnation proceeding in the federal court to acquire title to land in Georgia, whether certain claimants of the fund had title to the land by adverse possession under color of title depended on the law of the state and was not a question concerning which the court could form an independent judgment. U. S. v. One Lot of Land for Bainbridge Post Office (D. C. 1910) 178 Fed. 334.

58. Decisions relating to assignments for creditors and fraudulent conveyances.—The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors is a question on which the decisions of the highest court of the state are controlling in the courts of the United States. Jencks v. Quidnick Co. (1890) 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; Union Nat. Bank v. Bank of Kansas City (1890) 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; South Branch Lumber Co. v. Ott (1892) 142 U. S. 622, 12 Sup. Ct. 318, 35 L. Ed. 1136; May v. Tenney (1893) 148 U. S. 60, 13 Sup. Ct. 491, 37 L. Ed. 368; Rice v. Frayser (C. C. 1885) 24 Fed. 460; Rothschild v. Hasbrouck (C. C. 1896) 72 Fed. 813.

Although the supreme court will generally follow the decisions of courts of a state upon the construction of state statutes where settled rules of property have been established under them, yet in construing statutes of a different character—such as those prescribing the remedies of creditors—this rule is not applied. In such cases the court may follow its own judgment. This is equally true whether the cause is brought up for review from a United States court or from a state court. Butz v. City of Muscatine (1869) 75 U. S. (8 Wall.) 575, 19 L. Ed. 490.

The question of the construction and effect of a law regulating assignments for creditors is one on which the deci

sions of the highest court of the state are controlling. Union Nat. Bank v. Bank of Kansas City (1890) 10 Sup. Ct. 1013, 1017, 136 U. S. 223, 34 L. Ed. 341.

The validity of an assignment for the benefit of creditors which requires a release by creditors as a condition of preference is determinable by the state law as interpreted by its highest courts. Robinson v. Belt (1902) 23 Sup. Ct. 16, 187 U. S. 41, 47 L. Ed. 65, affirming judgment (1900) 100 Fed. 718, 40 C. C. A. 664.

In determining whether an instrument executed in the Indian Territory is an assignment for the benefit of creditors or a mortgage, the circuit court of appeals will follow the decisions of the supreme court of Arkansas in the construction of the Arkansas statute governing assignments, which was put in force in the Indian Territory by 26 Stat. 81, 94. Sanger v. Flow (1891) 48 Fed. 152, 1 C. C. A. 56; Appolos v. Brady (1892) 49 Fed. 401, 1 C. C. A. 299; Rainwater-Boogher Hat Co. v. Malcolm (1892) 51 Fed. 734, 2 C. C. A. 476.

Whether a chattel mortgage is void under a state statute, as being a common-law assignment for benefit of creditors, with preferences, being purely a question of local law, should be decided in accordance with the latest exposition of the law by the highest tribunal of the state. Brown v. Grand Rapids Parlor Furniture Co. (1893) 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817.

In the construction of the Colorado statute authorizing general assignments by one in contemplation of insolvency for the benefit of all creditors, more weight ought to be given to decisions of the supreme court of the state foreshadowing the construction of the statute therein than to decisions under statutes declaring all voluntary assignments void unless for the common benefit of all creditors. Hayden v. Wellington (1894) 63 Fed. 7, 9, 11 C. C. A. 7.

Where the statutes of a state determine the rights of creditors, and those rights come before a federal court, either in a case at law or in equity, for adjudication, that court is bound to accept such exposition of the meaning of the law as the state courts have given it, and ought not to give an exposition of its own, unless there has been no previous exposition of it by the state courts. Johnston v. Straus (C. C. 1882) 26 Fed. 57.

As the federal courts are bound to follow the decision of the highest court of the state in the construction of a state statute, a deed adjudged valid by the supreme court of Rhode Island, as not being a conveyance made in fraud of creditors, must be held valid by the circuit court. Moulton v. Chafee (C. C. 1884) 22 Fed. 26.

A decision of the supreme court of a state, that a statute of that state regulating the administration and distribution of estates under general assignments for the benefit of creditors is an insolvency law, will be followed by the federal courts of bankruptcy in deciding upon the effect of the enactment of the national bankruptcy law upon the operation of such statute. In re Curtis (D. C. 1899) 91 Fed. 737.

59. **Construction and effect of contracts—In general.**—It is the duty of federal courts in all cases within their jurisdiction depending upon local law, to administer that law so far as it affects contract obligations and rights, as it was judicially declared to be by the highest court of the state at the time such obligations were incurred or such rights accrued. Taylor v. Ypsilanti (1881) 105 U. S. 60, 71, 26 L. Ed. 1008.

Decisions by the court of last resort of a state construing state laws, on the faith of which a subsequent contract is made, will be adopted and applied by the supreme court of the United States in considering the nature of the contract right relied upon. Warburton v. White (1900) 20 Sup. Ct. 404, 176 U. S. 484, 44 L. Ed. 555, affirming judgment (1898) 52 Pac. 233, 532, 18 Wash. 511.

A court of the United States will follow the rule laid down by the highest court of the state in determining whether a contract is governed by the laws of the place where it was made and to be performed or by the law of the forum, and also upon the question whether a contract is contrary to the public policy or statutes of the state. Parker v. Moore (1902) 115 Fed. 799, 53 C. C. A. 369, reversing judgment (C. C. 1901) 111 Fed. 470, and writ of certiorari denied Moore v. Parker (1902) 23 Sup. Ct. 844, 187 U. S. 644, 47 L. Ed. 347.

While the federal courts are bound by the construction placed by the highest court of a state on a state statute or constitutional provision, when it becomes necessary to apply the statute or provision, as thus construed by the local courts, to a particular contract, and to determine from a consideration of all its provisions whether it is a violation of the law, a federal court is entitled to express an independent judgment. City of Ottumwa, Iowa, v. City Water Supply Co. (1902) 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

A federal court should not refuse to follow a rule established by the supreme court of a state, on the faith of which the parties presumably contracted, unless that rule is against the very decided weight of authority. Columbia Digger Co. v. Sparks (C. C. A. 1915) 227 Fed. 780.

60. —— **Guaranty.**—A decision by the supreme court of Connecticut, in in-

solvency proceedings, that a contract of guaranty dated and signed by others at Chicago, and to be performed in Illinois, which was afterwards signed by a married woman in Connecticut, and then delivered by her husband in Illinois, was, as to her, a Connecticut contract, and invalid under the law of that state for want of capacity to make such a contract, will be followed by a federal court in an action against her on the guaranty. First Nat. Bank v. Mitchell (C. C. 1898) 84 Fed. 90.

61. —— **Bonds and notes.**—The decisions of the state courts that its statutes compelling a holder of a note to sue the principal within a certain time after notice, as a condition of holding the indorser or surety liable, are binding on the federal court. Davie v. Hatcher (C. C. 1871) Fed. Cas. No. 3,610.

Declaration of the highest court of a state concerning rights, equities, and policy arising out of bonds given by municipal contractors, being affected by the public policy of the state, will be considered as rules of decision in the federal courts, and followed if not directly opposed by higher federal authority. Columbia Digger Co. v. Rector (D. C. 1914) 215 Fed. 618.

62. —— **Sales and transfers.**—Where a state statute is local and applies only to sales in the state, the supreme court will follow the construction given to it by the highest court of the state. Massey v. Allen (1872) 17 Wall. 351, 354, 21 L. Ed. 542.

Whether a receiver of an insolvent can avoid the unrecorded condition in a contract of conditional sale is a question of local law, and its determination by the highest tribunal of the state is controlling on the federal courts. T. L. Smith Co. v. Orr (1915) 224 Fed. 71, 139 C. C. A. 517.

Where a person buys goods in good faith, without notice of the seller's fraud, and, as part consideration, agrees to pay certain claims against the seller held by persons residing in the state, the rule established by the court of last resort in that state, whereby the purchaser is liable to the persons for whose benefit the promise is made, will be followed by the federal court in a suit by the seller's creditors to recover from the purchaser the amount of said claims, since to hold otherwise would subject the defendant to a second payment thereof to the holders of the claims, without the possibility of relief from the federal courts. Sonstiby v Keeley (C. C. 1882) 11 Fed. 578.

Construction placed by supreme court of Washington on Rem. & Bal. Code Wash. § 3670, as to validity of conditional sales of personal property will be adopted by the federal court as to cases claimed to be within it. In re Pacific Electric & Automobile Co. (D. C. 1915) 224 Fed. 220.

63. —— **Insurance.**—A decision of the supreme court of a state construing a statute relative to insurance by any "company, corporation, association, or partnership" as separable in its provisions with respect to these different bodies, is conclusive upon federal courts. Noble v. Mitchell (1896) 17 Sup. Ct. 110, 164 U. S. 367, 41 L. Ed. 472.

The interpretation of a state statute by the state courts with respect to its application to policies issued by a foreign insurance company is binding on the supreme court of the United States. New York Life Ins. Co. v. Cravens (1900) 20 Sup. Ct. 962, 178 U. S. 389, 44 L. Ed. 1116, affirming judgment Cravens v. New York Life Ins. Co. (1899) 50 S. W. 519, 148 Mo. 583, 71 Am. St. Rep. 628.

The decisions of the Missouri Supreme court as to the effect of the repeal of a state statute making suicide no defense to a suit on an insurance policy, and as to the validity of amendatory statutes as affected by the state constitution, are binding upon the United States courts in a suit on a policy, which was removed from a state court. Knights Templars' & Masons' Life Indemnity Co. v. Jarman (1902) 23 Sup. Ct. 108, 111, 187 U. S. 197, 47 L. Ed. 139.

The construction by the state courts of a state statute which penalizes life insurance companies for failure to pay losses, as requiring a demand of payment notwithstanding the company's denial of liability, which demand can be made, however, after suit, and can be set up by an amended petition as an original suit, will be adopted by the federal courts. Iowa Life Ins. Co. v. Lewis (1902) 23 Sup. Ct. 126, 187 U. S. 335, 47 L. Ed. 204.

The decisions of the supreme court of Pennsylvania declaring it to be the law of the state that a statute applied to contracts of life insurance made within the state by a foreign insurance company under authority granted by the state to do business therein, notwithstanding a provision of such contracts that they should be governed by the laws of another state which was the domicile of the company, were binding upon a federal court sitting in the state in an action on such a policy, and established the rule by which the contract must be construed. McClain v. Provident Sav. Life Assur. Soc. of New York (1901) 110 Fed. 80, 49 C. C. A. 31, reversing judgment Same v. Provident Savings Life Assur. Soc. of New York (C. C. 1901) 105 Fed. 834, denying writ of certiorari Provident Sav. Assur. Soc. of New York v. McClain (1902) 22 Sup. Ct. 938, 184 U. S. 699, 46 L. Ed. 765.

When the Supreme Judicial Court of the state in construing St. Mass. 1894, c. 522, § 73, laid down the rule that where, under its terms, the application was not

in itself admissible in evidence, the company could not be permitted to show by oral evidence statements made by the insured, which were afterwards incorporated into the application, in support of a defense of fraud, such rule was binding upon the federal courts sitting within the state in actions at law of the same character. Manhattan Life Ins. Co. v. Albro (1904) 127 Fed. 281, 62 C. C. A. 213, affirming judgment Albro v. Manhattan Life Ins. Co. (C. C. 1902) 119 Fed. 629, and writ of certiorari denied (1904) 24 Sup. Ct. 857, 194 U. S. 633, 48 L. Ed. 1159.

Where, in an action on a policy of insurance, the supreme court of the state had held that certain conduct upon the part of the insurance company should be submitted to the jury as evidence of its intention to waive a forfeiture for over-insurance, such ruling was binding on the federal court on removal of the cause. Cleaver v. Traders' Ins. Co. (C. C. 1889) 40 Fed. 711.

The construction of the insurance code of a state should be left to the state tribunals. E. H. Stanton Co. v. Rochester German Underwriters' Agency (D. C. 1913) 206 Fed. 978.

64. —— State contracts.—The competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract, are matters which the supreme court of the United States, on writ of error to a state court, must determine for itself by an independent judgment, as an exception to the general rule that it will accept the decision of the state supreme court on the construction of the state constitution, though in determining the matter it may lean towards the interpretation placed thereon by the state court. Stearns v. State of Minnesota (1900) 21 Sup. Ct. 73, 179 U. S. 223, 45 L. Ed. 162, reversing judgment State v. Stearns (1898) 75 N. W. 210, 72 Minn. 200.

65. Decisions relating to title, transfers, and liens on property—Property rights in general.—A single decision of a state supreme court upon the question of property rights arising out of the union of two national church organizations held not conclusive on a federal court in a subsequent suit between different parties and relating to different property. Barkley v. Hayes (D. C. 1913) 208 Fed. 319.

A federal court whose jurisdiction depends on diversity of citizenship alone will follow a state court's decision of a question affecting the same property unless fully convinced that it was erroneous. Old Colony Trust Co. v. City of Tacoma (D. C. 1915) 219 Fed. 775.

66. —— Affecting title to real estate.—The construction of a state law on a question affecting the title to real property in the state by its highest court is binding on the federal courts. Polk v. Wendal (1815) 9 Cranch, 87, 98, 3 L. Ed. 665; Thatcher v. Powell (1821) 6 Wheat. 119, 127, 5 L. Ed. 221; Gardner v. Collins (1829) 2 Pet. 58, 84, 7 L. Ed. 347; Beauregard v. New Orleans (1855) 18 How. 497, 502, 15 L. Ed. 469; Williams v. Kirtland (1871) 13 Wall. 306, 311, 20 L. Ed. 683; Walker v. Marks (1873) 17 Wall. 648, 650, 21 L. Ed. 744; American Land Co. v. Zeiss (1911) 191 Fed. 125, 111 C. C. A. 605; Ehmen v. City of Gothenburg, Neb. (C. C. A. 1911) 200 Fed. 564; Holden v. Circleville Light & Power Co. (C. C. A. 1914) 216 Fed. 490.

The mode of conveying real estate is subject to the control of the legislature of the state, and where a case involved the proposition that title had passed from the government of the United States and was in controversy between private citizens, there is no valid objection to enforcing the contract according to the law of the state. Langdon v. Sherwood (1888) 8 Sup. Ct. 429, 430, 124 U. S. 74, 31 L. Ed. 344.

The construction placed by the New York courts on the statute of New York of Feb. 23, 1786, abolishing estates tail, will be followed by the courts of the United States. Van Rensselaer v. Kearney (1850) 52 U. S. (11 How.) 297, 13 L. Ed. 703.

By analogy to the rule in regard to limitations, federal courts should follow the decisions of a state court as to laches affecting rights relating to the title or possession of realty therein. Wheeling Bridge & Terminal Ry. Co. v. Reymann Brewing Co. (1898) 90 Fed. 189, 32 C. C. A. 571.

In determining the title of real estate, the federal courts are governed by the law of the state as to transfers and alienation, and the effect of decrees and judgments of the state courts and as to the construction of its statutes are controlled by the decisions of its highest court. Seefeld v. Duffer (1910) 179 Fed. 214, 103 C. C. A. 32, writ of certiorari denied Duffer v. Seefeld (1911) 31 Sup. Ct. 720, 220 U. S. 616, 55 L. Ed. 611.

A judgment of a Minnesota court of superior general jurisdiction which determines adverse claims to real estate under Gen. St. Minn. 1894, § 5817, affirmed by the state supreme court, is a finality as against the objection that the relief granted is broader than the complaint, since the construction placed on the complaint as stating a cause of action to determine adverse claims, is at most erroneous. Gibbs v. Alger, Smith & Co. (1912) 201 Fed. 47, 119 C. C. A. 379.

A state, which by the decision of its own Supreme Court has no interest in the lands, held not entitled to maintain a proceeding for a writ of mandamus to compel allowance of an appeal by a federal court in behalf of one of its levee districts. U. S. ex rel. State of Louisi-

ana v. Boarman (1914) 217 Fed. 757, 133 C. C. A. 487.

67. —— **Dedication.**—A decision of the supreme court of a state that the designation of certain land on a plat as "Ehmen's Park" constituted a dedication of it to public use, though not conclusive on the federal courts, would be followed under the doctrine of comity. Ehmen v. City of Gothenburg (1912) 200 Fed. 564, 119 C. C. A. 44.

68. —— **Accretions.**—The settled decisions of the courts of a state and its laws which infringe no right secured by the constitution of the United States, or by the general or commercial law, determine the extent of the rights of riparian owners to accretions to their lands in that state. State of Iowa v. Carr (1911) 191 Fed. 257, 112 C. C. A. 477; Same v. John A. Creighton Real Estate & Trust Co. (1911) 191 Fed. 270, 112 C. C. A. 496.

69. —— **State and municipal grants.**—The decisions of a state court as to the legal effect of royal charters, by which the state claims certain rights as against individuals, are entitled to great weight in the supreme court in a case involving the rights litigated in the state courts. Martin v. Waddell (1842) 41 U. S. (16 Pet.) 367, 10 L. Ed. 997.

Whether the grant by a town of its water front to an individual had been ratified, confirmed, or compromised by authority of law, and to what extent, if any, it had been so done, were questions of local law which having been determined by the supreme court of the state will be followed by the United States circuit court. Southern Pac. Co. v. Western Pac. Ry. Co. (C. C. 1906) 144 Fed. 160, decree reversed Western Pac. Ry. Co. v. Southern Pac. Co. (1907) 151 Fed. 376, 80 C. C. A. 606.

Where the priority of certain state grants had been settled by the supreme court of the state of North Carolina, the decision was binding on the federal court sitting in such state in a suit instituted therein. North Carolina Min. Co. v. Westfeldt (C. C. 1907) 151 Fed. 290, decree reversed Westfeldt v. North Carolina Min. Co. (1909) 166 Fed. 706, 92 C. C. A. 378, writ of certiorari denied North Carolina Min. Co. v. Westfeldt (1909) 29 Sup. Ct. 697, 214 U. S. 516, 53 L. Ed. 1064, appeal dismissed (1909) 30 Sup. Ct. 404, 215 U. S. 586, 54 L. Ed. 339.

70. —— **Partition.**—In a suit for partition, removed to a federal court, it will follow the state decisions holding that a right of entry in the plaintiff, without actual seisin, is sufficient. McClaskey v. Barr (C. C. 1890) 42 Fed. 609.

71. —— **Conveyances or other transfers.**—Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before a justice of the county where the lands lie, it had been the long-established practice, before t year 1775, to acknowledge deeds befo a justice of the supreme court of t province of Pennsylvania; and thou the act does not authorize the practic yet, as it had been recognized by t courts of Pennsylvania, the feder court will adopt such construction the law. McKeen v. Delancy (180 9 U. S. (5 Cranch) 22, 3 L. Ed. 25.

The supreme court on a writ of e ror to the circuit court for the distri of a state is bound by the decisions the highest court of the state constr ing a statute regulating the conveyan of real estate in the state. Olcott Bynum (1872) 17 Wall. 44, 57, 21 Ed. 570.

A decision by a state supreme cou as to the effect of a state statute o sheriff's sales of land is binding on th federal courts. Henry v. Pittsburg Clay Manuf'g Co. (1897) 80 Fed. 48 25 C. C. A. 581.

The decision of the highest court of state construing a state statute, an declaring that an acknowledgment by married woman precisely similar, ex cept names and dates, to the one i question, was in substantial compliance therewith, and valid, is binding on th federal courts sitting in such stat Berry v. Northwestern & P. Hypothee Bank (1898) 93 Fed. 44, 35 C. C. A 185.

A federal court is governed by th law of Texas as settled by its court o last resort, that a deed of land therei expressly reserving a vendor's lien doe not vest the legal title in the vendee Oliver v. Clarke (1901) 106 Fed. 40 45 C. C. A. 360.

A deed acknowledged before the may or of Cincinnati, Ohio, who has th same power as a justice of the peac "in civil and criminal cases," is goo under the state decisions, which will b followed by the federal courts. Shult v. Moore (C. C. 1839) Fed. Cas. No 12,824.

Rule of construction, applicable t deed to standing timber adopted b courts of a state, held to be followe by the federal courts. Crown Orchar Co. v. Dennis (D. C. 1915) 220 Fed 516.

72. —— **Mortgages.**—On the questio of the validity of a mortgage, the fed eral courts follow the decisions of th state courts. Thompson v. Fairbank (1905) 25 Sup. Ct. 306, 308, 196 U S. 516, 49 L. Ed. 577; Dodge v. Nor lin (1904) 133 Fed. 363, 66 C. C. A 425; In re Elletson Co. (D. C. 1909 174 Fed. 859 (order affirmed Ritchie County Bank v. McFarland [1910] 18 Fed. 715, 106 C. C. A. 153, and appea dismissed [1910] 183 Fed. 718, 106 C C. A. 156); In re Harnden (D. C. 1912) 200 Fed. 175; In re Manning (D. C 1913) 206 Fed. 685.

Federal courts should respect ruling of Porto Rico supreme court that provisions of Porto Rico Mortgage Law,

rt. 395, remain in force notwithstand-
g Porto Rico Code Civ. Proc. § 188,
nd Law of Evidence, §§ 59, 101, which
e Porto Rico supreme court, having
nowledge of Mortgage Law, art. 413,
ontinued in force by Act April 12, 1900,
8, though it could not have been in-
ended to operate as an implied repeal.
e Elzaburu v. Chaves (1915) 36 Sup.
t. 47.

The conclusion of the highest court
f a state as to sale and record of ti-
e of real estate and the nature of the
ghts of a mortgage creditor, are
art of the local law to be accepted by
e supreme court of the United States.
braham v. Casey (1900) 21 Sup. Ct.
8, 179 U. S. 210, 45 L. Ed. 156, affirm-
g decree Lacassagne v. Abraham
1899) 25 So. 441, 51 La. Ann. 840.

In a suit to foreclose a mortgage on
ebraska land executed by a resident
f that state, it is the duty of the fed-
al court to follow a decision of the
ate supreme court that a provision
a mortgage for the payment of at-
rney's fees is invalid. Dodge v. Tul-
ys (1892) 144 U. S. 451, 12 Sup. Ct.
28, 36 L. Ed. 501; Gray v. Havemeyer
1892) 53 Fed. 174, 3 C. C. A. 497,
U. S. App. 456; Vitrified Paving &
ressed Brick Co. v. Snead & Co. Iron
orks (1893) 56 Fed. 64, 5 C. C. A.
8, 12 U. S. App. 336.

The decisions of the highest court of
state as to the nature and extent of
e rights of mortgagees of property
erein are binding in the federal courts.
ity of Omaha v. Omaha Water Co.
1911) 192 Fed. 246, 112 C. C. A. 504.

Where the execution by a debtor of a
ortgage is relied on as an act defraud-
g other creditors, justifying an ad-
dication of bankruptcy on an invol-
tary petition therefor, the decisions
the state supreme court construing
e statute defining fraudulent convey-
ces and the acts necessary to purge
way the constructive fraud based on
ch statutes are binding on the fed-
al court sitting in the state. Johan-
n Bros. Shoe Co. v. Alles (C. C. A.
912) 197 Fed. 274, 116 C. C. A. 636.

A decision by the highest court of a
ate, that a foreclosure of the mort-
ge under a law of the state was bona
le, and made in conformity thereto,
binding on the federal court. Sulli-
n v. Portland & K. R. Co. (C. C.
74) Fed. Cas. No. 13,596.

Where, under the statutes of a state,
contract would be considered a mort-
ge, a United States court in such
ate, in carrying such contract into
fect, will be guided by the decisions of
e supreme court of such state. Pio-
er Gold Min. Co. v. Baker (C. C.
85) 23 Fed. 258.

The decision of the court of appeals
Virginia (Fidelity Ins., etc., Co. v.
enandoah Val. R. Co. [1889] 9 S. E.
9) declaring the acts of Virginia of
arch 21, 1877, and April 2, 1889, un-
nstitutional, so far as they attempted
to give material and supply claims priority over mortgage bonds, furnishes the rule for the federal courts, and an exception to a master's report which gives priority to such claims will be sustained. Fidelity Insurance & Safe Deposit Co. v. Shenandoah Iron Co. (C. C. 1889) 42 Fed. 372.

In the absence of a decision upon the question by the supreme court of the state, the court will follow the decision of the supreme court that railway mortgages are not within the purview of state statutes regulating mortgages of chattels. Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co. (C. C. 1895) 71 Fed. 29.

A decision of the New York court of appeals that a mortgage given to secure payment of alimony by a husband during the life of his wife, awarded by an ordinary divorce decree, could not be enforced as to alimony accruing after the husband's death in the absence of an agreement by the husband to pay alimony during the wife's life, involved construction of the state divorce statutes, and was binding on federal courts sitting in such state. Whitney v. Whitney Elevator & Warehouse Co. (C. C. 1910) 180 Fed. 187, decree affirmed (1910) 183 Fed. 678, 106 C. C. A. 28, writ of certiorari denied Whitney Elevator & Warehouse Co. v. Whitney (1911) 31 Sup. Ct. 472, 219 U. S. 588, 55 L. Ed. 348.

Priority of mortgages executed in Illinois on land located in that state is to be determined in accordance with the decisions of the Illinois supreme court. In re Buchner (D. C. 1912) 202 Fed. 979, order affirmed (1913) 205 Fed. 454, 123 C. C. A. 522.

A federal court will accept the settled law of each state with reference to chattel mortgages and conditional sales as decisive in respect to any case affecting such contracts arising therein. E. I. Du Pont de Nemours Powder Co. v. Jones Bros. (D. C. 1912) 200 Fed. 638.

73. —— **Lease.**—In an action for breach of covenant of quiet enjoyment in a lease of property in New York City, whether the eviction was by virtue of the act of the holder of a paramount title, for whose acts defendant was responsible, was a question relating to the rights and title to real estate located in New York, and was determinable by the decisions of the courts of last resort of that state. Pabst Brewing Co. v. Thorley (1906) 145 Fed. 117, 76 C. C. A. 87, reversing judgment (C. C. 1904) 127 Fed. 439, and writ of certiorari denied Thorley v. Pabst Brewing Co. (1906) 27 Sup. Ct. 784, 203 U. S. 597, 51 L. Ed. 333.

Upon the question of the measure of damages in an action in a federal court for breach of a covenant of quiet enjoyment in a lease, the court is governed by the decisions of the highest

court of the state where the property is situated, so far as they determine the question. Thorley v. Pabst Brewing Co. (1910) 179 Fed. 338, 102 C. C. A. 522, writ of certiorari denied Pabst Brewing Co. v. Thorley (1910) 31 Sup. Ct. 469, 219 U. S. 583, 55 L. Ed. 346.

The federal court will follow the construction given by the state court to an oil and gas lease, because it involves a question of local law. Smith v. Guffey (1912) 202 Fed. 106, 120 C. C. A. 436.

Decisions of the state court of last resort that prohibition law did not release tenant of premises leased for a saloon only from payment of rent should be followed by the United States district court in bankruptcy in determining the tenant's liability for rent. In re Bradley (D. C. 1915) 225 Fed. 307.

74. —— Liens and priorities of claims.—A decision of the supreme court of Pennsylvania that settlements made by the state comptroller within certain prescribed formalities are liens on the estate of the comptroller, in the same manner as if judgment had been given in favor of the commonwealth for such debt, is controlling on the United States courts under this section. Livingston v. Moore (1833) 32 U. S. (7 Pet.) 469, 8 L. Ed. 751.

Questions as to the right to a possessory lien upon a raft under state laws, and the extent thereof, as well as the existence of possession, are local questions dependent upon the law of the state, in respect to which the federal courts will follow the state decisions. Knapp, Stout & Co. Company v. McCaffrey (1900) 20 Sup. Ct. 824, 177 U. S. 638, 44 L. Ed. 921, affirming decree (1899) 52 N. E. 898, 178 Ill. 107, 69 Am. St. Rep. 290.

The decision of the highest state court that the owner of property abutting on a local improvement can, by mandamus or injunction, compel a hearing by the body making the assessment, or prevent the approval of the engineer's report until such hearing has been accorded, is conclusive on the supreme court of the United States in reviewing a judgment of the state court, foreclosing the lien of such assessment. Hibben v. Smith (1903) 24 Sup. Ct. 88, 191 U. S. 310, 48 L. Ed. 195, affirming judgment (1902) 62 N. E. 447, 158 Ind. 206.

The construction of the New York mechanic's lien law (Laws 1897, c. 418) by the New York court of appeals, to the effect that during the time a laborer, mechanic, materialman, or subcontractor is entitled to file his lien, he has a preferential statutory claim, in the nature of a nonperfected equitable lien, which cannot be defeated by the party against whom it might be asserted by a general assignment for the benefit of creditors, will be followed in the federal courts. In re Grissler (1905) 136 Fed. 754, 69 C. C. A. 406.

Bates' Rev. St. Ohio, § 3231—1, which gives an absolute lien upon the property of a railroad company for supplies or materials furnished for the construction of its road to any contractor or subcontractor, is unconstitutional and void, as an abridgment of the liberty of contract secured by the bill of rights of the state constitution, under the construction placed on such constitutional provision by the supreme court of the state. George A. Shaw & Co. v. Cleveland, C., C. & St. L. Ry. Co. (1909) 173 Fed. 746, 97 C. C. A. 520.

The decision of the highest court of Arizona that there is no implied lien for unpaid purchase money must be given effect by the federal courts in determining whether real estate in Arizona is subject to a lien for the unpaid price, and no lien can arise from the mere fact that there is a document in writing evidencing an agreement to pay a further price for land situated in Arizona. Consolidated Arizona Smelting Co. v. Hinchman (1914) 212 Fed. 813, 129 C. C. A. 267, reversing decree Hinchman v. Consolidated Arizona Smelting Co. (D. C. 1912) 198 Fed. 907.

The creation of liens or titles, by proceedings under state insolvent laws, are governed by such laws, and the construction of the laws by the state court will be followed by the federal court. Perry Mfg. Co. v. Brown (C. C. 1847) Fed. Cas. No. 11,015.

The lien of judgment depends upon the laws of the state in which they are asserted; and the federal courts, in determining their nature and priority, will be governed by the construction put upon those laws by the highest courts of the state. Pence v. Cochran (D. C. 1881) 6 Fed. 269.

Decision of a state court of last resort that a landlord, in the absence of distraint, is not entitled to priority for rent in arrear, on the insolvency of the tenant, is binding on the federal courts sitting in bankruptcy. In re Chaudron & Peyton (D. C. 1910) 180 Fed. 841.

75. —— Fixtures.—The federal courts adopt as the rule of decision as to fixtures the local law as established by the decisions of the courts of the state where the property is situated, when such decisions are explicit and uniform. New York Life Ins. Co. v. Allison (1901) 107 Fed. 179, 46 C. C. A. 229, writ of certiorari denied (1901) 21 Sup. Ct. 923, 181 U. S. 618, 45 L. Ed. 1030.

76. —— Status of slaves.—When a negro, held as a slave in one state, is thence taken by his master, for a temporary residence, into a state where slavery is prohibited by law, and afterwards returns with his master to the same slave state, and resumes his residence there, his status and condition

on such return is a question exclusively of the law of that state, and the decisions of the state courts upon it are binding upon the federal courts. Scott v. Sandford (1856) 60 U. S. (19 How.) 393, 15 L. Ed. 691.

77. —— Registration of instruments.—The construction given by the courts of North Carolina to the act of 1715, concerning the registration of deeds, will be followed by the supreme court of the United States. Ross v. McLung (1832) 31 U. S. (6 Pet.) 283, 8 L. Ed. 400.

The supreme court held bound to follow the uniform decisions of the courts of a state in construing its recording acts. Townsend v. Todd (1875) 91 U. S. 452, 453, 23 L. Ed. 413.

Validity of an unregistered mortgage as between the parties is a question as to which decisions of the highest courts of the states are controlling on the federal courts sitting therein. Walter A. Wood Co. v. Eubanks (1909) 169 Fed. 929, 95 C. C. A. 273.

A decision of the highest court of a state, construing the recordation acts of the state as respects what is necessary to be done to secure liens thereunder, will be followed by the federal courts. Tygart Valley Brewing Co. v. Vilter Mfg. Co. (1910) 184 Fed. 845, 107 C. C. A. 169, reversing judgment Vilter Mfg. Co. v. Tygarts Valley Brewing Co. (C. C. 1909) 168 Fed. 1002.

Whether unrecorded instruments relating to real property are valid against creditors in bankruptcy depends on the decisions of the highest courts of the state. Sturdivant Bank v. Schade (1912) 195 Fed. 188, 115 C. C. A. 140; Merchants'-Laclede Nat. Bank v. Same (1912) 195 Fed. 199, 115 C. C. A. 151.

A railroad corporation executes a trust deed, giving preference to one of its directors over other creditors, and this deed is acknowledged before and certified by that director for registration, as a notary public. The court of highest resort of the state in which this deed is recorded pronounced that it does not create a lien upon the property conveyed, because of its defective registration. The validity of this registration is afterwards assailed in a federal court, which held that it would not reopen the question of registration and would treat the registration as null. Hay v. Alexandria & W. R. Co. (C. C. 1884) 20 Fed. 15.

78. Exemption laws.—In determining the right to exemptions, a federal court is bound by the construction placed on the statutes of the state by its highest court. First Nat. Bank v. Glass (1897) 79 Fed. 706, 25 C. C. A. 151; Richardson v. Woodward (1900) 104 Fed. 873, 44 C. C. A. 235; Thompson v. McConnell (1901) 107 Fed. 33, 46 C. C. A. 124; In re Sullivan (1906) 148 Fed. 815, 78 C. C. A. 505 (denying petition for revision of judgment [D. C.] 142 Fed. 620); In re National Grocer Co. (1910) 181 Fed. 33, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982; In re Baker (1910) 182 Fed. 392, 104 C. C. A. 602; Green v. Root (D. C. 1893) 62 Fed. 191, 194; In re Camp (D. C. 1899) 91 Fed. 745 (appeal dismissed [1899] 97 Fed. 981, 38 C. C. A. 689); In re Stevenson (D. C. 1899) 93 Fed. 789; In re Beauchamp (D. C. 1900) 101 Fed. 106; In re Stone (D. C. 1902) 116 Fed. 35; In re Wood (D. C. 1906) 147 Fed. 877; In re McCrary Bros. (D. C. 1909) 169 Fed. 485; In re Cochran (D. C. 1911) 185 Fed. 913; In re Crook (D. C. 1915) 219 Fed. 979.

79. Interest and usury laws.—The state court's construction of state usury laws will be followed by the federal courts. Missouri, K. & T. Trust Co. v. Krumseig (1899) 19 Sup. Ct. 179, 172 U. S. 351, 43 L. Ed. 474 (affirming decree [1896] 77 Fed. 32, 23 C. C. A. 1); Bond v. John V. Farwell Co. (1909) 172 Fed. 58, 96 C. C. A. 546; Brown v. Grundy (C. C. 1901) 111 Fed. 15; Union Mortgage Banking & Trust Co. v. Hagood (C. C. 1899) 97 Fed. 360.

Code Civ. Proc. N. Y. § 1211, provides that a judgment shall bear interest from the date of its entry. Laws N. Y. 1879, c. 538, § 1, changing the rate of interest from 7 to 6 per cent., contains a proviso that nothing therein shall affect any prior contract. The New York court of appeals decided that a judgment for breach of contract, obtained prior to the date when the latter act went into effect, bore 7 per cent. interest until that date, and only 6 per cent. thereafter. Held, that this decision was conclusive in the federal supreme court as to the meaning of the New York statute. Morley v. Lake Shore & M. S. Ry. Co. (1892) 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925, following O'Brien v. Young (1884) 95 N. Y. 428, and Prouty v. Lake Shore & M. S. Ry. Co. (1884) 95 N. Y. 667.

Mills' Ann. St. Colo. § 2252, which provides that "creditors shall be allowed to receive interest when there is no agreement as to the rate thereof at the rate of eight per centum per annum for all moneys after they become due, * * *" is mandatory in an action at law to recover for labor performed and materials furnished, and requires the allowance of interest at the statutory rate from the date of demand of payment, and the court cannot, as in equity cases, take into consideration the laches of plaintiff in bringing suit. City of Denver v. Barber Asphalt Pav. Co. (1905) 141 Fed. 69, 72 C. C. A. 402.

Where damages for wrongful death are recovered in a court of admiralty under a state statute, the rule as to the allowance of interest established under the statute by the court of last

resort of the state will be followed. Thompson Towing & Wrecking Ass'n v. McGregor (1913) 207 Fed. 209, 124 C. C. A. 479.

Where a building and loan association makes a loan and takes a mortgage on land in another state, the contract being valid in the state of the domicile of the corporation, and after the loan is made the supreme court of the state in which the land is situated decides, in a suit between other parties, that such contracts cannot be enforced in such state because usurious, a federal court in that state in an action to foreclose such mortgage, is not required to follow such decision when it believes the decision to be wrong. United States Savings & Loan Co. v. Harris (C. C. 1902) 113 Fed. 27.

80. Construction of wills and administration of estates.—A single verdict and judgment in ejectment, in the Pennsylvania courts, not being conclusive of the rights of the parties, a decision of the state supreme court construing a will in a first ejectment suit is not controlling in a subsequent ejectment suit in the federal court, unless its opinion is simply declaratory of the settled law of the state as to the effect of such devises, and not merely a construction of the particular devise. Barber v. Pittsburgh, F. W. & C. Ry. Co. (1897) 17 Sup. Ct. 488, 166 U. S. 83, 41 L. Ed. 925 (determined in certificate [C. C. 1895] 69 Fed. 501); Buchanan v. Denig (C. C. 1898) 84 Fed. 863, 865.

The laws of a state affecting devises of real estate therein and the rules of the courts of the state governing evidence in ejectment, as well as the construction placed thereon by the courts of the state, are conclusive on the supreme court so far as the constitution does not control. Darby v. Mayer (1825) 10 Wheat. 465, 468, 6 L. Ed. 367.

The decision of a state court construing a will does not, as in the case of statutes, constitute a rule of decision for the supreme court of the United States, unless the decision of the state court has been long acquiesced in, so as to become a rule of property. Lane v. Vick (1845) 44 U. S. (3 How.) 464, 11 L. Ed. 681.

The supreme court of the United States will adopt the decision of the supreme court of a state as conclusive as to the right of alien heirs of a colonist to inherit his landed possessions in that state. Middleton v. McGrew (1859) 64 U. S. (23 How.) 45, 16 L. Ed. 403.

The interpretation by a state court of a local statute governs in an action in the federal court involving the local inheritance law. Bates v. Brown (1866) 5 Wall. 710, 719, 18 L. Ed. 535.

A decision by the courts of Massachusetts that under the laws of that state, a charitable gift for beneficiaries to be selected by the trustees is sufficiently certain, will not be disturbed by the federal courts. Lorings v. Marsh (1867) 73 U. S. (6 Wall.) 337, 18 L. Ed. 802.

The construction placed by state courts on state statutes prescribing the scheme of distribution of the property of a decedent is binding on the federal courts. Byers v. McAuley (1893) 13 Sup. Ct. 906, 911, 149 U. S. 608, 37 L. Ed. 867.

A federal court is bound by a decision of the supreme court of a state with respect to the descent of property of an intestate which was within the jurisdiction of the state courts. McPherson v. Mississippi Valley Trust Co. (1903) 122 Fed. 367, 58 C. C. A. 455.

A judgment of the supreme court of a state in an action by an administrator de bonis non to recover a lot, determining that, under the statutes of the state, such lot never came within the control or disposition of such administrator, but was fully administered upon by his predecessor, is conclusive against the right of his assignee to subject such lot to a lien in a subsequent action in a federal court. White v. Warburton (1903) 122 Fed. 911, 59 C. C. A. 137.

It is the settled rule that the courts of the United States will follow the decisions of the highest court of a state in the interpretation of its local statutes, and especially when they concern the descent and alienation of lands and the construction of wills and conveyances. Yocum v. Parker (1904) 134 Fed. 205, 67 C. C. A. 227, affirming judgment on rehearing (C. C. 1903) 130 Fed. 722.

Complainant held notes of a decedent, secured by a mortgage, which did not mature until after the time fixed by the probate court for filing claims against the estate had expired. The mortgage was then foreclosed, and the property, which the decedent had transferred, was sold, leaving a deficiency, to recover which action was brought in a federal court against the executors. Under Gen. St. Minn. 1894, § 4509, the court had power to allow the claim if presented within 18 months after the order for filing claims was made "for good cause shown." Held, that under the liberal construction of such provision by the Supreme Court of the state, and in view of the facts that the estate was not closed and that there was no defense on the merits, the facts shown were sufficient to authorize its consideration and allowance. Schurmeier v. Connecticut Mut. Life Ins. Co. (1909) 171 Fed. 1, 96 C. C. A. 107, writ of certiorari dismissed (1911) 31 Sup. Ct. 470, 219 U. S. 586, 55 L. Ed. 347.

Illinois Statute of Wills (Hurd's Rev. St. 1901, c. 148) § 7, as amended by Act July 1, 1903 (Laws 1903, p. 355), provides that if any person interested

within one year after the probate of any will, shall appear and by bill in chancery contest the validity of the same, an issue of law shall be made up as to whether the writing produced be the will of testator. Held, that decisions of the supreme court of Illinois that the phrase "any person interested" does not include persons having a mere expectancy, but only includes those having an interest already attached in case the ancestor is held to have died intestate, is conclusive on the federal courts. Selden v. Illinois Trust & Savings Bank (1911) 184 Fed. 872, 107 C. C. A. 196.

Federal courts being governed by local laws, orders and judgments of state probate courts are conclusive and binding on federal courts in the exercise of their jurisdiction in the administration of the estates as between citizens of different states. Newberry v. Wilkinson (1912) 199 Fed. 673, 118 C. C. A. 111, affirming decree Newbery v. Same (C. C. 1911) 190 Fed. 62.

Though a single decision of state court on the construction of a particular devise is not conclusive in a United States court between other parties involving the same will, held that the court would lean, for the sake of harmony, to an agreement with the state court. Pineland Club v. Robert (1914) 213 Fed. 545, 130 C. C. A. 125; Same v. Sanders (1914) 214 Fed. 85, 130 C. C. A. 612.

The federal courts will follow the decisions of the state in respect to the validity of a bequest to charitable uses. Meade v. Beale (C. C. 1850) Fed. Cas. No. 9,371.

The federal court in Montana is bound by the decision of the supreme court of the state, holding that Laws Mont. 1876, p. 63, § 1, which gives a widow as dower one-third of all lands of which her husband was seised of an estate of inheritance during the marriage, unless the same has been relinquished by her, is still in force, although the court is of a different opinion, because said law does not appear in the Compiled Statutes, and because of the provisions of the statute of succession (page 395, § 534), embodied therein. Black v. Elkhorn Min. Co. (C. C. 1891) 47 Fed. 600, judgment affirmed (1892) 52 Fed. 859, 3 C. C. A. 312.

A ruling by the Missouri supreme court that an estate passing by will is a statutory estate, and that the effort of the testator to further control it was in contravention of the state statutes, is controlling in the federal courts. Buford v. Kerr (C. C. 1898) 86 Fed. 97.

While the federal courts adopt the local law of real property, as ascertained by the decisions of the state courts, including that pertaining to the construction of wills, such decisions merely afford a guide in applying the general rule that the intention of the testator is to be carried out to the solution of the question whether a will creates, by way of wish or recommendation, a testamentary trust. Russell v. United States Trust Co. of New York (C. C. 1904) 127 Fed. 445, decree affirmed (1905) 136 Fed. 758, 69 C. C. A. 410.

In suit in federal court, held, that the validity of a will will be determined by rules established by state supreme court in prior litigation. Barker v. Eastman (C. C. 1911) 192 Fed. 659.

In construing a will, the decisions of the state in which the will was made and in which it would operate govern. Kramer v. Lyle (D. C. 1912) 197 Fed. 618.

81. Liability for negligence and torts.—The state having power to determine the liability of an employer to an employé for injury sustained in his service, the construction put on its statute on the subject by its court of last resort will be followed by federal courts. Northern Pac. R. Co. v. Hogan (1894) 63 Fed. 102, 11 C. C. A. 51; Texas & P. Ry. Co. v. Carlin (1901) 111 Fed. 777, 49 C. C. A. 605, 60 L. R. A. 462 (affirmed [1903] 23 Sup. Ct. 585, 189 U. S. 354, 47 L. Ed. 849); Fulton v. Wilmington Star Min. Co. (1904) 133 Fed. 193, 66 C. C. A. 247, 68 L. R. A. 168; Hayward v. Key (1905) 138 Fed. 34, 70 C. C. A. 402; United States Leather Co. v. Howell (1907) 151 Fed. 444, 80 C. C. A. 674; Pennsylvania Steel Co. v. Lakkonen (1910) 181 Fed. 325, 104 C. C. A. 513; United States Gypsum Co. v. Sliwienska (1910) 183 Fed. 688, 106 C. C. A. 38; Proctor & Gamble Co. v. Williams (1910) 183 Fed. 695, 106 C. C. A. 45; Southern Ry. Co. v. Ritch (1911) 185 Fed. 717, 108 C. C. A. 55; Roberts, Johnson & Rand Shoe Co. v. Dower (1913) 208 Fed. 270, 125 C. C. A. 470; Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co. (C. C. 1888) 69 Fed. 353; Crosby v. Lehigh Valley R. Co. (C. C. 1903) 128 Fed. 193; Dormidy v. Sharon Boiler Works (C. C. 1904) 127 Fed. 485.

A decision of the highest court of a state, holding that a contract exempting a railroad company from liability for negligence in setting fire to a storage warehouse on the railroad right of way is not against public policy, is conclusive upon a federal court sitting in that state. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co. (1899) 20 Sup. Ct. 33, 175 U. S. 91, 44 L. Ed. 84, affirming judgment (1895) 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

The construction by the highest court of a state of a statute thereof creating a right of action for death as not extending to non-resident alien relatives must be accepted by the supreme court on writ of error. Maiorano v. Baltimore & O. R. Co. (1909) 29 Sup. Ct. 424, 425, 213 U. S. 268, 53 L. Ed. 792.

A rule that contributory negligence shall not be a complete bar to a statu-

tory action for negligence (Mill. & V. Code Tenn. §§ 1298–1300) is binding on a federal court when such rule grows out of the language of the statute, and the construction of that language by the supreme court of the state. Byrne v. Kansas City, Ft. S. & M. R. Co. (1894) 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693, modifying judgment (C. C. 1893) 55 Fed. 44.

The validity, under the constitution of Nebraska, of Comp. St. Neb. c. 72, § 3 relating to injuries to passengers, having been upheld by the supreme court of the state, such decisions are binding on the federal courts. Clark v. Russell (1899) 97 Fed. 900, 38 C. C. A. 541.

Code Ala. 1896, § 27, providing that, that, in actions for negligently causing the death of another, plaintiff may recover "such damages as the jury may assess," having been construed by the supreme court of Alabama as awarding exemplary damages, and been declared by that court to be constitutional, its decisions are binding upon the federal courts. Louisville & N. R. Co. v. Lansford (1900) 102 Fed. 62, 42 C. C. A. 160.

Where a liability for death is not created, but merely preserved, by statute, a decision of the supreme court of Tennessee, in an action for wrongful death, that the conductor of a railroad train was a vice principal, and not a fellow servant towards the brakeman, did not define a statutory liability so as to be binding on the federal courts as a construction of a state statute. Elliott v. Felton (1902) 119 Fed. 270, 56 C. C. A. 74.

Shannon's Code Tenn. §§ 1574, 1575, requiring that a lookout shall be maintained on railroad locomotives, and, when any person or other obstruction appears on the road, that the alarm whistle shall be sounded, etc., and that a failure to observe such precautions shall make the company liable for damages, having been construed by the Tennessee supreme court as giving damages notwithstanding contributory negligence, such construction will be followed in the federal court. Rogers v. Cincinnati, N. O. & T. P. Ry. Co. (1905) 136 Fed. 573, 69 C. C. A. 321.

A federal court, in administering a state statute giving a right of recovery for wrongful death, will follow the decisions of the highest court of the state with respect to the measure of damages. Quinette v. Bisso (1905) 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303, writ of certiorari denied Bisso v. Quinette (1905) 26 Sup. Ct. 746, 199 U. S. 606, 50 L. Ed. 330.

Where an action against a carrier to recover damages for injuries to a passenger had been dismissed pursuant to the unanimous opinion of the highest state court, and the questions of negligence presented were not questions as to which the federal and state courts were at variance, comity required such decision to be followed by the federal courts in a subsequent action therein by the same parties for the same cause, though such opinion was not controlling authority. Mearns v. Central R. R. of New Jersey (1905) 139 Fed. 543, 71 C. C. A. 331.

Act S. C. March 7, 1905 (22 St. at Large, p. 962), relating to relief departments for employés having been held by the courts of South Carolina to be beyond the power of the legislature, and that an employé who had elected to accept benefits was estopped from bringing an action for damages notwithstanding the act, the federal court in South Carolina should have ruled that the acceptance of benefits was a good defense to the action for damages. Atlantic Coast Line R. Co. v. Dunning (1908) 166 Fed. 850, 94 C. C. A. 128, reversing judgment Lee v. Atlantic Coast Line R. Co. (C. C. 1906) 150 Fed. 775.

A decision by the highest court of a state that a state statute requiring the guarding of machinery impliedly abolished the defense of assumption of risk by the employé is binding upon the federal courts. Columbia Box Co. v. Saucier (1914) 213 Fed. 310, 129 C. C. A. 656.

A decision of the state court that the corporation of the city of New York is not liable to respond in damages for injuries to persons or property arising from the negligence of the employés of the commissioners of charities and correction while in the discharge of their separate functions will be followed by a federal court. Haight v. The Mayor (D. C. 1885) 24 Fed. 93.

In an action for death by wrongful act, based on a state statute, the circuit court is not bound by the decisions of the state supreme court that the statute is penal and also to a certain extent compensatory. Marshall v. Wabash R. Co. (C. C. 1891) 46 Fed. 269, 271.

82. Decisions relating to public lands.—Where an action in the federal court depends on the construction of a state statute providing for the sale of state lands, the federal court is required to adopt the construction placed on the statute by the highest court of such state. Lockard v. Asher Lumber Co. (1904) 131 Fed. 689, 65 C. C. A. 517, reversing judgment Lockhard v. Asher Lumber Co. (C. C. 1903) 123 Fed. 480.

As to the construction of ancient colonial charters granting lands to towns, etc., touching the character of the estate they conveyed, the rulings of the courts of the state will be followed. Huntington v. Lowndes (C. C. 1889) 40 Fed. 625, 629 (affirmed [1894] 14 Sup. Ct. 758, 153 U. S. 1, 38 L. Ed. 615).

The question, "What did the legislature mean by the use of the term 'ship channel'" in the grant of the lands lying between high tide and ship chan-

nel, is a question of local law, and where the supreme court of the state determines it as comprising waters left free to navigation and the definite natural boundary of such navigable waters as the line of low tide, its decision will be followed by the United States circuit court. Southern Pac. Co. v. Western Pac. Ry. Co. (C. C. 1906) 144 Fed. 160, decree reversed Western Pac. Ry. Co. v. Southern Pac. Co. (1907) 151 Fed. 376, 80 C. C. A. 606.

The supreme court of California having located the boundaries of the grant of the Oakland water front in determining the extent and validity of the grant, such boundaries will be followed by the circuit court of the United States in determining conflicting claims of parties claiming title to lands on such water front. Id.

In a case coming to the supreme court of the United States by appeal from Pennsylvania, the rules established by the courts of Pennsylvania that a pre-emption right to islands in the great rivers of the state cannot be obtained by settlement will be followed. Fisher v. Haldeman (1857) 61 U. S. (20 How.) 186, 15 L. Ed. 879.

A ruling of the highest court of a state that, under the policy of the state law, the common-law doctrine of an implied covenant in a lease that the lessor shall pay the taxes is inapplicable to leases of tide lands, will not be disturbed by the federal supreme court, in determining on writ of error to the state court whether the contract obligations of the state toward its lessees are unconstitutionally impaired by the subsequent enactment of statutes authorizing the assessment of such leaseholds for local improvements specially benefiting them, and the inclusion of them within local improvement districts. Trimble v. Seattle (1914) 34 Sup. Ct. 218, 231 U. S. 683, 58 L. Ed. 435.

83. Questions effecting officers, receivers, and attorneys.—The decision of the supreme court of a state that the removal of an attorney without formal legal process is not in violation of the constitution of the state, it not being called in question by any conflicting decision of this court, is conclusive upon this court. Randall v. Brigham (1868) 74 U. S. (7 Wall.) 523, 19 L. Ed. 285.

A decision by a state supreme court that the procedure by which a state officer has been suspended or removed from office by the governor was regular, and pursuant to a valid state statute, is not reviewable by the federal supreme court, unless fundamental rights protected by the federal constitution have been infringed. Wilson v. State of North Carolina (1898) 18 Sup. Ct. 435, 169 U. S. 586, 42 L. Ed. 865.

Settled construction by state court of Const. Cal. art. 6, §§ 6, 8, as to sessions of said court, and the power of the judges of one county in another county, will be accepted as correct, notwithstanding subsequent amendment of November 8, 1910, relating to such sessions. Collins v. Johnston (1915) 35 S. Ct. 649, 237 U. S. 502, 59 L. Ed. 1071.

The appointment by the supreme court of Iowa of district judges to act as a court of condemnation to appraise the value of waterworks, under Acts Iowa 33d Gen. Assem. c. 45, as amended by Acts 34th Gen. Assem. c. 35, held presumptively at least an affirmance of the validity of the statute, which would be followed by a federal court. Des Moines Water Co. v. City of Des Moines (1913) 206 Fed. 657, 124 C. C. A. 445, affirming decree (D. C. 1912) 194 Fed. 557.

Where a taxpayers' action was brought in the federal court to determine whether Act Pa. April 14, 1903 (P. L. 175), increasing the salaries of state judges, infringed the state constitution, and before the determination of a motion to dismiss the bill the state supreme court decided that the act was constitutional, such decision was binding on the federal court. Henry F. Michell Co. v. Matthues (C. C. 1905) 134 Fed. 493.

The power of a state court to appoint receivers is essentially a question of local law, which, when determined by the highest court of the state, will be followed by a federal court. McKinney v. Kansas Natural Gas Co. (D. C. 1913) 206 Fed. 772, decree affirmed Same v. Landon (1913) 209 Fed. 300, 126 C. C. A. 226.

The construction by the highest court of a state of a state statute defining the powers of a state railroad commission is binding on a federal court in determining the powers of the commission. Louisville & N. R. Co. v. Kentucky Railroad Commission (D. C. 1914) 214 Fed. 465, order affirmed Same v. Finn (1915) 35 S. Ct. 146.

84. Construction of criminal statutes.—Decisions by judges of the supreme court of New Jersey, upon applications by a convicted murderer for writs of habeas corpus and certiorari, overruling his contention that the word "conviction," as used in the state constitution (article 5, § 9), refers to the verdict of the jury, and not to the sentence passed by the court, and that, consequently, a reprieve, granted by the governor more than 90 days after the date of the verdict, but less than 90 days from the date of the sentence, was granted after the expiration of the time within which he had constitutional authority to do so, are conclusive upon the federal courts; and they therefore have no power to discharge the prisoner on habeas corpus, on the ground that he was, by such decisions, deprived of due process of law, or of any privilege or immunity secured to

him by the constitution of the United States. Lambert v. Barrett (1895) 157 U. S. 697, 15 Sup. Ct. 722, 39 L. Ed. 865.

A decision of the Georgia supreme court that a so-called "resentence" of a criminal after the original sentence had been superseded was in legal effect but a fixing of a new date for the execution of the previous sentence, which had remained constantly in force, being but a construction of the state statutes, is binding on the federal supreme court. Nobles v. State of Georgia (1897) 18 Sup. Ct. 87, 168 U. S. 398, 42 L. Ed. 515, affirming judgment Baughn v. State (1897) 28 S. E. 68, 100 Ga. 554, 38 L. R. A. 577.

The decisions of the Georgia supreme court that the state statute (Code 1882, § 4666) providing for inquisitions of lunacy in criminal cases is sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after a verdict of guilty is binding on the supreme court of the United States. Id.

A decision of the highest state court that a conspiracy to defraud is a crime under the laws of the state concludes the supreme court of the United States on habeas corpus to inquire into a detention under a conviction for that crime in a court of the state. Howard v. Fleming (1903) 24 Sup. Ct. 49, 191 U. S. 126, 48 L. Ed. 121, dismissing writ of error State v. Howard (1901) 40 S. E. 71, 129 N. C. 584.

A decision of the highest state court, that the Michigan indeterminate sentence act (Pub. Acts 1903, No. 136) was not repealed as to those sentenced under it by Pub. Acts 1905, No. 184, will be followed by the federal supreme court on writ of error to the state court. Ughbanks v. Armstrong (1908) 28 Sup. Ct. 372, 208 U. S. 481, 52 L. Ed. 582.

The construction given by the Maryland court of appeals to Code Md. 1904, art. 43, § 99, making it a misdemeanor to attempt to practice medicine without registration, as not being subject to the limitations of section 80 of that article, relating to the sending of notice to unregistered physicians, is conclusive upon the federal supreme court on writ of error to the state court. Watson v. Maryland (1910) 30 Sup. Ct. 644, 646, 218 U. S. 173, 54 L. Ed. 987.

Upon the question of the construction of a Texas statute, enforceable through criminal proceedings, a federal court is bound by the construction placed thereon by the Texas court of criminal appeals. Love v. Busch (1906) 142 Fed. 429, 73 C. C. A. 545.

Criminal cases in the federal courts are governed by federal statutes and decisions; state statutes and decisions being inapplicable. Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied (1908) 29 S. Ct. 685, 212 U. S. 576, 53 L. Ed. 657.

The determination by the highest court of a state that the offense charged in an indictment is one punishable under the laws of the state is conclusive in a subsequent proceeding by the accused in a federal court for release on a writ of habeas corpus. Erickson v. Hodges (1910) 179 Fed. 177, 102 C. C. A. 443.

Petitioner was indicted for embezzlement as an agent, under How. St. Mich. § 9151, and sentenced thereunder after pleading guilty to failure to pay over money collected by him as attorney at law, for which offense a less punishment is imposed by section 9152. The supreme court of the state decided that an attorney at law might, notwithstanding the latter section, be convicted of embezzlement under the former. Held, that this construction of the statute is binding on the United States circuit court, which accordingly will not discharge petitioner on habeas corpus as being imprisoned without due process of law. In re Converse (C. C. 1890) 42 Fed. 217, judgment affirmed (1890) 11 S. Ct. 191, 137 U. S. 624, 34 L. Ed. 796.

When an indictment found in a court of a state in which the offense is defined by statute is removed to a federal court for trial, the latter court must be controlled by the interpretation given to such statute by the highest court of the state. State of North Carolina v. Gosnell (C. C. 1896) 74 Fed. 734.

Whether a state legislature has power to enact a statute prescribing an indictment or information charging in general terms a particular offense is a question that the supreme court of the state has power to determine, and its decision is controlling upon the federal courts. In re Krug (C. C. 1897) 79 Fed. 308.

When a statute providing for the sentence to prison of persons convicted of crime has been construed by the highest state court to apply to offenses committed prior to its enactment, the question whether it violates any provision of the federal constitution is directly in issue, on habeas corpus, to release one sentenced thereunder for a crime so committed. In re Murphy (C. C. 1898) 87 Fed. 549.

The rule restated that a federal court should lean towards a decision of the highest court of a state declaring a state statute penal in its nature, the question being peculiarly local, though it is not concluded thereby. Perkins v. Boston & A. R. Co. (C. C. 1898) 90 Fed. 321.

A decision of the highest court of a state that a recovery authorized by a state statute is civil and not criminal or quasi criminal action is controlling on the federal courts. United Breweries Co. v. Colby (C. C. 1909) 170 Fed. 1008, dismissed (1910) 178 Fed. 1005, 101 C. C. A. 664.

85. Construction of Sunday laws.—In an action for injuries received by plaintiff while traveling on defendant's railroad in the state of Massachusetts on the Sabbath, the adjudications of the supreme court of that state holding that no recovery can be had for injuries received while traveling on the Sabbath in violation of the Massachusetts statutes are binding on the United States supreme court as the local law, though its own views may not accord with such ruling. Bucher v. Cheshire R. Co. (1887) 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

In an action for personal injuries received by a passenger while traveling on Sunday, where, on a former trial in the state court, it had been ruled that plaintiff's evidence did not show that he was traveling either from necessity or for charity, and he subsequently took a nonsuit, and brought his action in the United States circuit court, on the same evidence the circuit court, following the state court, properly refused to submit the question of necessity or charity to the jury. Bucher v. Cheshire R. Co. (1888) 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

The decisions of the highest court of a state as to the effect of its Sunday laws upon contracts made and to be performed in the state will be followed by the federal courts. Hill v. Hite (1898) 85 Fed. 268, 29 C. C. A. 549, affirming decree (C. C. 1897) 79 Fed. 826.

86. Questions as to accrual of causes of action.—The conclusion of a state court as to the time when a cause of action accrues, in case of fraud or concealment, is not binding on the United States courts, when based, not on a construction of a state statute, but on the view taken of the rule of the common law. Murray v. Chicago & N. W. Ry. Co. (1898) 92 Fed. 868, 35 C. C. A. 62, affirming judgment (C. C. 1894) 62 Fed. 24.

Where a cause of action is created by a state statute, the question when the right of action accrues, and what conditions authorize its enforcement, is one of judicial construction, as to which the decisions of the highest court of the state are controlling on the federal courts. Whitman v. Atkinson (1904) 130 Fed. 759, 65 C. C. A. 185.

87. Construction of laws relating to jurisdiction and creation of courts.—The question what functions the circuit courts of a state may have is a matter of state law, on which the decisions of the state courts will be followed by a federal court. Freeport Water Co. v. City of Freeport (1901) 21 Sup. Ct. 493, 180 U. S. 587, 45 L. Ed. 679, affirming judgment (1900) 57 N. E. 862, 186 Ill. 179; Danville Water Co. v. City of Danville (1901) 21 Sup. Ct. 505, 180 U. S. 619, 45 L. Ed. 696, affirming judgment (1900) 57 N. E. 1129, 186 Ill. 326.

Acts Ind. 1901, c. 247, § 1, provides that the jurisdiction of the appellate court shall be final except where the case is transferred to the supreme court, or the supreme court, on application, shall order the case certified to it, or in cases involving a sum exceeding $6,000. Held that, where a decision of the appellate court was not plainly in conflict with the decisions of the supreme court of the state, it was the duty of a federal court sitting in such state in applying the state law to follow such decision. In re Gilligan (1906) 152 Fed. 605, 81 C. C. A. 595, writ of certiorari denied Troy Wagon Works Co. v. Hancock (1907) 27 Sup. Ct. 796, 206 U. S. 563, 51 L. Ed. 1190.

Where the equity jurisdiction of the federal court is derived from a state statute, the construction put upon the statute by the state supreme court is binding upon the federal court. Beebe v. Louisville, N. O. & T. R. Co. (C. C. 1889) 39 Fed. 481.

Where the constitutionality of a state statute dividing the supreme court of the state into divisions, and giving to each separate duties, etc., was decided by all of the justices of the supreme court sitting together, and the constitution of the state provided that the judicial power should be vested in one supreme court, etc., such decision was by a constitutional tribunal, without regard to the fact that the petition in the case was filed in one of the divisions of the supreme court created by the statute. Williams v. Stearns (C. C. 1903) 126 Fed. 211.

Where a state statute dividing the state supreme court into divisions and conferring separate powers and duties on such divisions was held to be constitutional by all of the justices of such court sitting in banc in a case in which the question was directly involved, such decision is conclusive on the federal courts. Id.

88. Decisions establishing rules of property—Property in general.—The federal court will follow the decision of the highest court of a state interpreting a statute of the state which involves a rule of property. Shipp v. Miller (1817) 15 U. S. (2 Wheat.) 316, 4 L. Ed. 248; City of Chicago v. Robbins (1862) 67 U. S. (2 Black) 418, 17 L. Ed. 298; Leffingwell v. Warren (1862) 67 U. S. (2 Black) 599, 17 L. Ed. 261; Nichols v. Levy (1866) 72 U. S. (5 Wall.) 433, 18 L. Ed. 596; Orvis v. Powell (1878) 98 U. S. 176, 25 L. Ed. 238; Bondurant v. Watson (1880) 103 U. S. 281, 289, 26 L. Ed. 447; Taylor v. Ypsilanti (1881) 105 U. S. 60, 26 L. Ed. 1008. State decisions establishing a rule of property will be followed by the supreme court of the

United States, when called upon to interpret the state law, if it is possible to do so. Warburton v. White (1900) 20 Sup. Ct. 404, 176 U. S. 484, 44 L. Ed. 555 (affirming judgment [1898] 52 Pac. 233, 532, 18 Wash. 511); Travelers' Ins. Co. v. Oswego (1893) 59 Fed. 58, 61, 7 C. C. A. 669; In re McHarry (1901) 111 Fed. 498, 49 C. C. A. 429; Traer v. Fowler (1906) 144 Fed. 810, 75 C. C. A. 540; Paine v. Willson (1906) 146 Fed. 488, 77 C. C. A. 44; Beckwith v. Clark (1911) 188 Fed. 171, 110 C. C. A. 207; Burham v. Fritz (C. C. 1882) 13 Fed. 368; Taylor v. Holmes (C. C. 1882) 14 Fed. 498 (decree affirmed [1888] 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179); Hazard v. Vermont & C. R. Co. (C. C. 1883) 17 Fed. 753; Burford v. Holley (C. C. 1886) 28 Fed. 680; Cumberland Bldg. & Loan Ass'n v. Sparks (C. C. 1900) 106 Fed. 101 (reversed [1901] 111 Fed. 647, 49 C. C. A. 510); Converse v. Mears (C. C. 1908) 162 Fed. 767; Barker v. Eastman (C. C. 1911) 192 Fed. 659; In re Burke (D. C. 1909) 168 Fed. 994; In re Doyle (D. C. 1913) 205 Fed. 543 (order reversed In re John F. Doyle & Son [1913] 209 Fed. 1, 126 C. C. A. 143); Mishawaka Woolen Mfg. Co. v. Teasdale (1911) 129 N. W. 671, 145 Wis. 73.

Where the supreme court of the state changes its decision as to a rule of property in the state, the United States court will follow such decision, though it may be inconsistent with its former decisions, made in accordance with the original decision of the state courts. Green v. Neal (1832) 31 U. S. (6 Pet.) 291, 8 L. Ed. 402.

A ferry franchise is property, and a decision of a state court supporting it is a rule of property to be followed by the United States courts. Conway v. Taylor's Ex'x (1861) 66 U. S. (1 Black) 603, 17 L. Ed. 191.

Decisions of the highest court of a state that nothing supplies the place of registry of mortgages, and that a failure to reinscribe a mortgage within the statutory limit is not supplied by a pending suit to foreclose, establish a rule of property and are binding on federal courts. Pickett v. Foster (1893) 13 Sup. Ct. 998, 1008, 149 U. S. 505, 37 L. Ed. 829.

Gen. St. Ky. c. 44, art. 2, which provides that a fraudulent preference by a debtor shall operate as an assignment for benefit of creditors, being a rule of property, the construction thereof by the state court of appeals, making the mode of distribution of the debtor's assets, as to creditors having liens or collateral securities, the same as in cases of insolvent decedents, controls the federal courts in the state, even where such decision of the state court was filed after a decree of the federal court was entered declaring such fraudulent preference, but before a decree of distribution in the case. Marbury v. Kentucky Union Land Co. (1894) 62 Fed. 335, 10 C. C. A. 393, reversing Tod v. Kentucky Union Land Co. (C. C. 1893) 57 Fed. 47.

A single decision of a state supreme court, applying principles of the common law to the solution of a question as to the validity of judgments, does not establish a rule of property which is binding upon a federal court, in a case where the rights of a party claiming property under such a judgment became vested before the decision was made. Ryan v. Staples (1896) 76 Fed. 721, 23 C. C. A. 541, affirming judgment Staples v. Ryan (C. C. 1894) 62 Fed. 635, rehearing denied (1897) 78 Fed. 563, 23 C. C. A. 551.

The right to fasten a special trust upon funds held by the receiver of an insolvent bank in Iowa not having been created by any statute of that state, but depending upon the general principles of law and equity applicable to the circumstances, decisions of the supreme court of that state in relation thereto, if not in accord with the decisions of the supreme court of the United States or the decided weight of authority, do not constitute a rule of property binding on the federal courts. Beard v. Independent Dist. of Pella City (1898) 88 Fed. 375, 31 C. C. A. 562.

In determining whether a chattel mortgage executed by a bankrupt was fraudulent on its face, the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property. Dugan v. Beckett (1904) 129 Fed. 56, 63 C. C. A. 498.

The statutes and decisions of the courts of last resort in a state where property mortgaged is situated, and where the controversy arose, are binding on the federal courts as a rule of property. Haggart v. Wilczinski (1906) 143 Fed. 22, 74 C. C. A. 176.

Under the rule established by decision in New Hampshire, which will be followed by the federal courts, there can be no exclusive right of fishing in a lake or great pond, at least unless by legislative grant. Percy Summer Club v. Astle (1908) 163 Fed. 1, 90 C. C. A. 527, rehearing denied (1908) 166 Fed. 1020, 92 C. C. A. 667.

A ruling by the California courts that partnership property must be applied to the payment of firm debts despite one partner's sale of his interest to the other held not a rule of property binding on the federal court on subsequent insolvency of the firm. Rapple v. Dutton (C. C. A. 1915) 226 Fed. 430.

The decisions of the supreme court of a state, under a state statute touching the validity of chattel mortgages made in such state, establish a rule of property as binding upon a court of the

United States as upon the courts of the state. Morse v. Riblet (C. C. 1884) 22 Fed. 501.

A right of a mortgagor to have time to redeem on suit to foreclose, given by the laws of a state where the mortgage was made, is a property right, which will be regarded in a suit to foreclose brought in a federal court. Jackson & Sharp Co. v. Burlington & L. R. Co. (C. C. 1887) 29 Fed. 474.

The fact that the supreme court of Missouri in a former decision, in which the exemption from taxation of a railroad corporation was not a controverted question, assumed that it was exempt, which decision was followed by the federal court in a case wherein no questions were considered except such as had been previously considered by the state supreme court, does not establish a settled rule of property, to which the federal court is bound to adhere. Keokuk & W. R. Co. v. County Court of Scotland County (C. C. 1890) 41 Fed. 305, decree affirmed (1894) 14 Sup. Ct. 608, 152 U. S. 317, 38 L. Ed. 457.

Where the rights of a litigant have arisen under decisions of state courts establishing a rule of property which has been overthrown by later decisions, the federal courts are entitled to exercise an independent judgment. Chisolm v. Caines (C. C. 1894) 67 Fed. 285.

The decision of the Alabama supreme court that children adopted according to the laws of foreign states are not entitled to take property by descent in Alabama from their adopting parents, being a fixed rule of property in Alabama, is conclusive on the federal courts in determining the devolution of property in Alabama unless in violation of the federal constitution. Hood v. McGehee (C. C. 1911) 189 Fed. 205, decree affirmed (1912) 199 Fed. 989, 117 C. C. A. 664.

Under this section the Ohio rule that, if property covered by an unfiled chattel mortgage passes into the hands of a receiver, the mortgage lien is lost, and the rights of creditors are the same as if the mortgagor had given an assignment in trust for their benefit, will be regarded as a rule of property and applied in proceedings in a federal court sitting in that state to administer assets of an insolvent through a receiver, as against the holder of an unfiled conditional contract of sale of goods to the insolvent, and not the federal rule that the possession of a receiver is only that of the court, and adds nothing to the previously existing title of the mortgagee, the receiver holding for the benefit of whomsoever it shall be found to concern. Hamilton v. David C. Beggs Co. (D. C. 1910) 179 Fed. 949.

Decisions of a supreme court of a territory construing a territorial statute should be given the same force and effect as a decision of a supreme court of a state, especially where the decision establishes or relates to a rule of property. In re Scheier (D. C. 1911) 188 Fed. 744.

Determination of the supreme court of Tennessee, that there was no constitutional union between the Cumberland Presbyterian Church and the Presbyterian Church of the United States of America effected by their respective General Assemblies in May, 1906, held not a rule of property, but the decision of a question of general jurisdiction, and therefore not binding on federal courts sitting in that state. Sherard v. Walton (D. C. 1913) 206 Fed. 562.

Where conditional sale contract was a Pennsylvania contract, law of Pennsylvania held a rule of property, to be applied in United States courts, either at law or in equity. General Electric Co. v. Richardson (D. C. 1916) 228 Fed. 758.

89. —— Land titles and interests in real estate.—On questions relating to real estate, the federal courts will uniformly follow the latest decision of the state courts. Bodley v. Taylor (1809) 9 U. S. (5 Cranch) 191, 3 L. Ed. 75; Polk v. Wendal (1815) 13 U. S. (9 Cranch) 87, 3 L. Ed. 665; Thatcher v. Powell (1821) 19 U. S. (6 Wheat.) 119, 5 L. Ed. 221; Jackson ex dem. St. John v. Chew (1827) 12 Wheat. 153, 167, 6 L. Ed. 583; Waring v. Jackson ex dem. Eden (1828) 1 Pet. 570, 571, 7 L. Ed. 266; Inglis v. Trustees of Sailor's Snug Harbor (1830) 3 Pet. 99, 130, 7 L. Ed. 617; Fisher v. Haldeman (1857) 20 How. 186, 194, 15 L. Ed. 879; Henderson v. Griffin (1831) 30 U. S. (5 Pet.) 151, 8 L. Ed. 79; Hinde v. Vattier (1831) 30 U. S. (5 Pet.) 398, 8 L. Ed. 168; Beauregard v. City of New Orleans (1855) 59 U. S. (18 How.) 497. 15 L. Ed. 469; League v. Egery (1860) 65 U. S. (24 How.) 264, .16 L. Ed. 655; Williamson v. Suydam (1867) 73 U. S. (6 Wall.) 723, 18 L. Ed. 967; Williams v. Kirtland (1871) 80 U. S. (13 Wall.) 306, 20 L. Ed. 683; Walker v. State Harbor Com'rs of U. S. (1873) 17 Wall. 648, 21 L. Ed. 744; Hoge v. Magnes (1898) 85 Fed. 355, 29 C. C. A. 564; Belding v. Hebard (1900) 103 Fed. 532, 43 C. C. A. 296; Hubbird v. Goin (1905) 137 Fed. 822, 70 C. C. A. 320; Pineland Club v. Robert (1914) 213 Fed. 545, 130 C. C. A. 125; Same v. Sanders (1914) 214 Fed. 85, 130 C. C. A. 612; Pugh v. Frierson (1915) 221 Fed. 513, 137 C. C. A. 223; Ingersoll Engineering & Constructing Co. v. Crocker (C. C. A. 1915) 228 Fed. 844; Newman v. Keffer (C. C. 1836) Fed. Cas. No. 10,177; Smith v. Shriver (C. C. 1857) Fed. Cas. No. 13,108; Loring v. Marsh (C. C. 1864) Fed. Cas. No. 8,514; Smith v. Houtz (C. C. 1868) Fed. Cas. No. 13,062; Hiller v. Shattuck (C. C. 1872) Fed. Cas. No. 6,504; In re

Zug (C. C. 1877) Fed. Cas. No. 18,-222; Lauriat v. Stratton (C. C. 1880) 11 Fed. 107; Greenwalt v. Tucker (C. C. 1882) 10 Fed. 884, 886; Myers v. Reed (C. C. 1883) 17 Fed. 401; Edwards v. Davenport (C. C. 1883) 20 Fed. 756; Myrick v. Heard (C. C. 1887) 31 Fed. 241; Santee River Cypress Lumber Co. v. James (C. C. 1892) 50 Fed. 360; Rummel v. Butler County (C. C. 1899) 93 Fed. 304; Southern Pac. Co. v. Western Pac. Ry. Co. (C. C. 1906) 144 Fed. 160, decree reversed Western Pac. Ry. Co. v. Southern Pac. Co. (1907) 151 Fed. 376, 80 C. C. A. 606.

In construing a deed to real estate, a federal court will follow the settled law of the state in which the property is situated. Barber v. Pittsburgh, Ft. W. & C. Ry. Co. (1897) 17 Sup. Ct. 488, 491, 166 U. S. 83, 41 L. Ed. 925; Buford v. Kerr (1898) 90 Fed. 513, 33 C. C. A. 166 (affirming judgment [C. C. 1898] 86 Fed. 97); Kuhn v. Fairmont Coal Co. (1910) 179 Fed. 191, 102 C. C. A. 457, 66 W. Va. 711 (affirming judgment [C. C. 1907] 152 Fed. 1013); Dickson v. Wildman (1910) 183 Fed. 398, 105 C. C. A. 618 (affirming judgment [C. C. 1910] 175 Fed. 580).

Decisions of state courts that oil lease passes to lessee a freehold interest taxable as real property, and that a clause giving option to surrender is valid, does not create a tenancy at will, nor make the lease void for want of mutuality, are rules of property to be followed by the federal courts. Guffey v. Smith (1915) 35 Sup. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; Id., 35 Sup. Ct. 532, 237 U. S. 120, 59 L. Ed. 866, reversing decree Smith v. Guffey (1912) 202 Fed. 106, 120 C. C. A. 436.

Under the California statute (Code Civ. Proc. § 1582) providing that "actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates," as interpreted by the decisions of the supreme court of the state, establishing a rule of property, an action for the foreclosure of a mortgage may be brought in a court of the state against the administrator of the deceased mortgagor alone, without joining his widow or heirs; and the title derived under a sale in such an action is valid and conclusive, as against such widow and heirs, in a collateral proceeding in a federal court, without regard to the question whether the widow and heirs would be necessary parties to a suit in the federal court for the foreclosure of the mortgage. Hearfield v. Bridges (1896) 75 Fed. 47, 21 C. C. A. 212.

The decisions of the supreme court of West Virginia holding that, under the state statutes, a bill to remove a cloud on title created by an irregular or void tax deed can be maintained by one out of possession, who relies solely on his legal title, are controling in the federal courts. Harding v. Guice (1897) 80 Fed. 162, 25 C. C. A. 352.

A decision of the highest court of a state construing the registration statutes of a state as to the competency as evidence of the records of deeds establishes a rule of property, and is binding upon the federal courts, no question of right under the constitution and laws of the nation and no question of general or commercial law being involved. Union Pac. Ry. Co. v. Reed (1897) 80 Fed. 234, 25 C. C. A. 389.

The decisions of the courts of a state as to the construction and effect of mining leases therein establish a rule of property which will be recognized and followed by the federal courts. Foster v. Elk Fork Oil & Gas Co. (1898) 90 Fed. 178, 32 C. C. A. 560.

Under the rule established by decision in Texas, which, as a rule of property, is binding upon the federal courts sitting in that state, declarations of a deceased surveyor in regard to the lines and corners of a survey which was originally made by him, made on the ground while pointing out a monument placed there by him in making the survey, are admissible in evidence in an action involving the location of the survey, although at the time the declarations were made he was part owner of the land embraced in such survey, and interested in a controversy then pending as to its boundaries. The objection that such declarations were self-serving is not fatal, since they should not be used as evidence during his lifetime, or while his testimony was obtainable. Tracy v. Eggleston (1901) 108 Fed. 324, 47 C. C. A. 357, writ of certiorari denied (1901) 22 Sup. Ct. 935, 183 U. S. 699, 46 L. Ed. 396.

The doctrine that it was competent for the general assembly, by special act, prior to the adoption of the constitution of 1865, to authorize the sale of lands belonging to minors, having been so well established, and so many titles having been acquired on the faith thereof, must be construed as constituting the rule of property in the state. Garth v. Arnold (1902) 115 Fed. 468, 53 C. C. A. 200, modifying judgment Arnold v. Garth (C. C. 1901) 106 Fed. 13.

Whether an oral contract for a lease of real property for more than a year, not complying with the statute of frauds of the state where the property is situated, is a nullity or unenforceable only at the election of the parties, is not a question of general jurisprudence or of commercial or mercantile law, but a rule of property, which must be determined in the federal courts according to the decisions of the highest judicial tribunal of the state where such

property is located. York v. Washburn (1904) 129 Fed. 564, 64 C. C. A. 132, affirming judgment (C. C. 1902) 118 Fed. 316.

The Kentucky statute of limitations relating to actions for the recovery of land has been liberally construed and applied by the court of appeals of the state in respect to the adverse possession of settlers which will ripen into a title thereunder, on account of the confusion created by the loose practice of the state in issuing patents for conflicting grants, and its decisions, having become a rule of property in the state, will be followed by the federal courts. Scott v. Mineral Development Co. (1904) 130 Fed. 497, 64 C. C. A. 659, writ of certiorari denied Mineral Development Co. v. Scott (1905) 25 Sup. Ct. 796, 196 U. S. 640, 49 L. Ed. 631.

Under the statutes of Illinois relating to foreclosure sales and redemption therefrom, as construed by the state supreme court, which establish a rule of property in the state binding on the federal courts, a sale under a decree foreclosing a mortgage exhausts and extinguishes the lien of the mortgage, and the same is not revived by a redemption from the sale. Barry v. Harnesberger (1906) 148 Fed. 346, 78 C. C. A. 338.

Where there is a state statute directing the manner and form of the examination of a married woman on making a deed jointly with her husband conveying her separate lands, the construction placed upon such statute by the highest court of the state, declaring what the necessary requirements are in order to make such examination effective, becomes a rule of property in that state, binding upon the federal courts. Gillespie v. Pocahontas Coal & Coke Co. (1908) 163 Fed. 992, 91 C. C. A. 494, reversing decree (C. C. 1907) 162 Fed. 742 and writ of certiorari denied Pocahontas Coal & Coke Co. v. Gillespie (1900) 29 Sup. Ct. 700, 214 U. S. 519, 53 L. Ed. 1065.

The decisions of a state supreme court as to the responsibility of a lunatic or person non compos mentis upon his contracts do not establish a rule relating to land titles within such state which the federal courts should follow, notwithstanding a contrary decision by the United States supreme court. Edwards v. Davenport (C. C. 1883) 20 Fed. 756.

State laws relating to compensation for improvements on land, made in good faith, are rules of property, which federal courts will recognize and follow. McClaskey v. Barr (C. C. 1894) 62 Fed. 209.

The provision in a lease that the lessor shall not be liable for destruction, through his negligence, of the building on the leased land, does not affect title to real estate, within the rule that decisions of state courts constituting a rule of property will be followed by the federal courts. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1894) 62 Fed. 904, judgment affirmed (1895) 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

The law of Missouri that where notes of the same date, maturing at different times, are secured by mortgage, the note first maturing is entitled to priority, though the security is not resorted to till all are due, and the first note has been transferred without assignment of the mortgage, will be followed in a federal court as a rule of property, where the land is in that state, and the parties resided there when the mortgage was executed. New York Security & Trust Co. v. Lombard Inv. Co. (C. C. 1895) 65 Fed. 271, decree reversed Ferree v. New York Security & Trust Co. (1896) 74 Fed. 769, 21 C. C. A. 83.

It being a rule of property in Pennsylvania that in ejectment upon an equitable title one verdict and judgment are conclusive of the title, equally binding effect is to be given to such a verdict and judgment in the federal courts. Bryar v. Bryar (C. C. 1897) 78 Fed. 657, decree affirmed Bryar v. Campbell (1898) 90 Fed. 690, 33 C. C. A. 236, and (1900) 20 Sup. Ct. 794, 177 U. S. 649, 44 L. Ed. 926.

Under the decisions of the supreme court of North Carolina, mortgage contracts relating to lands in that state must be construed with reference to its usury laws, regardless of the expressed intention of the parties, since such contracts are only enforceable by courts within the state. Such decisions further hold that mortgages given to building and loan associations are subject to the same rule as to usury as other mortgages. Held that, in a suit in a federal court to foreclose a mortgage given to a building and loan association of another state on land in North Carolina, the court would follow the rule of such decisions, which is in the nature of a rule of property. McIlwaine v. Iseley (C. C. 1899) 96 Fed. 62.

The decisions of the state court that under Sand. & H. Dig. Ark. § 5091, providing that a mortgage shall be a lien from the time it is filed in the recorder's office, which filing shall be notice to all persons of the mortgage, a mortgage not properly acknowledged constitutes no lien against third persons, though recorded to their knowledge, establish a rule of property, and will be followed by the federal courts. Cumberland Building & Loan Ass'n v. Sparks (C. C. 1900) 106 Fed. 101, decree reversed (1901) 111 Fed. 647, 49 C. C. A. 510.

A rule of the law of a state that the main belt connecting the driving wheel with the main shafting of a marble mill is a part of the realty is a rule of property, which must govern in the federal courts in the state. Friedly v. Giddings (C. C. 1902) 119 Fed. 438,

440, affirmed (1904) 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327.

Rev. Laws Minn. 1905, § 4389, providing that the pendency of an action relating to real estate is notice to purchasers or incumbrancers only from the time of the filing of notice thereof in the office of the register of deeds of the county in which the land is situated, is a rule of property of the state relating to real estate, and applies to a suit in equity pending in a federal court. U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 172 Fed. 271.

A unanimous decision of the highest court of a state construing a writing relating to the sale of a vein of coal underlying land in that state, and holding it to be an option and not a contract of sale, establishes a rule of property, and will be followed by a federal court in construing another contract relating also to property in that state and identical in terms. Fretts v. Shriver (C. C. 1910) 181 Fed. 279.

Under the decisions of the supreme court of North Carolina which establish a rule of property controlling in the federal courts in that state, a mechanic's lien cannot be acquired on land conveyed to a husband and wife through a contract with the husband alone. Healey Ice Mach. Co. v. Green (C. C. 1910) 181 Fed. 890, decree affirmed Same v. Greene (1911) 191 Fed. 1004, 111 C. C. A. 668.

Under the decisions of the supreme court of North Carolina, which establish a rule of property controlling in the federal courts in that state, a conveyance of land to a husband and wife vests them with an estate by entireties which cannot be aliened, burdened, or otherwise affected except by their joint action. Id.

An adjudication of bankruptcy having been held by the courts of Indiana to have the same effect upon the wife's claim to dower as a judicial sale of the husband's real estate, the federal courts will follow that rule in regard to land in that state. Warford v. Noble (D. C. 1880) Fed. Cas. No. 17,175.

A wharf built by an owner of shore land into navigable waters is an extension of the shore and a part of the real estate of the shore owner, and rights therein are governed by the laws of the state, as construed by its highest court, which will be adopted and followed by the federal courts. The Golden Rod (D. C. 1912) 197 Fed. 830.

The rule of property, established by decision in Arkansas, that a riparian owner on a nonnavigable lake owns to the center of the lake, is binding on the national courts. U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630.

The construction of a particular will or deed is a general question, upon which a federal court is not bound to follow a decision of the supreme court of the state, as establishing a rule of property. Knox & Lewis v. Alwood (D. C. 1915) 228 Fed. 753.

90. Authority of inconsistent decisions—Conflicting decisions in state courts.—Where two decisions of the highest court of a state conflict, the latest must control. Leffingwell v. Warren (1862) 67 U. S. (2 Black) 599, 17 L. Ed. 261; Yocum v. Parker (1904) 134 Fed. 205, 67 C. C. A. 227; Dike v. Kuhns (C. C. 1857) Fed. Cas. No. 3,907; Smith v. Shriver (C. C. 1857) Fed. Cas. No. 13,108; King v. Wilson (C. C. 1871) Fed. Cas. No. 7,810; Myrick v. Heard (C. C. 1887) 31 Fed. 241; Gay v. Hudson River Electric Power Co. (C. C. 1910) 178 Fed. 499.

A negro held in slavery in one state, under the laws thereof, and taken by his master, for a temporary residence, into a state where slavery is prohibited by law, and thence into a territory acquired by treaty where slavery is prohibited by act of congress, and afterwards returning with his master into the same slave state, and resuming his residence there, is not such a citizen of that state as may sue there in the circuit court of the United States, if by the law of that state, as repeatedly declared by its highest court in recent decisions, a negro, under such circumstances, is a slave; although, by the law of that state at the time of his return, as settled by earlier cases, he was then a freeman; and although the new decisions be not based upon the construction of the constitution and statutes of the state, but upon the ground that the state will not enforce laws which prohibit slavery in other states or territories. Scott v. Sandford (1856) 60 U. S. (19 How.) 393, 15 L. Ed. 691.

Where a series of decisions are made by the supreme court of a state, construing a statute in one way, and that way is in harmony with numerous decisions of other states upon similar statutes, and meets the approbation of the supreme court of the United States, the last-named court will regard such interpretation of the statute as the true one, so far as respects investments of money made during the time that those decisions were unreversed. The fact that the same supreme court of the state which made such former decision now holds that those decisions were erroneous, and ought not to have been made, can have no effect upon transactions in the past, however it may affect those in the future. Gelpcke v. City of Dubuque (1863) 68 U. S. (1 Wall.) 175, 17 L. Ed. 520.

Where territory acquired by the United States from a foreign government is divided into several states, and a law general to the whole territory at the time of its acquirement continues in force in the several states, and receives various judicial interpretation, the supreme court will adopt whichever interpretation has been placed upon it

by the highest court of the state in which the suit may originate. Christy v. Pridgeon (1866) 71 U. S. (4 Wall.) 196, 18 L. Ed. 322.

Where the power to issue bonds was fully conferred by law, the question of their validity in the hands of innocent holders without notice is a question of commercial law determinable by the exposition of the law of the state at the period when the bonds were issued, and cannot be affected by subsequent adjudications. Marshall County Sup'rs v. Schenck (1866) 72 U. S. (5 Wall.) 772, 18 L. Ed. 556.

Where the same provision occurring in codes of practice in various states had been construed differently by the different state courts, the supreme court of the United States refused in the case before them to revise the decision of the territorial court. Sweeney v. Lomme (1874) 89 U. S. (22 Wall.) 208, 22 L. Ed. 727.

The supreme court will change its decision construing a state constitution, when no rights have been acquired under it, and when it appears that before the decision was made the highest court of the state had interpreted it differently, fixing a rule of property within the state which had never been abandoned. Fairfield v. Gallatin County (1879) 100 U. S. 47, 55, 25 L. Ed. 544.

Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the state as they were then construed by her highest court; and hence, in a case involving those rights, the supreme court of the United States will not be governed by any subsequent decision in conflict with that under which they accrued. Douglass v. Pike County (1879) 101 U. S. 677, 25 L. Ed. 968.

While the courts of the United States accept and apply the construction of a state constitution or of a local statute by the state courts, rights accruing under one construction will not be lost by merely a change of opinion in the state court; and the federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment. Anderson v. Santa Anna Tp. (1886) 116 U. S. 356, 6 Sup. Ct. 413, 29 L. Ed. 633; Confarr v. Same (1886) 116 U. S. 366, 6 Sup. Ct. 418, 29 L. Ed. 636.

The Illinois supreme court having at one time held that the terms "towns" and "villages" are used synonymously, in the laws of Illinois, but having afterwards, in a suit relating to certain bonds, construed the word "village" in Act Ill. Feb. 24, 1869, § 10, amendatory of the charter of the Illinois Southeastern Railway Company, authorizing any "village" to make subscriptions in aid of such railroad as excluding "towns," held, that neither decision was binding upon the federal supreme court in a suit upon bonds issued prior to either decision, and which were the same bonds in controversy in the latter suit. Town of Enfield v. Jordan (1887) 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 623.

The federal supreme court will follow the decisions of a state court on the validity of a transfer for creditors under the laws of the state, though the same laws have received a different construction in other states. Jencks v. Quidnick Co. (1890) 10 Sup. Ct. 655, 657, 135 U. S. 457, 34 L. Ed. 200.

In 1871, the supreme court of Ohio declared constitutional Act Ohio May 4, 1869, which authorized the city of Cincinnati to construct and equip a continuous line of railroad. Laws Ohio 1880, p. 157, authorized a designated township, a quasi corporation, to construct through its territory a few miles of railroad forming part of a line intended to be ultimately owned and operated by private capital. An adjudication by the supreme court of Ohio, made after the purchase of the bonds in question, declared the act of 1880 unconstitutional. Held not to prevent the federal courts, in an action brought therein for the enforcement of the bonds, from exercising their independent judgment in the matter, in view of the unsettled character of the decisions of the supreme court of Ohio on this question. Pleasant Tp. v. Ætna Life Ins. Co. (1891) 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864.

Bonds issued by a township under authority of acts passed in 1882 and 1885 were purchased by plaintiff in 1886, in reliance upon their validity; such bonds being then treated as valid. In 1888 the state supreme court, by a majority of two to one, held the bonds to be invalid. In 1889 the same court affirmed the constitutionality of an act declaring bonds previously issued by a township to be valid,—a decision apparently in conflict with the previous one. Held, that the supreme court would not be bound by the decision rendered in 1888 by the state supreme court. Folsom v. Township Ninety-Six, Abbeville County (1895) 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278.

The decision of the supreme court of Minnesota in Minneapolis Mill Co. v. Board of Water Com'rs of St. Paul, 58 N. W. 33, that a municipality has a right to take water from a navigable stream, without making compensation to riparian owners below, who are using the flow of the stream for water power, is not inconsistent with any prior decision of that court, and the federal courts are bound to follow it, as the law of that state. St. Anthony Falls Water Power Co. v. Board of Water Com'rs of City of St. Paul, Minn. (1897) 18 Sup. Ct. 157, 168 U. S. 349, 42 L. Ed. 497.

The fact that the supreme court of a state on one appeal sustained the va-

lidity of a statute does not affect its right to declare the statute void on a subsequent appeal in the same suit, on a ground not presented by the record or considered on the first appeal, nor the weight to be given to such decision by a federal court. Board of Com'rs of Oxford, N. C., v. Union Bank (1899) 96 Fed. 293, 37 C. C. A. 493.

Where conflicting decisions construing a state statute have been rendered by the highest court of a state and a commission created by law to assist such court, a federal court will follow the construction adopted by the permanent court. Montgomery v. McDermott (1900) 103 Fed. 801, 43 C. C. A. 348, affirming decree (C. C. 1900) 99 Fed. 502.

A testator left all his property to trustees for certain purposes, among which was the payment to his son's wife, in case she should become a widow, without children, of an annuity sufficient to afford her a comfortable support during her widowhood. The son contested the will, and a decree was entered setting it aside and directing the trustees to convey the property to the son as heir at law, which they did. Thereafter the son sold all the property, his wife joining in the deeds for the purpose of relinquishing her right of dower. After his death a bill of review was filed by certain of the defendants in the suit, in which the decree was reversed, and the will was held valid. Thereafter the son's widow filed a petition to charge the lands sold with the payment of her annuity under the will. Held that, as between her and the purchasers of such lands, who bought in good faith and for full value in reliance on the decree, the equity of the latter was superior, and their rights were not affected by the proceedings on the bill of review. Ohio River R. Co. v. Fisher (1902) 115 Fed. 929, 53 C. C. A. 411.

In a suit in a federal court on municipal bonds, the question of the validity of the legislative act under which they were issued is to be determined by the law of the state as judicially declared by its highest court at the time the bonds were issued; and where, under such law, the act was valid, the rights of a holder of the bonds cannot be affected by the fact that before the date of his purchase the court had overruled its prior decisions and declared it invalid. Board of Com'rs of Franklin County, Ohio, v. Gardiner Sav. Inst. (1902) 119 Fed. 36, 55 C. C. A. 614.

An appellate court will reverse a judgment based on the decisions of the highest state court, where, pending the appeal, they have been overruled, and no question of contract rights is involved. American Sugar Refining Co. v. City of New Orleans (1902) 119 Fed. 691, 55 C. C. A. 328.

While the law of the state in which land is situated, either statutory or by decision, governs as to its alienation and transfer by deed or will, where there is an inconsistency in the decisions of the highest court of the state, and an action has been brought in a federal court to recover land in reliance on the law of the state as it was then established by decision, the court is not bound to follow a later decision which would deprive the plaintiff of his right of action. Northrop v. Columbian Lumber Co. (1911) 186 Fed. 770, 108 C. C. A. 640.

Where the court of last resort of a state adopting a statute from another state repudiates the construction put upon the statute by the courts of such other state, its action in so doing is binding upon the federal courts. Stonebraker v. Hunter (C. C. A. 1914) 215 Fed. 67.

Uniform holding of supreme court of state, whenever question was raised as to the right to maintain an action, held binding on the federal courts, though such actions had been maintained in numerous instances where the question was not raised. Id.

The federal court refused to follow a decision of the highest court of the state, holding laws authorizing municipal aid to railroads to be unconstitutional, where opposed to repeated decisions on other laws involving the same principle, and to the unanimous decisions of courts of other states in analogous cases. Talcott v. Pine Grove (C. C. 1872) Fed. Cas. No. 13,735.

In 1863, the supreme court of California construed a provision of the state constitution, which construction remained unquestioned by the courts for 11 years, during which time much legislation of a similar character to that in question, and among it that involved in this case, was had, under which important rights had become vested. In 1874, the supreme court, being differently constituted, overruled the prior decision; three of the six justices who sat in the two cases having taken one view, and three the other. The supreme court is now to be again reorganized, with seven members, only one of whom has considered the question as a member of the court of last resort. Held, that the construction is not settled within the rule, and the national courts are at liberty to adopt the view which appears to them correct. Southern Pac. R. Co. v. Orton (C. C. 1879) 32 Fed. 457.

If, at the time of issue of certain bonds, they were valid under the law as then expounded by the supreme court of the state, they will be held valid in the federal courts, though such supreme court subsequently changes its rulings. Burleigh v. Town of Rochester (C. C. 1881) 5 Fed. 667.

The federal courts, in passing on the validity of state or county bonds, will adopt the constructions of state laws

announced by the state courts at the time the bonds were issued, on the strength of which they found a market, rather than a contrary construction, announced after such bonds were in circulation as commercial securities. In re Copenhaver (C. C. 1893) 54 Fed. 660.

The rule that, where there are conflicting decisions of a state court as to the construction or validity of a state statute, the early decisions will be followed by the federal courts as to all rights accruing under them before the last decision, does not apply where the later decision is under an amendment of the statute, radically departing from previous legislation. Jones v. Great Southern Fireproof Hotel Co. (C. C. 1897) 79 Fed. 477, decree reversed Sosman v. Same (1898) 86 Fed. 370, 30 C. C. A. 108, which is reversed Great Southern Fireproof Hotel Co. v. Jones (1900) 20 Sup. Ct. 690, 177 U. S. 449, 44 L. Ed. 482.

Since at common law the heir of an heir would be liable, to the extent of real estate received by him, for a specialty made by the ancestor, and expressed to be binding on heirs, notwithstanding such liability is not expressly created by the statute of New York, which provides that the lands of heirs or devisees can be taken in payment of debts of the ancestor or testator, it will be held to exist, and be enforced in equity, in the absence of an express decision on the point by the court of appeals, and in view of the conflicting decisions of the state courts. Pyatt v. Waldo (C. C. 1898) 85 Fed. 399.

While under the constitution of Ohio as now interpreted by its supreme court an act of the legislature authorizing the trustees of a particular township to improve a designated road is invalid, yet, that court having for many years sustained the validity of such legislation, a federal court will not give a retroactive effect to its later decisions by holding invalid bonds issued during such time by a township under such an act and which were purchased and are owned by a citizen of another state. Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio (C. C. 1899) 91 Fed. 37.

Federal courts, in determining the rights of parties acquired under a state statute prior to the date of a change of opinion by the supreme court of the state as to its construction, will exercise its own independent judgment, and are not bound to follow the latest decision of the state court. Forest Products Co. v. Russell (C. C. 1907) 161 Fed. 1004, decree reversed Bass v. Forest Products & Mfg. Co. (1909) 173 Fed. 1019, 97 C. C. A. 666.

A reversal of a previous ruling by a court of last resort construing the law is retroactive except as to executed contracts. In re Dunham (D. C. 1872) Fed. Cas. No. 4,146.

91. —— Conflicting decisions between federal courts and state courts.—Where there is a settled construction of the laws of a state by its highest court, established by admitted precedent, the courts of the United States will adopt it; but when the supreme court of the United States first decides a question arising under a state law it will not follow a subsequent decision of the state court, or when the decisions of the state court are not consistent the supreme court of the United States will not follow the last decision, where it is contrary to its own convictions. Pease v. Peck (1855) 18 How. 595, 598, 15 L. Ed. 518.

A decision of the circuit court which is in accordance with the construction of the statutes of a state as there declared by the courts of that state will not be reversed by the supreme court, because of a subsequent case in courts of that state, overruling the former decision. Morgan v. Curtenius (1857) 61 U. S. (20 How.) 1, 15 L. Ed. 823; National Foundry & Pipe Works v. Oconto Water Co. (D. C. 1895) 68 Fed. 1006.

Where the supreme court of the United States has held that bonds issued by counties, cities, and towns in a state, to railroad companies for stock, when at the time they were issued such bodies were held by the settled adjudications of the highest courts of that state to possess full power to issue them, are ever after valid and binding in the hands of bona fide holders, it will not re-examine the rule, notwithstanding that the courts of the state, since the bonds were issued and in the hands of bona fide holders, have reversed their previous decision. Lee County v. Rogers (1868) 74 U. S. (7 Wall.) 181, 19 L. Ed. 160.

The laws of a state, which the courts of the United States are required by this section to follow as rules of decision in trials at common law, are to be determined by the latest settled adjudications of the highest court of the state, rather than by earlier ones, where there is any inconsistency between them (unless rights acquired on the faith of the former decisions are involved), and in case a construction has been placed on a state law, or constitutional provision, by its highest court, different from that previously given it by a federal court, though the latter may have followed a former state decision, the supreme court, in passing upon the case in review, will apply the law as determined by the subsequent holding of the state court. Wade v. Travis County, Tex. (1899) 19 Sup. Ct. 715, 174 U. S. 499, 43 L. Ed. 1060, reversing judgment (1897) 81 Fed. 742, 26 C. C. A. 589.

The court of appeals is not bound to yield its own opinion to a contrary decision of the state court of last resort, rendered, upon the same transaction

after the argument and before the decision of the case before this court; such decision appearing to be in plain conflict with the weight of authority on the subject, and distinctly inconsistent with the previous decisions of the state court. Forsyth v. City of Hammond (1896) 71 Fed. 443, 18 C. C. A. 175, reversing order Forsythe v. City of Hammond (C. C. 1895) 68 Fed. 774, and decree reversed Forsyth v. City of Hammond (1897) 17 Sup. Ct. 665, 166 U. S. 506, 41 L. Ed. 1095.

A local rule of law, maintained by the courts of a state, that a foreign assignment by an insolvent will not operate on property in the state, so as to defeat an attachment made by a resident, is expressly annulled by Blake v. McClung (1898) 172 U. S. 239, 19 Sup. Ct. 165, in so far as it discriminates against citizens of other states, and it cannot be presumed that the rule, as necessarily limited by Blake v. McClung, would be reaffirmed by the local courts. Therefore it is held that the entire rule is abrogated, and that it can no longer be accepted in any part. Belfast Sav. Bank v. Stowe (1899) 92 Fed. 100, 34 C. C. A. 229, affirming judgment Stowe v. Belfast Sav. Bank (C. C. 1897) 92 Fed. 90.

Where state statutes affecting title to land have been construed by the state supreme court, and the title so established reaffirmed by the United States supreme court, the federal court, when the title is again called in question, need not follow a later decision of the state court adverse to the earlier decisions. Wilson v. Ward Lumber Co. (C. C. 1895) 67 Fed. 674, appeal dismissed (1897) 84 Fed. 1023, 28 C. C. A. 689.

By a decision of the supreme court of Ohio rendered in 1888, stockholders in national banks were held entitled to deduct from the valuation of their shares for purposes of taxation the amount of their indebtedness, and subsequently such deductions were allowed and made. In 1897 the court rendered a contrary decision upon the same statutes, which was affirmed by the supreme court of the United States. Held, that all stockholders, including those who were parties to the first decision, were subject to taxation in accordance with the later decision, after it was rendered, but that such decision was not retroactive, so as to authorize the state or municipalities to collect taxes on the amount of deductions made in previous years under the former decision, while such decision was the law of the state. Mercantile Nat. Bank of Cleveland, Ohio, v. Lander (C. C. 1901) 109 Fed. 21, judgment affirmed Lander v. Mercantile Nat. Bank of Cleveland, Ohio (1902) 118 Fed. 785, 55 C. C. A. 523.

Where the circuit court of appeals in a suit by a taxpayer determined that a contract made by a city under an ordinance was void as creating an indebtedness, when the city was then indebted to the limit permitted by the constitution of the state, such decision is binding on a circuit court of the United States in a subsequent suit between the same parties, involving a different contract, but one which was made pursuant to the same ordinance, notwithstanding a contrary decision by the supreme court of the state. City Water Supply Co. v. City of Ottumwa (C. C. 1903) 120 Fed. 309.

The fact that the judgment of the highest court of a state on the construction of a state statute, on which is based a decision of the federal court construing the statute, is subsequently reversed by the court which rendered it, does not require the federal court to reverse its decision as to the rights of the parties in the same property in subsequent proceedings. National Foundry & Pipe Works v. Oconto Water Co. (D. C. 1895) 68 Fed. 1006, decree reversed Andrews v. National Foundry & Pipe Works (1896) 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139.

A federal court must follow the latest decision of the state court, though it may differ from prior decisions of that court, and though the federal court may have previously come to a different conclusion. In re Floyd & Hayes (D. C. 1915) 225 Fed. 262.

92. —— **Conflicting federal decisions as authority in state courts.**—See notes under Const. art. 3, § 1, post.

93. **Decisions of federal courts previous to decisions by state courts—In general.**—The United States supreme court will respect the decisions of state courts, and, from the time they are rendered, will regard them as conclusive in all causes involving the construction of their own constitution, but it will not give them a retroactive effect so as to allow them to render invalid contracts entered into with citizens of other states, which, in the opinion of the United States supreme court previously rendered, were lawfully made. Rowan v. Runnels (1847) 46 U. S. (5 How.) 134, 12 L. Ed. 85.

As, subsequent to the decisions of this court in certain cases, the court of appeals of the state of New York have affirmed a different opinion from that of this court respecting the title to the real property involved in those decisions, this court now adopts the decision of the court of New York, in conformity with the rule which has uniformly governed this court, that, where any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals. Suydam v. Williamson (1860) 65 U. S. (24 How.) 427, 16 L. Ed. 732.

When pending an appeal from a territorial court to the United States supreme court upon a question of local

law, the territory is admitted as a state, and the state supreme court thereof, in another case, reaches an opposite conclusion upon the same question, the latter decision will be followed by the supreme court of the United States. Stutsman County v. Wallace (1892) 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018.

A judgment of a territorial court on a question of practice should not be reversed by the supreme court of the United States because of the decision of the state courts in subsequent cases while the former cases are pending on appeal in the supreme court, the territory having been in the mean time admitted to the Union. Ankeny v. Clark (1893) 148 U. S. 345, 13 Sup. Ct. 617, 37 L. Ed. 475.

A decree of the circuit court of the United States, based on an estoppel created by a judgment of a state court between the parties, and which has been affirmed by the supreme court, will not be reversed on a bill of review because the judgment creating the estoppel is subsequently reversed by the highest court of the state on appeal, where, when rendered, it was in accordance with the law of the state as declared by such court, which afterwards overruled its former decisions. Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort (1903) 124 Fed. 18, 59 C. C. A. 538, affirming order (C. C. 1902) 120 Fed. 165.

Inferior federal courts are bound to follow the law as laid down by the supreme court of the United States, though it may be in conflict with the rules of the supreme court of the state on the same facts. Old Dominion Copper Mining & Smelting Co. v. Lewisohn (1913) 202 Fed. 178, 120 C. C. A. 392, affirming decree (C. C. 1911) 195 Fed. 637.

In an action against a resident of Minnesota to rescind because of fraud of the purchaser, a sale as against a transferee of the goods in good faith without notice of his vendor's fraud in procuring the goods, where the transferee, as part of the consideration for the transfer, assumed debts of his vendor, the federal circuit court will follow the decisions of the supreme court of Minnesota that a transferee of goods in consideration of assuming debts due by the vendor is a bona fide purchaser for value, in spite of the fact that the opposite doctrine is maintained by the supreme court of the United States, where the debt assumed by the transferee is due to a citizen of the state of which he is a resident, so that the question of his liability on his assumption is solely within the jurisdiction of the state court, because to adopt the rule laid down by the supreme court of the United States would result in depriving the transferee of the goods, and at the same time compel him to pay therefor. Sonstiby v. Keeley (C. C. 1882) 11 Fed. 578.

An issue of municipal bonds not originally authorized, but subsequently ratified, by the legislature, will be held valid in the federal courts, on the well-settled doctrine of the United States supreme court as to the power of a state legislature, in the absence of any constitutional provision to the contrary, to ratify acts of a municipal corporation which it might originally have authorized, notwithstanding decisions of the state supreme court adverse to such doctrine, rendered after the issue of the bonds and the passage of the curative act. Dows v. Town of Elmwood (C. C. 1888) 34 Fed. 114, writ of error dismissed Town of Elmwood v. Dows (1890) 10 Sup. Ct. 1074, 136 U. S. 651, 34 L. Ed. 555, following Bolles v. Town of Brimfield (1887) 120 U. S. 759, 7 Sup. Ct. 736, 30 L. Ed. 786.

Pending a number of suits to quiet title in a federal court by the owners of a large tract of land under a patent from the state which involved the question of the boundary of such tract, and after such question had been decided in two of the suits, and action in replevin to recover a number of logs, between different parties, was instituted in a state court, and the issues were so made as to raise the question of the boundary of the same tract of land, and a decision of such question by the highest court of the state was obtained therein, which reduced the area of the tract nearly one-half from that given it by the federal decisions. The owners of the land were not parties to such action, which was apparently brought for the purpose of obtaining such decision and was not seriously contested. Held, that the decision of the state court, while entitled to the highest consideration, was not binding on the federal court in the suits by the owners of the land which were still pending. Davis v. Commonwealth Land & Lumber Co. (C. C. 1904) 141 Fed. 711.

A federal court must decide a point for itself, when it has not been passed on by the courts of the state under which it arises. Hamilton v. Loeb (C. C. 1910) 179 Fed. 728, judgment affirmed (1911) 186 Fed. 7, 108 C. C. A. 109, writ of certiorari denied (1911) 32 Sup. Ct. 523, 223 U. S. 720, 56 L. Ed. 629.

94. —— Construction of constitutions or statutes.—The federal courts are reluctant to declare an act of a state legislature invalid as in violation of the state constitution which has not been so declared by the highest court of the state. Railroad Commission of Alabama v. Central of Ga. Ry. Co. (1909) 170 Fed. 225, 95 C. C. A. 117; Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (1912) 196 Fed. 340, 116 C. C. A. 160; Currie v. Town of Lewiston (C. C.

1883) 15 Fed. 377; Union Pac. R. Co. v. Alexander (C. C. 1901) 113 Fed. 347; Boston & M. R. R. v. Niles (D. C. 1914) 218 Fed. 944.

When a state court of last resort finally settles a question arising under a statute of the state, the United States supreme court will follow that ruling, although it had previously established a contrary rule. Green v. Neal (1832) 31 U. S. (6 Pet.) 291, 8 L. Ed. 402.

When a question upon a state statute has been decided in a circuit court of the United States, and subsequently otherwise decided in the supreme court of the state, the supreme court of the United States will not feel bound to follow the decision of the state court. Pease v. Peck (1855) 59 U. S. (18 How.) 595, 15 L. Ed. 518.

If a state law has never been passed on by the state courts, the federal courts are nevertheless bound to give the state constitution the same construction which the state courts give it, and hold a pretended act of the legislature void and not a law which the state courts would hold to be so. South Ottawa v. Perkins (1876) 94 U. S. 260, 268, 24 L. Ed. 154.

The construction of a state statute of limitations by the supreme court of a state will be followed by the supreme court rather than an earlier construction by the circuit court. Moores v. Citizens' Nat. Bank (1881) 104 U. S. 625, 26 L. Ed. 870.

The federal courts, in the exercise of their co-ordinate jurisdiction in the administration of state laws, will ordinarily defer to and follow state decisions construing state statutes, but where the rule is not so settled they will exercise an independent judgment. Thus, where, after a decision by the United States circuit court, the state court renders a contrary decision in another case growing out of the identical transactions, the supreme court, in reviewing the judgment of the circuit court, will not be bound by the ruling of the state court, but will examine the question for itself. Burgess v. Seligman (1882) 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

The provision of the Illinois constitution of 1870 forbidding any municipality to subscribe to the stock of, or to make a donation in aid of, any private corporation, except in the case of "subscriptions" previously voted under existing laws, having been construed by several decisions of the Illinois supreme court as including, under the word "subscriptions" in the excepting clause, "donations," held, that the federal supreme court would follow such decisions, although it had previously construed the provision differently. Town of Enfield v. Jordan (1887) 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523.

When the circuit court of appeals bases its judgment on a state statute, and pending an appeal to the supreme court, the court of last resort of the state declares the statute void, as in conflict with the state constitution, this latter ruling is binding on the federal supreme court, in the consideration of the appeal. Oakes v. Mase (1897) 17 Sup. Ct. 345, 165 U. S. 363, 41 L. Ed. 746, reversing judgment Northern Pac. R. Co. v. Mase (1894) 63 Fed. 114, 11 C. C. A. 63.

When a federal court construes a state statute with reference to a new question, and the state court of last resort subsequently interprets it differently, the federal court should thereafter conform to such interpretation. Leighton v. Young (1892) 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; Sanford v. Poe (1895) 69 Fed. 546, 16 C. C. A. 305.

The circuit court of appeals will not reverse its ruling upon the interpretation of a state statute, made in a former case, decided before there had been any adjudication upon the subject by the state courts, in deference to a contrary ruling made by a court of the state, not its highest judicial tribunal, which does not commend itself as sound. Sanborn, Circuit Judge, dissenting. Stryker v. Board of Com'rs of Grand County, Colo. (1896) 77 Fed. 567, 23 C. C. A. 286.

While the federal courts, in causes within their jurisdiction involving rights arising under state statutes which had not at the time received an authoritative construction by the state courts, or the validity of which had not been adjudicated, are not bound to follow a subsequent state decision as to such construction or validity, yet, in exercising its independent judgment thereon, a federal court should give effect to rules of construction which had previously been established by the highest court of the state, and should also lean towards an agreement of views with the state court, and not act upon a different view, unless compelled to do so to prevent an absolute denial of justice. Such considerations have peculiar weight when the question to be determined relates to the jurisdiction or power, under the constitution of the state, of tribunals or bodies created by legislative enactment, and charged with the performance of public duties, such as the making of special assessments on private property. O'Brien v. Wheelock (1899) 95 Fed. 883, 37 C. C. A. 309.

A subordinate federal court is bound to follow a construction placed upon a state statute by the supreme court of the United States in a suit involving the identical question, notwithstanding a contrary decision by the supreme court of the state, rendered later and after the rights in suit affected by such decision had been acquired. Adelbert College of Western Reserve University v. Wabash R. Co. (1909) 171 Fed. 805, 96 C. C. A. 465, 17 Ann. Cas. 1204,

writ of certiorari denied (1909) 30 Sup. Ct. 400, 215 U. S. 598, 54 L. Ed. 343.

Where objections have not previously been raised as to the legality of a tax, the federal court will not delay judgment to await a decision by the state court. Brooks v. Memphis (C. C.) Fed. Cas. No. 1,954.

The court will follow the construction of a state statute as given by the supreme court of the United States, rather than a later construction given by the highest court of the state. Neal v. Green (C. C. 1829) Fed. Cas. No. 10,065. CONTRA, see The Princess Alexandra (D. C. 1875) Fed. Cas. No. 11,430; Leslie v. Urbana (C. C. 1879) Fed. Cas. No. 8,276.

A federal court will follow a state decision as to the validity or construction of a state statute not in conflict with the constitution or laws of the United States, though such decision is contrary to a prior decision of the federal court itself. Nessmith v. Shelden (C. C. 1848) Fed. Cas. No. 10,125.

The circuit court of the United States must follow the decision of the supreme court of the United States declaring a state statute constitutional, rather than a later decision of the supreme court of the state declaring the statute unconstitutional. Foote v. Johnson County (C. C. 1878) Fed. Cas. No. 4,912.

The decision of the supreme court of the United States declaring a state statute valid under the state constitution will control the federal circuit court, as against a later decision by the supreme court of the state to the contrary. Westermann v. Cape Girardeau County (C. C. 1878) Fed. Cas. No. 17,-432.

The federal court will adhere to its prior decision construing a state statute, notwithstanding a subsequently conflicting decision by the state court, where there is nothing to prevent a review of the case by the supreme court. Perrine v. Thompson (C. C. 1879) Fed. Cas. No. 10,997.

A federal court, when determining the rights of parties under a state law, will never, in a doubtful case, adjudge the statute to be in conflict with the state constitution, unless sustained by some distinct adjudication of the highest court of the state. Fish v. Fond du Lac (C. C. 1881) Fed. Cas. No. 4,813a.

The federal courts will not reverse their decisions merely because the state court has in the meantime put a construction on a clause of the state constitution contrary to that of the federal courts in making the decision. King v. Dundee Mortgage & Trust Investment Co. (C. C. 1886) 28 Fed. 33.

Where a question under a statute of a state has been passed on by a federal court in that state in the light of conflicting opinions of the state courts, the federal court will, in a subsequent case involving the same question, where its attention is called for the first time to a decision of the state court of last resort definitely interpreting that statute, reverse its former decision, and follow the ruling of such state court, though that ruling was made before the earlier decision of the federal court. Tomes v. Barney (C. C. 1888) 35 Fed. 112, writ of error dismissed Barney v. Tomes (1890) 11 Sup. Ct. 1016, 140 U. S. 671, 35 L. Ed. 596.

When a suit in a federal court, involving the construction of the statute and constitution of a state, has been set for hearing, the court will not, on motion, postpone the trial to await the decision of the supreme court of the state in a suit pending before it, said to involve the same question, if it is not clear that the point involved will be determined in the latter suit, and it is uncertain when this suit will come on for determination. Nor will the hearing be postponed on the motion of the complainant, a city, though it intends to invoke the aid of the state to test the question involved in a quo warranto proceeding, when doubt exists whether the question can be raised in that way. City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 55 Fed. 569.

Where a federal court decides, on demurrer, that a state statute, the validity of which has never been passed on by the highest court of the state, is in violation of the constitution of such state, and afterwards, but before a final decree is entered in the federal court, the state supreme court decides that such statute is constitutional, the federal court will reverse its former ruling in deference to the decision of the state court. Western Union Tel. Co. v. Poe (C. C. 1894) 64 Fed. 9, decree affirmed Sanford v. Poe (1895) 69 Fed. 546, 16 C. C. A. 305.

Where it has been determined by the federal courts, contrary to the rule of the state courts, that under the statutes of a state a partnership creditor may maintain an action on his claim against the surviving partners without joining the administrator of a deceased partner, limitation runs against such an action brought in a federal court, and cognizable therein, from the time the cause of action accrued, notwithstanding provisions of the state statute which suspend the right of action against the estate of the deceased partner pending administration, and provide that the time of such suspension shall not be counted in computing the period of limitation. Brigham-Hopkins Co. v. Gross (C. C. 1901) 107 Fed. 769.

Act Pa. April 12, 1872 (P. L. 60), entitled "An act to regulate the execution and transfer of notes given for patent rights," will not be held invalid by a federal court, under the provision of the state constitution that "no bill shall be passed containing more than one subject which shall be clearly expressed in its title" because the act in the body thereof includes "other negotiable in-

struments" as well as notes, and provides that its violation shall constitute a misdemeanor, in the absence of any adjudication by the state courts so holding during the 30 years the act has been in force, and in view of the construction placed upon such constitutional provision by the supreme court of the state. Pegram v. American Alkali Co. (C. C. 1903) 122 Fed. 1000, judgment affirmed Brown v. Pegram (1903) 125 Fed. 577, 60 C. C. A. 383.

A federal court will follow the law as established by the supreme court of the United States, that a contract by a city to pay an annual rental to a water company does not create an indebtedness of the city, within the meaning of a provision of the state constitution which would render such an indebtedness illegal, where at the time of the making of the contract in dispute the law of the state had not been settled otherwise by its supreme court, although that court may have subsequently declared such contracts invalid. Mercantile Trust & Deposit Co. of Baltimore v. Columbus Waterworks Co. (C. C. 1903) 130 Fed. 180.

United States district court held bound to determine issues in action brought to enjoin enforcement of alleged unconstitutional state law, instead of declining jurisdiction and leaving the determination of the questions involved to the state courts. Raich v. Truax (D. C. 1915) 219 Fed. 273.

A state court of last resort is not bound by the judgment of the United States supreme court construing a state statute, but is entitled to construe the same according to its own judgment. People v. Linda Vista Irr. Dist. (1900) 61 P. 86, 128 Cal. 477.

The decision of the state supreme court that the statute of Illinois authorizes the administrator of a resident alien to sue for his death for the benefit of nonresident aliens will not be reversed because the federal supreme court determined that, under the statute of a sister state as construed by its courts, there could be no recovery by nonresident alien relatives, for the federal supreme court merely followed the general rule that the construction of a state statute by the highest court of the state must be accepted. Guianios v. De Camp Coal Mining Co. (1909) 89 N. E. 1003, 242 Ill. 278, affirming judgment (1909) 147 Ill. App. 243.

95. Construction of statute of frauds.—Construction which the courts of a state have placed on its statute of frauds is binding. Walker v. Hafer (1909) 170 Fed. 37, 95 C. C. A. 311, 24 L. R. A. (N. S.) 315.

The federal courts are bound by the construction given the Kentucky statute of frauds by the court of appeals of that state. Lowther v. Potter (1915) 221 Fed. 881, 137 C. C. A. 451, affirming decree (D. C. 1912) 197 Fed. 196.

96. Decisions as to enactment of statutes or adoption of constitution.—Whether the legislature of a state has authority under the constitution of the state to pass a statute, and what is the true interpretation of any statute passed by it, and what acts are justified under the statute, are exclusively for the determination of the highest court of the state. Aicardi v. Alabama (1873) 19 Wall. 635, 639, 22 L. Ed. 215.

Decisions of the supreme court of Illinois held (by a majority of the supreme court of the United States) to establish the rule for Illinois that an act of the legislature of that state is not valid unless the legislative journals show that it was passed by a majority of all the members elected in each house of the general assembly; and the rule held obligatory on the national courts, as respects Illinois cases. Town of South Ottawa v. Perkins (1876) 94 U. S. 260, 24 L. Ed. 154.

The decisions of the highest court of a state, to the effect that provisions of the state constitution respecting the passage of a statute are mandatory, must be followed on that question by a federal court, irrespective of the rule adopted by the federal court in respect to federal statutes. Board of Com'rs of Wilkes County v. Coler (1901) 21 Sup. Ct. 458, 180 U. S. 506, 45 L. Ed. 642.

It is the duty of the circuit court, upon collateral attack upon the judgment of an inferior state court, to follow the rule laid down in the state supreme court in so far as it held that it would not look to the journals as evidence as to whether the statute establishing the court was constitutionally passed. Comstock v. Tracey (C. C. 1891) 46 Fed. 162, 169.

The decisions of the supreme court of Nebraska establish the rule that the due authentication and enrollment of a statute afford only prima facie evidence of its passage; that the legislative journals may be examined for the purpose of ascertaining whether a measure was enacted in the mode prescribed by the constitution, and, if the entries therein explicitly and unequivocally contradict the evidence furnished by the enrolled bill, such entries will control. Such rule, relating to the construction of constitutional and statutory provisions of the state, is binding on the federal courts. Chicago, B. & Q. R. Co. v. Smyth (C. C. 1900) 103 Fed. 376.

The fact that the speaker of the house of representatives of the state of Arkansas declared a proposed amendment to the state constitution legally adopted on the canvass of the popular vote of the election at which it was submitted is not conclusive, in the absence of any constitutional, or even statutory, provision so declaring, and it is open to a federal court, equally

with a state court, to consider and determine such question when it incidentally arises in a case properly brought in such court under the laws of the United States, and which cannot be disposed of without the determination of such question. Knight v. Shelton (C. C. 1905) 134 Fed. 423.

The rule established by decision of the courts of New Jersey that an engrossed act of the legislature duly approved, signed, and filed is conclusive evidence of its contents, and cannot be contradicted by any evidence whatever, is one relating to the construction of the state statutes and is binding on the federal courts. U. S. v. Andem (D. C. 1908) 158 Fed. 996.

97. Questions as to organization of state governments.—On the question whether a state government has been lawfully established, the courts of the United States are bound to follow the decisions of the state tribunals. Luther v. Borden (1849) 48 U. S. (7 How.) 1, 12 L. Ed. 581.

98. Questions involving process, remedies, or procedure.—Where the effect of a state decision is not to settle a rule of property, but only to regulate the practice of the courts and determine what shall be a judgment, the supreme court of the United States is not bound by such decision on the ground that the laws upon which they are made are local in character. Amis v. Smith (1842) 41 U. S. (16 Pet.) 303, 10 L. Ed. 973.

Where a suit is removed to a federal court after the state supreme court has passed upon a demurrer filed in the suit, the decision on such demurrer is binding on the federal court. Lookout Mountain R. Co. v. Houston (C. C. 1890) 44 Fed. 449, appeal dismissed Huston v. Lookout Mountain R. Co. (1895) 15 Sup. Ct. 1040, 159 U. S. 256, 40 L. Ed. 143.

Const. S. C. art. 4, § 31, provides that all "processes" shall run in the name of the state of South Carolina. Held, that the courts of South Carolina having decided that a summons is not a "process" within its constitution, and that therefore it need not be in the name of the state, a summons issued in South Carolina by the circuit court of the United States need not be in the name of the United States, in order to conform to the procedure of that state. Chamberlain v. Mensing (C. C. 1891) 47 Fed. 435.

The decisions of a state court as to the sufficiency of an appeal in a special proceeding are controlling upon the federal courts. New York, N. H. & H. R. Co. v. Cockcroft (C. C. 1892) 49 Fed. 3.

The circuit court for the district of Indiana, having adopted the state statutes relating to service of process in actions at law, is bound by the construction placed on them by the state supreme court to the effect that the sheriff's return, showing that he has made service as prescribed by statute, is conclusive as against collateral attack by a resident of the state, both as to facts in the personal knowledge of the officer and facts which he must ascertain from others. Joseph v. New Albany Steam Forge & Rolling Mill Co. (C. C. 1892) 53 Fed. 180.

The construction of the state court in allowing a counsel fee to plaintiff in partition, under Act Pa. April 27, 1864, providing for "costs in cases of partition," will be followed by the federal courts. Willard v. Serpell (C. C. 1894) 62 Fed. 625.

The question whether an agreement to arbitrate differences arising under a contract is enforceable is one of remedy, determined by the law of the forum, upon which a federal court is not bound by state decisions. United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C. 1915) 222 Fed. 1006.

See, also, notes under § 1537, ante.

99. Exception of decisions involving federal questions—Questions involving federal government.—In an action against a grantee of the United States, but to which the United States is not a party, the court of civil appeals is not bound to follow the decision of the United States supreme court, reversing the state supreme court, that the statute of limitations runs in favor of the federal government. City of El Paso v. Ft. Dearborn Nat. Bank (Tex. Civ. App. 1903) 71 S. W. 799, judgment reversed (1903) 74 S. W. 21, 96 Tex. 496.

Stare decisis, based on the decisions of the state courts on federal questions, must yield to the determination of such questions by the United States supreme court, which is vested with power by writ of error to compel conformance of the decisions of the state court with the jurisprudence settled by the federal tribunal, under Const. art. 3, and R. S. § 709, ante, § 1214. State v. Ardoin (1899) 24 So. 802, 51 La. Ann. 169, 72 Am. St. Rep. 454.

100. —— Questions involving constitution or treaties.—Where a question involved in the construction of state laws particularly affects those remedies of creditors which are protected by the constitution, the supreme court will exercise its own judgment on the meaning of the laws, and, if it deems the state court's decisions wrong, will not follow them. U. S. ex rel. Butz v. Muscatine (1869) 8 Wall. 575, 582, 19 L. Ed. 490.

On writ of error to review the judgment of the highest court of a state on the ground that the judgment was against a right claimed under the constitution of the United States, the supreme court is not bound by the state court's construction of a statute of the

state, when the question is whether the statute provided for the notice required to constitute due process of law. Scott v. McNeal (1894) 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

The decision of the highest court of the state sustaining the constitutionality of Act Ky. May 24, 1892 (Laws 1891-93, c. 40), § 1, requiring separate coaches for white and colored passengers, on the ground that the statute applies only to transportation between points in that state, or, if not, that the regulation of such transportation is severable from that as to interstate business, constitutes a determination of the local law, which is binding on the supreme court of the United States. Chesapeake & O. Ry. Co. v. Commonwealth (1900) 21 S. Ct. 101, 179 U. S. 388, 45 L. Ed. 244, affirming judgment (1899) 51 S. W. 160, 21 Ky. Law Rep. 228.

The interpretation of a state statute against usury by a state court as applicable to a loan made by a foreign building and loan association to a resident of the state through a local agent, and as expressing the public policy of the state, which the parties could not, by their contract, contravene, is binding on the supreme court of the United States on a writ of error to review a judgment of the state court which is claimed to have denied full faith and credit to the public acts and records of the state where the association is domiciled. National Mut. Building & Loan Ass'n v. Braham (1904) 24 Sup. Ct. 532, 193 U. S. 635, 48 L. Ed. 823, affirming judgment (1902) 31 South. 840, 80 Miss. 407, 57 L. R. A. 793.

The construction of a state statute by the state court is to be accepted by the federal court in determining whether the statute violates the federal constitution. W. W. Cargill Co. v. State of Minnesota (1901) 21 S. Ct. 423, 180 U. S. 452, 45 L. Ed. 619, affirming judgment State v. W. W. Cargill Co. (1899) 79 N. W. 962, 77 Minn. 223; Smiley v. State of Kansas (1905) 25 Sup. Ct. 289, 196 U. S. 447, 49 L. Ed. 546, affirming judgment State v. Smiley (1902) 69 Pac. 199, 65 Kan. 240, 67 L. R. A. 903.

The construction given by the state courts to Act Tex. May 25, 1899, as removing the discriminatory features of prior anti-trust laws, is conclusive on the federal supreme court in determining, on writ of error to the state court, whether such statute denies the equal protection of the laws. National Cotton Oil Co. v. State of Texas (1905) 25 S. Ct. 379, 197 U. S. 115, 49 L. Ed. 689, affirming judgment (Civ. App. 1903) 72 S. W. 615; Southern Cotton Oil Co. v. Same (1905) 25 S. Ct. 383, 197 U. S. 134, 49 L. Ed. 696, affirming judgment (Civ. App. 1903) 72 S. W. 1135.

A decision of the supreme court of North Carolina, that the provision of Pub. Laws N. C. 1903, c. 247, imposing a tax on "every meat-packing house doing business in this state," does not apply to the interstate business of a foreign corporation, but only to its local business, such as the sale within the state of products already stored there, on orders received after the products are thus stored, is conclusive on the federal supreme court in determining, on writ of error to the state court, whether the tax is an interference with interstate commerce. Armour Packing Co. v. Lacy (1906) 26 S. Ct. 232, 200 U. S. 226, 50 L. Ed. 451, affirming judgment Lacy v. Armour Packing Co. (1904) 47 S. E. 53, 134 N. C. 567.

The construction placed by the highest court of the state upon Laws N. Y. 1908, c. 429, enacted to safeguard natural mineral springs against waste and impairment, must be accepted by the federal courts in determining the validity of such statute under the federal constitution. Lindsley v. Natural Carbonic Gas Co. (1911) 31 Sup. Ct. 337, 338, 220 U. S. 61, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

Whether a nonresident alien may recover for wrongful death of an alien resident in Pennsylvania depends on the statutes of that state, aside from the Italian treaty, as to which the federal courts sitting in Pennsylvania are bound by the decisions of the state supreme court. Fulco v. Schuylkill Stone Co. (1909) 169 Fed. 98, 94 C. C. A. 498, affirming judgment (C. C. 1908) 163 Fed. 124.

In determining all questions of rights under the constitution and laws of the United States, federal courts are not controlled by the decision of the state courts. First Nat. Bank of Shenandoah v. Liewer (1911) 187 Fed. 16, 109 C. C. A. 70.

While the construction of a state statute relating to court proceedings by the highest court of the state is binding on a federal court, the question whether such statute so construed violates the due process clause of the constitution is one on which the federal court must exercise its independent judgment. Audas v. Highland Land & Building Co. of Dayton, Ky. (1913) 205 Fed. 862, 125 C. C. A. 62.

A decision of the highest court of a state, holding an act of its legislature unconstitutional, is binding on the federal court only where it is based upon special provisions of the state constitution. Talcott v. Pine Grove (C. C. 1872) Fed. Cas. No. 13,735.

The decision of the state court that a tax paid under a void law cannot be recovered back where there was a natural obligation to pay it is not binding on the federal court, where the law conflicts with the federal constitution. John Kyle Steamboat Co. v. New Or-

leans (C. C. 1876) Fed. Cas. No. 7,-354.

In construing or determining the validity of a state statute involving a federal question, the national courts are not bound by the decision of the state court. Dundee Mortgage Trust Investment Co. v. School Dist. No. 1 (C. C. 1884) 19 Fed. 359.

The fact that a judgment in the state court is res judicata of the questions litigated in an action removed to the federal court does not deprive such court of jurisdiction where a federal question is involved. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1893) 62 Fed. 945.

If the controversy in a federal court involve a federal question—and all the more if it involve both a contract right and also a federal question—then that court must decide for itself, treating a state decision with due consideration, but not as foreclosing independent judgment. Central Trust Co. of New York v. Citizens' St. Ry. Co. of Indianapolis (C. C. 1897) 82 Fed. 1, appeal dismissed City of Indianapolis v. Central Trust Co. of New York (1897) 83 Fed. 529, 27 C. C. A. 580.

The decision of a supreme court of a state upon the question whether a law imposing a license is enacted under the police power or taxing power of the state is not conclusive upon a federal court when the validity of such law is drawn in question on the ground that it is in conflict with the constitution, laws, or treaties of the United States. Pabst Brewing Co. v. City of Terre Haute (C. C. 1899) 98 Fed. 330.

A decision of the highest court of a state sustaining the constitutionality of a state statute, while binding on the federal courts so far as it affects the validity of the statute under the state constitution, is not binding on the question whether the statute is in violation of the federal constitution. Morenci Copper Co. v. Freer (C. C. 1903) 127 Fed. 199.

It does not appear that the New York court of appeals have decided that so much of Act N. Y. April 24, 1862, as gives a material man a lien upon a vessel for supplies furnished in her home port, is void because in conflict with the grant of admiralty jurisdiction to the United States; and, if it did, this court is not bound to follow it, because the question as to its validity arises under the constitution of the United States, and not the state, and is therefore a federal one. The Canada (D. C. 1881) 7 Fed. 730.

The question of what is interstate commerce is a federal question, and a decision of a state supreme court does not control. In re Monongahela Distillery Co. (D. C. 1910) 186 Fed. 220.

Where the constitutionality of a state statute under the constitution of the United States has not been passed upon by the highest court of the state, it is the right and duty of a federal court, whose jurisdiction is properly invoked, to determine the question in the exercise of its independent judgment. Van Dyke v. Geary (D. C. 1914) 218 Fed. 111.

In cases not arising upon the construction of the constitution and laws of the United States, the decisions of the supreme court of the United States are not authority binding on a state court. State courts will be bound by state decisions. Towle v. Forney (1856) 14 N. Y. (4 Kern.) 423; Lebanon Bank v. Mangan (1857) 28 Pa. St. (4 Casey) 452.

Where a state law, as to a certain class of cases, has once been held by the supreme court of the United States to be in contravention of the constitution of the United States or ex post facto, a state court will, whenever thereafter a case of such class comes before it, take notice of the decision of the federal court, and of the question respecting which the decision was made. State v. Bates (1900) 61 P. 905, 22 Utah, 65, 83 Am. St. Rep. 768.

101. —— Impairing obligation of contracts in general.—The supreme court will respect the decisions of the state courts, and will regard them as conclusive in all cases on the construction of their own constitution and laws, but it will not give them a retroactive effect and allow them to render invalid contracts entered into with citizens of other states which in the judgment of the supreme court were lawfully made. Rowan v. Runnels (1847) 5 How. 134, 139, 12 L. Ed. 85; Truly v. Wanzer (1847) 5 How. 141, 142, 12 L. Ed. 88.

The federal courts will not be bound by a decision of any state court that the state act in question is not a contract within the purview of the United States constitution. To do so would be substantially to give up its jurisdiction under the judiciary act. Jefferson Branch Bank v. Skelly (1861) 66 U. S. (1 Black) 436, 17 L. Ed. 173.

The supreme court of the United States will not follow decisions of the state courts which are deemed wrong on questions involving the construction of state statutes practically affecting those remedies of creditors which are protected by the constitutional provision in relation to the obligation of contracts. Butz v. City of Muscatine (1869) 75 U. S. (8 Wall.) 575, 19 L. Ed. 490.

A contract having been entered into, valid at the time by the laws of the state, no decision of the courts of the state subsequently made can impair the obligation. Filor v. U. S. (1869) 9 Wall. 45, 50, 19 L. Ed. 549.

The decision of a state court that its statutes did not authorize an inferior court to grant an exclusive privilege of maintaining bridges, so that the grant

of authority to maintain another bridge within the limits of the original grant, did not impair the obligation of the contract, is not conclusive on the supreme court. Wright v. Nagle (1879) 101 U. S. 791, 794, 25 L. Ed. 921.

In deciding whether a judgment of the supreme court of a state gives effect to a law of the state, which, in violation of the constitution of the United States, impairs the obligation of a contract, this court will decide, independently of the decisions of the state courts, whether there is a contract and whether its obligation is impaired; and, if the decision of the question as to the existence of the alleged contract requires a construction of state constitutions and laws, the court will not necessarily be governed by the previous decisions of the state courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Louisville & N. R. Co. v. Palmes (1883) 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922.

Whether or not a state statute creates a valid contract is a question upon which the supreme court is not bound by the decision of the supreme court of the state, in a suit in which such contract is claimed, and the question of the impairment of its obligation by subsequent legislation is involved. McCullough v. Commonwealth of Virginia (1898) 19 Sup. Ct. 134, 172 U. S. 102, 43 L. Ed. 382, reversing judgment (1894) 19 S. E. 114, 90 Va. 597.

In determining whether a contract exists between a corporation and a state protected from impairments by the United States constitution, the United States supreme court forms an independent judgment in each case, unaffected by the decision of the state courts in other like cases. Citizens' Sav. Bank v. City of Owensboro (1899) 19 Sup. Ct. 530, 173 U. S. 636, 43 L Ed. 840.

The rule that, in considering whether a state law impairs the obligation of a contract, state decisions construing its laws in determining the existence of the contract, etc., are not binding on the federal courts, does not apply when a prior state judgment is set up as res judicata. Stone v. Bank of Kentucky (1899) 19 S. Ct. 881, 174 U. S. 408, 799, 43 L. Ed. 1187, affirming decree Bank of Kentucky v. Stone (C. C. 1898) 88 Fed. 383.

The federal courts, in determining contract rights as affected by a state constitution, will enforce the contract in accordance with the constitution of the state as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made. Loeb v. Trustees of Columbia Tp. (1900) 21 Sup. Ct. 174, 179 U. S. 472, 45 L. Ed. 280, reversing judgment (C. C. 1899) 91 Fed. 37.

Where a contract is alleged to have been impaired by subsequent legislation, the United States supreme court will put its own construction upon the contract though it may differ from that of the supreme court of the state. Yazoo & M. V. R. Co. v. Adams (1901) 21 Sup. Ct. 256, 257, 180 U. S. 41, 45 L. Ed. 415.

Although it is the duty of the United States supreme court to exercise an independent judgment as to the nature and scope of a contract, when its jurisdiction is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, nevertheless, when the contract alleged to have been impaired arises from a state statute, the federal court, for the sake of harmony and to avoid confusion, will lean towards an agreement of views with the state courts, if the question seems balanced with doubt. Board of Liquidation of City Debt v. State of Louisiana (1901) 21 Sup. Ct. 263, 179 U. S. 622, 45 L. Ed. 347, affirming judgment State ex rel. Wilder v. Board of Liquidation of City Debt (1899) 26 South. 679, 51 La. Ann. 1849.

When the provision against legislation impairing the obligation of a contract is invoked, the federal courts will decide for themselves the fact of contract, including not only its formal execution, but its legal basis in law, and will therefore construe for themselves the statutes of the state upon which it is claimed to rest, though they will be disposed to incline to an agreement with the state courts. Freeport Water Co. v. Freeport (1901) 21 Sup. Ct. 493, 496, 180 U. S. 587, 45 L. Ed. 679.

Where legislation is claimed to be repugnant to the constitution of the United States because it impairs the obligation of a contract, the power to determine whether there be such impairment imposes on the supreme court of the United States the duty when necessary to ascertain whether there was a contract and its import, even though the state court has decided that there was no impairment either because no contract existed or because from an interpretation of its provisions, it was found that the obligations which it is asserted were impaired never arose. St. Paul Gaslight Co. v. St. Paul (1901) 21 Sup. Ct. 575, 576, 181 U. S. 142, 45 L. Ed. 788.

Although the supreme court of the United States on writ of error to a state court to determine whether certain legislation impairs the obligation of a contract is not bound by the construction placed upon the state statutes by the state courts, nevertheless it will follow the construction adopted by the highest court of the state, where the true construction of the particular stat-

ute involved is not free from doubt, and it appears best to follow such decisions. Waggoner v. Flack (1903) 23 Sup. Ct. 345, 347, 188 U. S. 595, 47 L. Ed. 609.

An independent judgment as to the constitutionality, under a state constitution. of a mechanic's lien law, may be exercised by a federal court, notwithstanding decisions of the state courts, rendered before the commencement of the suit in the federal court, but not until after the rights of the parties had been fixed by their contracts, declaring such law to be repugnant to the state constitution. Great Southern Fire Proof Hotel Co. v. Jones (1904) 24 Sup. Ct. 576, 193 U. S. 532, 48 L. Ed. 778, affirming decree Great Southern Fire Proof Hotel Co. v. American Blower Co. (1902) 116 Fed. 793, 54 C. C. A. 165.

The construction of a state statute by the highest court of the state as a legislative change of the grade of a street for its full width is conclusive on the supreme court of the United States in determining, on writ of error to the state court, whether such statute impairs the obligation of any contract right of abutting owners to appropriate the street or an extension thereof for wharfage purposes. Mead v. City of Portland (1906) 26 Sup. Ct. 171, 200 U. S. 148, 50 L. Ed. 413, affirming decree (1904) 76 Pac. 347, 45 Or. 1.

The decision of the highest state court that a state statute which is claimed to create a contract is valid will be followed by the supreme court of the United States in determining whether any contract obligations have been impaired by subsequent legislation. Powers v. Detroit, G. H. & M. Ry. Co. (1906) 26 Sup. Ct. 556, 201 U. S. 543, 50 L. Ed. 860, affirming decree Detroit, G. H. & M. Ry. Co. v. Powers (C. C. 1905) 138 Fed. 264.

A decision of the highest state court that the grantor in a deed conveying the coal under a tract of land, with the right to enter upon and under said land, and to mine, excavate, and remove all of the coal, cannot maintain an action for damages in tort, founded upon the failure of the grantee or his successors to leave sufficient support to the overlying or surface land, is not binding upon the federal courts in a similar action based on almost identical facts and circumstances, the granting clause of the two deeds being in fact identical, where such decision was handed down after the deed upon which the defendant relies was executed, and after the injury complained of was sustained, and the action begun, and where the point decided had not been previously adjudged by the state supreme court. Kuhn v. Fairmont Coal Co. (1910) 30 Sup. Ct. 140, 215 U. S. 349, 54 L. Ed. 228.

A judgment in a federal court, in favor of a garnishee, was amended, on his application and in supposed compliance with the state statute, so as to award him his personal expenses and attorney's fees. Afterwards the state supreme court, in a case pending before it, decided that the statute did not apply in such cases. Held, that this decision was binding on the federal appellate court, and required a reversal of the amending order, notwithstanding that the amendment was applied for in good faith by the garnishee. Tefft v. Stern (1896) 74 Fed. 755, 21 C. C. A. 73, reaffirming (1896) 73 Fed. 591, 21 C. C. A. 67.

Where a contract is made before there has been any judicial construction of a state statute on which the contract depends by the highest state court, a federal court obtaining jurisdiction of a question touching such a contract, while leaning to an agreement with the state court, will not necessarily follow opinions of the state court construing such statute, if they were rendered after the rights involved in the controversy originated. Louisville Trust Co. v. City of Cincinnati (1896) 76 Fed. 296, 22 C. C. A. 334, certiorari denied (1896) 17 Sup. Ct. 995, 164 U. S. 707, 41 L. Ed. 1183.

Where contracts or transactions have been entered into, and rights have accrued thereunder, before state laws applicable to them have been construed by the state courts, the federal courts will place their own interpretation on such laws, though the state courts have since adopted a different construction. Bartholomew v. City of Austin (1898) 85 Fed. 359, 29 C. C. A. 568.

Decisions of state courts as to their statutes, which affect the validity of contracts between citizens of different states which were made, or under which rights were acquired, before there was a judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States. Speer v. Board of Com'rs of Kearney County (1898) 88 Fed. 749, 32 C. C. A. 101.

While the federal courts, in causes within their jurisdiction involving rights arising under state statutes which had not at the time received an authoritative construction by the state courts, or the validity of which had not been adjudicated, are not bound to follow a subsequent state decision as to such construction or validity, yet, in exercising its independent judgment thereon, a federal court should give effect to rules of construction which had previously been established by the highest court of the state, and should also lean towards an agreement of views with the state court, and not act upon a different view, unless compelled to do so to prevent an absolute denial of justice. Such considerations have pecul-

iar weight when the question to be determined relates to the jurisdiction or power, under the constitution of the state, of tribunals or bodies created by legislative enactment, and charged with the performance of public duties, such as the making of special assessments on private property. O'Brien v. Wheelock (1899) 95 Fed. 883, 37 C. C. A. 309, affirmed (1902) 22 S. Ct. 354, 184 U. S. 450, 46 L. Ed. 636.

A decision of the supreme court of a state declaring a state statute invalid is not binding upon a court of the United States in a suit involving rights of citizens of another state under obligations created or contracts made before such decision was rendered, and which are dependent upon such statute for their validity. Great Southern Fireproof Hotel Co. v. Jones (1902) 116 Fed. 793, 54 C. C. A. 165, decree affirmed (1904) 24 Sup. Ct. 576, 193 U. S. 532, 48 L. Ed. 778.

Where a suit involves rights under a contract affected by a state statute, and entered into before such statute had been construed by the state courts, a federal court is not bound by a subsequent construction by the state courts, but will exercise an independent judgment. Southern Pine Co. v. Hall (1900) 105 Fed. 84, 44 C. C. A. 363, writ of certiorari denied (1901) 21 Sup. Ct. 921, 180 U. S. 639, 45 L. Ed. 711; Wicomico County Com'rs v. Bancroft (1905) 135 Fed. 977, 70 C. C. A. 287, decree reversed (1906) 27 Sup. Ct. 21, 203 U. S. 112, 51 L. Ed. 112, and affirming judgment Bancroft v. Wicomico County Com'rs (C. C. 1903) 121 Fed. 874.

Decisions of state courts, which so construe their statutes as to impair rights previously acquired through contracts between citizens of different states under statutes and constitutions which warranted them when they were vested, are not obligatory on the courts of the United States. Westinghouse Air-Brake Co. v. Kansas City Southern Ry. Co. (1905) 137 Fed. 26, 71 C. C. A. 1, reversing decrees State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1904) 128 Fed. 129, and (C. C. 1904) 129 Fed. 455.

Where the change of opinion in the state court concerns the interpretation of a state statute and results in an avoidance of contracts already entered into on the faith of the earlier decisions of the same court, the federal court in construing the state statute deems itself bound to follow the earlier state decisions so far as those contracts are concerned, but as to contracts made since the change of decision in the state court the federal court follows the later decision. Percy Summer Club v. Astle (1908) 163 Fed. 1, 90 C. C. A. 527, rehearing denied (1908) 166 Fed. 1020, 92 C. C. A. 667.

The rule that federal courts will accept and follow a construction of a state statute by the highest court of the state is not obligatory, where such construction was made after rights involved had accrued, although they will lean toward an agreement with the state court. Adelbert College of Western Reserve University v. Wabash R. Co. (1909) 171 Fed. 805, 96 C. C. A. 465, 17 Ann. Cas. 1204, writ of certiorari denied (1909) 30 Sup. Ct. 400, 215 U. S. 598, 54 L. Ed. 343.

The federal courts are bound to follow the latest decision of the state court, though it renders invalid a contract valid under the decisions of state court when made. Mitchell v. Lippincott (C. C. 1874) Fed. Cas. No. 9,665.

Ordinarily, the federal courts follow the ruling of the state courts in their interpretation of the constitutions and statutes of their respective states; but, where property has been acquired and investments made under statutory contracts, generally recognized and believed to be constitutional, in the absence of adjudications declaring them invalid, the federal courts are not concluded by the construction which the state courts may give to such statutes subsequent to the acquisition of such property rights. Louisville & N. R. Co. v. Gaines (C. C. 1880) 3 Fed. 266.

The opinions of the state courts, construing the effect of section 10, art. 1, of the federal constitution, upon state laws and constitutional articles, prohibiting the impairment of the obligation of contracts, cannot determine the jurisdiction of the federal courts. Sawyer v. Parish of Concordia (C. C. 1882) 12 Fed. 754.

Whenever a construction has been placed upon a state statute or constitution by the state supreme court, that determines for both state and federal courts all questions and rights arising after such construction; but, when the rights arose prior to such construction, it is the duty of federal courts to examine and determine the question. Rollins v. Lake (C. C. 1888) 34 Fed. 845, reversed (1889) 9 Sup. Ct. 651, 130 U. S. 662, 32 L. Ed. 1060.

Federal courts will exercise an independent judgment in determining the validity of a state statute under the state constitution in cases involving rights which arose under the statute prior to any decision of the state court. Jones v. Great Southern Fireproof Hotel Co. (C. C. 1897) 79 Fed. 477, decree reversed Sosman v. Same (1898) 86 Fed. 370, 30 C. C. A. 108, which is reversed Great Southern Fireproof Hotel Co. v. Jones (1900) 20 Sup. Ct. 690, 177 U. S. 449, 44 L. Ed. 482.

Where the controversy concerns a contract, and the meaning of the contract depends on the construction of a state statute or a provision of a state constitution, a decision on the meaning of the statute or the constitutional

provision by the highest court of the state, made after the contract was entered into and rights had vested thereunder, is not conclusive upon a federal court. Central Trust Co. v. Citizens' St. Ry. Co. of Indianapolis (C. C. 1897) 82 Fed. 1, appeal dismissed City of Indianapolis v. Central Trust Co. of N. Y. (1897) 83 Fed. 529, 27 C. C. A. 580.

Federal courts are not bound by the construction of a state statute by the courts of the state, as applied to contracts made before such construction was adopted. Cæsar v. Capell (C. C. 1897) 83 Fed. 403.

Where a suit involves rights under a contract affected by a state statute, and entered into before such statute had been construed by the state courts, a federal court is not bound by a subsequent construction by the state courts, but will exercise an independent judgment. Vermont Loan & Trust Co. v. Dygert (C. C. 1898) 89 Fed. 123.

A federal court is not bound to follow the decision of the supreme court of a state construing a state statute relating to the liability of stockholders, where the transaction before it, upon which liability is asserted, occurred prior to such construction, and especially where the correctness of the decision was subsequently doubted by the court which made it, and followed by a divided court only on the principle of stare decisis. Brunswick Terminal Co. v. National Bank of Baltimore (C. C. 1901) 112 Fed. 812, affirmed (1904) 24 Sup. Ct. 314, 192 U. S. 386, 48 L. Ed. 491.

Where rights involved in a suit in a federal court were acquired on the faith of a constitutional or statutory provision of a state, the court is not bound by a construction subsequently placed on such provision by the highest court of the state, but is required to exercise its own independent judgment as to such construction. Farmers' Loan & Trust Co. v. City of Sioux Falls (C. C. 1904) 131 Fed. 890, decree reversed City of Sioux Falls v. Farmers' Loan & Trust Co. (1905) 136 Fed. 721, 69 C. C. A. 373.

The decision of the highest court of the state as to the validity and effect of state action claimed to make a contract, the obligation of which is attempted to be impaired by subsequent state action, raises a federal question, and is not binding on federal courts, but it is the duty of the latter when the question is properly brought before them to determine it by the exercise of independent judgment. East Tennessee Telephone Co. v. Board of Councilmen of City of Frankfort, Ky. (C. C. 1911) 190 Fed. 346.

Where state legislation is assailed in the federal courts as impairing the obligation of contract, the determination by the state courts that there is no contractual right to be impaired is not conclusive on the federal courts, but they will determine for themselves whether contractual rights exist, and whether such rights, if they exist, are impaired by the legislation attacked. Birmingham Waterworks Co. v. Birmingham (D. C. 1913) 211 Fed. 497.

Where state legislation is assailed as violative of the contract clause of the federal constitution and the state courts have upheld the existence of contract rights, such decisions will be followed in the federal courts. Id.

A federal court is not bound by the decision of the highest court of a state as to the construction of a particular deed, where the law of the state on the question involved was not settled at the time the deed was executed and the rights of the parties accrued, but under the rule of comity it will lean toward a concurrence with the state decision. Steele v. Highland Park Mfg. Co. (D. C. 1914) 212 Fed. 972.

102. —— Impairing obligation of municipal contracts.—A decision of the supreme court of a state construing a state statute authorizing the issuance of municipal bonds, rendered after one became the owner of bonds, is not conclusive on the federal supreme court, unless it is sound. Barnum v. Okolona (1893) 13 Sup. Ct. 638, 640, 148 U. S. 393, 37 L. Ed. 495.

Federal courts, in determining the validity, in the hands of bona fide purchasers, of county bonds issued in aid of railroad construction under the authority of Code N. C. §§ 1996–1999, are not bound by the construction given such statute by a decision of the highest state court subsequent to such purchase, but will exercise an independent judgment as to its meaning. Board of Com'rs of Stanly County v. W. N. Coler & Co. (1903) 23 Sup. Ct. 811, 190 U. S. 437, 47 L. Ed. 1126, affirming decree Board of Com'rs of Stanly County v. Coler (1902) 113 Fed. 705, 51 C. C. A. 379, reversing (1899) 96 Fed. 284, 37 C. C. A. 484.

The question as to what effect the invalidity of a legislative act creating a township has upon the validity of warrants issued for indebtedness incurred by such township, in the hands of purchasers who are citizens of another state, is one upon which a federal court is not concluded by a state decision rendered after the warrants were purchased. Speer v. Board of Com'rs of Kearney County (1898) 88 Fed. 749, 32 C. C. A. 101.

A decision of the supreme court of a state holding invalid a township election authorizing the issuance of bonds, which was not made until after the bonds had been issued and sold, is not conclusive on a federal court in an action to recover on such bonds. Ron-

dot v. Rogers Tp. (1900) 99 Fed. 202, 39 C. C. A. 462.

The decision of the supreme court of a state, declaring unconstitutional a statute authorizing the issuance of municipal bonds, is not conclusive on a court of the United States in a case involving the rights of a bona fide purchaser of such bonds, whose rights accrued prior to such decision, and, where the supreme court of the United States has determined the same act to be constitutional and valid, its decision governs in such case. Pickens Tp. v. Post (C. C. A. 1900) 99 Fed. 659.

While the federal courts uniformly adopt the construction of the statutes of the state as given by its highest judicial tribunal, yet a decision of the supreme court of Nebraska holding that a precinct of a county had no legal existence, and that therefore bonds voted by it and issued by the county in which it was situated were invalid, was not obligatory on the federal court; and the validity of the creation of such precinct would be reviewed by the federal courts at the instance of an innocent purchaser of such bonds, who had acquired title thereto 10 years before the decision of the state court. Clapp v. Otoe County, Neb. (1900) 104 Fed. 473, 45 C. C. A. 579, writ of certiorari denied Otoe County v. Clapp (1901) 21 Sup. Ct. 920, 180 U. S. 638, 45 L. Ed. 710.

County bonds, which were authorized and valid when issued under the law of the state as declared by its supreme court in previous decisions, will not be declared invalid in the hands of bona fide holders by a federal court because the state court has since reversed its former rulings. Board of Com'rs of Henderson County v. Travelers' Ins. Co. (1904) 128 Fed. 817, 63 C. C. A. 467.

Act Ohio March 21, 1894 (91 Ohio Laws, p. 543), which authorized counties of a certain population, on petition of a majority of the landowners in any election precinct, to levy an extra tax thereon, and an issuance of bonds in anticipation of such tax, for improvement of the public roads, was not a law of a general nature within the meaning of Const. Ohio, art. 2, § 26, providing that "all laws of a general nature shall have a uniform operation throughout the state," as such provision was judicially construed by the supreme court of the state when such act was passed, and bonds issued thereunder are valid and enforceable, although, subsequent to their issuance, a construction was placed upon the constitutional provision which would render the act invalid. Rees v. Olmsted (1905) 135 Fed. 296, 68 C. C. A. 50.

In an action on town bonds by a bona fide purchaser for value, decisions of state courts of appeal holding such bonds invalid, rendered subsequent to the issue and sale of the bonds in controversy to which plaintiff was not a party, were inoperative to govern plaintiff's rights. Northwestern Sav. Bank v. Town of Centreville Station (1906) 143 Fed. 81, 74 C. C. A. 275.

Where a railroad company to which county aid bonds were issued acquired the same before any decision of the state court, construing a constitutional provision, alleged to have been violated by the statute under which the bonds were issued, and was therefore entitled as a bona fide purchaser of the bonds to have a federal court, in an action on coupons taken therefrom put its own construction on such constitutional provision, independent of subsequent opinions rendered by the supreme court of the state, the railroad's assignees of the bonds and coupons were entitled to the same rights, though they may have purchased after the rendition of such state decisions. Board of Com'rs of Onslow County v. Tollman (1906) 145 Fed. 753, 76 C. C. A. 317, affirming decree Tolman v. Board of Com'rs of Onslow County (C. C. 1905) 140 Fed. 89.

Where certain township railroad aid bonds were issued under a state statute, and passed into the hands of nonresident holders for value at a time when the highest court of the state had rendered no decision intimating that a provision of the constitution of the state would be subsequently so construed as to invalidate the bond act, the federal courts sitting within such state were not bound by such a decision holding that the bond act was illegally passed, the effect of which was to impair the obligation of the contract existing between the township and the bondholders. Board of Com'rs of Hertford County, N. C., v. Tome (1907) 153 Fed. 81, 82 C. C. A. 215.

Where there had been no settled construction of the constitution as to supervisors' authority to borrow money when a loan was made, the federal courts would follow a decision of the state supreme court, rendered subsequent to the loan. Eaton v. Shiawassee County (1914) 218 Fed. 588, 134 C. C. A. 316.

The decision of the highest court of a state, adjudging municipal bonds issued under a state statute to be invalid in the hands of bona fide purchasers, is not binding upon the circuit court of the United States, if rendered after the rights of such purchasers were acquired. McCall v. Town of Hancock (C. C. 1882) 10 Fed. 8.

The rule that a federal court is bound by the decision of the court of last resort of a state holding a state statute void because not constitutionally enacted does not apply as to a statute authorizing the issuance of municipal bonds, in an action by a holder of such bonds who purchased before the decision was made, nor when at the date of such purchase the decisions of the state court sustained the validity of the

bonds. Coler v. Board of Com'rs of Stanly County (C. C. 1898) 89 Fed. 257.

Where the decisions of the court of last resort of a state, up to the time of the issuance and sale of the bonds of a county, all tended to establish the doctrine that a statute which had received the signatures of the presiding officers of the two houses of the legislature could not be collaterally attacked for invalidity in its enactment, a subsequent decision holding the act under which the bonds were issued void for such reason does not conclude a federal court in a suit involving the rights of a purchaser of the bonds. Id.

While under the constitution of Ohio as now interpreted by its supreme court an act of the legislature authorizing the trustees of a particular township to improve a designated road is invalid, yet, that court having for many years sustained the validity of such legislation, a federal court will not give a retroactive effect to its later decisions by holding invalid bonds issued during such time by a township under such an act and which were purchased and are owned by a citizen of another state. Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio (C. C. 1899) 91 Fed. 37, reversed (1900) 21 Sup. Ct. 174, 179 U. S. 472, 45 L. Ed. 280.

A decision of the highest court of a state adjudging void a contract made by a city, as beyond its constitutional powers, is not binding on a federal court in a suit involving the rights of a citizen of another state under such contract, unless the rule applied in such decision had been so long and firmly established as to have become a rule of property in the state at the time the contract was made. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. City of Dawson (C. C. 1903) 130 Fed. 152.

103. —— Questions involving federal laws.—Upon a question of priority between a mortgage of a vessel and a lien given by a state statute for supplies and repairs in her home port, the determination of which depends upon principles of general jurisprudence and the construction of an act of congress, and which arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution, the supreme court is not controlled by the decisions of the highest courts of the state or of the circuit or district courts of the United States. The J. E. Rumbell (1893) 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

Decisions by state courts in cases involving railroad corporations created by the state holding that the construction of railroads does not constitute a public purpose, such as to authorize municipal donations in aid thereof under the state constitution, are not binding upon the federal courts in a case involving a railroad company created by the laws of the United States and subjected by its charter to important public duties, especially when the state legislature has declared that within the state it should be vested with all the rights, powers, privileges, and immunities given by the acts of congress. Roberts v. Northern Pacific R. Co. (1895) 15 Sup. Ct. 756, 761, 158 U. S. 1, 39 L. Ed. 873.

Decisions of the courts of Maryland rendered since the cession of the District of Columbia to the United States, giving a construction to state statutes different from that prevailing at that time, cannot control their construction by courts of the United States as affecting property within the District, over which they were continued in force by congress. Morris v. U. S. (1899) 19 Sup. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

The construction put by the Kentucky court of appeals upon the provisions of Const. Ky. § 218, by which a different effect is given to it than to similar language in the interstate commerce law, is binding upon the supreme court of the United States in a case governed by the state constitution. Louisville & N. R. Co. v. Commonwealth of Kentucky (1902) 22 Sup. Ct. 95, 183 U. S. 503, 46 L. Ed. 298, affirming judgment (1899) 51 S. W. 164, 1012, 106 Ky. 633, 21 Ky. Law Rep. 232, 90 Am. St. Rep. 236.

The determination by a state court that the property covered by a mortgage of all the property and franchises of a railway company remains liable, after a sale under a federal court decree of foreclosure, for the debts thereafter accruing against the mortgagor, because of the purchaser's failure to organize a domestic corporation, is not conclusive on the federal supreme court in determining the rights secured by the purchaser under such decree. Julian v. Central Trust Co. (1904) 24 Sup. Ct. 399, 193 U. S. 93, 48 L. Ed. 629, affirming judgment (1902) 115 Fed. 956, 53 C. C. A. 438.

Whether and to what extent a chattel mortgage covering after-acquired property is valid is a local question on which the decisions of the state courts will be followed by the federal supreme court in determining whether the taking possession of the mortgaged chattels after condition broken amounted to a preference voidable by the mortgagor's trustee in bankruptcy. Thompson v. Fairbanks (1905) 25 Sup. Ct. 306, 196 U. S. 516, 49 L. Ed. 577, affirming judgment (1903) 56 Atl. 11, 75 Vt. 361, 104 Am. St. Rep. 899.

The construction given by the supreme court of Arkansas to the statutes of that state, which have been adopted and put in force in the Indian Territory by act of congress, will be followed by the federal courts. Robinson v. Belt (1900) 100 Fed. 718, 40

C. C. A. 664, affirmed (1902) 23 S. Ct. 16, 187 U. S. 41, 47 L. Ed. 65.

The question of the effect of the bankruptcy law upon the validity of a general assignment made after its passage, in accordance with the provisions of a state statute, is not one which is governed by any rule of decision in the state, but will be determined independently by the federal courts. In re Plotke (1900) 104 Fed. 964, 44 C. C. A. 282.

A federal court of bankruptcy, in determining whether a state imposition is a tax, within Bankr. Act July 1, 1898, § 64a, post, § 9648, requiring priority of payment thereof, will not be bound by the decisions of the state courts unless the state decisions have authoritatively expounded the substance of the question, and not merely given the name "tax" to an exaction which is not such. In re Cosmopolitan Power Co. (1905) 137 Fed. 858, 70 C. C. A. 388, judgment reversed (1906) 27 Sup. Ct. 137, 203 U. S. 483, 51 L. Ed. 284.

The Michigan water craft act (Comp. Laws, c. 298), which gives a lien to contractors and persons furnishing labor and materials in the construction of vessels, relates to contracts which are not maritime, and its construction by the supreme court of the state is binding on the federal courts. The Winnebago (1905) 141 Fed. 945, 73 C. C. A. 295, writ of certiorari denied Iroquois Transp. Co. v. A. Harvey's Sons Mfg. Co. (1905) 26 S. Ct. 752, 200 U. S. 616, 50 L. Ed. 621.

Whether a suit in a federal court involves the necessary jurisdictional amount is not a local question controlled by the statutes of the state or the rulings of its Supreme Court. Heffner v. Gwynne-Treadwell Cotton Co. (1908) 160 Fed. 635, 87 C. C. A. 606.

A decision by a state court that the Webb-Kenyon Act does not apply to shipments of intoxicating liquor contrary to a state statute adopted before its enactment is not controlling upon the federal courts. State of West Virginia v. Adams Express Co. (1915) 219 Fed. 794, 135 C. C. A. 464, reversing order (D. C. 1914) 219 Fed. 331.

Federal courts are not bound by the decision of the court of last resort of a state that, to entitle defendant to remove a cause from a state court to a federal court, he must first file his pleadings in the state court, because the question is one involving the construction of the statutes of the United States, and not of any state. Egan v. Chicago, M. & St. P. Ry. Co. (C. C. 1893) 53 Fed. 675.

The decision by a state court of last resort that a special proceeding under the state laws is not a civil suit is not controlling on the federal court on a question whether the proceeding is a civil suit in law or equity, within the removal acts. In re Jarnecke Ditch (C. C. 1895) 69 Fed. 161.

The rule that the construction of the constitution or laws of a state by its supreme court is binding upon the federal courts does not apply, where such construction affects the jurisdiction of a federal court, which is under the duty of determining such matter for itself. U. S. v. Tully (C. C. 1905) 140 Fed. 899.

Whether a state statute authorizing arrest of a judgment debtor on certain grounds after the return of an execution unsatisfied has been superseded by the federal bankruptcy law is a federal question, as to which state decisions are merely advisory. Johnson v. Crawford & Yothers (C. C. 1907) 154 Fed. 761.

The meaning of the word "tax," as used in Bankr. Act July 1, 1898, § 64a, is for the ultimate determination of the federal courts. In re Otto F. Lange Co. (D. C. 1908) 159 Fed. 586.

This section does not require the recognition of state statutes in an examination before an immigration officer to determine the right of an alien to enter or to remain in the United States under our immigration statutes. Section 3636 of the Revised Laws of Minnesota of 1905, providing that the word "minor" shall mean a male under 21 or a female under 18 years of age, is not binding in determining whether an alien female attains her majority when she reaches the age of 18 years; but such officer should follow the common-law rule, which fixes the age of majority at 21 for both sexes. Ex parte Petterson (D. C. 1908) 166 Fed. 536.

Since the construction of state laws is primarily within the authority of the state courts, a court of the state having held that it had jurisdiction under a state statute of a naturalization petition, and having granted a certificate of citizenship, a federal district court of concurrent jurisdiction, in a proceeding by the government to cancel the certificate for alleged want of jurisdiction of the state court on considerations of comity, would reach a conclusion as to the construction of the state law in conformity with that of the state court. U. S. v. Andersen (D. C. 1909) 169 Fed. 201.

Decisions of the highest courts of states, that the marriage of a woman in a foreign jurisdiction to a citizen of the United States is within R. S. § 1994, post, § 3948, is conclusive on a federal court, though not strictly binding. U. S. v. Williams (D. C. 1909) 173 Fed. 626, affirmed (1911) 184 Fed. 322, 106 C. C. A. 464.

The doctrine of stare decisis is based upon the assumption that the rules of law to which this doctrine applies have previously been determined by a court having final jurisdiction of the questions involved; hence it does not apply with full force to a decision of the supreme court of a state on a question involving an act of congress, where

such question has not been determined by the supreme court of the United States. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17, judgment affirmed (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200.

A decision of the United States supreme court, in construing an act of congress, must override a decision of the supreme court of the state on the same subject. McGoon v. Shirk (1870) 54 Ill. 408, 5 Am. Rep. 122.

While a state court is bound by the decisions of the United States supreme court as to the powers of national banks, the application of such decisions to a state bank in a case brought in the state courts is to be determined by the state decisions. Hunt v. Hauser Malting Co. (1903) 96 N. W. 85, 90 Minn. 282.

While a state court is bound by the decisions of the United States supreme court as to the powers of national banks, the application of such decisions as to the powers of such a bank, as a defense in a case properly brought in the state courts, is to be determined by state decisions. Security Nat. Bank v. St. Croix Power Co. (1903) 94 N. W. 74, 117 Wis. 211.

III. AUTHORITY OF STATE LAWS ON PARTICULAR SUBJECTS

104. Enforcement of rights under state statutes.—A state law, though it cannot give jurisdiction to any federal court, or limit such jurisdiction, may give a substantial right which may be enforced in the proper federal court, whether of equity, admiralty, or common law. In re McNiel (1871) 13 Wall. 236, 243, 20 L. Ed. 624; Aurora Shipping Co. v. Boyce (1911) 191 Fed. 960, 112 C. C. A. 372 (affirming decree The Aurora [D. C. 1910] 178 Fed. 587); Jones v. Mutual Fidelity Co. (C. C. 1903) 123 Fed. 506.

Rights created and remedies provided by the statutes of the state to be pursued in the state courts may be administered in the national courts, where those courts have jurisdiction either at law, or in equity, or in admiralty, as the nature of the rights and remedies may require. Rights created by state statutes may be enforced in the federal courts either at law, in equity, or in admiralty. Darragh v. H. Wetter Mfg. Co. (1897) 78 Fed. 7, 23 C. C. A. 609, removed to supreme court on appeal (1897) 84 Fed. 1016, 28 C. C. A. 680.

When, by the statute law of a state, a right of action has become fixed, or a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court having jurisdiction over the subject-matter and the parties. International Nav. Co. v. Lindstrom (1903) 123 Fed. 475, 60 C. C. A. 649, writ of certiorari denied Linstrom v. International Nav. Co. (1904) 24 Sup. Ct. 852, 193 U. S. 669, 48 L. Ed. 840, reversing judgment Lindstrom v. International Nav. Co. (C. C. 1902) 117 Fed. 170.

Rights created and remedies provided by the statutes of states to be pursued in the state courts may be administered in the federal courts, as the nature of the rights and remedies may require, where the citizenship and the amounts involved bring the action within the constitution and the acts of congress. Harrison v. Remington Paper Co. (1905) 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, writ of certiorari denied (1905) 26 Sup. Ct. 747, 199 U. S. 607, 50 L. Ed. 331; Platt v. Lecocg (1907) 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558, reversing decree (C. C. 1906) 150 Fed. 391.

A new right originated by a local law or usage may be enforced by the federal courts sitting within the state, by the exercise of a common law or chancery power, as the case may require. Lorman v. Clarke (C. C. 1841) Fed. Cas. No. 8,516.

The courts of the United States take cognizance of cases to enforce remedies given by a state statute, where the plaintiff who sues is a citizen of another state. Goshorn v. Alexander (C. C. 1868) Fed. Cas. No. 5,630.

All rights and defenses under the state laws are recognized by the federal court. Akerly v. Vilas (C. C. 1872) Fed. Cas. No. 120.

When a right is conferred by a state statute which is not in conflict with the constitution or laws of the United States, the courts of the United States, sitting in such states, can and must enforce such right. Buford v. Holley (C. C. 1886) 28 Fed. 680; Borland v. Haven (C. C. 1888) 37 Fed. 394.

Whenever a statute of a state gives a right, such right may, on proper citizenship, be enforced by suitable proceedings in the federal courts. Lilienthal v. Drucklieb (C. C. 1897) 80 Fed. 562.

The jurisdiction of the national courts does not always, nor often, depend upon the origin of the rights of the parties; and, where a state statute gives a right, the same may be asserted or enforced in such courts whenever the citizenship of the parties or the nature of the subject will permit. Holmes v. Oregon & C. Ry. Co. (D. C. 1880) 5 Fed. 75.

The fact that an action is wholly founded upon a state statute does not necessarily defeat the jurisdiction of the circuit court. Keith v. Town of Rockingham (C. C. 1880) 2 Fed. 834.

Where a federal court has jurisdiction of the parties and subject-matter, it has no power to refuse to exercise such jurisdiction merely because plain-

tiff seeks to litigate a right depending solely on the validity of a state statute as tested by the state constitution. F. W. Cook Brewing Co. v. Garber (C. C. 1909) 168 Fed. 942.

The rule that a federal court may enforce a remedy, either equitable or legal, given by a state statute, presupposes that the cause is one of which the federal court has jurisdiction. Anthony v. Burrow (C. C. 1904) 129 Fed. 783.

See, also, notes under § 1537, ante.

105. —— Right to maintain or defend suit or action.—Where an action was originally brought in a state court and then removed to a federal court at the instance of defendant, the removal did not deprive plaintiff of the right secured to her by local laws to prosecute the suit in her own name for her own benefit, though a married woman. Texas & P. Ry. Co. v. Humble (1899) 97 Fed. 837, 38 C. C. A. 502, affirmed (1901) 21 Sup. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

The president of a joint-stock company, empowered by the statute of New York, under which it was organized, to sue in its behalf, may maintain an action for injury to its property in a national court in Missouri. Johnson v. City of St. Louis (1909) 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949.

106. —— Equitable rights and defenses.—Where a title to land, which is merely equitable in its nature, gives a legal right of entry, by the laws of a state, that right having once become an established legal right, and having incorporated itself, as such, with property and tenures, it remains a legal right, notwithstanding any new distribution of judicial powers, and must be regarded by the common-law courts of the United States, in such state, as a rule of decision. Sims v. Irvine (1799) 3 U. S. (3 Dall.) 425, 1 L. Ed. 665.

The remedies in the courts of the United States at common law, and in equity, are not to be according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this doctrine, it may be admitted that where, by the statutes of a state, a title which would be otherwise deemed merely equitable is recognized as a legal title, or a title which would be valid at law is, under circumstances of an equitable nature, declared void, the right of the parties in such a case may be as fully considered in a suit at law, in the courts of the United States, as in any state court. Robinson v. Campbell (1818) 16 U. S. (3 Wheat.) 212, 4 L. Ed. 372.

See, also, notes under § 1537, ante.

107. —— Rights of citizens of other states.—Where a state law gives to citizens in an action or a suit inter partes, the right either at law or by suit in equity to assail the probate of a will, the United States courts, administering the rights of citizens of other states or aliens, will enforce such remedies. O'Callaghan v. O'Brien (1905) 25 Sup. Ct. 727, 734, 199 U. S. 89, 49 L. Ed. 101.

Whenever the citizens of a state can secure trial of their controversies by its courts of general jurisdiction, the citizens of different states may obtain the trial of like controversies between them by appropriate action in the federal courts. Barber Asphalt Pav. Co. v. Morris (1904) 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761.

Where a citizen of a state may go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to obtain the same relief. Chicago, B. & Q. R. Co. v. Oglesby (D. C. 1912) 198 Fed. 153.

The right to enforce in a federal court in one state a cause of action arising under the laws of another depends entirely on the statutes and policy of such other state. St. Bernard v. Shane (D. C. 1913) 201 Fed. 453.

108. —— Actions for personal injuries.—Where a general rule as to property or personal rights or injuries to either is established by a state statute, its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court is not subject to state limitation. Chicago & N. W. R. Co. v. Whitton (1871) 13 Wall. 270, 286, 20 L. Ed. 571.

In an action for personal injuries originally brought in West Virginia and transferred to the federal court on the ground of diverse citizenship, where the plaintiff died pending a writ of error to the supreme court, the question whether his administrator has a right of action depends upon the law of West Virginia. Gerling v. Baltimore & Ohio R. Co. (1894) 14 Sup. Ct. 533, 541, 151 U. S. 673, 38 L. Ed. 311.

The power of a circuit court of the United States to order a surgical examination of the plaintiff in an action for damages for a personal injury, in accordance with the provisions of a statute of the state in which the court is sitting, there being no law of congress in conflict therewith, is conferred by this section. Camden & S. Ry. Co. v. Stetson (1900) 20 Sup. Ct. 617, 619, 177 U. S. 172, 44 L. Ed. 721, affirming (1900) 104 Fed. 651, 44 C. C. A. 107.

Whenever the liability of a master to a servant for the negligence of a fellow servant is regulated by the statutes of the state in which the injury is inflicted, they become the "rules of decision in trials at common law" and measure the duties and liabilities of the litigants. Northern Pac. R. Co. v. Mase (1894) 63 Fed. 114, 115, 11 C.

C. A. 63, reversing (1897) 17 Sup. Ct. 345, 165 U. S. 363, 41 L. Ed. 746.

Acts Ohio 1890, p. 149, for the protection of railroad employés, prohibiting contracts exempting from liability, abrogating to some extent the rule as to fellow servants, etc., applies not only to railroad corporations of Ohio engaged in the domestic commerce of the state, but to all railroad corporations doing business in Ohio, and it does not encroach upon the jurisdiction and powers of the federal courts, and is binding upon those courts, and upon receivers appointed by them. Peirce v. Van Dusen (1897) 78 Fed. 693, 24 C. C. A. 280, writ of error dismissed Pierce v. Same (1899) 19 Sup. Ct. 879, 43 L. Ed. 1184.

Act Ohio Feb. 28, 1908 (99 Ohio Laws, p. 25), relating to the liability of railroad companies for injuries to employés, and providing that such companies shall be liable for damages resulting from the injury or death of an employé, when such injury or death was caused by a defect in any rail or track required by such company to be used by its employés, that any such employé shall not be deemed to have assumed the risk occasioned by such defect, and that contributory negligence shall not bar recovery when the negligence was slight and that of the employer was greater in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé, may be applied in the federal courts in Ohio. Erie R. Co. v. White (1911) 187 Fed. 556, 109 C. C. A. 322, rehearing denied (1911) 187 Fed. 944, 109 C. C. A. 326.

Act Nev. March 23, 1905 (Laws 1905, c. 142), which gives a right of action for a personal injury caused by the wrongful act or negligence of another, but which provides that such liability "shall exist only in so far as the same shall be ascertained and adjudged by a state or federal court of competent jurisdiction in this state in an action brought for that purpose by the person injured," supersedes the common law applicable to the subject in the state, and an action to recover for a personal injury received in Nevada, through the alleged negligence of the defendant, cannot be maintained except in a state or federal court in that state. Coyne v. Southern Pac. Co. (C. C. 1907) 155 Fed. 683.

109. —— Actions for death by wrongful act.—The liability created by a state statute in favor of personal representatives of a person whose death is caused by violence or negligence, will be enforced in a proceeding in admiralty for the limitation of liability arising out of a tortious collision on the high seas of vessels belonging to corporations of the state. Old Dominion S. S. Co. v. Gilmore (1907) 28 Sup. Ct. 133, 135, 207 U. S. 398, 52 L. Ed. 264, affirming judgment The Hamilton (1906) 146 Fed. 724, 77 C. C. A. 150.

The conclusion of highest state court that Laws Wash. 1911, c. 74, took away any right under Rem. & Bal. Code Wash. §§ 183, 194, to maintain an action for wrongful death of an employé, must be accepted by the federal courts. Northern Pac. Ry. Co. v. Meese (1916) 36 S. Ct. 223.

Whether a nonresident is entitled to maintain an action for wrongful death under a state statute is a question which goes to the defense of such an action, and does not affect the jurisdiction of a federal court therein. Pennsylvania Co. v. Scofield (1908) 161 Fed. 911, 88 C. C. A. 602.

A state statute (California) giving an action for negligence resulting in death cannot apply to negligence on the high seas. Armstrong v. Beadle (C. C. 1879) Fed. Cas. No. 541.

The right to sue for wrongful death given by Const. Ky. 1891, § 241, and by Ky. St. 1903, § 6, was originally given by Act Ky. March 10, 1854, and therein expressly conditioned on suit within one year from time of death. The later constitutional and statutory provisions, above cited, do not contain a specific limitation; but the same have been included in Ky. St. 1903, § 2516, as part of the general limitations statute. Held, following the interpretation placed on such provisions by the Kentucky court of appeals, that the limitation is still an integral part of the right thereby given, and governs an action based thereon, though brought in a foreign jurisdiction. De Valle Da Costa v. Southern Pac. Co. (C. C. 1909) 167 Fed. 654.

The right given by section 367 of the Oregon Civil Code to an administrator to recover damages on account of the death of his intestate from the party by whose act or omission such death was caused may be enforced in the national courts. Holmes v. Oregon & C. Ry. Co. (D. C. 1880) 5 Fed. 75.

An admiralty proceeding in personam in the United States courts, to recover under a state statute for a negligent killing caused by a collision on the navigable waters of the state is subject to the conditions of the state statute, and the contributory negligence of deceased will consequently bar a recovery the same as in the state courts. The City of Norwalk (D. C. 1893) 55 Fed. 98, decree modified (1894) 61 Fed. 364, 9 C. C. A. 521.

In the New Jersey statute of 1848 (1 Gen. St. p. 1188) giving a right of action for wrongful death, the proviso "that every such action shall be commenced within 12 calendar months after the death of such deceased person," was an express condition of the right of action itself, which must be given effect in every forum wherein an action based upon the statute is instituted. Stern

v. La Compagnie Generale Transatlantique (D. C. 1901) 110 Fed. 996.

In a suit in a federal court for the wrongful death of a child, the measure of damages is controlled by the statutes of the state. Penoza v. Northern Pacific Ry. Co. (D. C. 1914) 215 Fed. 200.

110. —— Fraudulent assignments or conveyances and rights of creditors.—Where the statutes of a state permit a creditor to follow the lands of a decedent in the hands of his heirs, or when conveyed to others than bona fide purchasers for value, and it is shown that there are no debts of the estate other than the one sued on, and that it has no property except lands which have been conveyed by the heirs to the widow of the decedent without consideration, a federal court may entertain a suit in equity by a creditor to establish his claim against the estate, and enforce the same against such lands, subject to such rights of dower or homestead as are given the widow therein by the state statutes. Kirtley v. Holmes (1901) 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738.

The validity of assignments for creditors with preferences will be determined in the federal courts by the law of the state. Parker v. Phetteplace (C. C. 1861) Fed. Cas. No. 10,746.

The federal courts have jurisdiction to enforce, on behalf of a creditor in another state, the remedy provided by Rev. St. Mo. § 354, providing that a voluntary assignment of property, made by a debtor to any one in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims. Clapp v. Dittman (C. C. 1884) 21 Fed. 15.

Act Minn. March 7, 1881, providing that in case of attachment the debtor may make an assignment for the benefit of all his creditors, does not discharge a debt unless the party discharges himself by releasing the debtor. As long as the plaintiff in the case chooses to stay out, he has a right to take a judgment which may at some time be effectual against the defendant. In such a case the United States courts have power to render a judgment. Sloane v. Chiniquy (C. C. 1884) 22 Fed. 213.

Under the Civil Code of Louisiana the judgment in the revocatory action instituted by creditors to set aside a fraudulent conveyance, if the action be successful, is that the conveyance be avoided as to its effects on the complaining creditors, and that all the property or money taken from the original debtor's estate by virtue thereof, or the value of such property, to the amount of the debt, be applied to the payment of the complaining creditors. The same rule will be applied in equity in the circuit court of the United States with respect to property in Louisiana, the complaining creditors being citizens of other states. Claflin v. Lisso (C. C. 1886) 27 Fed. 420, 421, reversed (1889) 10 Sup. Ct. 125, 132 U. S. 379, 33 L. Ed. 367.

The South Dakota statute relating to assignments for benefit of creditors (Civ. Code, § 4660) declares such assignments void if made upon any trust or condition by which any creditor receives a preference, but provides that in such case the property of the insolvent shall become a trust to be administered in equity in the district court, and shall inure to the benefit of all the creditors in proportion to their respective claims. Held, that in the case of foreign creditors the rights given by this statute may be enforced in a federal court. Wyman v. Mathews (C. C. 1893) 53 Fed. 678.

State laws relating to insolvency and assignments for creditors do not control the federal courts, in receivership cases, in respect to the right of a creditor holding collateral security to receive dividends without first surrendering the collateral. London & S. F. Bank v. Willamette Steam-Mill, Lumbering & Manufacturing Co. (C. C. 1897) 80 Fed. 226.

Rev. St. Ohio, § 6344, declaring all conveyances with intent to defraud creditors void, and authorizing the probate judge, after any such transfer has been adjudged void, to appoint a trustee to collect and administer the property so transferred, for the benefit of creditors in general, does not operate to create a trust in favor of creditors immediately on the making of such a conveyance, so as thereby to enable a mere general creditor to maintain a bill in a federal court to set aside the conveyance. England v. Russell (C. C. 1896) 71 Fed. 818.

Where a claim of priority is filed in bankruptcy, based on a chattel mortgage withheld from record for an unreasonable time, the validity of the claimant's lien is to be interpreted by the statutes of the state governing the record of such mortgages, where the claim does not fall within the inhibitions of the bankrupt act. In re H. G. Andrae Co. (D. C. 1902) 117 Fed. 561.

111. —— Rights under corporation laws.—The law of a state making shares of corporate stock personal property should be enforced by a circuit court of the United States sitting in that state, as part of the law of the state in respect of corporations created by it. Jellenik v. Huron Copper Min. Co. (1900) 20 Sup. Ct. 559, 563, 177 U. S. 1, 44 L. Ed. 647.

A federal court cannot enforce the statutory liability of a nonresident stockholder of a foreign corporation at the suit of a receiver of its assets,

where the latter has not first taken the steps which the statutes of the state, as construed by its courts, make a prerequisite to any action against an individual stockholder. Evans v. Nellis (1902) 23 Sup. Ct. 74, 78, 187 U. S. 271, 47 L. Ed. 173.

An action at law, to enforce the individual liability of stockholders, under Civ. Code Cal. § 322, may be maintained in the circuit court of the United States. Borland v. Haven (C. C. 1888) 37 Fed. 394.

The rights given a creditor of a corporation against a stockholder therein by the laws of Kansas are not repugnant to the public policy of the United States, or justice or good morals, and may be enforced in a federal court of another district, under the rule of comity, without regard to the decisions of the courts of the state. Dexter v. Edmands (C. C. 1898) 89 Fed. 467.

112. —— Recovery of money illegally paid.—Code Iowa 1897, § 2382 et seq., forbids unlawful sale of liquors under penalties, to be recovered by criminal prosecution. Section 2423 provides that all payments made for unlawful sales of liquors shall be held to have been received under a promise to repay the same on demand. Held, that an action to recover money so paid may be maintained in a federal court. United Breweries Co. v. Colby (C. C. 1909) 170 Fed. 1008. appeal dismissed (1910) 178 Fed. 1005, 101 C. C. A. 664.

113. —— Rights under mortgages.—How. Ann. St. Mich. § 7847, taking from the mortgagee the right to possession until confirmation of foreclosure sale, and the holding in Wagar v. Stone (1877) 36 Mich. 364, that this statute secures to the mortgagor the rents and profits pending foreclosure, constitute a rule governing substantial rights, and not mere matters of practice, and deprive the federal courts sitting in that state of the power to appoint a receiver of the rents and profits on the ground that the security is inadequate. Union Mut. Life Ins. Co. v. Union Mills Plaster Co. (C. C. 1889) 37 Fed. 286, 3 L. R. A. 90.

114. —— Right to liens.—Code Civ. Proc. N. Y. § 66, creating an attorney's lien on the client's cause of action, etc., and providing for the enforcement thereof on petition, was not a mere practice act, but created a right and provided a remedy for its enforcement, and was therefore controlling on the federal courts sitting in such state. In re Baxter & Co. (1907) 154 Fed. 22, 83 C. C. A. 106. But see Sherry v. Oceanic Steam Nav. Co. (C. C. 1895) 72 Fed. 565, holding that a state statute giving to an attorney a lien for his compensation on his client's cause of action will not be adopted by a federal court, so far as it requires the court to try a cause, for the attorney's benefit, after defendant has settled plaintiff's claim, in ignorance of an agreement between plaintiff and his attorney for compensation to the latter out of the proceeds of the suit.

115. —— Claims against estates of decedents.—Where the statutes of a state permit a creditor to follow the lands of a decedent in the hands of his heirs, or when conveyed to others than bona fide purchasers for value, and it is shown that there are no debts of the estate other than the one sued on, and that it has no property except lands which had been conveyed by the heirs to the widow of the decedent without consideration, a federal court may entertain a suit in equity by a creditor to establish his claim against the estate, and enforce the same against such lands, subject to such rights of dower or homestead as are given the widow therein by the state statutes. Kirtley v. Holmes (1901) 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738.

State laws providing that, in the settlement of estates of deceased persons, claims presented in a certain time should be preferred, are binding upon federal courts. Dodd v. Ghiselin (C. C. 1886) 27 Fed. 405.

Under Rev. St. Mo. 1889, § 190, which provides that demands against the estates of deceased persons may be established by judgment of some court of record in the ordinary way, and by exhibiting a copy of such judgment to the probate court, the federal courts in Missouri have jurisdiction of suits to establish such demands. Stephens v. Bernays (D. C. 1890) 41 Fed. 401.

116. —— Performance of official duty.—Const. La. art. 285, having given to any railroad company the right to maintain proceedings in a state court against the state railroad commission to contest the validity of any decision, rule, or order of the commission, a company which is a citizen of another state may maintain a suit for the same purpose in a federal court, where the amount involved is sufficient to give the court jurisdiction. Railroad Commission of Louisiana v. Texas & P. Ry. Co. (1906) 144 Fed. 68, 75 C. C. A. 226.

A federal court will not compel by injunction the officers of a state to execute the state laws. McCauley v. Kellogg (C. C. 1874) Fed. Cas. No. 8,688.

117. —— Eminent domain.—A United States district court has no authority to condemn land in this state for a foreign corporation acquiring its right to exercise the power of eminent domain under the laws of this state. Reitzer v. Medina Valley Irrigation Co. (Tex. Civ. App. 1913) 153 S. W. 380.

118. —— Assessment and collection of taxes.—The powers granted by acts

of the Kentucky legislature approved March 18, 1878, and February 27, 1882, authorizing a court in which a judgment is recovered against Taylor county on county bonds to assess the taxpayers to collect such judgment, may be exercised by a federal court. Campbellsville Lumber Co. v. Hubbert (1902) 112 Fed. 718, 50 C. C. A. 435, affirmed Hubbert v. Campbellsville Lumber Co. (1903) 24 Sup. Ct. 28, 191 U. S. 70, 48 L. Ed. 101.

Where the state law affords a remedy by summary proceedings by the holders of bonds issued by the levee commissioners against delinquent taxpayers, the federal court will enforce that remedy in a suit by the citizens of another state against such commissioners. Stansell v. Levee Board of Mississippi, Dist. No. 1 (D. C. 1881) 13 Fed. 846.

119. —— Interest.—Under the provisions of the constitution and statutes of Kansas, which secure dues from corporations by the individual liability of stockholders, and require a stockholder to pay an unsatisfied execution against the corporation, a creditor enforcing the remedy so given against a stockholder in another forum is entitled to recover 10 per cent. interest to the date of trial, where that was the contract rate, and also the rate borne by the judgment rendered thereon against the corporation in a court of Kansas, in accordance with the requirement of the state statute. Whitman v. Citizens' Bank of Reading (1901) 110 Fed. 503, 49 C. C. A. 122, writ of certiorari denied Whitman v. Norton (1901) 22 Sup. Ct. 932, 183 U. S. 695, 46 L. Ed. 394.

Where a railroad bridge construction contract was made in Missouri for performance in Mexico, and suit for an accounting was brought thereon in Maryland, where funds of the railroad were attached, the contractor was entitled to recover interest on the balance due from the date of demand or suit brought under Rev. St. Mo. 1899, § 3705 (Ann. St. 1906, p. 2073), declaring that creditors shall be allowed interest at 6 per cent., when no other rate is agreed on, for all moneys after they become due and payable on written contracts and on accounts after maturity and demand made. Freygang v. Vera Cruz & P. R. Co. (1907) 154 Fed. 640, 83 C. C. A. 414.

120. Commercial or other general law.—This section is strictly limited to local statutes and usages involving rights and titles to things having a permanent locality, and does not extend to contracts or other instruments of a commercial nature or to questions of general law. Swift v. Tyson (1842) 16 Pet. 1, 18, 10 L. Ed. 865; Neves v. Scott (1851) 13 How. 268, 272, 14 L. Ed. 140; Watson v. Tarpley (1855) 18 How. 517, 520, 15 L. Ed. 509; Boyce v. Tabb (1873) 85 U. S. (18 Wall.) 546, 21 L. Ed. 757; Oates v. First Nat. Bank (1879) 100 U. S. 239, 246, 25 L. Ed. 580; Brooklyn City & N. R. Co. v. National Bank of the Republic (1880) 102 U. S. 14, 29, 26 L. Ed. 61; Baltimore & O. R. Co. v. Baugh (1893) 13 Sup. Ct. 914, 915, 149 U. S. 368, 37 L. Ed. 772; Willis v. Board of Com'rs of Wyandotte County (1898) 86 Fed. 872, 30 C. C. A. 445; Wall v. Chesapeake & O. Ry. Co. (1899) 95 Fed. 398, 402, 37 C. C. A. 129; Independent School Dist. of Sioux City, Iowa, v. Rew (1901) 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; Pennsylvania R. Co. v. Hummel (1909) 167 Fed. 89, 92 C. C. A. 541; H. Scherer & Co. v. Everest (1909) 168 Fed. 822, 94 C. C. A. 346; Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; First Nat. Bank of Shenandoah v. Liewer (1911) 187 Fed. 16, 109 C. C. A. 70; Guernsey v. Imperial Bank of Canada (1911) 188 Fed. 300, 110 C. C. A. 278, 40 L. R. A. (N. S.) 377; Donnell v. Columbian Ins. Co. (C. C. 1836) Fed. Cas. No. 3,987; Robinson v. Commonwealth Ins. Co. (C. C. 1838) Fed. Cas. No. 11,949; Williams v. Suffolk Ins. Co. (C. C. 1838) Fed. Cas. No. 17,738; Riley v. Anderson (C. C. 1841) Fed. Cas. No. 11,835; Meade v. Beale (C. C. 1850) Fed. Cas. No. 9,371; Gloucester Ins. Co. v. Younger (C. C. 1855) Fed. Cas. No. 5,487; Bradley v. Lill (C. C. 1861) Fed. Cas. No. 1,783; Schenck v. Marshall County (C. C. 1866) Fed. Cas. No. 12,449 (affirmed [1866] 72 U. S. [5 Wall.] 772, 18 L. Ed. 556); Jewett v. Hone (C. C. 1873) Fed. Cas. No. 7,311; Galpin v. Page (C. C. 1874) Fed. Cas. No. 5,206; Branch v. Macon & B. R. Co. (C. C. 1875) Fed. Cas. No. 1,808; Mohr v. Manierre (C. C. 1877) Fed. Cas. No. 9,695; Crooks v. Stuart (C. C. 1881) 7 Fed. 800; Taylor v. Holmes (C. C. 1882) 14 Fed. 498 (decree affirmed [1888] 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179); Hollingsworth v. Parish of Tensas (C. C. 1883) 17 Fed. 109; Logan v. Greenlaw (C. C. 1885) 25 Fed. 299, 313; Van Fleet v. Sledge (C. C. 1891) 45 Fed. 743, 749; Union Bank v. Board of Com'rs of Oxford (C. C. 1898) 90 Fed. 7; Jennings v. Smith (C. C. 1900) 99 Fed. 189, 191; Continental Securities Co. v. Interborough Rapid Transit Co. (C. C. 1908) 165 Fed. 945; Cross v. Chicago, B. & Q. R. Co. (1915) 177 S. W. 1127, 191 Mo. App. 202; Stoddard v. Long Island R. Co. (1851) 7 N. Y. Super. Ct. (5 Sandf.) 180.

So a federal court is not bound by the decision of a state court as to what the common law is. City of Chicago v. Robbins (1862) 67 U. S. (2 Black) 418, 17 L. Ed. 298; Pennsylvania R. Co. v. Hummel (1909) 167 Fed. 89, 92 C. C. A. 541; Guernsey v. Imperial Bank of Canada (1911) 188 Fed. 300, 110 C. C. A. 278, 40 L. R. A. (N. S.) 377; Hocking Valley R. Co. v.

New York Coal Co. (1914) 217 Fed. 727, 132 C. C. A. 387.

On questions of general commercial law the courts of the United States are bound by the decisions of state courts only when such decisions are by the highest court of the state and are based either on a statute or a long-established local custom having the force of a statute. In re Hopper-Morgan Co. (D. C. 1907) 154 Fed. 249.

The federal courts, when called upon to construe the general commercial law of a state in respect to a question which is a new one in the federal courts, should give weight to the state decisions, although they are not absolutely bound thereby. Burgess v. Seligman (1883) 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Farmers' Nat. Bank v. Sutton Mfg. Co. (1892) 52 Fed. 191, 3 C. C. A. 1, 6 U. S. App. 312.

Where the federal court is in doubt as to a doctrine of general law, it is its duty to lean towards the decision of the state court. Brown v. Grand Rapids Parlor Furniture Co. (1893) 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817.

The following questions have been held to be questions of general law: Sufficiency of the description of land sold at a marshal's sale. Rogers v. Jones (1909) 29 Sup. Ct. 635, 636, 214 U. S. 196, 53 L. Ed. 965. Whether a statutory right to recover some damages for a breach of a statutory duty to deliver a telegram without unreasonable delay affords a basis to also recover for injured feelings. Western Union Tel. Co. v. Sklar (1903) 126 Fed. 295, 61 C. C. A. 281. The measure of damages recoverable in an action of tort, where not governed by the state constitution or statutes. Woldson v. Larson (1908) 164 Fed. 548, 90 C. C. A. 422. The right of a state legislature to authorize private property to be taken or damaged, or its use appropriated, without compensation, for public purposes, under the general police power or other implied powers of government. Hollingsworth v. Parish of Tensas (C. C. 1883) 17 Fed. 109. The right of a creditor holding collateral security to a dividend on the full amount of his debt in the absence of special provisions in the insolvency laws of a state. Tod v. Kentucky Union Land Co. (C. C. 1893) 57 Fed. 47, decree reversed Marbury v. Kentucky Union Land Co. (1894) 62 Fed. 335, 10 C. C. A. 393. Whether the right of action given by a statute is in the nature of a specialty. Brunswick Terminal Co. v. National Bank of Baltimore (C. C. 1898) 88 Fed. 607. Whether presumptions will be made in aid of a defective return of substituted service. King v. Davis (C. C. 1903) 137 Fed. 198, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348. Whether a federal court acquired jurisdiction over a foreign corporation defendant by the service made. New Haven Pulp & Board Co. v. Downingtown Mfg. Co. (C. C. 1904) 130 Fed. 605. The nature of the liability imposed on stockholders of a corporation by the Constitution of Minnesota, declaring that each stockholder shall be liable to the amount of stock held or owned by him, as to whether such liability is wholly statutory or partially contractual, and therefore transitory. Converse v. Mears (C. C. 1908) 162 Fed. 767.

Whether a state statute is strictly penal, or is so far remedial that an action thereon is within the jurisdiction of a federal court. Malloy v. American Hide & Leather Co. (C. C. 1906) 148 Fed. 482; Leyner Engineering Works v. Kempner (C. C. 1908) 163 Fed. 605.

Whether an attorney has a lien for services rendered on money recovered as the result of his efforts is a matter of local law not to be disposed of on independent views entertained by the federal courts. Cain v. Hockensmith Wheel & Car Co. (C. C. 1907) 157 Fed. 992.

While no decision or statute of a state restricting or impairing the rights and remedies secured to the citizens of the several states under the general commercial law, or devesting the federal courts of their cognizance of those rights and remedies, is binding on those courts, statutes which enlarge the commercial law will be enforced. They are not confined to the commercial law as it exists outside such statutes. Bank of Sherman v. Apperson (C. C. 1880) 4 Fed. 25.

Where there is a conflict between the decisions of the federal courts and those of a state court upon a question of commercial law, the federal courts will follow the decisions of the state court, if it appears that, by reason of the situation of the parties and of the subject-matter, a party would otherwise be subjected to a double payment of the same debt without the possibility of relief from the federal courts. Sonstiby v. Keeley (C. C. 1880) 7 Fed. 447.

The conclusion of a state court as to the time when a cause of action accrues in case of fraud or concealment, based, not on a construction of the state statute, but on the view taken of the rule of the common law, is not binding on the United States courts, when called on to construe the common law and apply its principles to cases arising between citizens of different states. Murray v. Chicago & N. W. Ry. Co. (C. C. 1894) 62 Fed. 24, judgment affirmed (1899) 92 Fed. 868, 35 C. C. A. 62.

The courts of the United States are not required by this section to follow state decisions made on grounds of public policy or comity merely; and a single decision of the supreme court of a state, made in 1828, holding that, as to property situated in that state, a general assignment made by a debtor in another state would not be allowed

to defeat an attachment of such property by one of its own citizens which decision has never been repeated, will not be accepted as binding on a federal court in the state. Stowe v. Belfast Sav. Bank (C. C. 1897) 92 Fed. 90.

Where a state statute is merely declaratory of the general law, federal courts sitting in the state are not bound by construction of the statute by the highest court of the state. Mutual Life Ins. Co. v. Lane (C. C. 1907) 151 Fed. 276, affirmed (1907) 157 Fed. 1002, 85 C. C. A. 677, certiorari denied (1908) 28 Sup. Ct. 569, 208 U. S. 617, 52 L. Ed. 647.

121. —— Rights of action.—Recourse may be had to the laws of the state to determine whether the cause of action survives the death of the plaintiff. Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257.

The right of a third person to sue upon a contract made for his benefit being fully established by decision in Rhode Island, such rule of the state court is controlling upon a federal court sitting in that state. But whether the state decisions can be extended so far as to sustain an action on a contract to pay only a percentage of a debt due from the promisee to the plaintiff, quære. Bethlehem Iron Co. v. Hoadley (C. C. 1907) 152 Fed. 735.

122. —— Relation of master and servant.—Federal courts are not controlled by local decisions as to the mutual relations of master and servant. McPeck v. Central Vt. R. Co. (1897) 79 Fed. 590, 25 C. C. A. 110.

The control of the relation of master and servant and other like relations is reserved to the states, and the federal courts, when administering the state law upon such subjects, should follow the decisions of the state courts. Kerlin v. Chicago, P. & St. L. R. Co. (C. C. 1892) 50 Fed. 185; Becker v. Baltimore & O. R. Co. (C. C. 1893) 57 Fed. 188.

123. —— Liability for torts.—In actions in the United States courts for personal injuries the rule adopted by the federal courts must prevail, rather than the rule of the state court. Tweeten v. Tacoma Ry. & Power Co. (1914) 210 Fed. 828, 127 C. C. A. 378; Johnson v. Chicago, M. & St. P. Ry. Co. (D. C. 1915) 224 Fed. 196.

The decisions of the highest court of a state on the subject of negligence are not laws within this section, but the federal court must exercise an independent judgment thereon. Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; Snare & Triest Co. v. Friedman (1909) 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367 (writ of certiorari denied [1909] 29 Sup. Ct. 700, 214 U. S. 518, 53 L. Ed. 1065); Force v. Standard Silk Co. (C. C. 1908) 160 Fed. 992, judgment affirmed Standard Silk Co. v. Force (1909) 170 Fed. 184, 95 C. C. A. 286.

The question of the measure of damages recoverable for a personal injury is one of general jurisprudence, upon which a federal court is not bound to follow the state decisions. Power v. City of Augusta (C. C. 1911) 191 Fed. 647.

The question of the liability of a telegraph company for a failure to promptly deliver a message is one of general law, as to which, in the absence of statutory provisions, the decisions of the state courts are not controlling upon the federal courts. Western Union Tel. Co. v. Wood (1893) 57 Fed. 471, 6 C. C. A. 432 (applying Baltimore & O. R. Co. v. Baugh [1893] 13 Sup. Ct. 914, 149 U. S. 368, 37 L. Ed. 772); Western Union Telegraph Co. v. Burris (1910) 179 Fed. 92, 102 C. C. A. 386. So is the question as to the validity of contracts exempting telegraph companies from liability for mistakes, delays, or nondelivery in the transmission of messages, unless they are repeated. Western Union Tel. Co. v. Cook (1894) 61 Fed. 624, 9 C. C. A. 680.

Whether a provision in a lease by a railroad company of part of its right of way, exempting it from liability for damage to property situated on the leased land, resulting from the negligence of its employés, or from fire communicated from its locomotives, is against public policy, is a question of general law, the state decisions as to which are not binding on the federal courts. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co. (1895) 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, affirming (C. C. 1894) 62 Fed. 904. So is the question whether a lessor railroad company is liable for the negligence of its lessee in the operation of trains on its road, in the absence of any state statute on the subject. Curtis v. Cleveland, C., C. & St. L. Ry. Co. (1905) 140 Fed. 777; Yeates v. Illinois Cent. R. Co. (C. C. 1905) 137 Fed. 943.

Whether a municipal corporation is responsible in damages for torts of its officers in a stated case is a matter of local law, which it is the duty of the federal courts within said state to follow when made manifest by legislative action or the decisions of the highest state court. City of Denver v. Porter (1903) 126 Fed. 288, 61 C. C. A. 168; Clark v. Atlantic City (C. C. 1910) 180 Fed. 598; Edgerton v. The Mayor (D. C. 1886) 27 Fed. 230.

Upon the question of the care required of a traveler on a highway on approaching a street railway crossing, the local decisions are persuasive in a federal court. Milford & U. St. Ry. Co. v. Cline (1907) 150 Fed. 325, 80 C. C. A. 95.

It is a settled rule of the common law as administered by the federal courts that in an action for a tort, such as the alienation of the affections of the plaintiff's wife, exemplary damages are recoverable. Woldson v. Larson (1908) 164 Fed. 548, 90 C. C. A. 422.

Where there is no settled line of decisions of a state court as to the duty of the owner of a machine shop towards a child wandering into it, a federal court has the duty of deciding independently what the common law is. Chesko v. Delaware & Hudson Co. (1914) 218 Fed. 804, 134 C. C. A. 492.

Whether a carrier can stipulate for exemption from liability for its own negligence is a question on which the federal courts will not be bound by state decisions. Eells v. St. Louis, K. & N. W. Ry. Co. (C. C. 1892) 52 Fed. 903. But see J. M. Pace Mule Co. v. Seaboard Air Line Ry. Co. (N. C. 1912) 76 S. E. 513, and Herring v. Atlantic Coast Line R. Co. (N. C. 1912) 76 S. E. 527, holding that the United States supreme court follows the decisions of the state courts in determining whether an interstate carrier may relieve itself from liability for negligence by a valuation clause if the case originated in the state courts.

The right of an owner of land on one side of a navigable river, which forms the boundary between two states, by artificial structures to turn the waters upon land on the opposite side of the river, is one depending for determination on the general principles of the law, on which decisions of the state courts are not binding on the federal courts. Cairo, V. & C. Ry. Co. v. Brevoort (C. C. 1894) 62 Fed. 129, 25 L. R. A. 527.

The question whether or not the negligence of a parent should be imputed to a child of tender years is one of general law, upon which a federal court will be guided by its own views of that law, and is not bound by the decisions of state courts. Berry v. Lake Erie & W. R. Co. (C. C. 1895) 70 Fed. 679.

124. —— Liability of master for injuries to servant.—In the absence of a state statute governing the subject, the question of the liability of an employer for an injury to an employé is one of general law, as to which the federal courts are not bound by the decisions of the state courts. Baltimore & O. R. Co. v. Baugh (1893) 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Gardner v. Michigan Cent. R. Co. (1893) 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; New York, N. H. & H. R. Co. v. O'Leary (1899) 93 Fed. 737, 35 C. C. A. 562; Illinois Cent. R. Co. v. Hart (1910) 176 Fed. 245, 100 C. C. A. 49; Salmons v Norfolk & W. Ry. Co. (C. C. 1908) 162 Fed. 722; Chandler v. St. Louis & S. F. R. Co. (1907) 106 S. W. 553, 127 Mo. App. 34; Farrar v. Same (1910) 130 S. W. 373; Cross v. Chicago, B. & Q. R. Co. (1915) 177 S. W. 1127, 191 Mo. App. 202. But see Easton v. Houston & T. C. Ry. Co. (C. C. 1887) 32 Fed. 893, holding that in determining the liability of a federal receiver for injuries to a section hand caused by the negligence of an engineer the law of the state where the action arose would govern.

In the absence of a governing statute of the state, where an injury was received, a federal court will apply the general rule of such courts in determining who are fellow servants, regardless of where the contract of employment was made. Baltimore & O. R. Co. v. Baugh (1893) 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Northern Pac. R. Co. v. Peterson (1892) 51 Fed. 182, 2 C. C. A. 157 (judgment reversed [1896] 16 Sup. Ct. 843, 162 U. S. 346, 40 L. Ed. 944); Newport News & M. V. Co. v. Howe (1892) 52 Fed. 362, 3 C. C. A. 121; Hunt v. Hurd (1900) 98 Fed. 683, 39 C. C. A. 226; Elliott v. Felton (1902) 119 Fed. 270, 56 C. C. A. 74; Pennsylvania Co. v. Fishack (1903) 123 Fed. 465, 59 C. C. 269; Jones v. Southern Pac. Co. (1906) 144 Fed. 973, 75 C. C. A. 602 (writ of certiorari denied [1906] 26 Sup. Ct. 766, 202 U. S. 620, 50 L. Ed. 1174); Kinnear Mfg. Co. v. Carlisle (1907) 152 Fed. 933, 82 C. C. A. 81; Snipes v. Southern Ry. Co. (1908) 166 Fed. 1, 91 C. C. A. 593; Moss v. Gulf Compress Co. (1913) 202 Fed. 657, 121 C. C. A. 67; Tweeten v. Tacoma Ry. & Power Co. (1914) 210 Fed. 828; 127 C. C. A. 378; Spring Valley Coal Co. v. Patting (1904) 112 Ill. App. 4 (judgment affirmed [1904] 71 N. E. 371, 210 Ill. 342; Chandler v. St. Louis & S. F. R. Co. (1907) 106 S. W. 553, 127 Mo. App. 34.

Since, in the federal courts, negligence of a superior servant does not create liability of the master for injuries to an inferior servant, Rev. St. Ohio, § 3365—22, providing that every person in the employ of a railroad company, having charge or control of employés in any separate branch or department, shall be held to be the superior, and not the fellow, servant of employés in any other branch or department who have no power to direct or control in the branch in which they are employed, does not create a liability of the master to an inferior servant for injuries sustained through the negligence of the superior servant, enforceable in the federal courts. Kane v. Erie R. Co. (C. C. 1904) 128 Fed. 474, judgment reversed (1904) 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788.

The construction and effect of a state statute requiring owners of mills and factories to safeguard their machinery is not a matter of general, but of local, law, and the decisions of the highest

court of the state thereon are binding on the federal courts. Welsh v. Barber Asphalt Pav. Co. (1909) 167 Fed. 465, 93 C. C. A. 101.

Whether the doctrine res ipsa loquitur applies to an action for injuries to a servant by the breaking of a ladder rung on the side of a freight car is a question of general jurisprudence, and not of local law, as to which federal courts are governed by their own decisions and not by those of the state in which the court is sitting. Patton v. Illinois Cent. R. Co. (C. C. 1910) 179 Fed. 530.

125. —— **Liability of master for torts of servant.**—The question whether a railroad corporation can be charged with punitive damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger is a question, not of local law, but of general jurisprudence, upon which the judgment of the supreme court of the United States, in the absence of express statute regulating the subject, is not controlled by decisions of state courts. Lake Shore & M. S. Ry. Co. v. Prentice (1893) 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; Norfolk & P. Traction Co. v. Miller (1909) 174 Fed. 607, 98 C. C. A. 453.

The question of the responsibility of a railroad corporation for injuries caused by its servants is one of general law in regard to which the federal courts are not bound to follow the decisions of the state courts. Salmons v. Norfolk & W. Ry. Co. (C. C. 1908) 162 Fed. 722.

126. —— **Contracts in general.**—A federal court is not bound to accept the construction of a contract by the supreme court of a state, where such construction in no manner depends on any state law, and is not pleaded as creating an estoppel between the parties; but is required to exercise its independent judgment, giving to the state decision, however, due weight as a precedent. Swift v. Tyson (1842) 41 U. S. (16 Pet.) 1, 10 L. Ed. 865; Bancroft v. Hambly (1899) 94 Fed. 975, 36 C. C. A. 595 (reversing judgment Hambly v. Bancroft [1897] 83 Fed. 444); Gilbert v. American Surety Co. (1902) 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253 (writ of certiorari denied [1903] 23 Sup. Ct. 855, 190 U. S. 560, 47 L. Ed. 1184); Keene Five Cent. Sav. Bank v. Reid (1903) 123 Fed. 221, 59 C. C. A. 225 (writ of certiorari denied Reid v. Keene Five Cent Sav. Bank [1903] 24 Sup. Ct. 841, 191 U. S. 567, 48 L. Ed. 305); Mechanics'-American Nat. Bank v. Coleman (1913) 204 Fed. 24, 122 C. C. A. 338; Henderson v. Phillips (C. C. 1910) 178 Fed. 374.

The supreme court does not recognize, as in any way binding on it as a part of the local law, the decisions of state courts on a private act providing for the alienation of private estates, by particular persons, under the sanction of the court or the chancellor, such decisions forming no part of the local law of real property. Williamson v. Berry (1850) 49 U. S. (8 How.) 495, 12 L. Ed. 1170; Same v. Irish Presbyterian Congregation (1850) 49 U. S. (8 How.) 565, 12 L. Ed. 1200; Same v. Ball (1850) 49 U. S. (8 How.) 566, 12 L. Ed. 1200.

Where a decision that a contract is valid or void is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one which the United States supreme court is not authorized to review. Delmas v. Merchants' Mut. Ins. Co. (1871) 14 Wall. 661, 666, 20 L. Ed. 757. So a decision of the highest court of a state, holding that a contract exempting a railroad company from liability for negligence in setting fire to a storage warehouse on the railroad right of way is not against public policy, is conclusive upon a federal court sitting in that state. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co. (1899) 20 Sup. Ct. 33, 40, 175 U. S. 91, 44 L. Ed. 84. But see Sheppey v. Stevens (C. C. 1910) 177 Fed. 484, holding that whether a contract is contrary to public policy is a question of general law, not dependent solely on any local statute or usage, so that in determining the question federal courts are not bound by state law, but will exercise their own judgment.

While the federal court is bound by the construction placed by the highest court of a state upon a local statute, yet, when it becomes necessary to apply the statute, as construed by the local court, to a particular contract, and determine, upon a consideration of all of the provisions of the contract, whether it is violative of the statute as it has been construed, a federal court is entitled to express an independent judgment, the question involved being one of general law, rather than of statutory construction. Casserleigh v. Wood (1902) 119 Fed. 308, 56 C. C. A. 212.

In the exercise of jurisdiction in bankruptcy, conferred under the constitution, the courts of the United States have the right to resort to the principles of the common law, and therefrom to determine whether an obligation of a contract nature arises upon a conversion of goods and is available to the owner upon waiver of his right to pursue his remedy in tort, and are not controlled by the decisions of the state courts. Reynolds v. New York Trust Co. (1911) 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391.

The right of a party to an executory contract, on the refusal of other party to perform, to sue for and recover

his entire damages for the breach, without waiting for the expiration of the time for performance, is a question of general law, upon which the federal courts are not bound by the rule of the state courts. H. T. Smith Co. v. Minnetto-Meriden Co. (C. C. 1909) 168 Fed. 777.

127. —— **Corporate contracts.**—The question of the liability of a railroad company on a contract of transportation over a connecting line beyond its terminus is a question of general, and not local, law, and the supreme court will not be bound in passing thereon by the decisions of the state where the contract was made, but will exercise its own judgment. Michigan Cent. R. Co. v. Myrick (1883) 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325.

A clause in a bill of lading exempting the carrier from liability for loss caused by the negligence of its servants will be held invalid in the federal courts, though the law of the state where the bill of lading was executed may be otherwise. Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (1889) 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Same v. Insurance Co. of North America (1889) 129 U. S. 464, 9 Sup. Ct. 480, 32 L. Ed. 788.

The relations between a building and loan association and its stockholders, as such, are the same as between other business corporations and their stockholders, and their respective rights and obligations under the contract are governed by the general law, unless modified by statute. As to matters arising out of such relations, the decisions of the courts of the state are not binding upon the federal courts, but when a stockholder becomes also a borrower his contract as such is governed by the local law, and upon the question of his rights and liabilities thereunder the state decisions are controlling. Coltrane v. Blake (1902) 113 Fed. 785, 51 C. C. A. 457. So the question as to what law governs a contract between a building and loan association and a borrowing member, where the member resides in another state and the mortgaged property is there situated, and whether such contract is usurious, when that depends upon whether it is solvable under the laws of that state or those of the state in which the association is domiciled, are questions of general commercial law. Manship v. New South Building & Loan Ass'n (C. C. 1901) 110 Fed. 845. As is the question as to what law governs a contract of loan between a building and loan association of one state and a member residing in the state in which the court is sitting, secured by mortgage on land in the latter state. U. S. Savings & Loan Co. v. Harris (C. C. 1902) 113 Fed. 27.

Each state may determine what powers shall be possessed by corporations organized under its authority and what effect shall attach to acts done by such corporations beyond their powers. The question is one of state policy, and therefore a matter of local and not general law. Anglo-American Land, Mortgage & Agency Co. v. Lombard (1904) 132 Fed. 721, 68 C. C. A. 89, writ of certiorari denied Lombard v. Anglo-American Land, Mortgage & Agency Co. (1904) 25 Sup. Ct. 793, 196 U. S. 638, 49 L. Ed. 630.

A decision of the highest court of a state, holding a contract made by a city void upon the facts shown, and not upon a construction of the local statutes, is not conclusive upon a federal court, nor in any event where the rights of the plaintiff in the federal court under the contract were fixed prior to such decision to which it was not a party. City of Mankato v. Barber Asphalt Pav. Co. (1905) 142 Fed. 329, 73 C. C. A. 439.

Questions as to the validity and construction of the following contracts have been held to be questions of general, not local, law: Deeds. Thomas v. Hatch (C. C. 1838) Fed. Cas. No. 13,899. A decision of a state court upon the construction of a deed, as to matters and language belonging to the common law, and not to any local statute, although entitled to high respect, is not held conclusive upon the supreme court of the United States. Foxcraft v. Mallett (1846) 45 U. S. (4 How.) 353, 11 L. Ed. 1008; Thomas v. Hatch (C. C. 1838) Fed. Cas. No. 13,899. A contract of guaranty. Johnson v. Charles D. Norton Co. (1908) 159 Fed. 361, 86 C. C. A. 361. A contract of carriage of a passenger. Baltimore & O. R. Co. v. Thornton (1911) 188 Fed. 868, 110 C. C. A. 502. A release by sleeping car conductor of claims against sleeping car and railroad companies. Fowler v. Pennsylvania R. Co. (1916) 229 Fed. 373, 143 C. C. A. 493. A bond given in conformity to the requirements of a state statute. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 Fed. 507. An arbitration agreement to oust the courts of all jurisdiction over the subject of a controversy. Jefferson Fire Ins. Co. v. Bierce & Sage (C. C. 1910) 183 Fed. 588.

128. —— **Insurance contracts.**—The construction of a policy of marine insurance, depending on questions of general commercial law, is a matter on which courts of the United States are at liberty to exercise their own judgment, and are not bound to accept the decisions of the courts of the state in which the contract was made. Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co. (1900) 21 Sup. Ct. 1, 179 U. S. 1, 45 L. Ed. 49 (affirming judgment [1897] 82 Fed. 296, 27 C. C. A. 134); Washburn & Moen Mfg. Co.

v Reliance Marine Ins. Co. (C. C. 1895) 106 Fed. 116.

The construction of a life policy issued by a New York company executed and to be carried out there as declared by the highest court of the state is of persuasive influence, if not of binding force, in the federal courts, in the absence of any federal question arising in a case on the policy. Equitable Life Assur. Soc. v. Brown (1909) 29 Sup. Ct. 405, 410, 213 U. S. 25, 53 L. Ed. 682.

A federal court, in exercising jurisdiction concurrent with the courts of a state in an action on a policy of insurance, is administering the law of the state, and is as much bound by its statute and common law and by its declared public policies as would be the state courts in a like case. McClain v. Provident Sav. Life Assur. Soc. of New York (1901) 110 Fed. 80, 49 C. C. A. 31, reversing judgment Same v. Provident Savings & Life Assur. Soc. of New York (C. C. 1901) 105 Fed. 834, and writ of certiorari denied Provident Sav. Assur. Soc. of New York v. McClain (1902) 22 Sup. Ct. 938, 184 U. S. 699, 46 L. Ed. 765.

A ruling of the supreme court of a state that a suit for the cancellation of a life insurance policy cannot be maintained after the death of the insured is upon a matter of general law, and is not binding on a federal court sitting within the state. Riggs v. Union Life Ins. Co. of Indiana (1904) 129 Fed. 207, 63 C. C. A. 365, reversing order Union Life Ins. Co. v. Riggs (C. C. 1903) 123 Fed. 312, and writ of certiorari denied Fidelity Mut. Life Ins. Co. v. Same (1904) 24 Sup. Ct. 860, 194 U. S. 637, 48 L. Ed. 1161.

The question whether or not an insurable interest in an assignee is requisite to the validity of the assignment of a policy of life insurance originally issued to one who had an insurable interest is a question of general law, on which decisions in the state in which the assignment was made are not controlling in the federal courts. Gordon v. Ware Nat. Bank (1904) 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

The question whether a case of double insurance is made out, so as to require contribution between the insurers, is one of general commercial law, the determination of which by the supreme court of the state where the question arose is not binding on the federal courts of that jurisdiction. Meigs v. London Assur. Co. (1905) 134 Fed. 1021, 68 C. C. A. 249, affirming judgment (C. C. 1904) 126 Fed. 781.

Where two insurance contracts were obtained at the same time through the same agent through misrepresentations on his part, the fact that after a liability had accrued on both policies the state supreme court in an action on one policy decided that the agent was the agent of the insurer, and therefore precluded the latter from relying on such misrepresentations as constituting breaches of warranty and defenses, did not require the federal court in a suit brought on the other policy to follow the state decision as a rule of law established in that state at the time of the contract; the federal court being authorized to form an independent judgment on such question as a matter of general law. Travelers' Ins. Co. v. Thorne (1910) 180 Fed. 82, 103 C. C. A. 436, 38 L. R. A. (N. S.) 626, writ of certiorari denied Lynch v. Travelers' Ins. Co. (1911) 31 Sup. Ct. 719, 220 U. S. 614, 55 L. Ed. 610.

Whether a provision in an insurance policy that no action shall be brought after the lapse of a year from the date of insured's death is valid is one of general public policy, as to which federal courts will follow federal decisions, though in conflict with the decisions of the highest courts of the state. Spinks v. Mutual Reserve Fund Life Ass'n (C. C. 1905) 137 Fed. 169.

In a suit in the federal courts to determine the rights of policy holders and the insurer, the decisions of the highest courts of the state are of controlling authority. Polk v. Mutual Reserve Fund Life Ass'n (C. C. 1905) 137 Fed. 273.

Civ. Code Ga. 1895, §§ 2114, 2116, defining life insurance, are merely declaratory of the general law, and hence the federal courts sitting in Georgia are not bound by a construction of such sections by the highest court of the state not in accord with the views of such federal courts. Mutual Life Ins. Co. of New York v. Lane (C. C. 1907) 151 Fed. 276, decree affirmed Alexander v. Lane (1907) 157 Fed. 1002, 85 C. C. A. 677, writ of certiorari denied (1908) 28 Sup. Ct. 569, 208 U. S. 617, 52 L. Ed. 647.

129. —— Negotiable Instruments.— The effect of a provision for attorney's fees in a note is a matter of general or commercial law, as to which the federal courts are not bound by state decisions. Mechanics'-American Nat. Bank v. Coleman (1913) 204 Fed. 24, 122 C. C. A. 338; The Avalon (D. C. 1909) 169 Fed. 696.

A state statute regulating actions on commercial paper is not controlling in actions in the courts of the United States. Watson v. Tarpley (1855) 18 How. 517, 520, 15 L. Ed. 509.

The question of the validity of negotiable bonds in the hands of a bona fide holder, without notice of any irregularity as to their issue, is a question of commercial law upon which the adjudications of the state where the bonds were issued are not binding on this court, although entitled to great respect. Marshall County Sup'rs v. Schenck (1866) 72 U. S. (5 Wall.) 772, 18 L. Ed. 556.

A decision of the highest court of a state that a statute authorizing townships or municipal corporations to pledge their credit to aid railroad companies is in conflict with the constitution of the state is not binding on the supreme court, where the bonds issued by a township of the state pursuant to the statute are negotiable in form and are in the hands of a citizen of another state or a foreigner, since the question of the validity of the statute belongs to the domain of general jurisprudence. Pine Grove Twp. v. Talcott (1873) 19 Wall. 666, 677, 22 L. Ed. 227.

The decisions of the New York court of appeals, requiring holders of municipal bonds to make affirmative proof of assent of taxpayers to the creation of the bonds, are not obligatory upon the United States courts in similar cases arising in New York, for the reason that they do not rest upon construction of statutes of the state, but assert general principles independent of statute. Town of Venice v. Murdock (1875) 92 U. S. 494, 23 L. Ed. 583.

The application of the rule recognized in the federal supreme court, protecting purchasers of negotiable paper before maturity against pending suits calling in question the validity of the paper, cannot be affected by state laws or decisions, when the rights of persons not residing and not being in the state are involved. Town of Enfield v. Jordan (1887) 119 U. S. 680, 7 Sup. Ct. 358, 30 L. Ed. 523.

By the general commercial law parties placing their names on the back of a note before delivery, to give the maker credit, are joint makers of the note, and will be so treated in the federal courts, though the note be made in a state the court of last resort of which holds such parties indorsers. Phipps v. Harding (1895) 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; First Nat. Bank v. Lock Stitch Fence Co. (C. C. 1885) 24 Fed. 221.

The question whether a promissory note is governed, as to usury, by the law of the state where it was executed and in which suit is brought, or of the state in which it is made payable, in the absence of a state statute on the subject, is one of general law, upon which a federal court is not bound to follow the decisions of the supreme court of the state. Dygert v. Vermont Loan & Trust Co., 94 Fed. 913, 37 C. C. A. 389.

A provision in a note that "this note and the coupons hereto attached * * * are to be construed by the laws of the state of Kansas" means the statutes of the state with reference to negotiable instruments, and the rights and liabilities of the parties thereto, and does not comprehend the decisions of local courts construing like contracts that had been or might thereafter be announced; nor can it be extended so as to make the decisions of the local courts the governing law with respect to the construction of the provisions of a mortgage given to secure such note. Keene Five Cent Sav. Bank v. Reid (1903) 123 Fed. 221, 59 C. C. A. 225, writ of certiorari denied Reid v. Keene Five Cent Sav. Bank (1903) 24 Sup. Ct. 841, 191 U. S. 567, 48 L. Ed. 305.

Where, in an action on city notes, defendant claimed it was not liable because notes sued on constituted an over issue, but facts concerning such defense were not known to plaintiffs when they purchased them and did not appear on face thereof, plaintiffs' right to recover in a federal court was not a question of local law, but of general law concerning rights of bona fide holders of commercial paper, concerning which federal courts are not bound by local decisions. Citizens' Sav. Bank v. City of Newburyport (1909) 169 Fed. 766, 95 C. C. A. 232, writ of certiorari denied City of Newburyport v. Citizens' Sav. Bank (1909) 30 Sup. Ct. 399, 215 U. S. 598, 54 L. Ed. 342.

Decisions of a state court on the liability of parties to negotiable paper are not controlling on the federal courts. Riley v. Anderson (C. C. 1841) Fed. Cas. No. 11,835.

The negotiability of an instrument is a question pertaining to the law merchant, with regard to which federal courts are not bound by local decisions, unless predicated on a special statutory enactment defining the elements of a negotiable instrument. Austen v. Miller (C. C. 1850) Fed. Cas. No. 661; Bank of Saginaw v. Title & Trust Co. of Western Pennsylvania (C. C. 1900) 105 Fed. 491; State Nat. Bank of St. Louis v. Cudahy Packing Co. (C. C. 1904) 126 Fed. 543, judgment affirmed Cudahy Packing Co. v. State Nat. Bank of St. Louis, Mo. (1904) 134 Fed. 538, 67 C. C. A. 662.

A judgment against plaintiff in a suit in a state court against an indorser of a note, on the ground that plaintiff was affected by equities existing between original parties, held not a bar to a suit in the federal court against the maker, where a different rule obtained. National Bank of the Republic v. Brooklyn City & N. R. Co. (C. C. 1877) Fed. Cas. No. 10,039.

A plea in bar in the United States circuit court, that plaintiff, suing on a note, is not the owner of it, and alleging that it is the property of a citizen of Georgia, where the suit is brought, is not demurrable, notwithstanding the Code of Georgia (section 2789), providing that the title of a bona fide holder suing on a note cannot be inquired into, except to let in some defense. Lanning v. Lockett (C. C. 1882) 10 Fed. 451.

Where a note was executed in Missouri, the fact that it provided that it should be paid at the office of the

payees in Kansas City, Mo., did not render the note subject to the rulings of the Missouri courts as to its negotiability in an action thereon in the federal courts sitting in Missouri, in the absence of express legislation limiting the negotiability of such instruments. State Nat. Bank of St. Louis v. Cudahy Packing Co. (C. C. 1904) 126 Fed. 543, judgment affirmed Cudahy Packing Co. v. State Nat. Bank of St. Louis (1904) 134 Fed. 538, 67 C. C. A. 662.

Whether or not a certificate of deposit is a negotiable instrument, when not controlled by statute, is a question of general commercial law, upon which a federal court is not concluded by state decisions. Forrest v. Safety Banking & Trust Co. (C. C. 1909) 174 Fed. 345.

The validity of notes made in a state and payable therein is controlled by the decisions of the supreme court of the state where the notes are sought to be impeached for fraud or mistake in their execution pursuant to a settlement. Louisville Fertilizer Co. v. Strickland (C. C. 1910) 178 Fed. 578.

130. —— Agency.—State court decisions are not controlling on a question as to the general power of brokers in dealing with their principal's property. Bragg v. Meyer (C. C. 1858) Fed. Cas. No. 1,801.

131. —— Judgments.—The right of collateral attack on a judgment is a matter of general law as to which the decisions of the courts of a state are not binding on a federal court. Phœnix Bridge Co. v. Castleberry (1904) 131 Fed. 175, 65 C. C. A. 481.

132. —— Mortgages.—The supreme court, in a suit involving the question whether a deed absolute on its fact was a mortgage, is not bound by the decisions of the highest court of the state. Russell v. Southard (1851) 12 How. 139, 147, 13 L. Ed. 927.

The determination by a state court that the property covered by a mortgage of all the property and franchises of a railway company remains liable, after a sale under a federal court decree of foreclosure, for the debts thereafter accruing against the mortgagor, because of the purchaser's failure to organize a domestic corporation, is not conclusive on the federal supreme court in determining the rights secured by the purchaser under such decree. Julian v. Central Trust Co. (1904) 24 Sup. Ct. 399, 403, 193 U. S. 93, 48 L. Ed. 629.

The validity and effect of title to imports, vested in bankers to secure them for advances, is governed by the local law, and not, by the general commercial law. In re Richheimer (1915) 221 Fed. 16, 136 C. C. A. 542, certiorari denied Arbuthnot v. Central Trust Co. of Illinois (1915) 35 Sup. Ct. 662, 238 U. S. 624, 59 L. Ed. 1494.

The decisions of the supreme court of California holding that judgment creditors of a mining corporation may question the validity of a mortgage given by the corporation on the ground that it was not ratified by the stockholders, as required by the state statute, do not relate to any question of commercial or general law, but are local in their effect, and are binding on a federal court. Williams v. Gold Hill Min. Co. (C. C. 1899) 96 Fed. 454.

While chattel mortgages are instruments of general use, each state has the right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity, and the decisions of the courts of a state, determining the local law in that regard, will be followed by the federal courts. American Surety Co. of New York v. Worcester Cycle Mfg. Co. (C. C. 1900) 100 Fed. 40.

The rule of the supreme court of the United States that a chattel mortgage of goods, giving the mortgagor the right to sell and to replace the goods sold with others which should come under the mortgage, is fraudulent and void as to the other creditors as a matter of general law, is to be followed in bankruptcy proceedings, regardless of the decisions of the courts of the state on the question. In re Hull (D. C. 1902) 115 Fed. 858.

In determining the validity of a mortgage, the federal courts should follow the state laws. In re Clough (D. C. 1912) 197 Fed. 185.

133. —— Replevin.—The question of what will excuse a plaintiff for nonreturn of property replevied, on his failure in the action, is one of general law in Tennessee, and the decisions of its supreme court thereon are therefore not binding on a federal court. Three States Lumber Co. v. Blanks (1904) 133 Fed. 479, 66 C. C. A. 353, 69 L. R. A. 283.

134. International law.—The decisions of a state court that a law of another country is opposed to the policy of the state, and cannot be enforced there, are not controlling in the federal courts, the question of international comity being controlled by international law and custom. Evey v. Mexican Cent. Ry. Co. (1897) 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387.

Federal courts must render independent decisions on questions of right under laws of nations of which they have jurisdiction, and the decisions of the state courts are not controlling thereon. Guernsey v. Imperial Bank of Canada (1911) 188 Fed. 300, 110 C. C. A. 278, 40 L. R. A. (N. S.) 377.

135. Laws relating to procedure in general.—This section does not apply to the process or practice of the federal courts unless adopted by an act of congress, or by some rule of court

not inconsistent with the laws of the United States. U. S. v. Eckford (1867) 73 U. S. (6 Wall.) 484, 18 L. Ed. 920; McBride v. Neal (1914) 214 Fed. 966, 131 C. C. A. 262.

This section furnished a rule to guide the court in the formation of its judgment, but not one for carrying the judgment into execution. It furnishes a rule of decision in trials at common law without prescribing an execution, or proceedings after judgment, or the effect of such proceedings. Wayman v. Southard (1825) 10 Wheat. 1, 24, 6 L. Ed. 253.

While the nature, validity, and interpretation of contracts are to be governed by the law of the place where the contracts are made or are to be performed, the remedy on an instrument negotiable in one state and nonnegotiable in another is determined by the law of the forum. Bank of the U. S. v. Donnally (1834) 8 Pet. 361, 372, 8 L. Ed. 974.

This section has never been considered as an act to regulate process, and where a judgment was obtained in the federal court prior to a state law requiring judgments to be recorded in order to make them a lien, such statute did not abrogate the lien of the judgment, though it had not been recorded as required by the statute. Massingill v. Downs (1849) 7 How. 760, 767, 12 L. Ed. 903.

The lien of a judgment and execution in the federal courts arises under state laws, and a lien may be considered as a rule of property, and a rule of decision under this section. Clements v. Berry (1850) 11 How. 398, 411, 13 L. Ed. 745. See, also, post, § 1696, and notes.

A state statute, enacting that a judgment in ejectment, provided the action is brought in a form which gives precision to the parties and land claimed, shall be a bar to any other action between the same parties involving the same subject-matter, is a rule of property and of practice, and is conclusive on titles in the federal courts. Miles v. Caldwell (1864) 2 Wall. 35, 44, 17 L. Ed. 755.

The decision of the highest state court that the owner of property abutting on a local improvement can, by mandamus or injunction, compel a hearing by the body making the assessment, or prevent the approval of the engineer's report until such hearing has been accorded, is conclusive on the supreme court of the United States in reviewing a judgment of the state court, foreclosing the lien of such assessment. Hibben v. Smith (1903) 24 Sup. Ct. 88, 90, 191 U. S. 310, 48 L. Ed. 195.

Holders of oil and gas lease are precluded by this section and section 1537, ante, from maintaining ejectment in federal courts, if the action is not maintainable in state court. Guffey v. Smith (1915) 35 Sup. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; Id. (1915) 35 Sup. Ct. 532, 237 U. S. 120, 59 L. Ed. 866, reversing decree Smith v. Guffey (1912) 202 Fed. 106, 120 C. C. A. 436

The provision of Code Civ. Proc. N Y. § 450, that the husband shall not be a necessary or proper party to an action for damages to the person, estate, or character of his wife, being, under this section, a rule of decision in trials at common law in the United States courts held in the state of New York, applies to an action brought in such a court by an alien married woman against a corporation of the state for libel, and she need not join her husband, nor sue by prochein ami. Morning Journal Ass'n v. Smith (1892) 56 Fed. 141, 4 C. C. A. 8.

There are no federal statutes defining a successful party in a civil action, or granting to him a judgment for costs in a civil action at law; the federal circuit courts following the state statutes as authorized by this section. Scatcherd v. Love (1908) 166 Fed. 53, 91 C. C. A. 639.

The right of the prevailing party to costs is recognized by this section. Hathaway v. Roach (C. C. 1846) Fed. Cas. No. 6,213.

The federal courts are not bound by the decision of the highest court of the state that mandamus is the only proper remedy upon municipal bonds. Sanford v. Portsmouth (C. C. 1877) Fed. Cas. No. 12,315.

Rev. St. Ohio, § 5306, providing that "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury to the plaintiff," cannot be read as a proviso to section 6134, giving a right of action for the unlawful killing of another, and is therefore not a rule of property binding on the federal courts in an action under the latter section. Hughey v. Sullivan (C. C. 1897) 80 Fed. 72.

This section does not require the federal court to apply rules established by the highest court of the state in determining the validity of service of a summons on motion to quash return on summons. Kaufman v. Garner (C. C. 1909) 173 Fed. 550.

This section does not require the federal courts to conform to state laws as to the mere manner of executing commissions to take testimony, which may be regulated by the court, either by general rules, or by special directions accompanying the commission. U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601.

See, also, ante, § 1537, and notes.

136. Limitation of actions.—The courts of the United States, in the absence of legislation on the subject by Congress, recognize the statutes of limitation of the several states, and

give them the same construction and effect as given by the local tribunals. McCluny v. Silliman (1830) 3 Pet. 270, 277, 7 L. Ed. 676; Harpending v. Dutch Church (1842) 41 U. S. (16 Pet.) 455, 10 L. Ed. 1029; Leffingwell v. Warren (1862) 67 U. S. (2 Black) 599, 17 L. Ed. 261; Hanger v. Abbott (1867) 6 Wall. 532, 537, 18 L. Ed. 939; Chemung Canal Bank v. Lowery (1876) 93 U. S. 72, 75, 23 L. Ed. 806; Amy v. Dubuque (1878) 98 U. S. 470, 471, 25 L. Ed. 228; Bauserman v. Blunt (1893) 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Balkam v. Woodstock Iron Co. (1894) 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953 (affirming [C. C. 1890] 43 Fed. 648); Great Western Tel. Co. v. Purdy (1896) 16 Sup. Ct. 810, 162 U. S. 329, 40 L. Ed. 986; Dibble v. Bellingham Bay Land Co. (1896) 163 U. S. 63, 16 Sup. Ct. 939, 41 L. Ed. 72 (decree reversed McClaskey v. Barr [C. C. 1891] 47 Fed. 154); Security Trust Co. v. Black River Nat. Bank (1902) 23 Sup. Ct. 52, 61, 187 U. S. 211, 47 L. Ed. 147; Elder v. McClaskey (1895) 70 Fed. 529, 17 C. C. A. 251 (certiorari denied [1896] 16 Sup. Ct. 1201, 163 U. S. 685, 41 L. Ed. 315); Fearing v. Glenn (1896) 73 Fed. 116, 19 C. C. A. 388; Underwood v. Patrick (1899) 94 Fed. 468, 36 C. C. A. 330; Hanchett v. Blair (C. C. A. 1900) 100 Fed. 817; Cheatham v. Evans (1908) 160 Fed. 802, 87 C. C. A. 576; Nicolls v. Rodgers (C. C. 1828) Fed. Cas. No. 10,260; Amory v. Lawrence (C. C. 1872) Fed. Cas. No. 336; King Iron Bridge & Mfg. Co. v. Otoe County (C. C. 1886) 27 Fed. 800 (judgment reversed [1887] 7 Sup. Ct. 552, 120 U. S. 225, 30 L. Ed. 623); Andrews v. Bacon (C. C. 1889) 38 Fed. 777; McCormick v. Eliot (C. C. 1890) 43 Fed. 469, 472; Cockrill v. Butler (C. C. 1897) 78 Fed. 679; Buhl v. Stephens (C. C. 1898) 84 Fed. 922, 926; Brunswick Terminal Co. v. National Bank of Baltimore (C. C. 1898) 88 Fed. 607; Reynolds v. Lyon County, Iowa (C. C. 1899) 97 Fed. 155; Brown v. Allebach (C. C. 1908) 166 Fed. 488 (decree reversed Fidelity Trust & Safe Deposit Co. v. Archer [1910] 179 Fed. 32, 103 C. C. A. 16); Fordham v. Hicks (D. C. 1915) 224 Fed. 810.

The federal courts must conform to the decisions of the courts of a state construing the statute of limitations of the state in which the controversy has arisen. Shelby v. Guy (1826) 24 U. S. (11 Wheat.) 361, 6 L. Ed. 495; Harpending v. Reformed Protestant Dutch Church (1842) 16 Pet. 455, 493, 10 L. Ed. 1029; Tioga R. Co. v. Blossburg & C. R. (1873) 20 Wall. 137, 143, 22 L. Ed. 331; Brunswick Terminal Co. v. National Bank (1900) 99 Fed. 635, 40 C. C. A. 22; Forshaw v. Layman (1910) 182 Fed. 193, 104 C. C. A. 559; Quinette v. Pullman Co. (1916) 229 Fed. 333, 143 C. C. A. 453; Randolph v. King (C. C. 1867) Fed. Cas. No. 11,560; Coleman v. Peshtigo Lumber Co. (C. C. 1887) 30 Fed. 317; Bullion & Exchange Bank v. Hegler (C. C. 1899) 93 Fed. 890; Black v. Elkhorn Min. Co. (C. C. 1891) 47 Fed. 600 (judgment affirmed [1892] 52 Fed. 859, 3 C. C. A. 312); Taylor v. Union Pac. R. Co. (C. C. 1903) 123 Fed. 155; Capelle v. Trinity M. E. Church (D. C.) Fed. Cas. No. 2,392; Irvine v. Elliott (D. C. 1913) 203 Fed. 82.

Statutes of limitation, even in personal actions, including actions on judgments, were "laws of the several states," which, under Judiciary Act Sept. 24, 1789 (incorporated in this section), and before Act June 1, 1872, § 5, ante, § 1537, must "be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," except where otherwise provided by the constitution, treaties, or statutes. Michigan Ins. Bank v. Eldred (1889) 130 U. S. 693, 9 Sup. Ct. 690, 32 L. Ed. 1080.

It is only where the constitution, treaties, or statutes of the United States do not otherwise require or provide that this section operates; and where a statute of the United States giving a remedy imposes a limitation on an action thereunder, the statute of limitations of the states have no application. U. S. v. Boomer (1910) 183 Fed. 726, 106 C. C. A. 164; Id. (1910) 183 Fed. 730, 106 C. C. A. 168.

A state statute prescribing a limitation as to a suit in equity to affect a title to land is not binding upon the federal court. Hall v. Russell (C. C. 1875) Fed. Cas. No. 5,943.

When congress creates a new right of action, without providing any limitation thereto, the state statutes of limitations apply, and are binding upon the United States courts. Copp v. Louisville & N. Ry. Co. (C. C. 1892) 50 Fed. 164.

136½. —— **Admiralty.**—See notes under § 1537, line 21.

137. —— **Enforcement of particular limitation laws.**—The Virginia act of limitations of 1792, providing that unexecuted judgments may be revived within 10 years but not thereafter, being a limitation of law and not a rule regulating executions, is made applicable to cases from that state on appeal or writ of error to the supreme court by this section, although such provision does not apply to the state regulations for the execution of judgments. Ross v. Duval (1839) 38 U. S. (13 Pet.) 45, 10 L. Ed. 51.

A nonresident owner of a claim against a decedent's estate cannot maintain a suit against the administrator in a federal court, where the suit, if brought in the state courts, would have been barred by the statutes of the state as construed by its courts because instituted after the expiration of

the period limited by the order of the probate court for the presentation of claims against the estate, and after the administrator's final account had been allowed and the final distribution of the estate decreed. But Gen. St. Minn. 1894, §§ 4509–4511, 4514, 4517, 4523, which require all creditors of a decedent to present their claims to the probate court having charge of the administration of his estate within such time, not less than 6 nor more than 18 months from the granting of letters testamentary or of administration, as that court shall allow, and provide that any claim on contract not so presented shall be barred forever, do not deprive a federal court of jurisdiction of an action by a nonresident creditor against the executor or administrator of a decedent on a claim against his estate, and that the limitation therein cannot be applied to bar such an action in less than the full 18 months during which the probate court might, in its discretion, entertain a claim. Security Trust Co. v. Dent (1900) 104 Fed. 380, 43 C. C. A. 594, reversed (1902) 23 Sup. Ct. 61, 187 U. S. 237, 47 L. Ed. 158.

The statute of Maine (Rev. St. c. 87), which provides that, where a claim against the estate of a decedent is not filed in the probate office as therein authorized, "the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due," is a statute of limitations applicable to all claims founded upon a legal demand, in whatever court they may be asserted, state or federal, and whether in an action at law, which is recognized by the practice of the state as a proper remedy, or whether cognizable in a federal court of equity, independent of statute. Hale v. Coffin (1903) 120 Fed. 470, 57 C. C. A. 528, affirming decree (C. C. 1902) 114 Fed. 567.

Under the New Jersey statute giving a right of action for wrongful death, provided the action is brought within 12 months, such limitation is of the essence of the remedy, and is controlling in any court in which the action may be brought. International Nav. Co. v. Lindstrom (1903) 123 Fed. 475, 60 C. C. A. 649, reversing judgment Lindstrom v. International Nav. Co. (C. C. 1902) 117 Fed. 170, and writ of certiorari denied Id. (1904) 24 Sup. Ct. 852, 193 U. S. 669, 48 L. Ed. 840.

An action by a citizen of another state against executors in Minnesota, to enforce a claim against the estate of the decedent, cannot be maintained in a federal court after the time limited by the state statute for presenting claims to the probate court for allowance has expired, where the claim was not so presented, and no excuse is alleged for the failure to present it. Schurmeier v. Connecticut Mut. Life Ins. Co. (1903) 124 Fed. 865, 60 C. C. A. 51.

The limitation of time within which by the statute claims must be presented for allowance in the probate court is inseparable from the peculiar procedure prescribed. It is a part of that procedure, and so not like a general statute of limitations, and can only be applied to parties who are bound by such special mode of procedure. Hartman v. Fishbeck (C. C. 1883) 18 Fed. 291.

Act Pa. April 25, 1850, which takes out of the operation of the statute of limitations suits against a corporation which may have suspended business, etc., applies to a suit brought against a national bank in the hands of a receiver. Riddle v. First Nat. Bank (C. C. 1886) 27 Fed. 503.

B. & C. Comp. Or. § 241, providing that if, at any time after the entry of judgment, 10 consecutive years have elapsed without execution, no execution shall thereafter issue on the judgment which shall thereafter be conclusively presumed to be paid, is a rule of property binding on the federal court sitting in Oregon, and hence a federal decree recovered in Oregon, on which no execution had been issued for more than 10 years, was barred. General Electric Co. v. Hurd (C. C. 1909) 171 Fed. 984.

Rem. & Bal. Code Wash. § 1432, which provides that an action against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal, and section 1633, which declares that all the provisions of the title containing the above-named section relating to administrators' bonds shall apply to bonds taken of guardians, are enforceable in a federal court and available as a defense to a suit on a guardian's bond against the surety more than six years after the death of his principal. Newbery v. Wilkinson (C. C. 1911) 190 Fed. 62, decree affirmed Newberry v. Same (1912) 199 Fed. 673, 118 C. C. A. 111.

138. Actions to which state limitation laws apply.—In the absence of an act of Congress on the subject, the statutes of limitations of the several states apply to actions at law for the infringement of patents brought within their borders. Campbell v. City of Haverhill (1895) 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 240; Parker v. Hawk (C. C. 1857) Fed. Cas. No. 10,737; Rich v. Ricketts (C. C. 1870) Fed. Cas. No. 11,762; Sayles v. Oregon Cent. Ry. Co. (C. C. 1879) Fed. Cas. No. 12,423; Hayden v. Oriental Mills (C. C. 1883) 15 Fed. 605; Brickill v. City of Baltimore (C. C. 1892) 52 Fed. 737. CONTRA, see Parker v. Hallock (C. C. 1857) Fed. Cas. No. 10,735; Collins v. Peebles (C. C. 1865) Fed. Cas. No. 3, 017; Read v. Miller (C. C. 1867) Fed. Cas. No. 11,610; Wetherill v. New Jersey Zinc Co. (C. C. 1874) Fed. Cas. No. 17,464; Anthony v. Carroll (C. C. 1875) Fed. Cas. No. 487; Sayles v.

Dubuque & S. C. R. Co. (C. C. 1881) 9 Fed. 516; Hayward v. City of St. Louis (C. C. 1882) 11 Fed. 427; Adams v. Bellaire Stamping Co. (C. C. 1885) 25 Fed. 270, 271; May v. Buchanan County (C. C. 1886) 29 Fed. 469; Same v. Logan County (C. C. 1887) 30 Fed. 250; Same v. County of Cass (C. C. 1887) 30 Fed. 762; Same v. Ralls County (C. C. 1887) 31 Fed. 473; McGinnis v. Erie County (C. C. 1890) 45 Fed. 91; California Artificial Stone Pav. Co. v. Starr (C. C. 1891) 48 Fed. 560; Brickill v. City of Buffalo (C. C. 1892) 49 Fed. 371; Same v. City of Hartford (C. C. 1892) 49 Fed. 372.

Under a state statute limiting the time to file a new action after dismissal of a former action, and after the time limited by the general statute of limitations, a suit in the state court, after dismissal, might be renewed in the United States court within the limitation period, though the state court had held that a suit could not be renewed therein after dismissal of a previous suit brought in, or removed to the federal court. Alexander v. Gordon (1900) 101 Fed. 91, 41 C. C. A. 228; Harrison v. Remington Paper Co. (1905) 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Kansas City Hydraulic Press Brick Co. v. National Surety Co. (1909) 167 Fed. 496, 93 C. C. A. 132; Brown v. Erie R. Co. (1910) 176 Fed. 544, 100 C. C. A. 132; McCormick v. Eliot (C. C. 1890) 43 Fed. 469; Fordham v. Hicks (D. C. 1915) 224 Fed. 810.

Actions to enforce the statutory liability of stockholders of national banks are governed by the statutes of limitations of the state where the suit is brought, so far as applicable. Aldrich v. Skinner (C. C. 1899) 98 Fed. 375; Rankin v. Miller (D. C. 1913) 207 Fed. 602.

An action under section 7 of the antitrust law (section 8829, post), is governed as to limitation by the statutes of the state in which it is brought. City of Atlanta v. Chattanooga Foundry & Pipeworks (1903) 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721; Same v. Chattanooga Foundry & Pipe Co. (C. C. 1900) 101 Fed. 900.

An action under R. S. § 1980, post, § 3933, for an assault committed in attempting to prevent plaintiff from voting, is governed by the state statute of limitations. O'Sullivan v. Felix (1912) 194 Fed. 88, 114 C. C. A. 166.

An action against a railroad company for injury to an employé based on Safety Appliance Act March 2, 1893, and brought in Kentucky, held governed as to limitation by Ky. St. § 2515, as one upon a "liability created by statute." Nichols v. Chesapeake & O. Ry. Co. (1912) 195 Fed. 913, 115 C. C. A. 601.

The interstate commerce act prescribes no limitation of time within which actions based thereon shall be instituted, and therefore actions to recover damages for discrimination in rates must be governed, as to limitations, by the statutes of the state wherein they are brought. Ratican v. Terminal R. Ass'n of St. Louis (C. C. 1902) 114 Fed. 666.

In a proceeding begun in a state court to recover a legacy by a remedy given by the state statute, it will be held by the federal court to which it has been removed, in conformity to the decisions of the state courts, that a claim barred by the statute of limitations cannot be set off against such legacy. Wilson v. Smith (C. C. 1902) 117 Fed. 707, decree affirmed (1904) 126 Fed. 916, 61 C. C. A. 446.

Under this section the statute of limitations of the particular state where the action is brought controls in respect to the right of action for the price of mileage books for both intrastate and interstate transportation. South Georgia Ry. Co. v. South Georgia Grocery Co. (Ga. App. 1915) 86 S. E. 939.

139. —— **Actions by United States.**— A state statute of limitations does not bar suits by the United States brought in their own courts in their sovereign capacity to assert a public interest or to enforce a public right. U. S. v. Thompson (1878) 98 U. S. 486, 25 L. Ed. 194; Same v. Fidelity Trust Co. (1903) 121 Fed. 766, 58 C. C. A. 42; State of Iowa v. Carr (1911) 191 Fed. 257, 112 C. C. A. 477; Same v. John A. Creighton Real Estate & Trust Co. (1911) 191 Fed. 270, 112 C. C. A. 496; U. S. v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552; Chesapeake & Delaware Canal Co. v. U. S. (1915) 223 Fed. 926, 139 C. C. A. 406; U. S. v. Hoar (C. C. 1821) Fed. Cas. No. 15,373; Same v. Williams (C. C. 1849) Fed. Cas. No. 16,720; (C. C. 1850) Fed. Cas. No. 16,721; McGlinchy v. U. S. (C. C. 1875) Fed. Cas. No. 8,803; Perkins v. Same (C. C. 1875) Fed. Cas. No. 10,990; U. S. v. Southern Pac. R. Co. (C. C. 1889) 39 Fed. 152; Same v. Belknap (C. C. 1896) 73 Fed. 19; Same v. Fitts (D. C. 1912) 197 Fed. 1007; Same v. Chesapeake & D. Canal Co. (D. C. 1913) 206 Fed. 964; Same v. Pitan (D. C. 1915) 224 Fed. 604.

But this rule does not apply where the government is not the real party in interest but if successful the litigation must inure to the benefit of private individuals. U. S. v. Des Moines Val. R. Co. (C. C. 1895) 70 Fed. 435; La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

An action of assumpsit, brought by the United States to recover dividends on corporate stock owned by it, to be paid into the national treasury, is a suit in its sovereign capacity, which is not barred by a state statute of limitations. U. S. v. Chesapeake & D. Canal Co. (D. C. 1913) 206 Fed. 964.

The fact that United States is a

stockholder does not exempt a corporation from the operation of the statute of limitations. Bank of the United States v. M'Kenzie (C. C. 1829) Fed. Cas. No. 927. But this rule does not prevent the application of the rule that a state statute of limitations will not bar a suit brought by the government in its sovereign capacity, in an action for dividends on corporate stock owned by the United States. U. S. v. Chesapeake & D. Canal Co. (D. C. 1913) 206 Fed. 964.

There is a distinction between a pure statute of limitations and a stipulation as to time in a contract, or as to the time for taking certain steps in an action, which latter obligations bind the United States, as well as a private individual. U. S. v. Chesapeake & D. Canal Co. (D. C. 1913) 206 Fed. 964.

The 10-years limitation prescribed by Rev. St. Wis. § 4221, in respect to real estate, does not run against a claimant to land so long as the legal title remains in the United States, the sovereign being exempt from suit. Godkin v. Cohn (1897) 80 Fed. 458, 25 C. C. A. 557.

140. —— Conflict of limitation laws. —The general rule is that in respect to the limitation of actions the law of the forum governs, and, while the courts will enforce a limitation established under the law of another state, when applicable, they will not do so to the exclusion of the law of the forum. Hutchings v. Lamson (1899) 96 Fed. 720, 37 C. C. A. 564.

In an action for personal injuries, the right to relief is governed by the laws of the state in which action is brought, though barred by a statute of the state in which the cause of action accrued. Southern Ry. Co. v. Mayes (1902) 113 Fed. 84, 51 C. C. A. 70, writ of certiorari denied Mayes v. Southern R. Co. (1902) 22 Sup. Ct. 942, 186 U. S. 483, 46 L. Ed. 1260; Nonce v. Richmond & D. R. Co. (C. C. 1887) 33 Fed. 429.

In an action for a death occurring in another state, through defendant's wrongful act, the statute of limitations of the forum governs, unless the statute giving the right of action in such other state itself prescribes a limitation. Munos v. Southern Pac. Co. (1891) 51 Fed. 188, 2 C. C. A. 163; Theroux v. Northern Pac. R. Co. (1894) 64 Fed. 84, 12 C. C. A. 52; Gregory v. Southern Pac. Co. (C. C. 1907) 157 Fed. 113.

Where plaintiff, a resident of Montana, contracted in Minnesota with defendant for the transportation of certain cattle from Minnesota, to destination in Montana, and thereafter brought suit in the Montana state courts for damages resulting from delay, which suit defendant removed to the federal circuit court sitting in Montana, such court would not enforce a stipulation in the transportation contract, providing a 60-day limitation for an action thereon, which was void under the express provisions of Civ. Code Mont. § 2245, though it was not prohibited by the laws of Minnesota, where the contract was made. Northern Pac. Ry. Co. v. Kempton (1905) 138 Fed. 992, 71 C. C. A. 246.

Gen. St. Conn. 1888, § 1379, providing that "no suit for any forfeiture on any penal statute shall be brought, but within one year next after the commission of the offense," does not apply to an action in the federal court sitting in Connecticut against trustees of a Montana mining corporation, residing in Connecticut, to recover debts of the corporation, as authorized by Civ. Code Mont. § 451, by reason of the trustees' failure to file annually a specified report of the company's business, as required by such section. Davis v. Mills (1903) 121 Fed. 703, 58 C. C. A. 123.

In an action in Vermont by a railway brakeman against the company for personal injuries occasioned in the province of Quebec, Can., defendant in its pleas set out "a general law of the province of Quebec" "that all suits for any damage or injury sustained by reason of the railway shall be instituted within 12 months." Held, that this was a mere general statute of limitations, and as the right of action is given by the common law, and not by the statute, the statute of limitations of Vermont should govern. Johnston v. Canadian Pac. Ry. Co. (C. C. 1892) 50 Fed. 886, judgment affirmed Canadian Pac. Ry. Co. v. Johnston (1894) 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470.

An action to charge a stockholder in a foreign corporation with liability for debts of the corporation, under the constitution and statutes of the foreign state is governed as to limitation by the law of the forum; there being no limitation prescribed as to such actions by the statute of the foreign state other than that contained in its general statute of limitations. Whitman v. Citizens' Bank of Reading (1901) 110 Fed. 503, 49 C. C. A. 122 (writ of certiorari denied Same v. Norton [1901] 22 Sup. Ct. 932, 183 U. S. 695, 46 L. Ed. 394); Seattle Nat. Bank v. Pratt (1901) 111 Fed. 841, 49 C. C. A. 662, affirming judgment [C. C. 1900] 103 Fed. 62); Platt v. Hungerford (C. C. 1902) 116 Fed. 771; Ramsden v. Gately (C. C. 1906) 142 Fed. 912; Same v. Knowles (C. C. 1906) 151 Fed. 718.

But where the foreign state has a statute providing that all suits for the enforcement of rights accruing to individuals under statutes, "acts of incorporation," or by operation of law, shall be brought within 20 years after the right of action accrues, that statute, and not the statute of limitations of the forum, applies. Brunswick Terminal Co. v. National Bank (1900) 99 Fed. 635, 40 C. C. A. 22, reversing Brunswick Terminal Co. v. National

Bank of Baltimore (C. C. 1898) 88 Fed. 607.

141. Laws of evidence.—The state laws of evidence are rules of decision in trials at the common law in the United States courts. McNeil v. Holbrook (1838) 37 U. S. (12 Pet.) 84, 9 L. Ed. 1009; Vance v. Campbell (1861) 1 Black, 427, 430, 17 L. Ed. 168; Wright v. Bales (1862) 67 U. S. (2 Black) 535, 17 L. Ed. 264; Ryan v. Bindley (1863) 68 U. S. (1 Wall.) 66, 17 L. Ed. 559; Hinds v. Keith (1893) 57 Fed. 10, 6 C. C. A. 231; U. S. v. Dunham (C. C. 1857) Fed. Cas. No. 15,006; Fowler v. Hecker (C. C. 1860) Fed. Cas. No. 5,001.

The "laws of the several states" with respect to evidence within the meaning of this section, apply not only to the statutes, but to the decisions of their highest courts. Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co. (1903) 23 Sup. Ct. 517, 518, 189 U. S. 221, 47 L. Ed. 782.

This section does not require the federal courts to conform to state laws as to the mere manner of executing commissions to take testimony, which may be regulated by the court, either by general rules, or by special directions accompanying the commission. U. S. v. Fifty Boxes and Packages of Lace (D. C. 1899) 92 Fed. 601.

A state law compelling parties to testify is enforceable in the federal court. Berry v. Fletcher (C. C. 1870) Fed. Cas. No. 1,356. So is a state law allowing a party to be examined as a witness on his own behalf. Dibblee v. Furniss (C. C. 1859) Fed. Cas. No. 3,888.

A witness, competent under the state laws, is also competent in suits at law in the United States courts. Vance v. Campbell (1861) 66 U. S. (1 Black) 427, 17 L. Ed. 168; Hausknecht v. Claypool (1861) 66 U. S. (1 Black) 431, 17 L. Ed. 172.

The power of a circuit court of the United States to order a surgical examination of the plaintiff in an action for damages for a personal injury, in accordance with the provisions of a statute of the state in which the court is sitting, there being no law of congress in conflict therewith, is conferred by this section. Camden & S. Ry. Co. v. Stetson (1900) 20 Sup. Ct. 617, 177 U. S. 172, 44 L. Ed. 721. But see Chicago & N. W. Ry. Co. v. Kendall (1909) 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560, holding that the question whether a court has at common law the power to compel a plaintiff in an action for a personal injury to submit to a surgical examination is a matter of practice and not of evidence, and, as a matter of practice relating to the power of courts, neither state statutes nor the decisions of state courts on the subject are binding on federal courts.

Suits in equity are not within this section, and hence the Pennsylvania statute providing for the examination of a party to a suit when called by his adversary, as if under cross-examination, is not applicable to a suit in equity in a United States court. Pennsylvania R. Co. v. Allegheny Valley R. Co. (C. C. 1885) 25 Fed. 115.

In view of this section, Code Civ. Proc. N. Y. § 834, providing that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States sitting within that state in trials at common law. Connecticut Mut. Life Ins. Co. v. Union Trust Co. (1884) 5 Sup. Ct. 119, 112 U. S. 250, 28 L. Ed. 708.

The law governing the admissibility of testimony in criminal cases is the law of the state as it was when the courts of the United States were established by Judiciary Act 1789, and where a trial took place in Virginia the fact that evidence was competent under a law of the state passed in 1849 did not render it competent in the federal court. U. S. v. Reid (1851) 12 How. 361, 363, 13 L. Ed. 1023.

Where depositions taken to be used in an action in a state court that has been dismissed would be admissible as evidence under the statute of the state in another suit subsequently brought, and such second suit, after being brought, has been removed from the state court, such depositions are admissible in the federal court. Gravelle v. Minneapolis & St. L. R. Co. (C. C. 1882) 16 Fed. 435, 3 McCrary, 385.

By the uniform decisions of the United States courts, the contract created by the indorsement and delivery of a negotiable note cannot be contradicted, added to, or varied by proof of a contemporaneous parol agreement; and, the question being one of general commercial law, such rule governs in all federal courts. Northern Nat. Bank v. Hoopes (C. C. 1900) 98 Fed. 935.

See, also, ante, § 1537, and notes.

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Taylor v. Benham (1847) 5 How. 233, 261, 12 L. Ed. 130; Hyde v. Stone (1857) 20 How. 170, 175, 15 L. Ed. 874; Fenn v. Holme (1858) 21 How. 481, 485, 16 L. Ed. 198; Andreae v. Redfield (1878) 98 U. S. 225, 235, 25 L. Ed. 158; Rouse v. Hornsby (1896) 16 Sup. Ct. 610, 611, 161 U. S. 588, 40 L. Ed. 817; Ex parte Connaway (1900) 20 Sup. Ct. 951, 953, 178 U. S. 421, 44 L. Ed. 1134; Fenno v. Primrose (1903) 119 Fed. 801, 56 C. C. A. 313; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (1903) 121 Fed. 233, 57 C. C. A. 469; Allen v. Clark (1903) 126 Fed. 738, 740, 62 C. C. A. 58; Dolbear v. Foreign Mines Development Co. (1912) 196 Fed. 646, 116 C. C. A. 338; U. S.

v. Minor (C. C. 1884) 26 Fed. 672, 674 (reversed [1885] 5 Sup. Ct. 836, 114 U. S. 233, 29 L. Ed. 110); Richter v. Magone (C. C. 1889) 47 Fed. 192, 194; Allen v. Fairbanks (C. C. 1891) 45 Fed. 445, 447; Brickill v. Baltimore (C. C. 1892) 52 Fed. 737, 739 (affirmed [1894] 60 Fed. 98, 8 C. C. A. 500); Atlanta v. Chattanooga Foundry & Pipe Co. (C. C. 1900) 101 Fed. 900, 910; Hale v. Coffin (C. C. 1902) 114 Fed. 567 (affirmed [1903] 120 Fed. 470, 57 C. C. A. 528); Beck v. Johnson (C. C. 1909) 169 Fed. 154; Rural Home Telephone Co. v. Powers (C. C. 1910) 176 Fed. 986; Hicks v. Knost (D. C. 1899) 94 Fed. 625, 628 (affirmed [1900] 104 Fed. 1005, 44 C. C. A. 305); The Jonas H. French (D. C. 1902) 119 Fed. 462, 464.

§ 1539. (R. S. § 915.) Attachments, etc., in common-law causes as provided by laws of State.

In common-law causes in the [circuit and] district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such [circuit or] district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy.

Act June 1, 1872, c. 255, § 6, 17 Stat. 197.

The words of this section inclosed in brackets, "circuit and," and "circuit or," became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Attachments in postal suits were provided for by R. S. §§ 924–932, post, §§ 1550–1558.

The dissolution of attachments, in conformity with State laws, was provided for by R. S. § 933, post, § 1559.

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See note to § 918.

1. Operation and effect in general.—The law of the United States pro-

viding that the form of writs, executions and other processes "and the forms and modes of proceedings in suits of common law shall be same as are now used" in the state courts respectively, do not impose on United States officers an obligation to conform their conduct to the state law in serving process of attachment, and committing, for want of bail, a person arrested on a writ sued out by the United States to recover a penalty for violating a federal law. Palmer v. Allen (1813) 7 Cranch, 550, 564, 3 L. Ed. 436.

An action by the United States, brought in the circuit court of the United States to recover in specie logs claimed to belong to the United States, is not a case of an attachment against the property of a defendant, under this section, but is a case where, under section 914, R. S., section 1537, ante, the forms and modes of proceeding are to conform, as near as may be, to the forms and modes of proceeding existing at the time, in a like cause, in the courts of the state in which the circuit court is sitting. U. S. v. Bryant (1884) 4 Sup. Ct. 601, 603, 111 U. S. 499, 28 L. Ed. 496.

The remedies are the remedies defined in the state laws and subject to the same conditions and limitations, and the practice of permitting a constructive levy by attaching creditors under state process on the property in possession of a United States marshal and their intervention in proceedings in the circuit court of the United States for the same district is sufficient, where as between state courts of concurrent jurisdiction a similar method of acquiring and adjusting conflicting rights is prescribed. Gumbel v. Pitkin (1888) 8 Sup. Ct. 379, 389, 124 U. S. 131, 31 L. Ed. 374.

The district court of Porto Rico, when exercising the jurisdiction of a circuit court, conferred by Act April 12, 1900, c. 191, § 34, 31 Stat. 77, must conform to the local practice for the issuing of attachments, and the recovery of damages when wrongfully issued. Fernandez y Perez v. Perez y Fernandez (1906) 26 Sup. Ct. 561, 565, 202 U. S. 80, 50 L. Ed. 942.

Gen. St. Kan. 1889, par. 4290, provides that, where plaintiff desires to take issue on the answer of a garnishee, he shall give notice thereof, "in which case the issue shall stand for trial as a civil action," etc. Held that, though it is begun by attachment, the proceeding is a "civil cause," within the meaning of R. S. § 914, ante, § 1537, requiring the practice and pleading in the federal courts in civil causes to conform to those in the state courts in similar causes, any rule of court to the contrary notwithstanding. Citizens' Bank v. Farwell (1893) 56 Fed. 570, 6 C. C. A. 24.

The decisions of the supreme court of the state construing and applying its attachment laws are rules of decision in the federal courts in like cases coming from that state. Rice v. Adler-Goldman Commission Co. (1895) 71 Fed. 151, 18 C. C. A. 15.

A citizen and resident of West Virginia can maintain his action and pursue under attachment proceedings in the circuit court for the district of West Virginia all that the laws of the state could allow him. Pacific Mut. Life Ins. Co. v. Tompkins (1900) 101 Fed. 539, 545, 41 C. C. A. 488.

The circuit courts of the United States give effect to the attachment laws of the state, and are bound by the construction placed thereon by the supreme court of the state. Lehman v. Berdin (C. C. 1878) Fed. Cas. No. 8,-215.

The section does not limit or abrogate the constitutional right of nonresidents to resort to the federal courts. Bates v. Day (C. C. 1882) 11 Fed. 529, 530.

The remedies given by state law to suitors in the state courts, supplementary to writs of attachment for discovery of the debtor's property, are applicable to suitors in the federal courts, and may be enforced at law or in equity, according as the state law provides. Senter v. Mitchell (C. C. 1883) 16 Fed. 206, judgment reversed Emerson v. Senter (1886) 6 Sup. Ct. 981, 118 U. S. 3, 30 L. Ed. 49.

The issuance of a writ of provisional seizure, other than that of seizure and sale, in executory process, is not warranted by the Louisiana state practice, except where the suit is based on a title importing a confession of judgment, and is therefore not otherwise within rule 39 of the federal courts. The result, moreover, of such issuance, would be to change the executory process, by proceedings looking to a suit and contestation, into an ordinary suit. Marchand v. Sobral (C. C. 1885) 24 Fed. 316.

The effect of this section is to make the state statutes in regard to remedies by attachment in common-law causes laws of the United States. Files v. Davis (C. C. 1902) 118 Fed. 465.

Under this section the law of Connecticut relating to attachments, their enforcement, and when and how benefit is lost, is operative in District Court for district of Connecticut. Loewe v. Union Savings Bank of Danbury (D. C. 1915) 226 Fed. 294.

The proceeding by garnishment being authorized by law in Alabama in 1828, the district court of the United States in that state could legitimately adopt scuh mode of proceeding, under the act of congress of that year. Pearce v. Winter Iron Works (1858) 32 Ala. 68.

Under this section the method of making and prosecuting attachments in a federal court is governed by the state laws, either those in force when

the statute was enacted, or such as have since been enacted, and adopted by rule of court. Russia Cement Co. v. Le Page Co. (1899) 174 Mass. 349, 55 N. E. 70.

The United States district court, for the district of Wisconsin, has power by rule to adopt and, in cases provided by law within said state, to issue, in common-law actions begun or pending in said court, process of attachment against the property of debtors, as a provisional remedy according to the form and mode prescribed by the Code of Procedure. Adler v. Cole (1860) 12 Wis. 188.

2. Rules of court adopting state laws, and presumption as to adoption.—By R. S. §§ 914–916, and 918 (this compilation, §§ 1537, 1539, 1540, 1544), it sufficiently appears that, while it was the purpose of congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. Shepard v. Adams (1898) 18 Sup. Ct. 214, 216, 168 U. S. 618, 42 L. Ed. 602.

This section does not require the rule of court adopting such laws to be promulgated in writing; and it will be presumed on appeal that such a rule has been adopted by the trial court, when it is necessary to sustain its judgment, and there is no affirmative showing to the contrary. Citizens' Bank v. Farwell (1893) 56 Fed. 570, 6 C. C. A. 24.

The circuit court of appeals will presume that the federal circuit court of a state has adopted the remedial laws of the state in force at the time a proceeding has been taken thereunder in the federal court in accordance with the proviso of this and the succeeding section. Logan v. Goodwin (1900) 104 Fed. 490. 43 C. C. A. 658.

An attachment issued by a federal court under a state law, not adopted by congress or by rule of court, cannot be sustained. Binns v. Williams (C. C. 1849) Fed. Cas. No. 1,423.

A federal court may adopt, as the practice of the court, the provisions of a state statute relating to proceedings by attachment, as well in respect to debts to become due as to those already due. Ely v. Hanks (D. C. 1858) Fed. Cas. No. 4,430.

3. Foreign attachment.—Whether the circuit court can obtain jurisdiction of a suit against a citizen of another state residing in a foreign country by process of foreign attachment, where defendant is not found in the district, quære. Toland v. Sprague (C. C. 1834) Fed. Cas. No. 14,076.

The circuit court in Pennsylvania has power to issue writs of foreign attachment under the state laws. Guillou v. Fontain (C. C. 1875) Fed. Cas. No. 5,861.

United States courts, under this section, have no authority to institute suits of foreign attachment. Chittenden v. Darden (C. C. 1875) Fed. Cas. No. 2,688.

Under the judiciary act of 1875, a federal court has no jurisdiction to attach property of a citizen of another state who is not found in the jurisdiction. Mauldin v. Carll (C. C. 1878) Fed. Cas. No. 9,307.

Under Jud. Code, § 51, ante, § 1033, and this section, jurisdiction cannot be acquired by a federal court of a nonresident of the state and district by an attachment of his property within the division and district in accordance with the state law, under Gen. Code Ohio, § 11,292. Smith v. Reed (D. C. 1912) 210 Fed. 968.

4. Attachments as original process for commencing suits.—The right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court in personam; that is, where they are inhabitants or found within the United States, and not where they are aliens or citizens resident abroad at the commencement of the suit. Toland v. Sprague (1838) 12 Pet. 300, 330, 9 L. Ed. 1093.

Where a suit was commenced for an infringement of a patent right and process was served by attaching property of an absent defendant, this was not sufficient to give the court jurisdiction. Chaffee v. Hayward (1857) 20 How. 208, 215, 15 L. Ed. 804.

Jurisdiction of an inhabitant of the district cannot be acquired by an attachment of his property. Sadlier v. Fallen (C. C. 1856) Fed. Cas. No. 12,-210.

This section authorizes merely ancillary attachments, and federal courts cannot issue attachments as the original process for commencing suits against defendants not amenable to personal service. Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

5. Debts for which attachment may issue.—Federal courts may include in one attachment and suit debts due and not due, without regard to state practice in respect to such joinder. Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248, following O'Connell v. Reed (1893) 56 Fed. 531, 5 C. C. A. 586.

A federal court may adopt, as the practice of the court, the provisions of a state statute relating to proceedings

by attachment, as well in respect to debts to become due as to those already due. Ely v. Hanks (D. C. 1858) Fed. Cas. No. 4,430.

6. Property subject to attachment.—Laws exempting wages from attachment are not a part of the contract, but of the remedy, so as to be subject to the law of the forum. Chicago, R. I. & P. Ry. Co. v. Sturm (1899) 19 Sup. Ct. 797, 174 U. S. 710, 43 L. Ed. 1144, reversing judgment (1897) 51 P. 1100, 58 Kan. 818.

The policy of the law in Illinois not to permit the owner of personal property to sell it and still continue in possession, so as to exempt it from seizure or attachment at the suit of creditors of the vendor, will be followed by the courts of the United States in a case in which the validity of a sale of such property in that state as against attachment creditors is in question. Dooley v. Pease (1901) 21 Sup. Ct. 329, 180 U. S. 126, 45 L. Ed. 457, affirming judgment (1898) 88 Fed. 446, 31 C. C. A. 582.

The ruling of the highest court of a state, that, under the state constitution and laws, property situated in that state, the title to which is vested in a nonresident executor to whom letters testamentary have been issued by a court of another jurisdiction, may be attached and sold in an action of debt against such nonresident executor, is binding upon the supreme court of the United States on writ of error to the state court. Manley v. Park (1903) 23 Sup. Ct. 208, 187 U. S. 547, 47 L. Ed. 296, affirming judgment (1901) 64 P. 28, 62 Kan. 553.

As attachments and executions may be levied on equitable interests in real estate in Michigan, a bill in aid of an execution or attachment so levied will be entertained in the federal courts of equity sitting in that state. Lant v. Manley (1896) 75 Fed. 627, 21 C. C. A. 457.

Under this section and R. S. § 933, post, § 1559, a plaintiff, in an action at law in the Circuit Court for the district of Massachusetts, who attaches real estate there, is governed by Rev. Laws Mass. c. 147, § 3, and he may attach the real estate of his debtor where he has no notice of an oral trust under which the debtor holds the same. McDermott v. Hayes (1912) 197 Fed. 129, 116 C. C. A. 553, reversing order (D. C. 1912) 194 Fed. 902.

Under the requirements of a statute of the state of New York, defendant, a Virginia corporation, had deposited certain bonds with the superintendent of insurance, to be held to pay liabilities upon insurance policies made in favor of citizens of New York, which said bonds were to be returned to defendant by said superintendent upon satisfactory evidence that all such liabilities had been satisfied or terminated. Plaintiff, a Rhode Island corporation, brought suit on a policy of insurance issued to it by defendant, and levied an attachment upon the bonds in the hands of the superintendent. Held, that the bonds were not subject to such levy, they being held by a public officer by authority of law under a special trust, in which plaintiff's claim was not included. Providence & S. S. S. Co. v. Virginia F. & M. Ins. Co. (C. C. 1882) 11 Fed. 284.

Property in the possession of an assignee under a voluntary assignment purporting to be made by the debtor in pursuance of the statute of Minnesota approved March, 1881, is not in custodia legis, so as to exempt it from seizure by a writ of attachment issued out of the circuit court of the United States. Lapp v. Van Norman (C. C. 1884) 19 Fed. 406.

Where defendant is a resident of Illinois, and wages due him were earned there, the situs of the debt is Illinois, though plaintiff may have garnished the debtor while he was in Iowa, and by virtue of the principles of comity the Iowa court will apply the Illinois exemption laws to such wages. Mason v. Beebee (C. C. 1890) 44 Fed. 556, limiting Mooney v. Union Pac. R. Co. (1882) 60 Iowa, 346, 14 N. W. 343.

Property in possession of administrators appointed by the county probate court cannot be levied on under an attachment issued by a federal court. Lant v. Manley (C. C. 1895) 71 Fed. 7, decree reversed (1896) 75 Fed. 627, 21 C. C. A. 457.

The levy of an attachment on the shares of a national bank under the Vermont statutes (R. L. §§ 3261, 3262), which do not include national bank stock in their provisions, is of no effect against the defendant in attachment. Sowles v. National Union Bank (C. C. 1897) 82 Fed. 696.

7. Application to national banks.—Under R. S. § 5242, post, § 9834, providing that no attachment before final judgment shall be issued in any state court against a national bank, a federal court is limited by all the restrictions on state courts and cannot issue an attachment before final judgment against a national bank, notwithstanding this section. Butler v. Coleman (1888) 8 Sup. Ct. 718, 124 U. S. 721, 31 L. Ed. 567.

As the prohibition of R. S. § 5242, post, § 9834, left the state courts without power to grant attachment on mesne process against national banks, no such power is conferred on the circuit court by this section. Hower v. Weiss Malting & Elevator Co. (1893) 55 Fed. 356, 359, 5 C. C. A. 129.

8. Actions in which attachment will lie.—Since right to sue for infringement of a copyright is derived exclusively from statute, such suit is not a "common-law cause" within this section, so as to entitle plaintiff therein to a writ

of attachment. Dixon v. Corinne Runkel Stock Co. (D. C. 1914) 214 Fed. 418.

Attachment held not available in equity; there being no statutory authority, under R. S. § 914, ante, § 1537, and this section and neither the Supreme Court, under R. S. § 917, post, § 1543, nor the District Court having made any provision therefor. Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

9. Security for attachment.—In actions arising thereunder, the federal courts should be governed by the ruling of the supreme court of Louisiana that the Code of Practice of that state requires an attachment bond to be in "a sum exceeding by one-half" the claim of the creditor. Fleitas v. Cockrem (1879) 101 U. S. 301, 25 L. Ed. 954.

Plaintiff in attachment in a federal court must furnish security in the same manner and amount, and with sureties of the same qualifications, as if he were proceeding in a state court. Singer Mfg. Co. v. Mason (C. C. 1879) Fed. Cas. No. 12,903.

10. Allowance of writ.—Even if the statutes of Arkansas authorizing the clerk as well as the judge to grant an attachment do require the clerk to first make an order, specifying the amount for which it is allowed, as is required in case the judge grants the writ, an attachment issued by him without it would not be invalid, since, under the rulings of the state supreme court, the proceeding by attachment, like any other civil action, may be amended in matter of substance, as well as of form, at every stage of the case, and all errors or defects not injuriously affecting the substantial rights of the defendant will be disregarded. People's Sav. Bank & Trust Co. v. Batchelder Egg Case Co. (1892) 51 Fed. 130, 2 C. C. A. 126; Bank of Helena v. Same (1892) 51 Fed. 137, 2 C. C. A. 141; First Nat. Bank v. Same (1892) 51 Fed. 138, 2 C. C. A. 142.

11. Affidavits and amendments thereof.—Where a writ of attachment has been issued in a suit instituted in the circuit court of the United States on a defective affidavit, the court may, when right and justice require it, allow such affidavit to be amended, although, under the statutes of the state in which the circuit court is held, the state court would have no power to allow such an amendment. Erstein v. Rothschild (C. C. 1884) 22 Fed. 61.

Rev. St. Wis. §§ 2829, 2830, require the courts to disregard any errors not affecting substantial right, and give power to amend any process by correcting mistakes at any stage in the proceedings. R. S. §§ 948, 954, post, §§ 1580, 1591, provide that the courts may allow amendment of any process when the defect is not prejudicial, and that no writ shall be abated or quashed for want of form. R. S. § 646, ante, § 1018, provides that on removal of a suit from the state court any attachment shall hold the goods, the same as under the state laws. Held, that where a seal is omitted by mistake from a writ of attachment issued in a suit begun in a Wisconsin court, but removed to the federal court, the latter court will regard the writ as amended in that particular, as it would have been so amendable under the state laws. Wolf v. Cook (C. C. 1889) 40 Fed. 432.

12. Jurisdiction and venue.—Cobbey, Consol. St. Neb. 1891, p. 1003, § 237, gives a creditor the right of attachment against the property of a debtor for a claim before it is due when the debtor intends fraud. Held, that a federal circuit court, under this section, has jurisdiction to determine whether a plaintiff is entitled to an attachment on such a claim. Schunk v. Moline, Milburn & Stoddart Co. (1893) 147 U. S. 500, 13 Sup. Ct. 416, 418, 37 L. Ed. 255.

Neither under the bankrupt act of 1867 nor by this section in respect to attachment of property, can a civil suit be brought by original process in the federal court in any other district than that of which defendant is an inhabitant, or in which he is served with process. Nazro v. Cragin (C. C. 1874) Fed. Cas. No. 10,062.

The court for the Eastern district of New York has power to issue an attachment, and direct the same to the marshal for any other district within the state of New York. Treadwell v. Seymour (C. C. 1890) 41 Fed. 579.

In an action on an attachment bond given in a federal court, in the absence of a showing to the contrary, it will be presumed that the federal court acquired jurisdiction of the person of the attachment defendant. Hundley v. Chadick (1896) 109 Ala. 575, 19 South. 845.

13. Levy.—Where a writ of attachment is issued by a circuit court of the United States, held in the state of Arkansas, and administering, under this section, the attachment laws of the state, which provide, by Mansf. Dig. Ark. §§ 319, 359, for successive levies of several attachments, and for ascertaining their priorities, actual seizure is not necessary to make a valid levy of such writ of attachment on property in the custody of a sheriff by virtue of a prior levy by him of an attachment issued from a state court; a constructive seizure is a sufficient service to entitle plaintiff to a trial of the cause of attachment and of his case on their merits, and, if successful, to hold the surplus property after the prior attachment is satisfied. Brooks v. Fry (C. C. 1891) 45 Fed. 776.

14. Attachments as liens.—Under this and the following section and Act Aug. 1, 1888, post, §§ 1606, 1607, a judg-

ment of the federal court for north Carolina does not become a lien on defendant's land until docketed in the superior court of the county in which such land lies, as required by the state law (Code N. C. § 436, and Act N. C. 1889). Alsop v. Moseley (1889) 104 N. C. 60, 10 S. E. 124.

15. Priority of attaching creditors.—Where writs of attachment issue from a federal and state court against the same defendant, the one under which the property is first actually taken into custody has priority, without regard to the date of the respective writs, and a United States marshal and sheriff cannot make a joint or partnership levy, nor can one of these officers make a levy subject to the prior levy of the other. Adler v. Roth (C. C. 1881) 5 Fed. 895, 898.

When property has been attached in a suit in the United States court by the marshal, and the sheriff has levied an attachment issued from a state court on the goods in the hands of the marshal, the priority of the lien of the attaching creditors is to be determined by the state law. Bates v. Days (C. C. 1883) 17 Fed. 167.

Where a defendant removed into the federal court several attachment suits commenced against him by several plaintiffs in two state courts, held, that the rule of distribution and of the priority of the liens would be the same as it would have been had judgments been entered in the state courts. Bankers' & Merchants' Tel. Co. v. Chicago Carpet Co. (C. C. 1886) 28 Fed. 398.

16. Process, service, and appearance.—The change in the law effected by Act Aug. 13, 1888 (ante, § 991), permitting suits to be brought in the federal courts in the district of the residence either of the plaintiff or defendant, did not abrogate the settled rule that no attachment can issue out of a federal court in a case where a defendant, by reason of his nonresidence, was not and could not be personally served with process, and did not appear. Big Vein Coal Co. of West Virginia v. Read (1913) 33 Sup. Ct. 694, 229 U. S. 31, 57 L. Ed. 1053.

A nonresident defendant not personally served in an attachment suit does not submit to the jurisdiction of the court by specially appearing for the purpose of objecting to the jurisdiction on the ground, among others, that the property in question was not subject to attachment or garnishment. Big Vein Coal Co. of West Virginia v. Read (1913) 33 Sup. Ct. 694, 229 U. S. 31, 57 L. Ed. 1053.

Under the law of Oregon, as settled by decision, an attachment is merely auxiliary to the main action, and the issuance and levy of an attachment does not give the court jurisdiction to render a judgment in the action without a valid service upon, or appearance by, the defendant. Johnson v. North Star Lumber Co. (1913) 206 Fed. 624, 125 C. C. A. 118, affirming decree North Star Lumber Co. v. Johnson (D. C. 1912) 196 Fed. 56.

The federal circuit court has no jurisdiction on the ground of subject-matter of a suit against a person not a resident in the district, and not personally served with process, and not appearing therein, though an attachment has been made of his property. Saddler v. Hudson (C. C. 1854) Fed. Cas. No. 12,206.

In actions for the recovery of money only, the United States courts are authorized to issue attachments and garnishee process only where the court has acquired jurisdiction of the person. Anderson v. Shaffer (C. C. 1881) 10 Fed. 266.

An attachment gives no jurisdiction over the person; and a law of the state cannot authorize its courts to enter judgment against a nonresident not served which will be valid even against property within the state, except such as has been attached on mesne process. Graham v. Spencer (C. C. 1882) 14 Fed. 603.

Process in case of foreign attachment cannot issue unless defendant can be personally served with summons in the district in which the suit is brought. Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65.

An attachment in the United States circuit court in a suit where defendant could not be found in the district is void, and his subsequent appearance in the case does not waive the invalidity of the judgment proceedings. Noyes v. Canada (C. C. 1887) 30 Fed. 665.

This section and the one following, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings in rem against the property of a nonresident defendant, who has not been personally served or appeared, notwithstanding that, Act March 3, 1887 (ante, § 991), authorizes an original suit brought in the circuit court, where jurisdiction is founded on the fact of diverse citizenship solely, to be brought in the district of the residence of either plaintiff or defendant, and that the statutes of Connecticut permit the attachment of the property, located in the state, of a nonresident defendant, without personal service on him, and in the absence of voluntary appearance, the subjection of such property to a judgment in rem. Harland v. United Lines Tel. Co. (C. C. 1889) 40 Fed. 308, 6 L. R. A. 252.

A federal court does not acquire jurisdiction of a suit removed from a state court by virtue of an attachment made in the state court, where there was no personal service of process on defendant, a resident of another state. Perkins v. Hendryx (C. C. 1889) 40 Fed. 657.

This section does not confer on the

United States courts jurisdiction of suits by foreign attachment, or jurisdiction over a nonresident not served with process, though state courts have such jurisdiction under state laws. Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (C. C. 1895) 68 Fed. 685.

There is nothing in the Florida statutes relating to attachment (McClel. Dig. 1881, c. 7, §§ 18, 24, 25, 27) to prevent the operation of the general rule that an appearance by the defendant in a suit commenced by attachment authorizes the rendition of a personal judgment against him. L'Engle v. Gates (C. C. 1896) 74 Fed. 513.

An action cannot be maintained by the United States against a nonresident in a federal court by attaching defendant's property within the jurisdiction, without personal service, notwithstanding this section. United States v. Brooke (D. C. 1910) 184 Fed. 341.

17. —— Service by publication.—Statutes authorizing the service of process on nonresident property owners, by publication, in attachment suits, must be strictly complied with to give the court jurisdiction. Flint v. Coffin (1910) 176 Fed. 872, 100 C. C. A. 342, writ of certiorari denied Coffin v. Flint (1910) 30 Sup. Ct. 693, 217 U. S. 602, 54 L. Ed. 898.

Under Code N. C. § 352 (Revisal N. C. 1905, § 766), which provides that when the summons in an attachment suit is to be served by publication, the publication shall state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims are fatally defective. Id.

Where an action is commenced in a federal court against three partners, one of whom is not served, and no alias summons is issued, the suit as to him is at an end, and a subsequent attachment upon an affidavit of nonresidence and order of publication, though authorized by the Code of North Carolina, is void, as the federal court cannot thus acquire jurisdiction without the service of process in personam on defendant. Lackett v. Rumbaugh (C. C. 1891) 45 Fed. 23.

Service upon a nonresident by publication prior to attachment of his property is a nullity, and is not made good by a subsequent attachment. Baumgardner v. Bono Fertilizer Co., (C. C. 1893) 58 Fed. 1.

18. Sufficiency of return to show jurisdictional service.—The Rhode Island statute in regard to attaching real estate requires personal service on the defendant, or service by leaving a copy with some person at his residence, or, if he have no residence within the precinct of the officer, then by mailing a copy to him, and serving a like copy on the person, if any, in possession of the real estate. Held, that when the return shows service on a nonresident by mailing a copy to him, but makes no allusion to serving any person in possession of the land, the court has no jurisdiction. Richmond v. Brookings (C. C. 1891) 48 Fed. 241.

19. Claims by third persons.—Where property in the possession of an assignee under the Missouri statutes for the benefit of creditors has been seized on a writ of attachment issuing from the federal court in a suit against the assignor, the petition of intervention, filed by leave of court in the attachment suit, by the assignee claiming the restoration of the property, is not a statutory interplea under the Missouri statutes; and the failure of the plaintiff in the attachment to answer the petition, the attaching officer having duly filed his answer, will not entitle intervener to a judgment by default. Boltz v. Eagon (C. C. 1888) 34 Fed. 452.

Code Miss. 1892, §§ 4425–4428, provide for the filing of an affidavit of claim by a third party to property seized under execution or attachment, and that on the making of such claim "the court shall on motion of the plaintiff in execution direct an issue to be made up between the parties to try the right of property at the same term." Section 4428 provides that, if by default of the plaintiff in execution an issue be not made up at the term to which the execution is returnable, the court shall discharge the claimant from his bond, and the property shall not be subject to the plaintiff's execution or attached. Held, that such provisions are binding on a federal court, and, where an attachment plaintiff failed to have the issue made up at the term, the claimant was entitled to have the property discharged from the levy, and to be discharged from a forthcoming bond given by him, which right was not lost by his failure to move for such discharge until after a number of terms had passed. Miller v. Tennant-Stribling Shoe Co. (1903) 119 Fed. 865, 56 C. C. A. 377.

Under Rev. Code Miss. 1892, §§ 4425–4428, which governs in a federal court in that state, if an attachment plaintiff fails to have an issue made up on an affidavit of claim to the attached property at the term to which the attachment is returnable, the claimant is entitled to an order discharging the levy and releasing him from his bond. Tennent-Stribling Shoe Co. v. Roper (1904) 128 Fed. 40, 62 C. C. A. 548.

Where a fund on deposit in a bank and attached in an action in a federal court as property of the defendant therein is claimed by others, not parties, and an action against the bank for its recovery has been instituted in a state court, the plaintiff in the federal court should appear in such action and

submit his rights to adjudication therein for the protection of the bank, and unless he does so the attachment will be vacated. U. S. v. Neeley (C. C. 1906) 146 Fed. 763.

20. Quashing, vacating, dissolution, or abandonment.—A provision in a state attachment act that a motion to discharge property attached may be made in vacation is not applicable to the federal courts. Claflin v. Steinberg (C. C. 1871) Fed. Cas. No. 2,777.

Where plaintiff obtained an attachment on original process out of the circuit court, under the provisions of St. Md. 1864, c. 306, which was adopted, under this section such courts must apply the remedy agreeably to the construction put upon such law by the highest appellate court of the state, and, where such court decided an attachment was void if the declaration was demurrable, an attachment in such case must be quashed. Third Nat. Bank v. Teal (C. C. 1881) 5 Fed. 503.

The circuit court must apply the remedy agreeably to the construction put upon the law by the highest appellate court of the state; and, when decided by such court that, by the terms of the statute giving the remedy, the attachment was void if the declaration was demurrable, the attachment must be quashed. Id.

This section adopts the remedy by attachment provided by state laws; and when a contingency arises whereby the attachment would be dissolved under provisions of a state law, the attachment will be deemed dissolved in a federal court, as provided in section 933, R. S., section 1559, post. Mather v. Nesbit (C. C. 1882) 13 Fed. 872; Bates v. Days (C. C. 1883) 17 Fed. 167.

Under this section and R. S. § 933, post, § 1559, which provides that an attachment shall be dissolved on any contingency on which an attachment would be dissolved in the state courts, —proceedings in an action in which an attachment has been levied will be stayed where insolvency proceedings against the debtor are instituted in the state courts. Neufeld v. Neufeld (C. C. 1889) 37 Fed. 560.

Though under Rev. Laws Vt. § 1542, the land attached on mesne process, unless set off to the creditor, or sold within five months after final judgment, becomes subject to attachment by other creditors, who may hold it as against the prior attachment, the right of such prior attaching creditor to sell after the expiration of the five months is not affected by attachment and sale under a void judgment, rendered upon the defendant's stipulation for the purpose of avoiding his rights. Sowles v. Witters (C. C. 1893) 55 Fed. 159.

Where a suit was begun in a state court by foreign attachment, and the case was removed to the Circuit Court, the Circuit Court had jurisdiction of a rule on plaintiff to show cause of action, and why the attachment should not be dissolved on the pleadings; such rule being in accordance with prevailing state practice. Commonwealth Trust Co. v. Frick (C. C. 1903) 120 Fed. 688.

21. Judgment against one of several attachment defendants.—Where the state Code provides that judgment may be rendered "for or against one or more of several defendants," according as the proof may warrant, it is a provision as applicable to suits by attachment as to suits in any other form; and, where an attachment is sued out against two persons jointly, it may be sustained as against the separate property of one alone. Allen v. Clayton (C. C. 1882) 11 Fed. 73.

22. Liabilities on bonds or undertaking.—Attorney's fees incurred in dissolving an attachment, which by the local law of the state in which the attachment was issued can be recovered in an action in a court of such state on the attachment bond, are no less an element of damages, because the action has been removed to a federal court. Fidelity & Deposit Co. of Maryland v. L. Bucki & Son Lumber Co. (1903) 23 Sup. Ct. 582, 189 U. S. 135, 47 L. Ed. 744, affirming judgment L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland (1901) 109 Fed. 393, 48 C. C. A. 436.

Attachment being a statutory remedy, the question of the measure of damages recoverable for breach of an attachment bond is one governed by the law of the state as expressed in its constitution and statutes, or declared by its highest court, and the law as so determined will be followed by the federal courts. L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co. (1901) 109 Fed. 393, 48 C. C. A. 436, affirmed Fidelity & Deposit Co. of Maryland v. L. Bucki & Son Lumber Co. (1903) 23 Sup. Ct. 582, 189 U. S. 135, 47 L. Ed. 744.

An action on an attachment bond executed in a suit pending in a national court presents a federal question, within the meaning of the judiciary act, and is within the jurisdiction of a federal court, where the requisite amount is involved, regardless of the citizenship of the parties; the effect of this section being to make the state statutes in that regard laws of the United States. Files v. Davis (C. C. 1902) 118 Fed. 465.

23. Wrongful attachment.—A writ of attachment from a federal court having jurisdiction of parties and subject-matter, though voidable because issued upon an insufficient affidavit, is a sufficient protection to the marshal who levied it, in an action of trespass against him in the state court by the owners of the goods levied on, who were not the defendants in the attachment. Matthews

v. Densmore (1883) 3 Sup. Ct. 126, 109 U. S. 216, 27 L. Ed. 912.

24. Appeal and review.—Where a proceeding resulting in a verdict sustaining an attachment and a verdict and judgment on the merits of the cause of action are separate, under the provisions of the state statute, they may be separately considered on error by the supreme court under this section and the preceding one. Fitzpatrick v. Flannagan (1882) 1 Sup. Ct. 369, 106 U. S. 648, 27 L. Ed. 211.

25. Garnishment — Nature and grounds.—The garnishment proceeding authorized by How. St. Mich. c. 277, being one at law, cannot be entertained by a federal court in equity, whether or not it can be entertained by the state courts on their equity side. U. S. v. Swan (1895) 65 Fed. 647, 13 C. C. A. 77.

The summons in a garnishee proceeding is "process" within the meaning of the statute prescribing the manner in which processes shall issue from the federal courts; both the statutes and the decisions of the state courts regarding the garnishee proceeding as the commencement of a new suit against the defendant therein. Middleton Paper Co. v. Rock River Paper Co. (C. C. 1884) 19 Fed. 252.

26. Persons and property subject to garnishment.—Under the garnishment statute of Texas (Rev. St. Tex. 1895, arts. 226, 227), which is applicable to proceedings in the federal courts in that state, and which provides that a garnishee shall not make any payment to, nor deliver any effects to, the defendant after service of the writ upon him, the rights of a plaintiff are not fixed by the status of the parties at the time the writ is served, but if the garnishee then owes any debt to, or has in his possession effects of, the defendant, to which the garnishment can attach, the court may include in its determination any further indebtedness accruing, or property coming into possession of the garnishee, by virtue of the same contract or transaction, between the time of such service and the final hearing, requiring the garnishee to file a supplemental answer, or to answer additional interrogatories, in accordance with the local practice when necessary. Randolph v. Tandy (1900) 98 Fed. 939, 39 C. C. A. 351.

In the absence of statute, it is not necessary that a debt be due at the time of the garnishment. Smith v. Marker (1907) 154 Fed. 838, 85 C. C. A. 372, affirming judgment (1905) 90 S. W. 611.

A federal court will compel a voluntary assignee for the benefit of creditors to respond to a writ of garnishment, if the property is not already within the possession or control of the state court in which the assignee's bond and inventory are filed. Kohn v. Ryan (C. C. 1887) 31 Fed. 636.

Where partners among whom dissensions have arisen finally compromise their differences by two of them agreeing to pay the debts, releasing the third from all liability, in consideration of himself and wife conveying to the others their interest in the partnership realty and being paid $2,075 out of the insurance money for the buildings destroyed before the compromise, and the partner thus released empowers his attorney to receive the insurance money in trust for his wife, and it is paid to the attorney by the other partners on condition that it shall not be paid to the wife until she and her husband have executed the deeds according to the compromise, the fund in the hands of the attorney is a trust fund, not subject to garnishment by the partnership creditors, prior to a compliance by all of the parties with the conditions of the compromise. Lackett v. Rumbaugh (C. C. 1891) 45 Fed. 23.

Independently of statute, a receiver is not subject to garnishment except by consent of the court appointing him; but a state law exempting a receiver appointed by a court of equity from garnishment has no extraterritorial force, and though he is by statute exempt from garnishment in his own state, the federal court of another state, which appointed him, will not refuse to entertain garnishment against him on a petition properly presented by citizens within the jurisdiction, when no objection to the jurisdiction on other grounds exists. Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (C. C. 1895) 68 Fed. 685.

State statutes subjecting foreign corporations to the service of process and to suits and garnishment within the state as a condition of their right to do business therein cannot be held to also require by implication that their shareholders shall submit their shares of stock to the dominion of the state. Ashley v. Quintard (C. C. 1898) 90 Fed. 84.

Sums due to a railroad company from other companies as its share of freight collected by them as the terminal or final carriers on continuous interstate shipments are not subject to attachment by garnishment of the debtors under the foreign attachment laws of another state in which the defendant cannot be personally sued. Davis v. Cleveland, C., C. & St. L. R. Co. (C. C. 1906) 146 Fed. 403.

"The Regents of the University of Idaho," a corporation created by the laws of the territory and the Constitution of the state, is a public corporation and an agency of the state, and as such is not subject to garnishment in the absence of a statute clearly evincing the purpose of the Legislature to subject public corporations to such process; and the general provision that any "person" may be garnished is not sufficient for that purpose, although the

word "person" is expressly defined by the statutes as including a corporation; such provisions being generally construed as restricted to private or business corporations. Moscow Hardware Co. v. Colson (C. C. 1907) 158 Fed. 199.

27. Writ, summons, or notice in garnishment.—A notice to a garnishee in an action in the United States courts in Iowa is properly signed by the marshal, and need not bear the seal of such court or the teste of the chief justice of the United States supreme court. Wile v. Cohn (C. C. 1894) 63 Fed. 759, judgment affirmed Wile v. Farmers' State Bank of Charter Oak (1895) 70 Fed. 138, 17 C. C. A. 25.

28. Service and return of process.—In garnishment proceedings against a debtor of a defendant who cannot be personally served, because he resides out of the state, the jurisdiction of the court does not depend upon the situs of the debt, but upon the control which is obtained over the debtor by means of due process, duly served. Mooney v. Buford & George Manuf'g Co. (1896) 72 Fed. 32, 18 C. C. A. 421.

The right to garnish a debtor is not limited to the situs of the chose in action, and a garnishment by a citizen of one state of a debtor of the same state, whose creditor resides, whose debt was contracted and is payable in another state, is such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant. Tootle v. Coleman (1901) 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120, writ of certiorari denied (1901) 22 Sup. Ct. 932, 183 U. S. 695, 46 L. Ed. 394.

Garnishment cannot be maintained in the United States courts without personal service on the principal defendant, or his voluntary appearance. Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (C. C. 1895) 68 Fed. 685.

Shares of stock in a corporation of one state, owned by a resident of another, cannot be reached by garnishment in a third state in which the corporation does business, by service of garnishment on the agent of the corporation in the state and of summons on the defendant stockholder by publication, in the absence of special statutory provision therefor; and a statute subjecting foreign corporations to suits and garnishment in the state as a condition precedent to their doing business therein, in connection with one authorizing attachments in suits against nonresidents, does not confer such authority. Such statutes, as affecting corporate garnishees, apply only to debts due from the corporation generally, or to property held by it within the state; and a corporation is not a debtor of its stockholders in such sense that it may be garnished as such, nor does it hold their stock except at the place where it has its domicile, and subject to the laws of such place. Ashley v. Quintard (C. C. 1898) 90 Fed. 84.

The wages of a seaman cannot be attached by trustee process before the voyage on which they are earned is terminated. The Lizzie Williams (D. C. 1882) 11 Fed. 619.

When the wages of a fisherman are to be paid "within" 30 days after the arrival of the vessel in port, they are not exempt from garnishment after arrival and before the expiration of that time. Telles v. Lynde (D. C. 1891) 47 Fed. 912.

Where, after plaintiff's removal from Pennsylvania, her creditors sought to enforce judgment against her by garnishment proceeding against an insurance company on a policy assigned to plaintiff, personal service on her without the state did not give the court jurisdiction to determine her rights in the policy as against the insurance company and her father, her assignor, and the judgment was not conclusive against her. Dunlevy v. New York Life Ins. Co. (D. C. 1913) 204 Fed. 670.

29. State attachment and garnishment statutes construed—In general.—Arkansas—See Senter v. Mitchell (C. C. 1883) 16 Fed. 206, judgment reversed Emerson v. Senter (1886) 6 Sup. Ct. 981, 118 U. S. 3, 30 L. Ed. 49. Colorado—National Bank of Commerce v. Riethmann (1897) 79 Fed. 582, 25 C. C. A. 101. Kentucky—Courtney v. Pradt (1908) 160 Fed. 561, 87 C. C. A. 463.

30. —— Actions in which attachment will lie.—Colorado—See Tabor v. Big Pittsburg Consol. Min. Co. (C. C. 1883) 14 Fed. 636; People v. Boylan (C. C. 1885) 25 Fed. 594. Missouri—Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co. (C. C. 1891) 46 Fed. 584; American Surety Co. of New York v. Haynes (C. C. 1898) 91 Fed. 90. New York—Seeley v. Missouri, K. & T. Ry. Co. (C. C. 1889) 39 Fed. 252. Ohio—McCracken v. Covington City Nat. Bank (C. C. 1880) 4 Fed. 602; Jenks v. Richardson (C. C. 1895) 71 Fed. 365. Utah—Nevada Co. v. Farnsworth (C. C. 1898) 89 Fed. 164.

31. —— Grounds of attachment.—Arkansas—See Mack v. McDaniel (C. C. 1880) 4 Fed. 294; Senter v. Mitchell (C. C. 1883) 16 Fed. 206, judgment reversed Emerson v. Senter (1886) 6 Sup. Ct. 981, 118 U. S. 3, 30 L. Ed. 49. California—Foreign Mines Development Co. v. Boyes (C. C. 1910) 180 Fed. 594. Massachusetts—United Waterworks Co. v. Stone (C. C. 1906) 143 Fed. 1022. Mississippi—Fitzpatrick v. Flannagan (1882) 1 Sup. Ct. 369, 106 U. S. 648, 27 L. Ed. 211. Missouri—Kellog v. Richardson (C. C. 1883) 19 Fed. 70; La Belle Iron Works v. Hill (C. C. 1884) 22 Fed. 195; American Surety Co. of New York v. Haynes (C. C. 1898) 91 Fed. 90. New York—Knapp

v. Gerson (C. C. 1885) 25 Fed. 197. Tennessee—Butterfield v. Miller (1912) 195 Fed. 200, 115 C. C. A. 152.

32. —— **Property subject to attachment.**—Arkansas—See Masury v. Arkansas Nat. Bank (1899) 93 Fed. 603, 35 C. C. A. 476, reversing decree (C. C. 1898) 87 Fed. 381. Louisiana—Corning v. Dreyfus (C. C. 1884) 20 Fed. 426. Maryland—Torrens v. Hammond (C. C. 1882) 10 Fed. 900. Massachusetts—Pinney v. Nevills (C. C. 1898) 86 Fed. 97. Missouri—Boltz v. Eagon (C. C. 1888) 34 Fed. 521. New York—Shiel v. Patrick (1894) 59 Fed. 992, 8 C. C. A. 440; Montgomery v. McDermott (1900) 103 Fed. 801, 43 C. C. A. 348, affirming decree (C. C. 1900) 99 Fed. 502; Sturdee v. Cuba Eastern R. Co. (1912) 196 Fed. 211, 116 C. C. A. 43; Providence & S. S. S. Co. v. Virginia F. & M. Ins. Co. (C. C. 1882) 11 Fed. 284; Hankinson v. Page (C. C. 1887) 31 Fed. 184. Oregon—Hogue v. The City of Frankfort (D. C. 1894) 62 Fed. 1006. Pennsylvania—Gundry v. Reakirt (C. C. 1909) 173 Fed. 167. South Carolina—Simonds v. Pearce (C. C. 1887) 31 Fed. 137; Pringle v. Guild (C. C. 1902) 118 Fed. 655. Vermont—First Nat. Bank of St. Johnsbury v. Portland & O. R. Co. (C. C. 1880) 2 Fed. 831; First Nat. Bank v. Brainerd (C. C. 1886) 28 Fed. 917.

33. —— **Jurisdi tion, venue, and service of process.**—See Perry v. Sharpe (C. C. 1881) 8 Fed. 15.

34. —— **Affidavits and amendments thereof.**—Idaho—See Glidden v. Whittier (C. C. 1891) 46 Fed. 437. Illinois—Fisher v. Secrist (C. C. 1891) 48 Fed. 264. Indian Territory—Salmon v. Mills (1895) 68 Fed. 180, 15 C. C. A. 356, reversing judgment (1892) 49 Fed. 333, 1 C. C. A. 278. Kentucky—Johnson v. Johnson (C. C. 1887) 91 Fed. 700; Spreen v. Delsignore (C. C. 1899) 94 Fed. 71. Minnesota—Bigelow v. Chatterton (1892) 51 Fed. 614, 2 C. C. A. 402, following Kenney v. Goergen (1886) 31 N. W. 210, 36 Minn. 190. New York—Laughlin v. Queen City Const. Co. (C. C. 1898) 89 Fed. 482; Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft (C. C. 1910) 177 Fed. 458. Tennessee—Butterfield v. Miller (1912) 195 Fed. 200, 115 C. C. A. 152. Texas—Booth v. Denike (C. C. 1894) 65 Fed. 43. Utah—Nevada Co. v. Farnsworth (C. C. 1898) 89 Fed. 164.

35. —— **Necessity and sufficiency of filing summons, complaint, or affidavits.**—Arkansas—See People's Sav. Bank & Trust Co. v. Batchelder Egg Case Co. (1892) 51 Fed. 130, 2 C. C. A. 126; Bank of Helena v. Same (1892) 51 Fed. 137, 2 C. C. A. 141; First Nat. Bank v. Same (1892) 51 Fed. 138, 2 C. C. A. 142. Kentucky—Spreen v. Delsignore (C. C. 1899) 94 Fed. 71.

36. —— **Security for attachment.**—Kentucky—See Bluegrass Canning Co. v. Steward (1909) 175 Fed. 537, 99 C. C. A. 159. New York—Isenburger v. Roxbury Distilling Co. (C. C. 1908) 163 Fed. 133. West Virginia—Ritchie v. Sayers (C. C. 1900) 100 Fed. 520. Wisconsin—Bradley v. Kroft (C. C. 1883) 19 Fed. 295.

37. —— **Allowance of writ or warrant.**—Arkansas—See People's Sav. Bank & Trust Co. v. Batchelder Egg Case Co. (1892) 51 Fed. 130, 2 C. C. A. 126; Bank of Helena v. Same (1892) 51 Fed. 137, 2 C. C. A. 141; First Nat. Bank v. Same (1892) 51 Fed. 138, 2 C. C. A. 142. Ohio—Perry v. Sharpe (C. C. 1881) 8 Fed. 15.

38. —— **Time of issuance of writ or warrant.**—Kentucky—See Spreen v. Delsignore (C. C. 1899) 94 Fed. 71.

39. —— **Levy—Requisites, validity, and manner of making.**—Arkansas—See Adler v. Roth (C. C. 1881) 5 Fed. 895. New Hampshire—Cary Brick Co. v. Tilton (1913) 208 Fed. 497, 125 C. C. A. 499. Texas—Coulson v. Panhandle Nat. Bank (1893) 54 Fed. 855, 4 C. C. A. 616 (distinguishing Brown v. Bacon [1885] 63 Tex. 597, and Clagett v. Kilbourne [1861] 1 Black, 346, 17 L. Ed. 213); Samuels v. Revier (1899) 92 Fed. 199, 34 C. C. A. 294. Vermont—In re Clough (D. C. 1912) 197 Fed. 185.

40. —— **Attachments as liens.**—Montana—See Great Falls Nat. Bank v. McClure (1910) 176 Fed. 208, 99 C. C. A. 562. Wisconsin—Meloy v. Orton (C. C. 1890) 42 Fed. 513.

41. —— **Issuance of summons as prerequisite to attachment.**—Oregon—See Ranch v. Werley (C. C. 1907) 152 Fed. 509.

42. —— **Amendments to correct proof of publication.**—Minnesota—See Bigelow v. Chatterton (1892) 51 Fed. 614, 2 C. C. A. 402.

43. —— **Claims by third persons.**—Arkansas—See Rice v. Adler-Goldman Commission Co. (1895) 71 Fed. 151, 18 C. C. A. 15. Colorado—Baum v. Gosline (C. C. 1883) 15 Fed. 220. Indiana—Marden v. Starr (C. C. 1901) 107 Fed. 199. Indian Territory—Swift & Co. v. Russell (1899) 97 Fed. 443, 38 C. C. A. 259. Kansas—Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248. Missouri—Boltz v. Eagon (C. C. 1888) 34 Fed. 452.

44. —— **Return and amendment thereof.**—Alaska—See Griffin v. American Gold Min. Co. (1905) 136 Fed. 69, 68 C. C. A. 637. Oregon—Fleischner v. Pacific Postal Telegraph Cable Co. (C. C. 1893) 55 Fed. 738, judgment reversed Pacific Postal Telegraph Cable Co. v. Fleischner (1895) 66 Fed. 899, 14 C. C. A. 166. Rhode Island—Rich-

mond v. Brookings (C. C. 1891) 48 Fed. 241.

45. —— **Discharge, modification, or vacation of attachment.**—Connecticut—See In re Windt (D. C. 1910) 177 Fed. 584. Georgia—Rome R. Co. v. Richmond & D. R. Co. (C. C. 1894) 60 Fed. 43. Wisconsin—Meloy v. Orton (C. C. 1890) 42 Fed. 513.

46. —— **Liabilities on bonds or undertakings.**—Alaska—See Anvil Gold Min. Co. v. Hoxsie (1903) 125 Fed. 724, 60 C. C. A. 492; Johnston v. Shaw (1911) 190 Fed. 466, 111 C. C. A. 298. Indiana—Doggett, Bassett & Hills Co. v. Black (C. C. 1889) 40 Fed. 439.

47. —— **Trial, verdict, and judgment.**—Georgia—See Curtis v. Wortsman (C. C. 1885) 26 Fed. 36. Indian Territory—Waples-Platter Co. v. Low (1893) 54 Fed. 93, 4 C. C. A. 205. New York—Helvetia Swiss Fire Ins. Co. v. Brandenstein (1909) 168 Fed. 1020, 92 C. C. A. 614, affirming judgment Brandenstein v. Helvetia Swiss Fire Ins. Co. (C. C. 1908) 159 Fed. 589, writ of error dismissed (1909) 30 Sup. Ct. 405, 215 U. S. 588, 54 L. Ed. 339, writ of certiorari denied (1910) 30 Sup. Ct. 575, 216 U. S. 621, 54 L. Ed. 641.

48. —— **Wrongful attachment.**—Tennessee—See Jerman v. Stewart (C. C. 1882) 12 Fed. 266; Kennedy v. Meacham (C. C. 1883) 18 Fed. 312.

49. —— **Garnishment — Nature and grounds.**—Maine—See Macurda v. Globe Newspaper Co. (C. C. 1908) 165 Fed. 104.

50. —— **Persons and property subject to garnishment.**—Arkansas—See Allen-West Commission Co. v. Grumbles (C. C. 1908) 161 Fed. 461. Illinois—Lovejoy v. Hartford Fire Ins. Co. (C. C. 1882) 11 Fed. 63. Michigan—Treusch v. Ottenburg (1893) 54 Fed. 867, 4 C. C. A. 629. Ohio—Ashley v. Quintard (C. C. 1898) 90 Fed. 84. Tennessee—Rice v. Sharpleigh Hardware Co. (C. C. 1898) 85 Fed. 559.

51. —— **Proceedings to procure garnishment.**—Iowa—See Younkin v. Collier (C. C. 1891) 47 Fed. 571. Kansas—Logan v. Goodwin (1900) 104 Fed. 490, 43 C. C. A. 658.

52. —— **Liability of garnishee.**—Arkansas—See Allen-West Commission Co. v. Grumbles (1904) 129 Fed. 287, 63 C. C. A. 401. Pennsylvania—Greevy v. Jacob Tome Institute (C. C. 1904) 132 Fed. 408.

53. —— **Trial of garnishment action.**—Kansas—See Logan v. Goodwin (1900) 104 Fed. 490, 43 C. C. A. 658.

54. —— **Discharge by bond of garnishee.**—Colorado—See Henry v. Gold Park Min. Co. (C. C. 1881) 10 Fed. 11.

55. —— **Liabilities on bonds.**—Georgia—See A. Klipstein & Co. v. Allen-Miles Co. (1905) 136 Fed. 385, 69 C. C. A. 229.

56. —— **Defects of garnishee summons or notice.**—Colorado—See Manville v. Battle Mountain Smelting Co. (C. C. 1883) 17 Fed. 126. Iowa—Wile v. Cohn (C. C. 1894) 63 Fed. 759, judgment affirmed Wile v. Farmers' State Bank of Charter Oak (1895) 70 Fed. 138, 17 C. C. A. 25.

57. —— **Costs, disbursements, and fees.**—Georgia—See Rome R. Co. v. Richmond & D. R. Co. (C. C. 1894) 60 Fed. 43. Michigan—Tefft v. Stern (1896) 73 Fed. 591, 21 C. C. A. 67, judgment affirmed (1896) 74 Fed. 755, 21 C. C. A. 73. Pennsylvania—New York Finance Co. v. Potter (C. C. 1903) 126 Fed. 432.

Cited without definite application, Krippendorf v. Hyde (1884) 4 Sup. Ct. 27, 32, 110 U. S. 276, 28 L. Ed. 145; Campbell v. Haverhill (1895) 15 Sup. Ct. 217, 220, 155 U. S. 610, 39 L. Ed. 280; Shepard v. Adams (1898) 18 Sup. Ct. 214, 215, 168 U. S. 618, 42 L. Ed. 602; Davis v. Cleveland, C., C. & St. L. R. Co. (1909) 30 Sup. Ct. 463, 469, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907; Shwartz v. H. B. Claflin Co. (1893) 60 Fed. 676, 684, 9 C. C. A. 204; Randolph v. Tandy (1900) 98 Fed. 939, 942, 39 C. C. A. 351; Ex parte Crawford (1907) 154 Fed. 769, 83 C. C. A. 474; Steam Stone-Cutter Co. v. Sears (C. C. 1881) 9 Fed. 8, 9; U. S. v. Train (C. C. 1882) 12 Fed. 852, 853; Boston Electric Co. v. Electric Gas-Lighting Co. (C. C. 1885) 23 Fed. 838; Wells v. Clark (C. C. 1905) 136 Fed. 462, 464 (modified [1906] 27 Sup. Ct. 43, 203 U. S. 164, 51 L. Ed. 138); U. S. v. O'Brien (C. C. 1903) 120 Fed. 446; Moscow Hardware Co. v. Colson (C. C. 1907) 158 Fed. 199; Whelan v. Enterprise Transp. Co. (C. C. 1908) 164 Fed. 95.

§ 1540. (R. S. § 916.) Executions, etc., in common-law causes as provided by laws of State.

The party recovering a judgment in any common-law cause in any [circuit or] district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such [circuit or] district court; and such courts may, from time to time, by

general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Act June 1, 1872, c. 255, § 6, 17 Stat. 197.

The words of this section inclosed in brackets, "circuit or." became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

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30. Local laws construed and applied.

1. Power of congress and validity of statute.—Congress may regulate the proceedings on executions, and direct the mode and manner and out of what property of the debtor satisfaction may be obtained. Bank of the United States v. Halstead (1825) 10 Wheat. 51, 54, 6 L. Ed. 264. It possesses the uncontrolled power to legislate as to the form and effect of executions and other final process in the federal courts, and may authorize mandamus to enforce a judgment where the ordinary process of execution is inappropriate. Riggs v. Johnson County (1867) 6 Wall. 188, 18 L. Ed. 768.

The power of congress, and of the federal courts acting under its authority, extends to the adoption of the laws of the several states as to the nature and form of writs of execution for the enforcement of judgments and to all subsequent proceedings thereupon. Palmer v. Allen (1813) 7 Cranch, 550, 3 L. Ed. 436; Wayman v. Southard (1825) 10 Wheat. 1, 6 L. Ed. 253; Bank of the United States v. Halstead (1825) 10 Wheat. 51, 6 L. Ed. 264; Boyle v. Zacharie (1832) 6 Pet. 654, 8 L. Ed. 532; Beers v. Haughton (1835) 9 Pet. 329, 9 L. Ed. 145; Ross v. Duval (1839) 13 Pet. 45, 10 L. Ed. 51; Duncan v. Darst (1843) 1 How. 301, 11 L. Ed. 139; McCracken v. Hayward (1844) 2 How. 608, 11 L. Ed. 397; Homer v. Brown (1853) 16 How. 363, 14 L. Ed. 970; Ex parte Boyd (1881) 105 U. S. 647, 26 L. Ed. 1200; Cooke v. Avery (1893) 13 Sup. Ct. 340, 147 U. S. 375, 37 L. Ed. 209; Dobbin v. Allegheney (C. C. 1860) Fed. Cas. No. 3,941; Steam Stone Cutter Co. v. Jones (C. C. 1882) 13 Fed. 567.

This section, though construed as authorizing in a common-law cause supplementary proceedings in New York under the state law, is not unconstitutional. Ex parte Boyd (1882) 105 U. S. 647, 648, 26 L. Ed. 1200.

It may be more than doubted whether the power to use as equitable those remedies which are essentially remedies at law can be bestowed by state legislation upon the federal courts, although it is clear enough that, if any new rights which are equitable in their nature be conferred by state legislation, they may be made available in the federal courts, if it can be done pursuant to the modes of equitable procedure established by the supreme court or by federal laws, or even in some instances by state laws, where the right and the remedy are practically the same things. Hudson v. Wood (C. C. 1903) 119 Fed. 764, 768.

2. Construction and operation in general.—This provision of the Revised Statutes merely embodies the principle contained in Act 1789, c. 20, § 14, which, with subsequent legislation in furtherance of it, has been repeatedly the subject of consideration in the supreme court. Ex parte Boyd (1881) 105 U. S. 647, 26 L. Ed. 1200, and cases cited.

While United States courts adopt and conform to state process and proceedings, as a general rule, yet they have authority from time to time to alter the process in civil actions in such manner as they may deem expedient, and to make additions thereto and to enlarge the effect and operation of the process. Fink v. O'Neil (1882) 1 Sup. Ct. 325, 329, 330, 106 U. S. 272, 27 L. Ed. 196.

The remedies on federal judgments are such as were provided by the state laws in force when Act June 1, 1872, c. 255, was passed, or re-enacted into the Revised Statutes, or by subsequent laws of the state, which have been

adopted by rules of the federal courts. Fink v. O'Neil (1882) 1 Sup. Ct. 325, 106 U. S. 272, 27 L. Ed. 196; Canal & Claiborne Streets R. Co. v. Hart (1885) 5 Sup. Ct. 1127, 114 U. S. 654, 29 L. Ed. 226; Lamaster v. Keeler (1887) 8 Sup. Ct. 197, 201, 123 U. S. 376, 31 L. Ed. 238; In re Chateaugay Ore & Iron Co. (1888) 9 Sup. Ct. 153, 128 U. S. 544, 32 L. Ed. 508; Cooke v. Avery (1893) 13 Sup. Ct. 340, 344, 147 U. S. 375, 37 L. Ed. 209; Davis v. Cleveland, C., C. & St. L. R. Co. (1909) 30 Sup. Ct. 463, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907; U. S. v. Arnold (1885) 69 Fed. 987, 16 C. C. A. 575; Collin County Nat. Bank v. Hughes (1907) 155 Fed. 389, 83 C. C. A. 661; Sowles v. Witters (C. C. 1891) 46 Fed. 497; General Electric Co. v. Hurd (C. C. 1909) 171 Fed. 984; U. S. v. Houston (D. C. 1891) 48 Fed. 207; Newman v. Basch (N. Y. City Ct. 1915) 152 N. Y. S. 456, 89 Misc. Rep. 622. But see Meyer v. Consolidated Ice Co. (C. C. 1908) 163 Fed. 400.

Though the laws of the United States have adopted, with respect to actions at law in the federal courts, the forms of execution and other process, and the modes of proceeding authorized under the state laws, subject to such alterations and additions as may be made by the courts, writs of execution, issuing by virtue of those provisions, are not controlled in their general operations by restrictions imposed by the state laws on the state courts to govern them in the actual use or supersession thereof, for, being addressed exclusively to the state tribunals, they have no efficacy in the federal courts unless adopted by them. Boyle v. Zacharie (1832) 31 U. S. (6 Pet.) 648, 8 L. Ed. 532.

The remedies supplementary to judgment, adopted by this section, were those then provided by the laws of Louisiana, in regard to judgments in suits of like nature or class, and not the provisions of the act of the legislature of Louisiana passed March 17, 1870, in regard to judgments against the city of New Orleans. Canal & Claiborne Streets R. Co. v. Hart (1885) 5 Sup. Ct. 1127, 1131, 114 U. S. 654, 29 L. Ed. 226.

Act No. 5 of the legislature of Louisiana of 1870, which prohibits the issuance of writs of execution and mandamus against the city of New Orleans, has no effect as to the remedies on judgments rendered in the federal courts. Hart v. City of New Orleans (C. C. 1882) 12 Fed. 292. See, on same point, New Orleans v. Morris (C. C. 1877) Fed. Cas. No. 10,183.

Under this section the issuance of an execution against the sureties on a stay-bond, in accordance with a subsequent law of the state, which had not then been adopted by the federal courts, is void. Lamaster v. Keeler (1887) 8 Sup. Ct. 197, 200, 123 U. S. 376, 31 L. Ed. 238.

This section empowers a circuit court to use a similar remedy to that provided by a state statute to enforce its judgments, but does not require it to follow the method prescribed by a state statute in serving a writ of scire facias to revive a judgment on a nonresident defendant, if it deems such method insufficient. Collin County Nat. Bank of McKinney, Tex., v. Hughes (1907) 155 Fed. 389, 83 C. C. A. 661, rehearing (1907) 152 Fed. 414, 81 C. C. A. 556, denied.

Under the liberal and remedial provisions of this section, a plaintiff, who has obtained a judgment in an action at law in a federal court of a state, may have the benefit of any remedy by execution or otherwise afforded to a judgment plaintiff in the courts of the state. Naumburg v. Hyatt (C. C. 1885) 24 Fed. 898, 902.

This section only provides that the parties shall be entitled to similar remedies to those provided in like cases by the laws of the state. Collin County Nat. Bank v. Hughes (1907) 155 Fed. 389, 83 C. C. A. 661.

A United States court within New York, which has not by general rule adopted the laws of the state providing for proceedings supplementary to execution since January 1, 1878, when R. S. § 916 (this section), was finally enacted, has no power to entertain supplementary proceedings against a corporation judgment debtor; such proceedings not having been authorized by the state laws prior to 1878. Meyer v. Consolidated Ice Co. (C. C. 1908) 163 Fed. 400.

On application by judgment creditor of bankrupt for leave to procure execution against pension, bankruptcy court held bound to consider the state law claimed to authorize such execution. In re Hoag (D. C. 1915) 227 Fed. 480.

See Fink v. O'Neil (1882) 1 Sup. Ct. 325, 106 U. S. 272, 27 L. Ed. 196, for history of legislation on the subject.

State and national tribunals are as independent as they are separate, and neither can impede or arrest any action the other may take for the satisfaction of its judgments and decrees. Amy v. Barkholder (1870) 11 Wall. 136, 138, 20 L. Ed. 101.

3. —— **"The party recovering a judgment" defined.**—The words "the party recovering a judgment" include the government. Green v. U. S. (1869) 9 Wall. 655, 19 L. Ed. 806; Fink v. O'Neil (1882) 1 Sup. Ct. 325, 106 U. S. 272, 27 L. Ed. 196; Allen v. Clark (1903) 126 Fed. 738, 740, 62 C. C. A. 58; Clark v. Allen (D. C. 1902) 114 Fed. 374.

4. —— **"Common-law cause" defined.**—A suit in rem for forfeiture of property by reason of violation of the internal revenue laws is a "common-law

cause," within this section, and, after the return of execution against the stipulators unsatisfied, supplementary proceedings, under the New York law, are properly taken. In re Quantity of Manufactured Tobacco (D. C. 1879) Fed. Cas. No. 11,499.

As applied to a state retaining the distinction between common-law and equity causes, the statute must be read as if written: "The party recovering a judgment in a common-law cause shall be entitled to similar remedies * * * provided by the laws of the state * * * in common-law causes." Clark v. Allen (D. C. 1902) 117 Fed. 699.

5. —— **Law and equity.**—Only judgments at law are within the statute. Boyle v. Zacharie (1832) 6 Pet. 648, 8 L. Ed. 532; The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524; Steam Stone Cutter Co. v. Sears (C. C. 1881) 9 Fed. 8; Hudson v. Wood (C. C. 1903) 119 Fed. 764.

The legislation enacted by Act June 1, 1872, incorporated in part in this section, does not purport to affect equity suits, either by inclusion or exclusion. Steam Stone Cutter Co. v. Jones (C. C. 1882) 13 Fed. 567.

This section does not embrace remedies in equity by independent suit which may have been given by the statutes of a state. Hudson v. Wood (C. C. 1903) 119 Fed. 764.

A federal court sitting in equity will not enforce a state statute providing for supplementary proceedings in aid of execution, which are designed to provide a statutory remedy at law as a substitute for a creditors' bill, but will leave the creditor to enforce his rights by the recognized equitable procedure. Regina Music Box Co. v. F. G. Otto & Son (C. C. 1903) 124 Fed. 747.

In pursuance of equity rule 8, this section is made applicable to decrees solely for the payment of money. General Electric Co. v. Hurd (C. C. 1909) 171 Fed. 984.

In enforcing rights of occupying claimants a federal court need not follow the procedure prescribed by state statutes, but may adopt its ordinary procedure. Leighton v. Young (1892) 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266.

6. —— **Admiralty cases.**—This section does not apply to executions in admiralty. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524; Steam Stone-Cutter Co. v. Sears (C. C. 1881) 9 Fed. 8.

7. —— **Criminal cases.**—This section does not apply to judgments in criminal cases. Clark v. Allen (D. C. 1902) 114 Fed. 374, decree affirmed (1903) Allen v. Clark, 126 Fed. 738, 62 C. C. A. 58. See R. S. § 1041, post, § 1705.

8. —— **Applicability to property and person.**—This section is inapplicable to an execution against the body of the debtor. U. S. v. Arnold (1895) 69 Fed. 987, 16 C. C. A. 575. It applies to property and not to the person. Friedly v. Giddings (C. C. 1902) 119 Fed. 439; judgment affirmed Giddings v. Freedley (1904) 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327.

The remedy given to a judgment creditor by state statute by the arrest and imprisonment of defendant on a showing of fraudulent removal or concealment of his property is one to reach the property after judgment debtor, and is available in the federal courts. Ex parte Crawford (1907) 154 Fed. 769, 83 C. C. A. 474, affirming Johnson v. Crawford & Yothers (C. C. 1907) 154 Fed. 761, holding that the warrant is a writ capable of being adopted as necessary for the exercise of the jurisdiction of the federal courts.

9. —— **Exemptions.**—What real estate is subject to or exempt from execution issued from federal courts is governed by the law of the state where the real estate is situated. Thompson v. McConnell (1901) 107 Fed. 33, 46 C. C. A. 124.

Exemption laws passed after the commencement of a suit in the federal court will not apply to an execution therein. Lawrence v. Wickware (C. C. 1845) Fed. Cas. No. 8,148.

State exemption laws apply to process issued from the federal courts. Manufacturers' & Farmers' Bank v. Bayless (C. C. 1859) Fed. Cas. No. 9,-050.

10. —— **United States as judgment creditor.**—Exemptions from levy and sale under executions apply equally to executions on judgments in favor of the United States as to those in favor of private parties. A state statute exempting homesteads from levy and sale on execution, in force at the time of the adoption of this section, and remaining continuously in force from that time, becomes a law of the United States within that state, and applies to executions issued upon judgments in civil causes recovered in their courts in their own name and behalf, equally with judgments rendered in favor of private parties. In case of executions on judgments in civil actions, the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found. Fink v. O'Neil (1882) 1 Sup. Ct. 325, 328, 106 U. S. 272, 27 L. Ed. 196. An execution from a federal court in Virginia may not be levied on real estate there, though the judgment is in favor of the United States, since the phrase "in like causes" does not give the government the rights of the state, but, as applicable to Virginia, which is not a code state, means "common-law causes." Clark v. Allen (D. C. 1902) 117 Fed. 699. But see U. S. v. Howell (C. C. 1881) 9 Fed. 674, holding that state exemption laws are inapplicable to

debts due from a citizen to the United States.

Where the United States compromised a judgment against two debtors jointly, it was no ground for setting aside the satisfaction that it was subsequently discovered that there were items due one of the judgment debtors on the treasury books which had been allowed before recovery of the judgment, and retained to await the result of the suit, when such items were not shown to have any connection with the transactions out of which the judgment arose. U. S. v. Biggert (1895) 70 Fed. 38, 16 C. C. A. 616.

The United States has the same remedy against the lands of delinquent collectors that the state gives against the lands of those against whom she has obtained judgment. 1 Stat. 275. U. S. v. Graves (C. C. 1828) Fed. Cas. No. 15,250.

An action of debt for the value of merchandise forfeited for entry by means of false and fraudulent practices and appliances, under R. S. § 2864, is not an action "to recover a fine or penalty," or "an action upon contract, express or implied," within section 549 of the Code of Civil Procedure of the state of New York, and consequently an execution against the bodies of the defendants cannot be issued out of a circuit court of the United States in that state for damages and costs. U. S. v. Reid (C. C. 1883) 17 Fed. 497.

State forms of procedure and remedies do not cut off the rights of the United States in the collection of a debt as authorized by R. S. §§ 3466–3468, post, §§ 6372–6374. U. S. v. Houston (D. C. 1891) 48 Fed. 207, 210.

The right of the United States to execution on a judgment in a purely governmental suit is not affected by state statutes of limitations. U. S. v. Noojin (D. C. 1907) 155 Fed. 377.

11. —— Decisions under prior statute.—State laws controlling executions have no efficacy in federal courts, unless adopted. Boyle v. Zacharie (1832) 6 Pet. 648, 659, 8 L. Ed. 532.

The power given to the federal courts by the process act of 1828 to make rules as to final process, so as to conform the same to those of the state laws on the same subject, extended to future legislation as well as to the modes of proceeding on executions as to the forms of writ. The result of the opinion in Wayman v. Southard, 10 Wheat. 1, was that, the execution laws of Kentucky having been passed subsequent to the process acts, did not apply to executions issued by the federal circuit courts, and that under the judiciary and process acts the courts had power to regulate proceedings on executions. Ross v. Duval (1839) 13 Pet. 45, 58, 60, 62, 10 L. Ed. 51.

The act of 1828 gives to debtors, imprisoned under executions from the courts of the United States, the privilege of the jail limits in the several states as fixed by the laws of the several states at the date of the act. U. S. v. Knight (1840) 14 Pet. 301, 316, 10 L. Ed. 465.

The phrase "proceedings thereupon" in Act 1828 means the exercise of all the duties of the ministerial officers of the states prescribed by the laws of the state to enforce judgments. No rule made by district judges will be recognized by the supreme court as binding, except those by the district courts exercising circuit courts powers. Amis v. Smith (1842) 41 U. S. (16 Pet.) 303, 10 L. Ed. 973.

The term "mode of process," in Act 1789, c. 21, § 2, and "proceedings upon execution and other final process," in Act 1828, have the same meaning, and include all regulations and steps incident to that process, from its commencement to its termination, as prescribed by the state laws, so far as they can be made to apply to the federal courts. A state law, regulating the practice of state courts, and addressed to its judges and magistrates, but which can only be executed by them, or with their aid, is a peculiar municipal regulation, not adopted by the acts of Congress, nor applicable to the federal courts. Congress did not intend to defeat the execution of judgments rendered in the federal courts, but meant that they should have full effect by force of the state laws adopted; and hence all state laws regulating proceedings, affecting insolvent persons, or that are addressed to state courts or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have not power to execute such laws. Duncan v. Darst (1843) 1 How. 301, 306, 11 L. Ed. 139.

By the process acts of 1789, 1792, and 1828 congress adopted such state laws as prescribed the modes of process and proceedings in suits at common law as are not in conflict with the laws of the United States, which can be executed by the courts thereof, which impose no restraint on or obstruction of their process from its inception till ultimate satisfaction from the defendant, or the marshal, sheriff, or other officer intrusted with the execution. Congress did not intend to defeat the execution of judgments in the courts of the United States, but meant they should have full effect by force of the state laws adopted, and therefore all state laws regulating proceedings affecting insolvent persons, or that are addressed to state courts or magistrates in other respects, which confer peculiar powers on such courts and magistrates, do not bind the federal courts, because they have no power to execute such laws. McNutt v. Bland (1844) 2 How. 9, 17, 11 L. Ed. 159.

Such parts only of the state laws as are applicable to the United States courts were adopted by the process act of May 19, 1828. A penalty was not adopted, and the 25 per cent. damages for failure to pay over money collected on executions could not be enforced. Gwin v. Breedlove (1844) 2 How. 29, 36, 11 L. Ed. 167.

The statute of Mississippi, authorizing a summary process against a marshal to enforce payment of a debt for which he was liable by reason of his default, was adopted by the act of 1828; but the courts of the United States cannot enforce payment of a penalty imposed by the state law in addition to the money due on the execution. Gwin v. Barton (1848) 6 How. 7, 10, 12 L. Ed. 321.

An act passed on admitting Iowa into the Union having provided that the laws of the United States not locally inapplicable should have the same effect within that state as elsewhere, the process act of May 19, 1828, became applicable to the federal courts of that state. U. S. ex rel. Moses v. Keokuk (1867) 6 Wall. 514, 516, 18 L. Ed. 933.

The act of 1828, re-enacted August 2, 1842, having provided that the forms of mesne process and the forms and modes of proceedings in the federal courts in states admitted since September 29, 1789, in those of common law, shall be the same in each of said states, respectively, as are now used in the highest state court of original and general jurisdiction. the effect of the act admitting Kansas, providing that all the laws of the United States not locally inapplicable shall have the same force and effect therein as in other states, and constituting the state a judicial district, was to re-enact, as respects Kansas, the provision of the act of 1828; and so the federal courts thereof have a right to issue execution, and the marshal there has a right to execute it; but a sale by him not conforming to the mode of proceeding in levying execution and making the sale to the state practice was irregular and void, and his deed on such sale conveyed no title. Smith v. Cockrill (1867) 6 Wall. 756, 757, 18 L. Ed. 973.

The acts of 1789 and 1792 adopt the state law as it then stood, and when by state law lands were liable to executions from state courts they were equally liable on executions issued from the federal courts. Koning v. Bayard (C. C. 1829) Fed. Cas. No. 7,924.

Under Act May 19, 1828, the forms of execution, their force and effect, and the duties of the marshals in levying, advertising, and selling, are ascertained by the local law. Oelrich v. Pittsburgh (C. C. 1859) Fed. Cas. No. 10,444.

The act of May 19, 1828, to regulate process, adopted, for the federal courts, the laws then in force in the state of Indiana, governing executions issued by the supreme court of that state. Simpson v. Niles (1848) 1 Ind. (1 Cart.) 196.

A sale under an execution, by a United States marshal, made at a time not authorized by the state statute, is void. Merchants' Bank v. Evans (1873) 51 Mo. 335.

12. Adoption by courts of state statutes.—State laws which have been adopted by the courts are inoperative if in conflict with the federal constitution or an act of Congress. Amis v. Smith (1842) 16 Pet. 303, 314, 10 L. Ed. 973; Bronson v. Kinzie (1843) 1 How. 311, 315, 11 L. Ed. 143.

No state law could be adopted under Act May, 1828, similar to this section, if it was in collision with the federal constitution or any act of congress. A statute authorizing the federal courts, if they see fit in their discretion, to alter final process to conform to changes adopted by state legislation, authorizes the federal courts to adopt changes made by state law, but not to adopt the state law in part only, or alter it in any respect. McCracken v. Hayward (1844) 2 How. 608, 615, 11 L. Ed. 397. See Wayman v. Southard (1825) 10 Wheat. 1, 6 L. Ed. 253; U. S. v. Halstead (1825) 10 Wheat. 51, 6 L. Ed. 264.

A federal court may adopt, to enforce its judgment, the process of the state court, or state statutes. Dobbin v. Allegheny (C. C. 1860) Fed. Cas. No. 3,941; Pollock v. Lawrence County, Id. 11,255. This section does not give the federal courts power to do more than adopt by rule state statutes enacted after the date of the federal statute. Clark v. Allen (D. C. 1902) 117 Fed. 699. See, on same subject, Lamaster v. Keeler (1887) 8 Sup. Ct. 197, 123 U. S. 376, 31 L. Ed. 238; Board of Trade v. Hammond Elevator Co. (1905) 25 Sup. Ct. 740, 198 U. S. 424, 49 L. Ed. 1111. And see Dobbin v. Allegheny (C. C. 1860) Fed. Cas. No. 3,941, holding that the federal courts may in their discretion adopt any part or all of the remedies provided by the state legislature.

State insolvent laws may be adopted by a rule of court. Beers v. Haughton (C. C. 1834) Fed. Cas. No. 1,230.

A state statute prohibiting the sale on execution of an equity of redemption does not become a rule of practice of the federal court until adopted. Campbell v. McManus (C. C. 1850) Fed. Cas. No. 2,364.

13. —— Manner of adoption of state laws.—The existence of a rule adopting state regulations is not assumed. Boyle v. Zacharie (1832) 6 Pet. 648, 659, 8 L. Ed. 532.

It is the intention of Congress to reach uniformity in federal and state proceedings largely through the discretion of the federal courts, exercised in the form of general rules adopted from time to time, and so regulating their own practice as may be necessary.

Shepard v. Adams (1898) 18 Sup. Ct. 214, 216, 168 U. S. 618, 42 L. Ed. 602.

As the statute does not require the rule adopting a state law to be in writing, it is not perceived why it may not be adopted by a rule promulgated orally, and the uniform practice of the court ought to be accepted as sufficient evidence of the promulgation of the rule. Citizens' Bank v. Farwell (1893) 56 Fed. 570, 6 C. C. A. 24; Logan v. Goodwin (1900) 104 Fed. 490, 43 C. C. A. 658. In the absence of any general rule, a general practice may become a rule, and when the general practice is to use the remedies provided by state statutes, the appellate court will presume, in the absence of proof, that these have been adopted by a general practice or a general rule. Collin County Nat. Bank v. Hughes (1907) 155 Fed. 389, 83 C. C. A. 661. The adoption of a state statute, as part of the final process of the federal court to enforce judgments against counties, held valid. Dobbin v. Allegheny (C. C. 1860) Fed. Cas. No. 3,941. See Fullerton v. Bank of U. S. (1828) 1 Pet. 604, 7 L. Ed. 280, and Duncan v. U. S. (1833) 7 Pet. 435, 8 L. Ed. 739, holding that state practice may be established by a uniform mode of procedure for a series of years. And see, to the same effect, Williams v. Bank (1829) 2 Pet. 96, 7 L. Ed. 360; U. S. v. Stevenson (1869) 1 Abb. 497, Fed. Cas. No. 16,-395. And see, also, Fink v. O'Neil (1882) 1 Sup. Ct. 325, 106 U. S. 272, 27 L. Ed. 196. See U. S. v. Sturgis (D. C. 1883) 14 Fed. 811, holding that federal courts sitting in New York had by general rules adopted all the provisions of the state practice and statutes in existence as far as applicable to common-law actions. And see Sellers' Lessee v. Corwin (1832) 5 Ohio (5 Ham.) 398, 24 Am. Dec. 301, holding that judgments in the United States circuit court for the district of Ohio, rendered previous to May, 1828, attached as liens on lands of the defendant throughout the state, in virtue of the adoption by that court of the execution laws of the state, in the regulation of its practice.

14. —— **Adopted state laws as laws of the United States.**—The laws of a state adopted, pursuant to this section, by a rule of the federal district court for the government of judgment liens of such court, and for the guidance of the marshal in levying executions, derive their force from the United States, and not from the state; and a suit involving the question whether or not the marshal's proceedings in levying an execution issued out of the federal court were in conformity with such rule is a question arising under the laws of the United States, and cognizable by the federal courts. Sowles v. Witters (C. C. 1891) 46 Fed. 497. See Fink v. O'Neil (1882) 1 Sup. Ct. 325, 106 U. S. 272, 27 L. Ed. 196, holding that a state exemption law in force June 1, 1872, and remaining in force, has thereby become a law of the United States within the state.

15. —— **Compliance with state process adopted by rule.**—Where the circuit court, by a rule, adopts the process pointed out by a state law, there must be no essential variance between them. Such a variance is a new rule, unknown to any act of congress or the state law professedly adopted. McCracken v. Hayward (1844) 2 How. 608, 615, 11 L. Ed. 397.

A state remdy by execution goes into the federal law, if at all, with all its essential incidents, and the method of procedure marked out with regard to it by the state statute has to be substantially followed. Johnson v. Crawford & Yothers (C. C. 1907) 154 Fed. 761.

Writs of execution are not controlled in their general operation by any collateral regulations imposed by state laws on state courts. Boyle v. Zacharie (1832) 6 Pet. 648, 657, 8 L. Ed. 532.

16. —— **Conclusiveness of construction by state courts of state laws.**—The construction of state laws, made by the highest court of the state, is not absolutely binding on the federal courts, but is of almost controlling weight. Sowles v. Witters (C. C. 1893) 55 Fed. 159, 161. See Supervisors of Carroll County v. U. S. (1873) 18 Wall. 71, 21 L. Ed. 771, holding that the federal supreme court adopts the construction of a state statute settled in the state courts, distinguishing Butz v. Muscatine (1869) 8 Wall. 575, 19 L. Ed. 490. And see Atlantic & P. R. Co. v. Hopkins (1876) 94 U. S. 11, 24 L. Ed. 48, holding that state court decisions construing the practice act of the state are binding on the federal courts. See, in accord, Evans v. Pittsburg (C. C. 1863) Fed. Cas. No. 4,568.

17. —— **Subsequent modification or repeal of adopted state statutes.**—Proceedings on execution are governed by the state laws duly adopted until final satisfaction is obtained, regardless of any subsequent changes by state legislation. McCracken v. Hayward (1844) 2 How. 608, 615, 11 L. Ed. 397, citing Wayman v. Southard (1825) 10 Wheat. 1, 6 L. Ed. 253; U. S. Halstead (1825) 10 Wheat. 51, 6 L. Ed. 264.

A state remedy, adopted by act of congress as a remedy for the federal court sitting in the state, remains a remedy in the federal court, notwithstanding subsequent state legislation abolishing it in the state courts. Homer v. Brown (1853) 16 How. 354, 365, 14 L. Ed. 970. See Riggs v. Johnson County (1867) 6 Wall. 166, 18 L. Ed. 768.

18. **Lien of judgments.**—The lien of judgments of federal courts is regulated by the state law. Ward v. Chamberlain (1862) 67 U. S. (2 Black) 430, 17 L. Ed. 319; Konig v. Bayard (C. C. 1829) Fed. Cas. No. 7,924; Barth v.

Makeever (C. C. 1868) Fed. Cas. No. 1,069; Pollard v. Cocke (1851) 19 Ala. 188; Andrews v. Wilkes (1842) 7 Miss. (6 How.) 554, 38 Am. Dec. 450; Lawrence v. Belger (1877) 31 Ohio St. 175; In re Morris (Pa. 1866) 6 Phila. 134.

A judgment of a federal court held unaffected by state laws. Shrew v. Jones (C. C. 1840) Fed. Cas. No. 12,-818; Cropsey v. Crandall (C. C. 1851) Fed. Cas. No. 3,418; U. S. v. Scott (C. C. 1878) Fed. Cas. No. 16,242; Same v. Humphries (C. C. 1879) Fed. Cas. No. 15,422; Carroll v. Watkins (D. C. 1870) Fed. Cas. No. 2,457.

The lien of a judgment on lands of a judgment debtor, depending on the state law as adopted under federal statutes, may be modified or suspended in accordance with state practice. U. S. v. Sturgis (D. C. 1883) 14 Fed. 810.

A judgment of a federal court does not constitute a lien on the land of defendant until it is docketed in the superior court of the county in which the land lies, as provided by state laws. Alsop v. Moseley (1889) 104 N. C. 60, 10 S. E. 124.

The district court has power to suspend the lien of a judgment on lands, of the judgment debtor during appeal or writ of error, and to cause the docket of the judgment to be so marked, in accordance with the provisions of the state practice. U. S. v. Sturgis (D. C. 1883) 14 Fed. 810.

Where, under the law of a state in force prior to 1872, made applicable to federal judgments and decrees by this section, and equity rule 8, the lien of a judgment lapsed at the end of 10 years from the entry thereof unless execution was issued in the meantime, and requiring leave of court to issue an execution after five years have elapsed without an execution being issued, the lien of a federal decree, on which no execution had been issued since March 28, 1894, had lapsed. General Electric Co. v. Hurd (C. C. 1909) 171 Fed. 984.

19. —— **Priorities.** — Priorities between executions issued by a federal court and a state court defined. Pulliam v. Osborne (1854) 17 How. 471, 475, 15 L. Ed. 154. See, on same point, Hagan v. Lucas (1836) 10 Pet. 400, 9 L. Ed. 470; Brown v. Clarke (1846) 4 How. 4, 11 L. Ed. 850; Taylor v. Carryl (1857) 20 How. 583, 15 L. Ed. 1028; Conner v. Long (1881) 104 U. S. 228, 26 L. Ed. 723; Leopold v. Godfrey (C. C. 1882) 50 Fed. 145.

Where by the laws of a state the whole estate of a decedent is placed in the custody of the probate court for equal division among creditors, a nonresident creditor, because he has obtained a judgment in the federal court, cannot issue execution and take precedence of other creditors. Yonley v. Lavender (1874) 21 Wall. 276, 279, 22 L. Ed. 536.

20. **Enforcement of judgments in general.**—The process by which the courts, of the United States execute their judgments is not controlled by state law. Kaill v. Board of Directors of St. Landry Parish, La. (1912) 194 Fed. 73, 114 C. C. A. 151.

A federal court which has jurisdiction to render a judgment has power to enforce it by appropriate process, notwithstanding a statute providing a different remedy in a state court. Tucker v. Hubbert (1912) 196 Fed. 849, 117 C. C. A. 365.

The federal courts have equal and concurrent power with the courts of the state to carry judgments into execution. Georgia v. Atlantic & G. R. Co. (C. C. 1879) Fed. Cas. No. 5,351.

If the courts of the United States give substantial effect to the right of redemption secured by a state statute, they are at liberty in so doing to adhere to their own modes of proceeding. Allis v. Northwestern Mut. L. Insurance Co. (1877) 97 U. S. 144, 146, 24 L. Ed. 1008.

The power of federal courts to issue the writ of capias ad satisfaciendum for the enforcement of their judgments, derived from section 1239, ante, and from the process act of 1789 and early enactments of the state, is not affected by Laws Ill. 1893, p. 96, limiting the right to process against the person. U. S. v. Arnold (1895) 69 Fed. 987, 16 C. C. A. 575.

21. —— **Garnishment.** — Garnishment proceedings are warranted by this section when authorized by state statute in force when this was enacted. Canal & Claiborne Streets R. Co. v. Hart (1885) 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226; Pearce v. Winter Iron Works (1858) 32 Ala. 68.

22. —— **Mandamus.**—This section and rule 34 of the circuit court for the Western district of Missouri, providing that a party who recovers judgment in a circuit court shall be entitled to remedies upon execution and otherwise, similar to those provided by the laws of the state in which the court is held, do not authorize mandamus to compel the levying of taxes in satisfaction of a judgment against a county, where the laws of the state do not authorize an execution, since mandamus is merely an ancillary proceeding, partaking of the nature of an execution. Stewart v. Justices of St. Clair County Court (C. C. 1891) 47 Fed. 482, and cases cited. See Moran v. City of Elizabeth (C. C. 1881) 9 Fed. 72, holding that mandamus would not issue to compel the city council to provide for the payment of a judgment, in absence of proof that the requirements of the state statute had been complied with. And see President v. Mayor, etc., of City of Elizabeth (C. C. 1889) 40 Fed. 799.

23. —— **Supplementary proceedings.** —A judgment creditor in the federal

court in New York is entitled to the benefit of examining his debtor, under what are known as "proceedings supplementary to execution." Ex parte Boyd (1881) 105 U. S. 647, 26 L. Ed. 1200. See Meyer v. Consolidated Ice Co. (C. C. 1908) 163 Fed. 400, holding that a federal court which has not adopted the New York laws providing for supplementary proceedings may not entertain such proceedings against a corporation judgment debtor; the proceedings not having been authorized by state laws prior to 1878.

A United States court, proceeding under state laws in proceedings supplementary to execution, may not, within the state law, subpœna witnesses as provided by R. S. § 876, ante, § 1487. Meyer v. Consolidated Ice Co. (C. C. 1908) 163 Fed. 400. See, in accord, Quantity of Manufactured Tobacco (D. C. 1879) Fed. Cas. No. 11,499. And see Byrd v. Badger (C. C. 1858) Fed. Cas. No. 2,266, holding proceedings supplementary are a substitute for a creditor's bill and not available in the federal courts.

24. —— **Action at law.**—To support an action at law on a final decree in equity, the decree must be unconditional, and the sum adjudged to be due must be payable, in any event. Du Bois v. Seymour (1907) 152 Fed. 600, 81 C. C. A. 590, 11 Ann. Cas. 656.

A judgment of the Consular Court of China may be sued on in courts of New York. Newman v. Bosch (N. Y. City Ct. 1915) 152 N. Y. S. 456, 89 Misc. Rep. 622.

25. —— **Intervention in set-off proceedings.**—Assignee of chose in action held entitled to intervene in proceeding to set off judgment rendered thereon against another judgment. Cathay Trust v. Brooks (1912) 193 Fed. 973, 114 C. C. A. 125.

26. —— **Receivers.**—A receiver appointed for a foreign corporation by a United States District Court has legal capacity to sue directors, who had paid dividends from capital. Johnson v. Nevins (Sup. Ct. 1914) 150 N. Y. S. 828, 87 Misc. Rep. 430.

27. —— **Service of writs of execution.**—The issuance of an execution is a power incident to every court, and when the execution is delivered to the proper officer he must execute it according to its command; and to permit the marshal of the United States to be governed and controlled by a state law may defeat the operation of the execution. Bank of U. S. v. Halstead (1825) 10 Wheat. 51, 64, 6 L. Ed. 264.

Writs of execution can be served in a district other than that in which the judgment was rendered, where in favor of private persons in another district of the same state, and where in favor of the United States. Toland v. Sprague (1838) 12 Pet. 300, 328, 9 L. Ed. 1093.

This section does not limit the power of the court to determine how its process shall be served after judgment. Collin County Nat. Bank v. Hughes (1907) 155 Fed. 389, 83 C. C. A. 661.

28. —— **Quashing or controlling executions.**—A motion to quash an execution is addressed to the court's discretion. Boyle v. Zacharie (1832) 6 Pet. 648, 656, 8 L. Ed. 532.

A fi. fa. issued after the death of defendant, but bearing teste before his death, will not be quashed. Kane v. Love (C. C. 1823) Fed. Cas. No. 7,608.

A federal court of law has power after the term to so control the execution of its final process issued on its judgment as to prevent injustice. King v. Davis (C. C. 1905) 137 Fed. 222, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348, and cases cited.

29. —— **Manner of selling property under order or decree of federal court.**—See post, §§ 1640–1642, and notes thereunder.

30. **Local laws construed and applied.**—State laws governing execution and other proceedings after judgment—Alabama, Plant v. Anderson (C. C. 1883) 16 Fed. 914; In re Tune (D. C. 1902) 115 Fed. 906, following In re Moore (D. C. 1901) 112 Fed. 289. Alaska, Shoup v. Marks (1904) 128 Fed. 32, 62 C. C. A. 540; Heid v. Ebner (1904) 133 Fed. 156, 66 C. C. A. 222; Mitchell v. Porter (1912) 194 Fed. 49, 114 C. C. A. 69; Cowden v. Wild Goose Mining & Trading Co. (1912) 199 Fed. 561, 118 C. C. A. 35; Mason v. Bennett (D. C. 1892) 52 Fed. 343. Arkansas, Hawkins v. Wills (1892) 49 Fed. 506, 1 C. C. A. 339; Lewis v. Dillard (1896) 76 Fed. 688, 22 C. C. A. 488; Wrightman v. Boone County (1898) 88 Fed. 435, 31 C. C. A. 570; Newman v. Davis (C. C. 1885) 24 Fed. 609; Wrightman v. Boone County (C. C. 1897) 82 Fed. 412; Waters v. Shinn (C. C. 1907) 178 Fed. 345. California, In re Rebman (1906) 150 Fed. 759, 80 C. C. A. 594; Bates v. International Co. of Mexico (C. C. 1898) 84 Fed. 518; Moore v. Los Angeles Iron & Steel Co. (C. C. 1898) 89 Fed. 73; Walsh v. Erwin (C. C. 1902) 115 Fed. 531; Shainwald v. Lewis (D. C. 1889) 46 Fed. 839; The Queen (D. C. 1899) 93 Fed. 834. Colorado, Ryan v. Staples (1896) 76 Fed. 721, 23 C. C. A. 541 (affirming judgment Staples v. Ryan [C. C. 1894] 62 Fed. 635, rehearing denied [1897] 78 Fed. 563, 23 C. C. A. 551); Aspen Mining & Smelting Co. v. Wood (1897) 84 Fed. 48, 28 C. C. A. 276; Reed v. Munn (1906) 148 Fed. 737, 80 C. C. A. 215 (writ of certiorari denied Munn v. Reed [1907] 28 Sup. Ct. 255, 207 U.

S. 588, 52 L. Ed. 353); Collin County Nat. Bank of McKinney, Tex., v. Hughes (1907) 152 Fed. 414, 81 C. C. A. 556 (rehearing denied [1907] 155 Fed. 389, 83 C. C. A. 661); Town of Fletcher v. Hickman (1908) 165 Fed. 403, 91 C. C. A. 353; Henry v. Gold Park Min. Co. (C. C. 1883) 15 Fed. 649; White v. Crow (C. C. 1883) 17 Fed. 98 (decree affirmed [1884] 4 Sup. Ct. 71, 110 U. S. 183, 28 L. Ed. 113). Delaware, Wheeler v. Walton & Whann Co. (C. C. 1895) 65 Fed. 720. District of Columbia, Phillips v. Lowndes (C. C. 1805) Fed. Cas. No. 11,103; Johnson v. Glover (C. C. 1826) Fed. Cas. No. 7,385; Veitch v. Farmers' Bank (C. C. 1827) Fed. Cas. No. 16,910; Ott v. Murray (C. C. 1828) Fed. Cas. No. 10,615. Florida, Bornemann v. Norris (C. C. 1891) 47 Fed. 438. Georgia, Raisin v. Statham (C. C. 1884) 22 Fed. 144; McGriff v. Baldwin (C. C. 1885) 23 Fed. 222; Whelchel v. Lucky (C. C. 1890) 41 Fed. 114; Barstow v. Beckett (C. C. 1903) 122 Fed. 140 (decree reversed Goerz v. Barstow [1906] 148 Fed. 562, 78 C. C. A. 248). Illinois, Stroheim v. Deimel (1897) 77 Fed. 802, 23 C. C. A. 467 (reversing order [C. C. 1896] 73 Fed. 430); Barney v. Chapman (C. C. 1884) 21 Fed. 903; Thal v. Larmon (C. C. 1885) 25 Fed. 290; O'Brien v. Wheelock (C. C. 1897) 78 Fed. 673. Indiana, Crawford v. Foster (1898) 84 Fed. 939, 28 C. C. A. 576; Kregelo v. Adams (C. C. 1880) 3 Fed. 628; U. S. v. Murphy (C. C. 1883) 15 Fed. 589; Lippincott v. Shaw Carriage Co. (C. C. 1885) 25 Fed. 577; Milmine v. Bass (C. C. 1886) 29 Fed. 632 (appeal dismissed Bass v. Malmine [1889] 10 Sup. Ct. 1065, 136 U. S. 630, 34 L. Ed. 553); Foster v. Crawford (C. C. 1897) 80 Fed. 991 (judgment affirmed Crawford v. Foster [1897] 83 Fed. 975, 28 C. C. A. 242). Iowa, Renwick v. Wheeler (C. C. 1880) 48 Fed. 431. Kansas, Atlantic & P. R. Co. v. Hopkins (1876) 94 U. S. 11, 24 L. Ed. 48; Insley v. U. S. (1893) 14 Sup. Ct. 158, 150 U. S. 512, 37 L. Ed. 1163; Dempsey v. Oswego Tp. (1892) 51 Fed. 97, 2 C. C. A. 110; U. S. v. Insley (1893) 54 Fed. 221, 4 C. C. A. 296; Merrill v. Rokes (1893) 54 Fed. 450, 4 C. C. A. 433; Beall v. City of Leavenworth (C. C. 1888) 34 Fed. 113; Walker v. Cronkite (C. C. 1889) 40 Fed. 133; Brockway v. Oswego Tp. (C. C. 1889) 40 Fed. 612; U. S. v. Insley (C. C. 1892) 49 Fed. 776; Same v. Houston (D. C. 1891) 48 Fed. 207. Kentucky, U. S. v. Hogg (1902) 112 Fed. 909, 50 C. C. A. 608 (affirming judgment [D. C. 1901] 111 Fed. 292); Tucker v. Hubbert (1912) 196 Fed. 849, 117 C. C. A. 365. Louisiana, U. S. v. City of New Orleans (1902) 117 Fed. 610, 54 C. C. A. 106; Kaill v. Board of Directors of St. Landry Parish, La. (1912) 194 Fed. 73, 114 C. C. A. 151; Claflin v. Lisso (C. C. 1883) 16 Fed. 897; Rio Grande Ry. Co. v. Gomila (C. C. 1886) 28 Fed. 337 (judgment reversed Same v. Vinet [1889] 10 Sup. Ct. 155, 132 U. S. 478, 33 L. Ed. 400); U. S. v. City of New Orleans (C. C. 1887) 31 Fed. 537. Maine, U. S. v. Poole (D. C. 1880) 5 Fed. 412. Maryland, Brown v. Chesapeake & O. Canal Co. (C. C. 1880) 4 Fed. 770. Massachusetts, Sampson v. Mudge (C. C. 1882) 13 Fed. 260; Rosenstein v. Tarr (C. C. 1892) 51 Fed. 368. Michigan, Lant v. Manley (1896) 75 Fed. 627, 21 C. C. A. 457; Rich v. Victoria Copper Min. Co. (1908) 163 Fed. 207, 89 C. C. A. 637; Bergen v. Williams (C. C. 1846) Fed. Cas. No. 1,340; Converse v. Michigan Dairy Co. (C. C. 1891) 45 Fed. 18. Minnesota, Bigelow v. Chatterton (1892) 51 Fed. 614, 2 C. C. A. 402; Tomlinson & Webster Mfg. Co. v. Shatto (C. C. 1888) 34 Fed. 380; Sage v. St. Paul, S. & T. F. Ry. Co. (C. C. 1891) 47 Fed. 3. Missouri, Dunkerson v. Goldberg (1908) 162 Fed. 120, 89 C. C. A. 120; Loy v. Alston (1909) 172 Fed. 90, 96 C. C. A. 578; Jeffries v. Union Mut. Life Ins. Co. (C. C. 1880) 1 Fed. 450 (orders affirmed Same v. Mutual Life Ins. Co. [1884] 4 Sup. Ct. 8, 110 U. S. 305, 28 L. Ed. 156); Hickman v. Macon County (C. C. 1890) 42 Fed. 759; Stewart v. Justices of St. Clair County Court (C. C. 1891) 47 Fed. 482; U. S. v. King (C. C. 1896) 74 Fed. 493; Wonderly v. Lafayette County (C. C. 1896) 74 Fed. 702; Id. (C. C. 1896) 77 Fed. 665 (judgment affirmed Lafayette County v. Wonderly [1899] 92 Fed. 313, 34 C. C. A. 360). Montana, City of Helena v. U. S. (1900) 104 Fed. 113, 43 C. C. A. 429; King v. Bender (1902) 116 Fed. 813, 54 C. C. A. 317 (affirming decree Bender v. King [C. C. 1901] 111 Fed. 60, and writ of certiorari denied King v. Bender [1902] 23 Sup. Ct. 843, 187 U. S. 643, 47 L. Ed. 346). Nebraska, Leighton v. Young (1892) 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; Lamb v. Ewing (1893) 54 Fed. 269, 4 C. C. A. 320; Spitley v. Frost (C. C. 1883) 15 Fed. 299; Withnell v. Courtland Wagon Co. (C. C. 1885) 25 Fed. 372; Hilton v. Otoe County Nat. Bank (C. C. 1886) 26 Fed. 202; Young v. De Putron (C. C. 1888) 37 Fed. 46 (judgment affirmed Deputron v. Young [1890] 10 Sup. Ct. 539, 134 U. S. 241, 33 L. Ed. 923). Nevada, McWilliams v. Withington (C. C. 1881) 7 Fed. 326; Brown v. Evans (C. C. 1883) 18 Fed. 56; Wells, Fargo & Co. v. Vansickle (C. C. 1901) 112 Fed. 398. New Jersey, Third Nat. Bank v. Atlantic City (C. C. 1903) 126 Fed. 413 (decree reversed [1904] 130 Fed. 751, 65 C. C. A. 177). New York, Waterman v. Shipman (1893) 55 Fed. 982, 5 C. C. A. 371; In re Gormully & Jeffrey Co. (1900) 102 Fed. 1002, 43 C. C. A. 89 (affirming order In re Ferguson [D. C. 1899] 95 Fed. 429); Claflin v. McDermott (C. C. 1882) 12 Fed. 375; Lilienthal v. Wallach (C. C. 1889) 37 Fed.

241; Kittel v. Augusta, T. & G. R. Co. (C. C. 1897) 78 Fed. 855; Kimball v. Dunn (C. C. 1898) 89 Fed. 782; In re Shepherd (C. C. 1907) 154 Fed. 957; Meyer v. Consolidated Ice Co. (C. C. 1908) 163 Fed. 400; Crane v. Penny (D. C. 1880) 2 Fed. 187; Olney v. Tanner (D. C. 1882) 10 Fed. 101; Young v. Aronson (D. C. 1886) 27 Fed. 241; In re Ferguson (D. C. 1899) 95 Fed. 429; In re Dowie (D. C. 1912) 202 Fed. 816. North Carolina, U. S. v. Devereux (1898) 90 Fed. 182, 32 C. C. A. 564; Board of Com'rs of Hertford county, N. C., v. Tome (1907) 153 Fed. 81, 82 C. C. A. 215; Froneberger v. First Nat. Bank (1913) 203 Fed. 429, 121 C. C. A. 539; U. S. v. Howell (C. C. 1881) 9 Fed. 674; Naumburg v. Hyatt (C. C. 1885) 24 Fed. 898; U. S. v. Winstead (D. C. 1882) 12 Fed. 50; Same v. Vestal (D. C. 1882) 12 Fed. 59; Ex parte Worley (D. C. 1884) 19 Fed. 586. North Dakota, Lynch v. Burt (1904) 132 Fed. 417, 67 C. C. A. 305. Ohio, Brooks v. Raynolds (1893) 59 Fed. 923, 8 C. C. A. 370 (reversing decree Raynolds v. Hanna [C. C. 1893] 55 Fed. 783); Gregory v. Hewson (C. C. 1859) Fed. Cas. No. 5,801; Vance v. Royal Clay Mfg. Co. (C. C. 1897) 82 Fed. 251. Oregon, Balfour v. Rogers (C. C. 1894) 64 Fed. 925; Rose v. Northwest Fire & Marine Ins. Co. (C. C. 1895) 67 Fed. 439; Cambers v. First Nat. Bank (C. C. 1906) 144 Fed. 717 (judgment affirmed [1907] 156 Fed. 482, 84 C. C. A. 292); General Electric Co. v. Hurd (C. C. 1909) 171 Fed. 984; U. S. v. Griswold (D. C. 1887) 30 Fed. 604. Pennsylvania, Manhattan Life Ins. Co. v. McKown (1898) 90 Fed. 646, 33 C. C. A. 212; Safe-Deposit & Trust Co. of Pittsburgh v. Wright (1900) 105 Fed. 155, 44 C. C. A. 421; Du Bois v. Seymour (1907) 152 Fed. 600, 81 C. C. A. 590, 11 Ann. Cas. 656; Macrum v. U. S. (1907) 154 Fed. 653, 83 C. C. A. 427; Davis v. Davis (1909) 174 Fed. 786, 98 C. C. A. 494; Hurst v. Hurst (C. C. 1807) Fed. Cas. No. 6,931; Azcarati v. Fitzsimmons (C. C. 1811) Fed. Cas. No. 690; Evans v. Pittsburg (C. C. 1862) Fed. Cas. No. 4,567; Id. (C. C. 1863) Fed. Cas. No. 4,568; Gaskill v. Benton (C. C. 1881) 8 Fed. 746; Wilder v. Kent (C. C. 1883) 15 Fed. 217; Wickham v. Morehouse (C. C. 1883) 16 Fed. 324; McCullough v. Large (C. C. 1884) 20 Fed. 309; Fife v. Bohlen (C. C. 1885) 22 Fed. 878; In re Huddell (C. C. 1891) 47 Fed. 207; Erie Wringer Mfg. Co. v. National Wringer Co. (C. C. 1894) 63 Fed. 248; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C. 1897) 79 Fed. 389; Wright v. Wright (C. C. 1900) 103 Fed. 580; Seymour v. Du Bois (C. C. 1906) 145 Fed. 1003; International Coal Min. Co. v. Pennsylvania R. Co. (C. C. 1907) 152 Fed. 554; Johnson v. Crawford & Youthers (C. C. 1907) 154 Fed. 761; Gundry v. Reakirt (C. C. 1909) 173 Fed. 167; In re Bodek (D. C. 1911) 188 Fed. 817; Keystone Bank v. Donnelly (D. C. 1912) 196 Fed. 832; Troxell v. Delaware, L. & W. R. Co. (D. C. 1913) 205 Fed. 830. South Carolina, Boyd v. Hankinson (1899) 92 Fed. 49, 34 C. C. A. 197 (reversing decree [C. C. 1897] 83 Fed. 876); Hicks v. Cleveland (1901) 106 Fed. 459, 45 C. C. A. 429; Ex parte Mensing (C. C. 1893) 55 Fed. 17; Wesley v. Tindal (C. C. 1897) 81 Fed. 612; Ball v. Coker (C. C. 1909) 168 Fed. 304; U. S. v. Gayle (D. C. 1891) 45 Fed. 107. South Dakota, Hardin v. Kelley (1906) 144 Fed. 353, 75 C. C. A. 355; Jochem v. Cooley (1910) 176 Fed. 719, 100 C. C. A. 155; In re Lentz (D. C. 1899) 97 Fed. 486. Tennessee, Freeman v. Dawson (1884) 4 Sup. Ct. 94, 98, 110 U. S. 264, 28 L. Ed. 141; Reeve v. North Carolina Land & Timber Co. (1905) 141 Fed. 821, 72 C. C. A. 287 (writ of certiorari denied [1906] 27 Sup. Ct. 776, 203 U. S. 588, 51 L. Ed. 329); Steers v. Daniel (C. C. 1880) 4 Fed. 587; Grantland v. City of Memphis (C. C. 1882) 12 Fed. 287; Menees v. Matthews (D. C. 1912) 197 Fed. 633. Texas, Meek v. Skeen (1894) 60 Fed. 322, 8 C. C. A. 641; Booth v. Limited Partnership of J. L. S. Hunt (1895) 69 Fed. 220, 16 C. C. A. 214; Samuels v. Revier (1899) 92 Fed. 199, 34 C. C. A. 294; Thompson v. McConnell (1901) 107 Fed. 33, 46 C. C. A. 124; Tompkins v. Creighton-McShane Oil Co. (1908) 160 Fed. 303, 87 C. C. A. 427; Moore v. Gilbert (1910) 175 Fed. 1, 99 C. C. A. 141; Middlesworth v. Houston Oil Co. of Texas (1911) 184 Fed. 857, 107 C. C. A. 181; U. S. v. Sinclair (1913) 209 Fed. 612, 126 C. C. A. 606; Mexican Nat. Coal, Timber & Iron Co. v. Frank (C. C. 1907) 154 Fed. 217. Vermont, Witters v. Sowles (C. C. 1887) 32 Fed. 771; In re First Nat. Bank (C. C. 1891) 49 Fed. 120; Sowles v. Witters (C. C. 1893) 55 Fed. 159 (writ of error dismissed [1894] 14 Sup. Ct. 1153, 154 U. S. 517, 38 L. Ed. 1075). Virginia, Alston v. Munford (C. C. 1814) Fed. Cas. No. 267; Offutt v. Henderson (C. C. 1825) Fed. Cas. No. 10,451; Hay v. Alexandria & W. R. Co. (C. C. 1884) 20 Fed. 15; King v. Davis (C. C. 1903) 137 Fed. 198 (judgment affirmed Blankenship v. King [1906] 157 Fed. 676, 85 C. C. A. 348); King v. Davis (C. C. 1905) 137 Fed. 222 (judgment affirmed Blankenship v. King [1906] 157 Fed. 676, 85 C. C. A. 348). Washington, St. Paul, M. & M. Ry. Co. v. Drake (1896) 72 Fed. 945, 19 C. C. A. 252; Front St. Cable Ry. Co. v. Same (C. C. 1895) 65 Fed. 539; Dexter, Horton & Co. v. Sayward (C. C. 1897) 78 Fed. 275; Provident Life & Trust Co. of Philadelphia v. Mills (C. C. 1899) 91 Fed. 435; In re Buelow (D. C. 1899) 98 Fed. 86. West Virginia, Ryan v. Kanawha Val. Bank (1895) 71 Fed. 912, 18 C. C. A. 384; Davis v. Davis (1909) 174 Fed. 786, 98 C. C. A. 494 (revers-

ing judgment [C. C. 1908] 164 Fed. 281); Dickinson v. Huntington (1911) 185 Fed. 703, 109 C. C. A. 523 (affirming judgment (Huntington's Devisees v. Taylor [C. C. 1907] 156 Fed. 700). Wisconsin, Fink v. O'Neil (1882) 1 Sup. Ct. 325, 106 U. S. 272, 27 L. Ed. 196; Farrand v. Land & River Imp. Co. (1898) 86 Fed. 393, 30 C. C. A. 128; Walker v. Colby Wringer Co. (C. C. 1882) 14 Fed. 517; Young v. Towns of Dexter, Remington, and Wood (C. C. 1883) 18 Fed. 201; In re Jones (D. C. 1899) 97 Fed. 773.

Cited without definite application, U. S. v. Knight (1840) 14 Pet. 301, 313, 10 L. Ed. 465; Krippendorf v. Hyde (1884) 4 Sup. Ct. 27, 32, 110 U. S. 276, 28 L. Ed. 145; Campbell v. Haverhill (1895) 15 Sup. Ct. 217, 220, 155 U. S. 610, 39 L. Ed. 280; Randolph v. Tandy (1900) 98 Fed. 939, 942, 39 C. C. A. 351; Townsend v. Beatrice Cemetery Ass'n (1911) 188 Fed. 1, 110 C. C. A. 10; Devereaux v. Brownsville (C. C. 1887) 29 Fed. 742, 748; Whelan v. Enterprise Transp. Co. (C. C. 1908) 164 Fed. 95.

§ 1541. (Act June 1, 1874, c. 200.) Rights and remedies of occupying claimants of land as given by statutes of State.

When an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made. (18 Stat. 50.)

This was an act entitled "An act for the benefit of occupying claimants."

Notes of Decisions

Color of title within statute.—A homestead filing does not convey "color of title." Woodruff v. Wallace (1895) 41 P. 357, 3 Okl. 355; Haines v. Caldwell (1897) 47 P. 1101, 5 Okl. 127; Radebaugh v. Wolfe (1897) 47 P. 1101, 5 Okl. 147; Koller v. Odneal (1897) 49 P. 1118, 5 Okl. 569; O'Dell v. Bourns (1897) 49 P. 1119, 5 Okl. 570.

The act does not apply to land covered by a homestead entry, but to which no patent has been granted. Woodruff v. Wallace (1895) 3 Okl. 355, 41 Pac. 357. See Young v. Commissioners of Mahoning County (C. C. 1892) 53 Fed. 895, holding that where a city by deed in fee conveyed certain lots to a building committee in trust, empowering them, in their discretion, either to sell the lots and convey a fee simple to the purchaser, to exchange the lots for others, or to use them for the erection of a courthouse, and then donate them to the county commissioners and the building committee erected a courthouse on one of the lots, and then conveyed the same by deed in fee to the commissioners, that the title could not be considered as passing directly from the city to the commissioners, so as to deprive the latter of the benefits of the occupying claimant's law on ejectment under title paramount, for the committee was not a mere conduit for passing the title, but had discretion as to the use of the lots, and consequently authority to exercise the attributes of ownership.

Claimant entitled to benefit of statute.—A state statute giving a defendant in ejectment the right to recover the value of improvements made by him in good faith under color of title cannot be applied in a case in which the plaintiff claims under a patent issued by the United States after the improvements were made, since the power of the United States to dispose of its public lands is absolute, and the right of its grantee to possession on receiving the legal title cannot be obstructed or affected by any claim made under a law of the state. Tegarden v. Le Marchel (C. C. 1904) 129 Fed. 487.

A homestead claimant, whose entry is canceled, cannot avail himself of the benefits of the act. Woodruff v. Wallace (1895) 3 Okl. 355, 41 Pac. 357.

The value of improvements made on land known to be mineral is recoverable by the townsite entryman when he is ejected. Pierce v. Sparks (1885) 22 N. W. 491, 4 Dak. 1. See W. O. Whitney Lumber & Grain Co. v. Crabtree (1908) 166 Fed. 738, 92 C. C. A. 400.

—— Good-faith occupant.—Where a defendant in ejectment, in good faith, believing that he had an absolute title to the land in question, has made valuable improvements thereon, before the commencement of the action of ejectment, final judgment will not be rendered for the plaintiff in ejectment until he has paid to the defendant the value of his improvements, less the sum due by him for use and occupation. Where good faith and belief actually existed, the deeds not showing that an absolute title was not conveyed, and the defendant not being chargeable with laches, he will be allowed the value of his improvements, notwithstanding that

he held merely under a quitclaim deed. Mere notice of adverse claim does not forbid the conclusion that such subsequent improvements were made in good faith. Griswold v. Bragg (C. C. 1881) 6 Fed. 342.

See W. O. Whitney Lumber & Grain Co. v. Crabtree (1908) 166 Fed. 738, 92 C. C. A. 400; Jones v. Steam Stone-Cutter Co. (C. C. 1884) 20 Fed. 477; Young v. Commissioners of Mahoning County (C. C. 1892) 53 Fed. 895; Vilas v. Prince (C. C. 1898) 88 Fed. 682.

—— **Notice of claim.**—See Klever v. Seawall (1894) 65 Fed. 373, 12 C. C. A. 653, judgment reversed (1895) 65 Fed. 393, 12 C. C. A. 661.

—— **Measure of value of improvements.**—See Young v. Commissioners of Mahoning County (C. C. 1892) 53 Fed. 895, following Van Bibber v. Williamson (C. C. 1889) 37 Fed. 756.

—— **Submission of issue to jury.**—See Western Union Beef Co. v. Thurman (1895) 70 Fed. 960, 17 C. C. A. 542.

Sale of property and distribution of proceeds.—The object of the occupying claimant's act being to prevent a forfeiture of the interests of either occupant or owner, a court of equity should treat them as having rights in the property in proportion to the value of the improvements and the land, respectively; and if neither is willing to compensate the other as provided in the act, the court, on motion of either, will decree a sale, and distribute the proceeds in such proportion. Leighton v. Young (1892) 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266.

§ 1542. (R. S. § 722.) Proceedings, civil and criminal, in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Act April 9, 1866, c. 31, § 3, 14 Stat. 27. Act May 31, 1870, c. 114, § 18, 16 Stat. 144.

The circuit courts, mentioned in this section, were abolished by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

"This Title," mentioned in this section, was Title XIII of the Revised Statutes, "The Judiciary." The provisions thereof referred to as conferring jurisdiction of the district and circuit courts were incorporated in the Judicial Code, chiefly in section 24 thereof, ante, § 991, and were repealed by section 297 of said Code, ante, § 1274.

The Title "Civil Rights," also mentioned in this section, was Title XXIV of the Revised Statutes, including sections 1977–1991 thereof, post, §§ 3925, 3931–3938, 3940–3945.

The Title "Crimes," also mentioned in this section, was Title LXX of the Revised Statutes, the provisions of which relating to civil rights were incorporated into the Criminal Code, chiefly in chapter 3 thereof, post, §§ 10183–10190, and were repealed by section 341 of said Code, post, § 10515.

Notes of Decisions

Scope and effect of section.—In legal effect the section amounts to no more than a direction to a judge sitting in a criminal case to do as well as he can, without any suggestion as to procedure, if a question not regulated by the federal law, common law, or state law should arise. Tennessee v. Davis (1879) 100 U. S. 257, 299, 25 L. Ed. 648.

This section refers to the forms of process and remedy, and not to jurisdiction. In re Stupp (C. C. 1875) Fed. Cas. No. 13,563.

Jurisdiction in habeas corpus.—Under this section the jurisdiction of the federal courts in habeas corpus is required to be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect. In re

Stupp (C. C. 1875) Fed. Cas. No. 13,-563.

Applicability of state penal laws.—The rules of procedure in the federal courts for the trial of criminal causes are derived from the common law, and a state statute defining felonies and misdemeanors is not applicable therein. U. S. v. Baugh (C. C. 1880) 1 Fed. 784, 788.

Challenge to grand jurors.—As there are no federal statutes regulating challenges to grand jurors, the federal courts under this section may follow the practice of the courts of the state in which they are held. U. S. v. Eagan (C. C. 1887) 30 Fed. 608, 609.

Quashal of indictment.—Under this section an indictment in the federal court sitting in Oregon could not be set aside on grounds other than those specified in the state statute, except in the discretion of the court. U. S. v. Mitchell (C. C. 1905) 136 Fed. 896.

Cited without definite application, Tennessee v. Union & Planters' Bank (1894) 14 Sup. Ct. 654, 657, 152 U. S. 454, 38 L. Ed. 511; Brown v. American Bonding Co. (1914) 210 Fed. 844, 127 C. C. A. 406.

§ 1543. (R. S. § 917.) Power of the Supreme Court to regulate the practice of district courts.

The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the [circuit and] district courts.

Act Aug. 23, 1842, c. 188, § 6, 5 Stat. 518.

The words of this section inclosed in brackets, "circuit and," became inoperative on the abolition of the circuit courts by Jud. Code, § 289, ante, § 1266.

Notes of Decisions

1. Scope and validity of statute.
2. State legislation.
3. Nature and effect of rules.
4. Modification of regulations prescribed by congress.
5. Power as to jurisdiction.
6. Government as suitor.
7. Forms and modes of procedure.
8. Attachment of absent defendants.
9. Bail.
10. Equity practice.
11. Judgments or decrees as liens.
12. Limitation of liability.
13. Mode of taking testimony.
14. Service of process.

For text of equity and admiralty rules and decisions construing and applying them, see, ante, § 1536.

1. Scope and validity of statute.—The section relates wholly to the making of rules in suits at common law and in admiralty and equity. Friedenstein v. U. S. (1888) 125 U. S. 224, 232, 8 Sup. Ct. 838, 31 L. Ed. 736.

Congress has power to authorize the supreme court to fix by rule the manner of serving process. Levinson v. Oceanic Steam Nav. Co. (C. C. 1876) Fed. Cas. No. 8,292.

2. State legislation.—See notes under § 1538.

3. Nature and effect of rules.—No practice of a federal court of the United States, inconsistent with the rules of practice prescribed by the supreme court, can be admissible to control them. Bank of United States v. White (1834) 33 U. S. (8 Pet.) 262, 8 L. Ed. 938.

Every court of equity possesses the power to mold its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice, and it is not only in the power of the court, but it is its duty to exercise a sound discretion on the subject and enlarge the time whenever it shall appear that justice requires it, and the rules of the supreme court were not intended to deprive the courts of the United States of this necessary power. Poultney v. Lafayette (1838) 12 Pet. 472, 475, 9 L. Ed. 1161.

A party whose title or claim is equitable must follow the forms and rules of equity proceedings as prescribed by the supreme court under the authority of this section. Hurt v. Hollingsworth (1879) 100 U. S. 100, 103, 25 L. Ed. 569.

The equity rules promulgated by the supreme court have the force of law. Northwestern Mut. Life Ins. Co. v. Keith (1896) 77 Fed. 374, 23 C. C. A. 196; Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259.

The courts have no authority to rescind a rule adopted by the supreme court to govern their equity practice. Jenkins v. Greenwald (C. C. 1857) Fed. Cas. No. 7,270.

A rule established by the supreme court in pursuance of law becomes a

part of the law itself. Seymour v. Phillips & Colby Const. Co. (C. C. 1877) Fed. Cas. No. 12,689; U. S. v. Barber Lumber Co. (C. C. 1908) 169 Fed. 184.

The supreme court has authority to prescribe rules regulating the practice in suits in equity and parties must avail themselves of the rules so prescribed. Austin v. Riley (C. C. 1893) 55 Fed. 833, 835.

The rules established by the supreme court are rules of practice, not of decision. The Selt (D. C. 1872) Fed. Cas. No. 12,649.

4. Modification of regulations prescribed by congress.—This section is generally understood to give the supreme court no power to repeal or modify existing regulations prescribed by congress. Ward v. Chamberlain (1862) 2 Black, 430, 17 L. Ed. 319; The Kentucky (C. C. 1860) Fed. Cas. No. 7,717; Gray v. Chicago, I. & N. R. Co. (C. C. 1864) Fed. Cas. No. 5,713.

5. Power as to jurisdiction.—The courts may not enlarge or diminish their own jurisdiction by a rule of practice, but they have power over their own process and mode of procedure. Meyer v. Tupper (1861) 1 Black, 522, 528, 17 L. Ed. 180.

The supreme court acquired no power to change, by its rules, the jurisdiction of the federal courts in respect to nonresidents of the district, by virtue either of the act of 1792 or that of 1842. New England Ins. Co. v. Detroit & C. Steam Nav. Co. (D. C. 1871) Fed. Cas. No. 10,154.

6. Government as suitor.—The government is bound by the same rules of practice as apply to individuals. U. S. v. Barker Lumber Co. (C. C. 1908) 169 Fed. 184.

7. Forms and modes of procedure.—The mode of conducting trials and the introduction of proof are matters belonging to the practice of the circuit courts, with which the supreme court ought not to interfere, unless it chooses to prescribe some fixed general rules on the subject. The circuit courts possess this discretion in as ample a manner as other tribunals. Philadelphia & Trenton R. Co. v. Stimpson (1840) 14 Pet. 448, 463, 10 L. Ed. 535.

The supreme court has authority to alter the forms and modes of proceeding in the federal courts in admiralty and maritime cases, and a rule of admiralty practice which permits a proceeding in rem wherever the state law gives a lien is an exercise of this power, and by virtue of the same authority the supreme court by rule subsequently denied the taking out of process in rem on such ground. Meyer v. Tupper (1861) 1 Black, 522, 528, 17 L. Ed. 180.

8. Attachment of absent defendants.—The supreme court may make rules authorizing district courts to compel the appearance of absent defendants by attachment. Atkins v. The Disintegrating Co. (1873) 18 Wall. 272, 21 L. Ed. 841.

9. Bail.—Under this section the supreme court has power to regulate the manner of proceeding or mode of process in taking bail, upon writs of error from this court in civil or criminal cases. Hudson v. Parker (1895) 156 U. S. 277, 282, 15 Sup. Ct. 450, 39 L. Ed. 424.

10. Equity practice.—The equity practice and procedure in the federal courts are regulated by the rules promulgated by the supreme court of the United States. McDonald v. Smalley (1828) 26 U. S. (1 Pet.) 620, 7 L. Ed. 287; Martindale v. Waas (C. C. 1882) 11 Fed. 551.

The rules of practice by the supreme court for the federal courts of equity are binding upon all courts of the United States, and can only be modified by additional rules passed by circuit or district courts when such rules are not inconsistent with the rules of the supreme court. Story v. Livingston (1839) 38 U. S. (13 Pet.) 359, 10 L. Ed. 200.

When the rules prescribed by the supreme court do not apply, the practice of the district courts is to be regulated by the practice of the high court of chancery in England. Id.

See, also, notes under § 1536, ante.

11. Judgments or decrees as liens.—None of the provisions of this section authorize the supreme court to adopt rules making judgments or decrees for the payment of money a lien on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by an act of Congress. Ward v. Chamberlain (1862) 2 Black, 430, 436, 17 L. Ed. 319.

Without the authority of a rule of the Supreme Court a district court has no authority to direct a mortgagor to pay a balance of debt which may remain unsatisfied after foreclosure sale of mortgaged premises. Noonan v. Lee (1862) 2 Black, 499, 509, 17 L. Ed. 278.

12. Limitation of liability.—The supreme court has power to regulate proceedings to limit the liability of ship owners. Providence & N. Y. S. S. Co. v. Hill Mf'g Co. (1883) 3 Sup. Ct. 379, 389, 109 U. S. 578, 27 L. Ed. 1038; In re Providence & N. Y. S. S. Co. (D. C. 1872) Fed. Cas. No. 11,451.

Admiralty rules promulgated May 5, 1872 (13 Wall. rules 54–57), passed under authority of this section, do not give the district court of the United States jurisdiction in admiralty of a petition for limitation of liability under the Revised Statutes, where it would not have had cognizance in admiralty originally of the cause of action involved. Ex parte Phenix Ins. Co. (1886) 7 Sup. Ct. 25, 29, 118 U. S. 610, 30 L. Ed. 274.

13. Mode of taking testimony.—The power conferred upon the supreme court by this section to prescribe the forms and modes of taking and obtaining evidence, is valid and constitutional, and under the amendment to the sixty-seventh equity rule, adopted pursuant to such power, the courts of the United States are authorized to appoint examiners to take testimony orally beyond the limits of the district in which a suit is pending, and the attendance of witnesses before such an examiner may be compelled by the courts in the district to which the examiner is sent. White v. Toledo, St. L. & K. C. R. Co. (1897) 79 Fed. 133, 24 C. C. A. 467.

The right to make rules touching the mode of taking testimony is not conferred upon the district and circuit courts of the United States. Randall v. Venable (C. C. 1883) 17 Fed. 162.

14. Service of process.—A rule providing for service of process on an attorney is valid. Levinson v. Oceanic Steam Nav. Co. (C. C. 1876) Fed. Cas. No. 8,292.

Cited without definite application, Atkins v. The Disintegrating Co. (1873) 18 Wall. 272, 21 L. Ed. 841; The Mayflower v. The Sabine (1879) 101 U. S. 384, 385, 25 L. Ed. 982; U. S. v. The Three Friends (1897) 17 Sup. Ct. 495, 503, 166 U. S. 1, 41 L. Ed. 897; In re National Equipment Co. (1912) 195 Fed. 488, 115 C. C. A. 398 (certiorari denied [1912] 32 Sup. Ct. 835, 225 U. S. 701, 56 L. Ed. 1264); Goodyear Dental Vulcanite Co. v. Folsom (C. C. 1880) 3 Fed. 509, 511; Bryant v. Leyland (C. C. 1881) 6 Fed. 125, 126; Steam Stone Cutter Co. v. Jones (C. C. 1882) 13 Fed. 567–580; Morrison v. Bernards Tp. (C. C. 1888) 35 Fed. 400, 401; Deck v. Whitman (C. C. 1899) 96 Fed. 873, 875; American Graphophone Co. v. National Phonograph Co. (C. C. 1904) 127 Fed. 349; Stationary Engineer Pub. Co. v. Comerford (C. C. 1907) 155 Fed. 667; In re Long Island North Shore Passenger & Freight Transp. Co. (D. C. 1881) 5 Fed. 599, 612; The Brantford City (D. C. 1887) 32 Fed. 324, 326; In re Williams (D. C. 1903) 123 Fed. 321, 325; Chirurg v. Knickerbocker Steam Towage Co. (D. C. 1910) 177 Fed. 943.

§ 1544. (R. S. § 918.) Practice in the several courts to be regulated by their own rules.

The several [circuit and] district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

Act March 2, 1793, c. 22, § 7, 1 Stat. 335. Act Aug. 23, 1842, c. 188, § 6, 5 Stat. 518.

The words of this section inclosed in brackets, "circuit and," became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

1. Validity and purpose of act.
2. Power to establish rules.
3. Conformity to state practice.
4. State legislation.
5. Effect of rules.
6. Causes removed to federal court.
7. Unwritten rules.
8. Modification, suspension, or abrogation of rules.
9. Appearance.
10. Briefs and transcripts.
11. Costs and fees.
12. Depositions.
13. Evidence.
14. Findings of referees.
15. Instructions.
16. Issues.
17. Judgments by default or pro confesso.
18. Judgments, entry of.
19. Motions.
20. New trial.
21. Pleading.
22. Pleadings, verification of.
23. Priority of liens.
24. Process.
25. Redemption from foreclosure sales.
26. Supplementary proceedings.
27. Proceedings in vacation.
28. Jury.
29. Supersedeas.

1. Validity and purpose of act.—By sections 1537, 1539, 1540, ante, and this section, it sufficiently appears that, while it was the purpose of congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. Shep-

ard v. Adams (1898) 18 Sup. Ct. 214, 216, 168 U. S. 618, 24 L. Ed. 602.

The provision of the judiciary act which empowered the courts to adopt rules of practice and forms of procedure is a valid delegation of the powers of congress, though the discretion conferred was quasi legislative. U. S. v. Ormsbee (D. C. 1896) 74 Fed. 207, 209.

2. **Power to establish rules.**—The federal courts have authority to establish all necessary rules for the orderly conduct of business, provided the rules are not repugnant to the laws of the United States. Hecker v. Fowler (1864) 2 Wall. 123, 128, 17 L. Ed. 759.

The circuit court of appeals has no power to prescribe rules for the district court as this is vested in the supreme court by this section. The Philadelphian (1894) 60 Fed. 423, 427, 9 C. C. A. 54.

Under the judiciary act of 1789, and the act of 1792, the federal courts might make rules of practice according to their pleasure not repugnant to the laws of the United States. Koning v. Bayard, Jr. (C. C. 1829) Fed. Cas. No. 7,924.

The supreme court has the power to prescribe the forms of writs and process, and to regulate the whole practice in suits in equity in the circuit courts; but any federal court may, in any manner not inconsistent with any law of the United States or any rule prescribed by the supreme court, regulate its own practice to advance justice. Steam Stonecutter Co. v. Jones (C. C. 1882) 13 Fed. 567.

Powers as ample as legislation can give are conferred by law on the district court in cases of admiralty and maritime jurisdiction as to the forms and modes of proceeding, and such alterations or additions thereto as the said courts shall in their discretion deem expedient. The Hudson (D. C. 1883) 15 Fed. 162, 175.

Under this section the courts may, in the furtherance of justice, make such orders as will tend to advance their business, and a court of admiralty has power to authorize the employment of a stenographer, whose fees shall be taxed as costs, to take and transcribe the testimony before a commissioner on a reference, and will exercise it where the parties refuse to stipulate, and where the services are necessary if progress is to be made on the hearing, as where it involves a large number of disputed items of an account. Rogers v. Brown (D. C. 1905) 136 Fed. 813, 814.

3. **Conformity to state practice.**—The conformity act does not necessitate altering a rule of a federal court as to the return day for process, in conformity with the state practice then existing, to conform to a subsequent change in such practice. Boston & M. R. Co. v. Gokey (1908) 28 Sup. Ct. 657, 659, 210 U. S. 155, 52 L. Ed. 1002.

Section 1537, ante, when construed with this section and section 1591, post, does not require conformity to state practice where conformity will result in substantial injustice, and as to such matters the federal courts are not bound by decisions of the state courts. Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282.

This section should be construed in connection with section 1537, ante, requiring the practice and proceedings in federal courts to conform, as near as may be, to the practice in the courts of record of the state, any rule of the court to the contrary notwithstanding. Osborne v. City of Detroit (C. C. 1886) 28 Fed. 385; Importers' & Traders' Nat. Bank v. Lyons (C. C. 1905) 134 Fed. 510.

The federal court may adopt its own modes and methods for the enforcement of rights given by local law, and the particular mode prescribed by the local law is not of the substance of the right. McClaskey v. Barr (C. C. 1891) 48 Fed. 130, 136, modified (1894) 62 Fed. 211.

See § 1537, ante, and notes.

4. **State legislation.**—The federal courts have power to regulate their practice and may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and a state law regulating executions enacted subsequent to September, 1789, is not applicable to executions issued on judgments rendered by federal courts, unless expressly adopted by the regulations and rules of the courts. Wayman v. Southard (1825) 10 Wheat. 1, 42, 6 L. Ed. 253.

The provision of R. S. § 914, ante, § 1537, that the practice, etc., in the courts of the United States shall conform as near as may be to the practice, etc., of the state courts, applies to systems of judicial procedure, not to the details of doing the business of courts, which are left to be provided for by rules of court, made pursuant to this section. Accordingly, held, that rules of a United States court, providing that writs shall be returnable to the regular terms of the court, and that suits are to be docketed on the first day of the term, are not abrogated by the passage of a state statute providing that writs in the state courts shall be returnable to the clerk's office and be docketed therein within 21 days. Ewing v. Burnham (C. C. 1896) 74 Fed. 384.

5. **Effect of rules.**—A rule of the District Court fixing the time for taking appeals in admiralty is not a "law" within the meaning of the provision authorizing an appeal within six months, except where a lesser time is limited by law. Robins Dry Dock & Repair Co. v. Ches-

brough (1914) 216 Fed. 121, 132 C. C. A. 365.

Rules of practice adopted by the court do not control its discretion so as to deprive it of power to secure the trial of causes on their merits, on proper showing. Mutual Building Fund Soc. & Dollar Sav. Bank v. Bossieux (D. C. 1877) Fed. Cas. No. 9,977.

6. Causes removed to federal court.—Under rule 79 of the circuit court for the ninth circuit, plaintiff may, at any time after defendant has filed and submitted to the state court his petition and bond for removal of the cause, procure a transcript of the record of cause from the state court. and file the same in the circuit court, and, after service of notice thereof, as prescribed in said rule, the circuit court will take jurisdiction of the case for all purposes. Delbanco v. Singletary (C. C. 1889) 40 Fed. 177.

The rules of practice of a United States court govern a cause brought there from a state court, under Act 1887-88, providing that "the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court." Henning v. Western Union Tel. Co. (C. C. 1889) 40 Fed. 658.

Where a cause is removed from a state to a United States court, and the plaintiff amends his complaint, he puts himself within a rule of practice of the federal court, allowing a defendant, "in all cases," to demand security for costs before answering, though the demand could not have been made in the state court where the action was commenced. Id.

Failure to give notice of the filing in the federal court of a transcript of the record of a case removed from a state court, as required by rule 79 of the circuit court for the district of Nevada, constitutes no ground for remanding the cause. Chiatovich v. Hanchett (C. C. 1897) 78 Fed. 193.

The time for answering a complaint in a case removed to the federal courts from a state court is fixed by ascertaining the number of days which had elapsed between the service of the complaint in the state court and the date of the removal, suspending the time between such removal and the date the record reaches the federal court, which then begins to run from the day of the entry in such court, and, as provided by the circuit court rules (Fourth Circuit), the defendant will be in time if he serves his answer on a rule day within 20 days thereafter. Bryce v. Southern Ry. Co. (C. C. 1904) 129 Fed. 966.

7. Unwritten rules.—In the absence of written rules, the court will deduce from prior decisions such rules as are applicable to the particular case. Lamb v. Parkman (C. C.) Fed. Cas. No. 8,019.

A rule may be established by long course of practice without adoption in writing. Koning v. Bayard (C. C. 1829) Fed. Cas. No. 7,924.

A modification of a state law of practice followed for a long time will be considered as adopted by usage if not conflicting with the acts of congress. Curtis v. Central Railway (C. C. 1855) Fed. Cas. No. 3,501.

Where there is an established practice in a district, adhered to for many years and well known, to have the record in contested patent causes printed to facilitate its consideration by the judge, and to tax the cost of such printing as a part of the costs in the cause, such practice has all the force of a rule of court. Detroit Heating & Lighting Co. v. Kemp (C. C. 1910) 182 Fed. 847.

The practice of the court may be established without the existence of a positive written rule. U. S. v. Stevenson (D. C. 1869) Fed. Cas. No. 16,395.

8. Modification, suspension, or abrogation of rules.—Rules of court prescribing the time for presenting bills of exceptions may be dispensed with, in the discretion of the judge. Southern Pac. Co. v. Johnson (1895) 69 Fed. 559, 16 C. C. A. 317, reversing judgment (1894) 64 Fed. 951, 12 C. C. A. 479.

Parties to an action cannot, without the consent of the court, stipulate for the abrogation of rules which are formulated for its own benefit and are designed to facilitate the proper discharge of its own duties; when rules of such a character are disregarded, it is discretionary with the court whether it will enforce the prescribed penalty, and, in the absence of gross abuse of such discretion, its order in the premises will be respected on appeal or writ of error. Missouri, K. & T. Ry. Co. v. Kidd (1906) 146 Fed. 499, 77 C. C. A. 13, affirming order (Ind. T. 1904) 88 S. W. 308.

Rules made by the circuit courts may be varied or dispensed with in special cases. Wallace v. Clark (C. C. 1847) Fed. Cas. No. 17,098.

Rule 96 of the district court of the Southern district of New York of 1838 held to be abrogated by circuit court rules of 1845. Manchester v. Milne (D. C. 1848) Fed. Cas. No. 9,007.

9. Appearance.—A rule which treats as a general appearance a special appearance made for the purpose of objecting to the jurisdiction is inconsistent with this section and invalid. Davidson Bros. Marble Co. v. U. S. ex rel. Gibson (1909) 29 Sup. Ct. 324, 327, 213 U. S. 10, 53 L. Ed. 675.

The provision of rule 22 of the Circuit Court of the Ninth circuit that any party appearing specially shall state in the paper which he serves and files that the appearance is special, "and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court he will appear generally in the cause," and that if such statements be not made "the appearance shall be deemed and treat-

ed as a general appearance," was within the power of the court to prescribe, under this section, and valid. Mahr v. Union Pac. R. Co. (C. C. 1905) 140 Fed. 921, judgment affirmed (1909) 170 Fed. 699, 96 C. C. A. 19.

10. Briefs and transcripts.—But the clerk is not entitled to any fee for filing the various papers surrendered to his custody by the circuit court commissioners in compliance with Act May 28, 1896 (see section 1337, ante), abolishing their office and requiring them to "deposit" the official documents in their possession with the "clerk of the circuit court by which they were appointed," as such filing was authorized neither by this requirement nor by a standing court rule directing the clerk to file papers and transcripts of proceedings before a commissioner upon their receipt by him, which rule plainly had reference only to the current business of such commissioner. Decree Van Duzee v. U. S. (1900) 35 Ct. Cl. 214, reversed. U. S. v. Van Duzee (1902) 22 Sup. Ct. 648, 185 U. S. 278, 46 L. Ed. 909.

The clerk of a federal circuit court of appeals can make no charge for preparing for the printer, the record on an appeal from a final decree of a district court, or for indexing the same, or for supervising the printing and distributing the copies, by virtue of the fee bill prescribed for such services by the federal Supreme Court under the authority of this act, where, conformably to section 1656, post, the appellant has caused the transcript of record to be printed and indexed, under a rule of the district court, and has caused to be filed with the clerk of the circuit court of appeals 25 printed copies thereof, since this later statute by implication sets aside the fee bill authorized by the former statute, so far as it fixes the fee which the clerk of the circuit court of appeals may charge for such services. Rainey v. W. R. Grace & Co. (1914) 34 Sup. Ct. 242, 231 U. S. 703, 58 L. Ed. 445.

Under this section the court may by general rule require parties to a cause submitted to it for decision to file printed briefs, and may tax the reasonable expense thereof against the losing party. Neff v. Pennoyer (C. C. 1875) Fed. Cas. No. 10,084.

The costs of printing briefs for submission to the circuit court are not taxable in the ninth circuit, as there is no rule requiring briefs to be printed. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 1011.

11. Costs and fees.—Under a rule of court that in all criminal cases, unless otherwise specially ordered, the final record shall include the order made by the commissioner binding the party to appear before the grand jury, the clerk is entitled to an allowance for incorporating in the final record the transcript from the commissioner. U. S. v. Van Duzee (1891) 11 Sup. Ct. 758, 761, 140 U. S. 169, 35 L. Ed. 399, reversing Van Duzee v. U. S. (D. C. 1890) 41 Fed. 571.

Though this section, fixing the marshal's fee for service of subpœnas, forbids him to make a further charge for copy, the clerk, being required by rule of court to make copies to be left with witnesses, is entitled to an allowance therefor. Id.

A clerk of a circuit court was not entitled to any fee for filing papers surrendered to his custody by circuit court commissioners in compliance with Act May 28, 1896, c. 252, § 19, as such filing was not authorized thereby nor by a standing court rule directing him to file papers of proceedings before a commissioner referring only to the current business of such commissioner. U. S. v. Van Duzee (1902) 22 Sup. Ct. 648, 649, 185 U. S. 278, 46 L. Ed. 909.

The clerk is entitled to a fee for a seal to a copy of an indictment furnished to the defendant under the rule of court. U. S. v. Van Duzee (1892) 52 Fed. 930, 3 C. C. A. 361, affirming Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643.

Under the rule of court requiring the district attorney to examine the accounts of the marshal, clerk, and commissioners, and make a written report thereon to the court, such report, though not required by statute, becomes a part of the records of the court; and the clerk is entitled to a fee for filing the same. Id.

A commissioner of a circuit court was an officer of such court, and subject to its rules prescribing his administrative duties, the manner of keeping his records, etc., and he is entitled to his statutory fees for making the entries in his docket in criminal cases required by such rules. U. S. v. McGourin (1901) 106 Fed. 288, 45 C. C. A. 291.

Where plaintiff amends his complaint, he puts himself within a rule of practice of the federal court, allowing a defendant, "in all cases," to demand security for costs before answering, though the demand could not have been made in the state court where the action was commenced. Henning v. Western Union Tel. Co. (C. C. 1889) 40 Fed. 658.

Circuit court rule 23, providing for the taxation of costs by the clerk and for an appeal therefrom to the court within 10 days "after such taxation by the clerk, but not afterwards," requires the taking of an appeal within 10 days after the taxation by the clerk. Snyder v. McCarthy (1912) 197 Fed. 166, 116 C. C. A. 390.

Where an appeal from the taxation of costs by the clerk is taken after the time fixed by circuit court rule 23, and the successful party brings the same on for determination before the court on notice of time of hearing, he does not waive the objection that the appeal was not taken within the 10 days. Id.

In the second circuit, the charge for printing records and briefs in compliance with the circuit court rules will be taxed. Hake v. Brown (C. C. 1891) 44 Fed. 734.

A rule of court prescribing the form of a bond, and providing that, when costs become due by default or otherwise, a judgment or decree may be entered therefor against the surety on motion and ten days' notice, is valid, as a surety is supposed to know the law, and consent to the proceedings for summary remedies by signing the bond. McClaskey v. Barr (C. C. 1897) 79 Fed. 408.

Rule No. 77 of the circuit court for the district of Minnesota, providing that in every case "the plaintiff shall give security for costs," required security for the clerk's costs only, and not for the benefit of defendants. Robinson v. Honstain (C. C. 1897) 79 Fed. 678.

Under rule 53 of the circuit court for the Southern District of New York, a nonresident plaintiff, although joined with a resident, is required to give security for costs. Electric Vehicle Co. v. Gallagher (C. C. 1906) 145 Fed. 394.

Under a United States Circuit Court rule providing that where plaintiff is not a resident of the district when suit is brought, or, being so, afterwards removes from the district, and that in every other case where a defendant makes affidavit that he believes the costs could not be recovered of plaintiff by attachment or execution, a rule for security for costs may be entered, etc., a rule for costs on a nonresident plaintiff, or one who has removed from the district after bringing suit, need not be founded on an affidavit. Osborne v. Pennsylvania R. Co. (C. C. 1908) 159 Fed. 301.

A nonresident trustee in bankruptcy may be required to give security for costs under a rule providing for the entry of a rule for costs on nonresident plaintiffs. Id.

On a record which he is required to make by a rule of court. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 474, 2 L. R. A. 229.

Under a rule of court providing, in the absence of statutory provisions, that in criminal cases the final record shall include the order made by the commissioner binding the defendant to appear before the grand jury, the clerk is entitled to pay for entering the return of the commissioner in the final record; and it cannot be contended that there is no case in court until indictment found. Van Duzee v. U. S. (D. C. 1890) 41 Fed. 571, judgment reversed U. S. v. Van Duzee (1890) 11 S. Ct. 758, 140 U. S. 169, 35 L. Ed. 399.

The clerk is entitled to a fee for affixing the seal to the certificate attached to the copy of the order for drawing juries, under the provisions of the statute and rules of court, as this is the proper method of furnishing that officer with evidence of the court's order. Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643, 650, affirmed (1892) 52 Fed. 930, 3 C. C. A. 361.

The clerk is entitled to a fee for a certified copy of an indictment furnished to defendant under a rule of court. Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643, 649; affirmed (1892) 52 Fed. 930, 3 C. C. A. 361.

A rule of court requiring the clerk to make copies of all process issued by the court, including subpœnas for witnesses, and providing that all persons on whom process is served shall have a copy thereof, is binding on a commissioner, and he is entitled to fees for copies of subpœnas issued by him in criminal cases to be heard before him. McGourin v. U. S. (D. C. 1900) 102 Fed. 553, judgment modified U. S. v. McGourin (1901) 106 Fed. 288, 45 C. C. A. 291.

Where, by a rule of a federal court, service of the petition and affidavits upon which an order to show cause is based is required to be made together with such order, and the marshal makes such service in a bankruptcy proceeding, he is entitled to charge and receive a reasonable fee therefor in addition to his fee for the service of the order, under Bankr. Act July 1, 1898, § 52b, post, § 9636, although the petition cannot be considered a writ within the meaning of section 1386, ante, and the same fee fixed by such section for the service of a writ, where it has customarily been charged and allowed by the court, must be regarded as reasonable. In re Damon (D. C. 1900) 104 Fed. 775.

Under United States Supreme Court rule 24 (notes following § 1232, ante), and Circuit Court of Appeals rule 31 (notes under § 1114, ante), held, that defendant was not chargeable with attorney's docket fees in the Supreme Court and the Circuit Court of Appeals. U. S. v. Miller (D. C. 1915) 223 Fed. 183.

Defendant held not chargeable, under United States Supreme Court rule 24 (§ 1232, ante), with the expense of the transcript of the record in the District Court in carrying the case to the United States Supreme Court. Id.

12. Depositions.—Depositions not taken in accordance with the rules of the United States courts could not be used in such courts, though taken in accordance with the practice prevalent in the state courts. Evans v. Eaton (1822) 20 U. S. (7 Wheat.) 356, 5 L. Ed. 472.

Under rules of court requiring exceptions to interrogatories to be taken before commission issues, but which also permit exceptions to be taken on the trial to the admissibility of the evidence returned, where it might have been taken if the witness had been offered for oral examination, an exception to an interrogatory, which goes to the relevancy of the answer anticipated, can be better determined after the answer has been returned, and will not be sustained in advance of the examination. Leeds v. Evans (C. C. 1900) 99 Fed. 28.

Rule 7, § 4, of the rules of the Circuit Court of the United States for the Eastern District of Pennsylvania, which provides that "on all motions or rules to

show cause on the hearing of which facts are to be investigated, the testimony of witness shall be taken by deposition in writing, * * * and no witness shall be examined at the bar unless by special previous order of the court," prescribes a mode of practice which it was within the power of the court to adopt, and a witness may lawfully be subpœnaed to give testimony by deposition to be used on such a hearing in an action at law. Despeaux v. Pennsylvania R. Co. (C. C. 1906) 147 Fed. 926.

13. Evidence.—A rule dispensing with proof of the execution of a note, unless defendant makes affidavit that the note was not executed by him, is within this section. Mills v. Bank of United States (1826) 11 Wheat. 431, 440, 6 L. Ed. 512.

On a writ of inquiry, plaintiff's oath may be given in evidence of the amount of his claim, such having been the practice of the district courts of the state. Mandeville v. Washington (C. C. 1801) Fed. Cas. No. 9,017.

Congress has not conferred power upon the district court of the United States to make rules touching the mode of taking testimony. Randall v. Venable (C. C. 1883) 17 Fed. 162.

Rule 7, § 4, of the rules of the Circuit Court of the United States for the Eastern District of Pennsylvania, which provides that "on all motions or rules to show cause on the hearing of which facts are to be investigated, the testimony of witness shall be taken by deposition in writing, * * * and no witness shall be examined at the bar unless by special previous order of the court," prescribes a mode of practice which it was within the power of the court to adopt, and a witness may lawfully be subpœnaed to give testimony by deposition to be used on such a hearing in an action at law. Despeaux v. Pennsylvania R. Co. (C. C. 1906) 147 Fed. 926.

14. Findings of referees.—The rule that weight should be given to a referee's findings by the trial court applies more particularly to cases where the findings are deduced from conflicting evidence, and depend on the credibility of witnesses, than to cases in which different inferences are to be drawn from the established facts. In re Big Cahaba Coal Co. (D. C. 1910) 183 Fed. 662.

15. Instructions.—Under this section it was proper for the court to refuse to consider requests to charge not presented before argument, according to a rule requiring them to be presented at the close of the evidence and before argument. Atchison, T. & S. F. Ry. Co. v. Hamble (1910) 177 Fed. 644, 101 C. C. A. 270.

16. Issues.—If the cause commenced in the state court 30 days before the next session of the circuit court, and is not at issue when removed, the rule of the United States circuit court in the district of Minnesota gives until the fifth day of the term to make up the issue, and the case then stands for trial. Judge v. Anderson (C. C. 1884) 19 Fed. 885.

17. Judgments by default or pro confesso.—A plaintiff, to obtain a default judgment, must comply with the statute and the rules of court, and until a writ is duly entered in court and the time has elapsed within which a defendant should appear, no default or judgment by default can lawfully be entered against him. Kinney v. Plymouth Rock Squab Co. (1914) 214 Fed. 766, 131 C. C. A. 178.

Where the rules of a federal court authorize the clerk to enter judgment by default for certain defaults specified, he is without authority in any other case. Rehfeld v. Baltimore & O. R. Co. (1911) 187 Fed. 810, 109 C. C. A. 570.

The rule of the court stated as to the proper practice on motion to open a default. Jenks v. Garretson (C. C. 1847) Fed. Cas. No. 7,278.

By the rules of court in Tennessee judgment pro confesso might be entered if defendant did not plead, answer, or demur by the June rules. Prior thereto, defendant's counsel filed a motion to take the bill from the files, and at the next term, in September, filed a demurrer. Held, that an application, filed after the motion had been disallowed and the demurrer overruled, was filed after the time in which the defendant was required to plead or answer, and was too late. Tennessee Coal, Lumber & Tan-Bark Co. v. Waller (C. C. 1889) 37 Fed. 545.

18. Judgments, entry of. — Circuit Court rule 16, providing that, where judgment shall be omitted to be entered on a verdict, it shall be considered as entered on the last day of the term, was applicable only to a verdict sufficient to support a judgment. Pressed Steel Car Co. v. Steel Car Forge Co. (1906) 149 Fed. 182, 79 C. C. A. 130.

19. Motions.—A judge of the Circuit Court cannot properly take action in a cause pending therein on a motion sent him through the mail, and not filed with the clerk as required by the rules of the court; and the delivery by him to the clerk of a motion and papers in support thereof so received by him, with directions to notify counsel of the rule, was a proper disposition of the same. In re Kinney (1905) 135 Fed. 340, 67 C. C. A. 677.

20. New trial.—Where a case is tried before a referee, a motion for a new trial on a case and exceptions under the rule of 1877 need not be made to the referee, and is not within the jurisdiction of the court. Alder v. Edenborn (D. C. 1912) 198 Fed. 928.

Under court rule 5, the time for a motion of new trial, where judgment on

the verdict has been rendered, runs from the month in which judgment is entered. Hughes v. New York, O. & W. R. R. (D. C. 1915) 225 Fed. 568.

21. Pleading.—Under district court rule 15, a defendant may answer without leave on the overruling of its demurrer to the complaint. Mitsui v. St. Paul Fire & Marine Ins. Co. (1913) 202 Fed. 26, 120 C. C. A. 280.

A replication filed without leave, after the expiration of the time prescribed by rule 66, may be ordered to stand, in the discretion of the court. Fischer v. Hayes (C. C. 1881) 6 Fed. 76.

Act March 3, 1875, § 5, ante, § 1019, provides "that if, in any suit commenced in a circuit court, or removed from the state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not * * * involve a dispute * * * properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined * * * for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein." Rule 9 of the circuit court provides that "when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived." Held, that neither the act nor the rule authorizes a plea to the jurisdiction to be entered after answer to the merits, and after the commencement of taking testimony. Hewitt v. Story (C. C. 1889) 39 Fed. 158.

A rule of court that the genuineness of indorsements of notes shall be taken to be admitted unless denied by affidavit, was not intended to fix on a party the admission of a fact which he does not remember, and therefore asks shall be proved, though he acknowledges its existence to be possible. Owosso Sav. Bank v. Walsh (C. C. 1895) 65 Fed. 783.

The liberal construction of pleadings required by the Codes renders it immaterial what name is given to a pleading, and, although pleas in abatement are abolished by the Montana Code, which provides (sections 680, 684) that objections on the ground of a defect or misjoinder of parties, not appearing on the face of the complaint, may be taken by answer, a rule of the United States court in that district, requiring all matters in abatement to be set up by a separate preliminary answer, is not inconsistent with such provision, and a plea in abatement filed in that court will be treated as such an answer, where it is the same in substance, and will be considered on its merits. Whelan v. Rio Grande Western Ry. Co. (C. C. 1901) 111 Fed. 326.

The time for answering a complaint in a case removed is fixed by ascertaining the number of days which had elapsed between the service of the complaint in the state court and the date of the removal, suspending the time between such removal and the date the record reaches the federal court, which then begins to run from the day of the entry in such court, and, as provided by the circuit court rules (Fourth Circuit), the defendant will be in time if he serves his answer on a rule day within 20 days thereafter. Bryce v. Southern Ry. Co. (C. C. 1904) 129 Fed. 966.

The court may, in its discretion, relieve a party from the consequence of his failure to serve a copy of a pleading filed by him on the opposite party or his attorney as required by rule 20, § 7, where a reasonable excuse is shown, as that it was through inadvertence of his counsel, and where the pleading was subsequently served. Kinney v. Beaver (C. C. 1905) 140 Fed. 792; Same v. Rice (C. C. 1905) 140 Fed. 793.

22. Pleadings, verification of.—The Indiana statute requiring that the general issue which denies the execution of an instrument sued on must be sworn to was adopted as a rule of practice by the federal circuit court. McClintick v. Cummins (C. C. 1840) Fed. Cas. No. 8,698.

23. Priority of liens.—This section does not authorize a district court to prescribe that, as between holders of liens of equal rank, the one first libeling shall be paid first. Saylor v. Taylor (1896) 77 Fed. 476, 23 C. C. A. 343.

24. Process.—The term "final process" includes all the writs of execution then in use in a state court properly applicable to the courts of the United States. Amis v. Smith (1842) 16 Pet. 303, 312, 10 L. Ed. 973.

Though this section, fixing the marshal's fee for service of subpœnas, forbids him to make a further charge for copy, the clerk, being required by rule of court to make copies to be left with witnesses, is entitled to an allowance therefor. U. S. v. Van Duzee (1891) 11 Sup. Ct. 758, 761, 140 U. S. 169, 35 L. Ed. 399, reversing Van Duzee v. U. S. (D. C. 1890) 41 Fed. 571.

Under United States circuit court rule 5 for the district of South Carolina, requiring a notice to be served in all cases with the summons and complaint, stating, except where the demand is for a liquidated sum, that, on failure to answer, plaintiff will apply to the court for the relief demanded in the complaint, a notice served with a complaint and summons for trespass on lands was fatally defective when it stated that on failure to answer plaintiff will "take judgment against you for the relief de-

manded in the complaint." Chamberlain v. Mensing (C. C. 1891) 47 Fed. 202; Same v. Bittersohn (C. C. 1891) 48 Fed. 42.

Under a rule of court requiring a summons to be served on a defendant by "giving him notice of its contents," a return of service of a writ by "making known the contents" to the defendant is sufficient. Trimble v. Erie Electric Motor Co. (C. C. 1898) 89 Fed. 51.

Where, by a rule of a federal court, service of the petition and affidavits upon which an order to show cause is based is required to be made together with such order, and the marshal makes such service in a bankruptcy proceeding, he is entitled to charge and receive a reasonable fee therefor in addition to his fee for the service of the order, under Bankr. Act July 1, 1898, § 52b, post, § 9636, although the petition cannot be considered a writ within the meaning of section 1386, ante, and the same fee fixed by such section for the service of a writ, where it has customarily been charged and allowed by the court, must be regarded as reasonable. In re Damon (D. C. 1900) 104 Fed. 775.

25. Redemption from foreclosure sales.—While the local law giving the right of redemption, first to the mortgagor, then to the judgment creditors, is a rule of property, obligatory upon the federal court, it is competent for the latter by rules to prescribe the mode in which redemption from sales under its own decrees may be effected. The rule in the circuit court of the United States for the northern district of Illinois, requiring a judgment creditor to pay the redemption money to the clerk of that court, and not to the officer holding the execution, sustained as being within the domain of practice, and not affecting the substantial right to redeem within the time fixed by the local statute. Connecticut Mut. Life Ins. Co. v. Cushman (1883) 2 Sup. Ct. 236, 243, 108 U. S. 51, 27 L. Ed. 648.

The rule of the federal court requiring a party redeeming real estate, which has been sold under a foreclosure decree, to pay 1 per cent. commissions to the clerk, on the amount paid into court for the redemption of the property, is in addition to the amount, with the prescribed interest thereon, going to the purchaser in accordance with section 1383, ante, and is not in derogation of the right of redemption given by the state law. Blair v. Chicago & P. R. Co. (C. C. 1882) 12 Fed. 750, 751.

26. Supplementary proceedings.—Under this section the court was authorized to make a rule providing for the examination of judgment debtors in supplementary proceedings on return of an execution unsatisfied, etc. Walker v. Monad Engineering Co. (1912) 196 Fed. 206, 116 C. C. A. 38.

27. Proceedings in vacation.—Under equity rule No. 1, U. S. Cir. Ct. providing that "the circuit courts, as courts of equity, shall be deemed always open for the purpose of * * * issuing and returning mesne and final process," a sale made under a decree in chancery may be confirmed in vacation, especially when each of the parties has brought the other before the chancellor on the subject by a rule nisi. Central Trust Co. of New York v. Sheffield & Birmingham Coal, Iron & Ry. Co. (C. C. 1894) 60 Fed. 9.

28. Jury.—Where the rules of court require a notice of the drawing of juries to be posted up on the door of the clerk's office, the duty of posting such notice is properly to be performed by the clerk, but is not one for which he is entitled to compensation. Van Duzee v. U. S. (D. C. 1896) 73 Fed. 794.

29. —— Supersedeas.—Under rule 91, prescribing that no appeal shall operate as a stay of execution where the judgment is for a specific sum money, etc., and in all other cases, except where the United States are appellants, any justice of the court may determine the amount and character of the security to be given which shall at least be sufficient to cover all costs on appeal, an undertaking need not be filed by appellant unless the appeal is to operate as supersedeas. Bryan v. Sanderson (D. C. 1879) 3 MacArthur, 404.

Cited without definite application, Eberly v. Moore (1860) 24 How. 147, 158, 16 L. Ed. 612; Ward v. Chamberlain (1862) 2 Black, 430, 436, 17 L. Ed. 319; U. S. v. Converse (1894) 63 Fed. 423, 424, 11 C. C. A. 274; Morrison v. Bernards Tp. (C. C. 1888) 35 Fed. 400, 401; Delbanco v. Singletary (C. C. 1889) 40 Fed. 177, 180; The Normandie (C. C. 1889) 40 Fed. 590, 591; Consolidated Store-Service Co. v. Dettenthaler (C. C. 1899) 93 Fed. 307, 308; American Graphophone Co. v. National Phonograph Co. (C. C. 1904) 127 Fed. 349; U. S. v. Barber Lumber Co. (C. C. 1908) 169 Fed. 184; Manitowoc Malting Co. v. Fuechtwanger (C. C. 1909) 169 Fed. 983 (reversed [1911] 187 Fed. 713, 109 C. C. A. 461); The Mexican Prince (D. C. 1895) 70 Fed. 246, 248; The Columbia (D. C. 1900) 100 Fed. 890, 894; In re Damon (D. C. 1900) 104 Fed. 775, 777; Erie & Western Transp. Co. v. Great Lakes Towing Co. (D. C. 1910) 184 Fed. 349.

§ 1545. (R. S. § 919.) Suits for duties, imposts, taxes, penalties, or forfeitures.

All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States.

Act Aug. 4, 1790, c. 35, § 67, 1 Stat. 176. Act Dec. 31, 1792, c. 1, § 29, 1 Stat. 298. Act Feb. 18, 1793, c. 8, § 35, 1 Stat. 317. Act March 2, 1799, c. 22, § 89, 1 Stat. 695, 696. Act July 13, 1866, c. 184, § 9, 14 Stat. 111, 145. Act June 8, 1872, c. 335, § 303, 17 Stat. 323.

Notes of Decisions

Form of action.—A certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for a violation of law, may be recovered by civil action, though also recoverable in a proceeding technically criminal, unless the statute contemplates a recovery only by a criminal proceeding. Hepner v. U. S. (1909) 29 Sup. Ct. 474, 477, 213 U. S. 103, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960.

Where the statute which creates the offense prescribes the particular mode of proceeding or form of action, that mode of proceeding must be followed; but, where no mode of proceeding or form of action is mentioned, the proceeding must be in the name of the United States in any proper form of action, or by any appropriate form of proceeding. U. S. v. Moore (C. C. 1882) 11 Fed. 248.

A general penalty provided by a law of Congress, but not particularly specifying that the penalty shall go to somebody else, must carry with it the payment of the penalty into the treasury of the United States, and its subsequent disposal, or whether some one may be entitled thereto at the hands of the United States, cannot affect the form of the action under which the penalty should be sought to be recovered. The Stella B (D. C. 1910) 183 Fed. 507.

Claims due to state before admission to Union.—The state of Texas succeeded to the rights and claims of the republic for duties on goods imported before annexation, and suits pending for such duties, at the time of annexation, were properly conducted thereafter in the name of the state. State v. Williams' Ex'rs (1852) 8 Tex. 384.

Forfeitures under revenue laws.—The forfeiture accruing under the revenue laws is to the United States, and must be sued for in the name of the United States. U. S. v. Morris (1825) 10 Wheat. 246, 290, 6 L. Ed. 314.

Personal liability for importations.—The importer or consignee of imported goods is personally liable for the duties charged thereon, and the United States may maintain an action of assumpsit for their payment. U. S. v. Lyman (C. C. 1818) Fed. Cas. No. 15,647; Same v. Howland (C. C. 1824) Fed. Cas. No. 15,406; Same v. Dodge (D. C. 1865) Fed. Cas. No. 14,973; Same v. George (C. C. 1869) Fed. Cas. No. 15,198; Same v. Murdock (1866) 18 La. Ann. 305, 89 Am. Dec. 651; Same v. Wolf (Pa. 1796) Add. 312.

The personal liability of an importer for the duty on goods imported by him is not relieved by the taking of additional security for the payment thereof. U. S. v. Murdock (1866) 18 La. Ann. 305, 89 Am. Dec. 651.

Postal regulations.—A suit for a penalty for conveying letters by private express held not maintainable by a private prosecutor, but only by and in the name of the United States. Williams v. Wells Fargo & Co. Express (1910) 177 Fed. 352, 101 C. C. A. 328, 35 L. R. A. (N. S.) 1034, 21 Ann. Cas. 699.

Recovery of unpaid duties.—A state court has jurisdiction of an action by the United States to recover unpaid duties. U. S. v. Graff (N. Y. 1875) 4 Hun, 634.

Regulations relating to passenger vessels.—A proceeding to recover the penalty for overloading passenger vessels, prescribed by R. S. § 4465, post, § 8229, is not one to recover the penalties or forfeitures imposed by this section. Hatch v. The Boston (D. C. 1880) 3 Fed. 807, 809.

Cited without definite application, The Margaret (1824) 9 Wheat. 421, 427, 6 L. Ed. 125; Atlanta v. Chattanooga Foundry & Pipe Co. (C. C. 1900) 101 Fed. 900, 904.

§ 1546. (R. S. § 920.) Consolidation of revenue seizures.

Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must

be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them.

Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162.

Notes of Decisions

Failure to acquire jurisdiction.—Decree in consolidated action held valid, though the court failed to acquire jurisdiction in one of the actions so consolidated. Galpin v. Page (C. C. 1870) Fed. Cas. No. 5,205.

§ 1547. (R. S. § 921.) Orders to save costs, and consolidation of causes of a like nature.

When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.

Act July 22, 1813, c. 14, § 3, 3 Stat. 21.

Notes of Decisions

1. Discretion of court.
2. Order for simultaneous trial.
3. Parties entitled to move for consolidation.
4. Objections to consolidation.
5. Order or stipulation for consolidation.
6. Causes properly consolidated.
7. —— Actions for penalties.
8. —— Actions on insurance policies.
9. —— Actions on notes.
10. —— Breach of contract.
11. —— Collision cases.
12. —— Foreclosure suits.
13. —— Infringement suits.
14. —— Libel suits.
15. —— Original and ancillary suits.
16. —— Personal injury actions.
17. Effect of consolidation.
18. Trial of consolidated causes.
19. Waiver.

1. Discretion of court.—The consolidation of actions rests in the sound discretion of the court. Mutual L. Ins. Co. v. Hillmon (1892) 145 U. S. 292, 12 Sup. Ct. 909, 36 L. Ed. 706; Lewis v. Baltimore & L. R. Co. (1894) 62 Fed. 218, 221, 10 C. C. A. 446; Toledo, St. L. & K. R. Co. v. Continental Trust Co. (1899) 95 Fed. 497, 36 C. C. A. 155 (modifying decree Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. [C. C. 1898] 86 Fed. 929, and certiorari denied [1900] 20 Sup. Ct. 383, 176 U. S. 219, 44 L. Ed. 442); Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co. (C. C. 1911) 193 Fed. 69.

The court may order causes consolidated or one tried as a test case, where they involve same issues. Andrews v. Spear (C. C. 1877) Fed. Cas. No. 379.

2. Order for simultaneous trial.—R. S. § 5480, as amended by Act March 2, 1889, § 1 (post, § 10385), making the use of the mails to defraud a criminal offense, provides that an indictment thereunder may charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence. Nine indictments were returned against defendant under said section, each containing three counts, all relating to the same alleged scheme to defraud, but charging different mailings, all within the same six calendar months. The record showed that "by order of the court the said nine indictments were tried together and at the same time, and upon each of the said nine indictments separate verdicts were rendered," and separate sentences were imposed under the several indictments. Held, in view of this section, that the indictments were not consolidated, which would, in effect defeat the implied prohibition against joining more than three offenses in the same indictment; and that the only effect of the order was that all the indictments should be tried together to the same jury, leaving each party with the same material rights as though tried separately. Betts v. U. S. (1904) 132 Fed. 228, 65 C. C. A. 452.

Instead of consolidating actions for trespass to the person and for trespass to property, arising out of the same transaction, the court directed that they be tried at the same time and to the same jury. Holmes v. Sheridan (C. C. 1870) Fed. Cas. No. 6,644.

3. Parties entitled to move for consolidation.—Numerous suits involving the same issues will not be consolidated on motion of plaintiff. Ferrett v. Atwill (C. C. 1846) Fed. Cas. No. 4,747.

4. Objections to consolidation.—The intermission of a term between the issue of the writ on which one defendant was taken and an alias or pluries against the other will not prevent consolidation of the causes. Smith v. Woodward (C. C. 1821) Fed. Cas. No. 13,129.

5. Order or stipulation for consolidation.—A stipulation of parties that a cause, pending in a state court, shall be consolidated and heard as one, in the federal court, with other causes which have been removed thither, confers no jurisdiction on that court to hear or determine the unremoved cause. Olds

Wagon Works v. Benedict (1895) 67 Fed. 1, 14 C. C. A. 285.

Where cross-suits between the same parties, one in the Circuit Court and one in the District Court in admiralty, were by agreement tried together on the same evidence, but separate judgments were entered in each court, a subsequent order of the trial judge finding that the causes were consolidated into the admiralty case was not sufficient to effect a nunc pro tunc consolidation, and the judgment which remained of record in the Circuit Court was not reviewable on an appeal taken in the admiralty suit. S. P. Shotter Co. v. Larsen (1905) 134 Fed. 705, 67 C. C. A. 259, affirming decrees The Hercules (D. C. 1904) 129 Fed. 945, and Larsen v. S. P. Shotter Co. (C. C. 1904) 129 Fed. 945.

6. **Causes properly consolidated.**—Actions pending in a federal court of like nature or relative to the same question, may be consolidated to avoid unnecessary costs, or to prevent delay. The Burke (C. C. 1878) Fed. Cas. No. 2,159.

Causes of a like nature in which substantially the same questions are involved, though against different defendants, may be tried at the same time, even where in consequence the defendants will be brought into antagonism. Keep v. Indianapolis & St. L. R. Co. (C. C. 1882) 10 Fed. 454.

In the federal courts cases are consolidated if between the same parties, or between the same interests, where time, labor, and expense can be saved, but not otherwise. Davis v. St. Louis & S. F. Ry. Co. (C. C, 1885) 25 Fed. 786.

Where the interests involved in several suits pertain to separate and distinct corporations, and the complainant in one of the causes appears as defendant in another, and complainant in the two other bring suits against separate and distinct defendants, the court will not consolidate the causes. Central Trust Co. v. Virginia, T. & C. Steel & Iron Co. (C. C. 1893) 55 Fed. 769, 771, reversed (1894) 14 Sup. Ct. 288, 151 U. S. 129, 38 L. Ed. 98.

Where there are two suits seeking substantially the same relief, they will be consolidated. Bird v. People's Gas & Electric Light Co. (C. C. 1908) 158 Fed. 903.

Where plaintiff has several causes of action which may be joined, and brings a separate suit on each, the court will compel a consolidation at his costs. Wolverton v. Lacey (D. C. 1856) Fed. Cas. No. 17,932.

7. —— **Actions for penalties.**—A federal court may properly consolidate several actions brought by the United States against a carrier to recover the penalty prescribed by Act June 29, 1906, post, § 8651, for violations of its requirement as to unloading live stock during transit. Baltimore & O. S. W. R. Co. v. U. S. (1911) 31 Sup. Ct. 368, 220 U. S. 94, 55 L. Ed. 384, modifying judgment U. S. v. Baltimore & O. S. W. R. Co. (1908) 159 Fed. 33, 86 C. C. A. 223.

8. —— **Actions on insurance policies.**—Under this section actions on life insurance policies by one plaintiff against different defendants, in which the defenses are the same may be consolidated. Mutual Life Ins. Co. v. Hillmon (1892) 12 Sup. Ct. 909, 911, 145 U. S. 285, 36 L. Ed. 706.

Where several actions on policies of insurance are brought by the same plaintiffs against different companies, and the questions are the same, the evidence the same, and the counsel the same, the court may order them all to be tried to the same jury. Wiede v. Insurance Co. of North America (C. C. 1871) Fed. Cas. No. 17,617.

9. —— **Actions on notes.**—Consolidation of actions on notes, though parties are the same in all, not ordered. Bank of Alexandria v. Young (C. C. 1807) Fed. Cas. No. 857.

10. —— **Breach of contract.**—A federal court may in its discretion consolidate cross-actions between the same parties for breach of the same contracts. American Trust & Savings Bank v. Zeigler Coal Co. (1908) 165 Fed. 34, 91 C. C. A. 72.

11. —— **Collision cases.**—This section enables District Courts sitting in admiralty to combine suits arising out of collisions in a single proceeding, and where both parties are at fault to make a single decree in accordance with their rights and obligations. The North Star (1882) 106 U. S. 17, 27, 1 Sup. Ct. 41, 27 L. Ed. 91.

12. —— **Foreclosure suits.**—A mortgagor came into this court before default, alleged that it was going to default, and asked for and obtained the appointment of a receiver. The mortgagee filed a cross bill to foreclose the mortgage, and also filed a bill in the state court to accomplish the same object. The complainant in the original bill, filed here, removed the suit in the state court to this court, and moved to consolidate said suits. Held, that the motion would be sustained. Wabash, St. L. & P. Ry. Co. v. Central Trust Co. of New York (C. C. 1885) 23 Fed. 513.

A motion to consolidate three foreclosure suits, where all are not ripe for decree, and where nothing can be gained for the purpose of a hearing, will be denied. Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1889) 41 Fed. 8.

13. —— **Infringement suits.**—D. filed a bill on May 25, 1885, alleging an infringement of two of the patents issued for improvements in grain binders, both relating to the cord-binding mechanism; and on June 1, 1885, he filed another bill against the same defendants for an infringement of five patents relating to

grain-binding and harvesting machines, —all of the devices alleged to be infringed being used in one machine. Defendant, on June 18, 1885, moved to consolidate the two suits, and that the time to answer both bills be extended to the first rule day in September. Held, that the motion should be granted. Deering v. Winona Harvesting Works (C. C. 1885) 24 Fed. 90.

Separate actions for penalties, under R. S. § 4965, for infringements of copyrights, may be tried together. Snow v. Mast (C. C. 1895) 65 Fed. 995, 996.

Where two bills are properly filed for infringements of separate patents, one covering the articles and the other the package in which they are put up, the bills may be consolidated under the general rules of equity procedure and under this section. Wilkin Shoe-Button Fastener Co. v. Webb (C. C. 1898) 89 Fed. 982, 989.

Cases of infringement which are of like nature between the same parties may be consolidated, where it appears reasonable, and when consolidated one recovery can be decreed. Frank v. Geiger (C. C. 1903) 121 Fed. 126.

14. —— Libel suits.—Where several actions were brought against different newspapers for publishing the same alleged libel, and the principal issues for the jury in each of the causes were substantially identical, the causes might be consolidated and the issues of fact tried to a single jury, as authorized by this section, notwithstanding the elements with reference to the damages to be assessed in the several cases might be different. Butler v. Courier-Citizen Co. (C. C. 1904) 127 Fed. 1015.

15. —— Original and ancillary suits. —Under this section it is proper to consolidate an equity suit brought in aid of an attachment, and one to restrain the enforcement of such attachment by execution, and to make the bill in the latter a cross-bill in the former. Lant v. Kinne (1896) 75 Fed. 636, 21 C. C. A. 466.

Original and ancillary suits should be consolidated, where no one will be injured thereby and where their nature permits, as in the case of a creditors' bill and a foreclosure bill against the same insolvent railroad corporation. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1897) 82 Fed. 642.

16. —— Personal injury actions.—Where separate actions are brought by separate plaintiffs against the same defendants in the same court for injuries sustained in the same accident, depending on the same evidence, only different in the extent of the injuries, the causes are properly consolidated for trial. Denver City Tramway Co. v. Norton (1905) 141 Fed. 599, 73 C. C. A. 1.

A federal court has power in its discretion to consolidate for trial separate actions brought against a railroad company to recover for the death of persons who were killed at the same time and in the same manner. Diggs v. Louisville & N. R. Co. (1907) 156 Fed. 564, 84 C. C. A. 330, 14 L. R. A. (N. S.) 1029, rehearing denied (1907) 158 Fed. 97, 85 C. C. A. 565.

Where the plaintiff in each of two actions was injured in the same accident, and the same evidence, except as to the extent of the injuries, was determinative of both cases, it was a proper exercise of the trial court's discretion to consolidate the cases for trial over defendant's objection relating only to the disparity between the injuries of the two plaintiffs, under this section. American Window Glass Co. v. Noe (1908) 158 Fed. 777, 86 C. C. A. 133; Same v. Arnold (1908) 158 Fed. 781, 86 C. C. A. 137.

17. Effect of consolidation.—Where a railway company moves that three actions pending against it by members of the same family for personal injuries received in the derailing of a car shall be consolidated, and that if a verdict is found there shall be but one verdict, it cannot afterwards complain of the consolidation, although the court, against its objection, ruled that there should be a separate verdict for each plaintiff. Union Pac. Ry. Co. v. Jones (1892) 49 Fed. 343, 1 C. C. A. 282.

Suits consolidated remain separate as to parties, pleadings, and decrees, unless otherwise directed. Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (1899) 95 Fed. 497, 36 C. C. A. 155, modifying decree Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1898) 86 Fed. 929, and certiorari denied (1900) 20 Sup. Ct. 383, 176 U. S. 219, 44 L. Ed. ——.

The consolidation of several actions into one will not defeat the right to dismiss as to one or more of the original causes of actions. Young v. Grand Trunk Ry. of Canada (C. C. 1881) 9 Fed. 348.

18. Trial of consolidated causes.—Under this section actions on life insurance policies by one plaintiff against different defendants, in which the defenses are the same, may be consolidated, but the causes of action must remain distinct, requiring separate verdicts, and no defendant must be deprived of any right material to his defense. Each of the several defendants in such a consolidated action is entitled to the three peremptory challenges allowed each party under R. S. § 819, ante, § 1264. Mutual Life Ins. Co. v. Hillmon (1892) 12 Sup. Ct. 909, 911, 145 U. S. 285, 36 L. Ed. 706.

Where separate actions by the same plaintiff are consolidated for trial by order of the court, either on its own motion or on motion of counsel for the plaintiff, in order to avoid waste of time and unnecessary expense, but the caus-

es of action are such that separate verdicts are required, plaintiff and defendants are each entitled to the same number of challenges to jurors as they would be if the cases had been tried separately. Butler v. Evening Post Pub. Co. (1906) 148 Fed. 821, 78 C. C. A. 511, writ of certiorari denied News & Courier Co. v. Butler (1907) 27 Sup. Ct. 785, 204 U. S. 670, 51 L. Ed. 672.

Cases consolidated may be tried together or separately as the court may determine, and if tried together the court must be careful not to apply evidence taken before the consolidation to any issue with reference to which it was not taken. The Eliza Lines (C. C. 1894) 61 Fed. 308, 310.

19. Waiver.—In a suit on a municipal paving contract, an objection that the suit was premature because the matter in dispute had not been submitted to the city engineer, and that the contractor had not furnished the city proper evidence that all claims for labor and material had been paid as required by the contract, was mere matter of abatement, as to which it was the city's duty to demand an independent trial prior to a submission on the merits, and which the city waived by failing to do so. City of Greensboro v. Southern Pav. & Const. Co. (1909) 168 Fed. 880, 94 C. C. A. 292, writ of certiorari denied Southern Pav. & Const. Co. v. Greensboro (1910) 30 Sup. Ct. 693, 217 U. S. 602, 54 L. Ed. 898.

Cited without definite application, U. S. v. Union Pac. R. Co. (1878) 98 U. S. 569, 604, 25 L. Ed. 143; Ætna Life Ins. Co. v. Moore (1913) 34 Sup. Ct. 186, 191, 231 U. S. 543, 58 L. Ed. 356; Exchange Bank v. Moss (1906) 149 Fed. 340, 79 C. C. A. 278; U. S. v. Baltimore & O. S. W. R. Co. (1908) 159 Fed. 33, 86 C. C. A. 223 (modified [1911] 31 Sup. Ct. 368, 220 U. S. 94, 55 L. Ed. 384); The Prinz Georg (D. C. 1884) 19 Fed. 653, 654; Nashville Grain Exch. v. U. S. (Com. Ct. 1911) 191 Fed. 37.

§ 1548. (R. S. § 922.) When the marshal or his deputy is a party in a cause.

When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.

Act Sept. 24, 1789, c. 20, § 28, 1 Stat. 87.

Notes of Decisions

Process against marshal.—As process committing the marshal for a contempt would run to him in his official capacity, the issue of such process will be refused as impracticable. Ex parte Benedict (D. C. 1862) Fed. Cas. No. 1,292.

Object of statute.—The object of the statute is to make sure that a marshal or deputy interested cannot by a false return deprive the opposing party of his day in court. Barnes v. Western Union Tel. Co. (C. C. 1903) 120 Fed. 550.

Waiver of irregularity.—An appearance by his attorney cures irregularity in service upon a defendant who was a deputy marshal on the ground that the service was not by a disinterested person. Knox v. Summers (1806) 3 Cranch, 496, 498, 2 L. Ed. 510.

The irregularity of service by the deputy is waived by filing a general demurrer and a full answer to the merits, and where the application of an attorney for defendant for leave to withdraw his demurrer and answer, to insist on the technical irregularity of the service, can only delay the trial of the cause on the merits, the application will be denied. Barnes v. Western Union Tel. Co. (C. C. 1903) 120 Fed. 550.

§ 1549. (R. S. § 923.) Seizure for forfeiture in certain cases.

When any vessel, goods, wares, or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares, or merchandise, and gives bond to defend the prosecution thereof and to respond the cost in

case he shall not support his claim, the court shall proceed to hear and determine the cause according to law.

Act Aug. 4, 1790, c. 35, § 67, 1 Stat. 176. Act Dec. 31, 1792, c. 1, § 29, 1 Stat. 298. Act Feb. 18, 1793, c. 8, § 35, 1 Stat. 317. Act March 2, 1799, c. 22, §§ 70, 89, 1 Stat. 678, 695, 696.

Notes of Decisions

Hearing according to law.—In a libel in rem for a forfeiture, after a default, there must be some hearing, before a decree of forfeiture. U. S. v. The Lion (D. C. 1858) Fed. Cas. No. 15,607. But see U. S. v. Clarke (1873) 20 Wall. 112, 22 L. Ed. 320; The Mary Anne (D. C. 1826) Fed. Cas. No. 9,195; U. S. v. The Mollie (C. C. 1876) Fed. Cas. No. 15,795.

Overloading passenger vessel.—This section does not apply to a proceeding to recover a penalty prescribed by R. S. § 4465, post, § 8229, for overloading passenger vessels. Hatch v. The Boston (C. C. 1880) 3 Fed. 807, 810.

§ 1550. (R. S. § 924.) Attachment in postal suits.

In all cases where debts are due from defaulting or delinquent postmasters, contractors, or other officers, agents, or employés of the Post-Office Department, a warrant of attachment may issue against all real and personal property and legal and equitable rights belonging to such officer, agent, or employé, and his sureties, or either of them, in the following cases:

First. When such officer, agent, or employé, and his sureties, or either of them, is a non-resident of the district where such officer, agent, or employé was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process.

Second. When such officer, agent, or employé, and his sureties, or either of them, has conveyed away, or is about to convey away his property, or any part thereof, or has removed or is about to remove the same or any part thereof from the district wherein it is situate, with intent to defraud the United States.

And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof.

Act Feb. 23, 1865, c. 47, § 1, 13 Stat. 432, 433.

Notes of Decisions

Amendment.—The power to amend conferred by R. S. § 948, post, § 1580, applies to proceedings in attachment authorized in favor of the United States against defaulting and delinquent postmasters, contractors, and other officers, agents, and employés, of the post office, as regulated by this section. Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65.

Conditions precedent.—No preliminary demand of payment is necessary to put in default a postmaster who omits to pay over the public funds in his hands at the expiration of each successive quarter of his service, and no proof of such demand having been made is requisite to the sustaining of an action against him. (1844) 4 Op. Atty. Gen. 304.

§ 1551. (R. S. § 925.) Application for warrant; by whom and how made.

Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the Postmaster-General, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment

enumerated in the preceding section, and upon production of legal evidence of the debt.

Act Feb. 23, 1865, c. 47, § 2, 13 Stat. 433.

§ 1552. (R. S. § 926.) Issuing warrant; duty of clerk and marshal.

Upon any such application and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court.

Act Feb. 23, 1865, c. 47, § 2, 13 Stat. 433.

§ 1553. (R. S. § 927.) Ownership of attached property; trial; other remedies.

At any time within twenty days before the return day of such warrant, the party whose property is attached may, on giving notice to the district attorney of his intention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached and a specific return thereof, shall be confined to the remedy herein afforded, but his right to an action of trespass, or other action for damages, shall not be impaired hereby.

Act Feb. 23, 1865, c. 47, § 3, 13 Stat. 433.

§ 1554. (R. S. § 928.) Proceeds of attached property to be invested.

When the property attached is sold on any interlocutory order of the court or is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same.

Act Feb. 23, 1865, c. 47, § 4, 13 Stat. 433.

§ 1555. (R. S. § 929.) Publication of attachment.

Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months and of non-residents for four months. The publication shall be made in some newspaper published in the district where the property is situate, and the details thereof shall be regulated by the order under which the warrant is issued.

Act Feb. 23, 1865, c. 47, § 5, 13 Stat. 434.

§ 1556. (R. S. § 930.) Persons having property of defendants to account for it; sales void; personal notice.

After the first publication of such notice of attachment as required by law, every person indebted to, or having possession of any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney or marshal, such officer shall see that personal notice of the attachment is served upon such

person, but the want of such notice shall not invalidate the attachment.

Act Feb. 23, 1865, c. 47, § 6, 13 Stat. 434.

§ 1557. (R. S. § 931.) Discharge of attachment; bond.

Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property, or to answer any judgment which may be rendered by the court in the premises.

Act Feb. 23, 1865, c. 47, § 7, 13 Stat. 434.

§ 1558. (R. S. § 932.) Accrued rights not to be abridged.

Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of, or the adoption of State laws by, the United States courts.

Act Feb. 23, 1865, c. 47, § 9, 13 Stat. 434.

The "preceding eight sections" mentioned in this section were R. S. §§ 924–931, ante, §§ 1550–1557.

§ 1559. (R. S. § 933.) Attachments dissolved in conformity with State laws.

An attachment of property, upon process instituted in any court of the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the State where said court is held, such attachment would be dissolved upon like process instituted in the courts of said State: Provided, That nothing herein contained shall interfere with any priority of the United States in the payment of debts.

Act March 14, 1848, c. 18, § 1, 9 Stat. 213. Act Feb. 23, 1865, c. 47, §§ 1, 9, 13 Stat. 432, 434.

The "preceding nine sections," mentioned in this section, were R. S. §§ 924–932, ante, §§ 1550–1558.

Notes of Decisions

Grounds for dissolution.—Under this section an attachment is dissolved in Louisiana by an accepted cession of the attached property to creditors under the insolvency laws of that state. Shwartz v. H. B. Claflin Co. (1893) 60 Fed. 676, 9 C. C. A. 204.

A corporation had been for a number of years becoming more and more heavily indebted to a bank of which one of its directors was cashier. Notes given by the company were from time to time renewed, merely as a matter of form, and without expectation of payment, as the company was hopelessly insolvent. Finally, both the company and the bank went into the hands of receivers. Held, that an attachment thereafter obtained on behalf of the bank against the company based on such notes would not be held invalid by a court of equity, merely because the renewal notes taken for a portion of the indebtedness lacked a few days of maturity. Hadden v. Dooley (1899) 92 Fed. 274, 34 C. C. A. 338, affirmed on rehearing (1899) 93 Fed. 728, 35 C. C. A. 554.

An attachment, issued upon a return of non est, before the appearance day, will be quashed. Camilloz v. Johns (C. C. 1801) Fed. Cas. No. 2,343.

It is no ground for dismissing a foreign attachment, instituted in the federal court, that plaintiff had sued out another attachment against the defendant in a state court, and afterwards discontinued it. Fisher v. Consequa (C. C. 1809) Fed. Cas. No. 4,816.

An attachment under Maryland law against the property of a corporation aggregate is dissolved by its appearance without bail. Nicholl v. Savannah S. S. Co. (C. C. 1820) Fed. Cas. No. 10,-225.

An attachment by way of execution is discontinued if there is no appearance at the return term. Bank of Washington v. Brent (C. C. 1824) Fed. Cas. No. 948.

An attachment will be dissolved where defendant is arrested before its

return. Cox v. Watkins (C. C. 1829) Fed. Cas. No. 3,307.

An attachment under the Maryland statute is dissolved by the death of the principal defendant and the appearance of his administrator. Pancost v. Washington (C. C. 1838) Fed. Cas. No. 10,-706.

Where affidavits in support of a motion to dissolve an attachment showed that it was issued in good faith and on respectable evidence, which, if believed, would warrant a jury in finding a verdict for plaintiff, it will not be dissolved on the ground that the charges made in the affidavits are false. Perry v. Sharpe (C. C. 1881) 8 Fed. 15.

When a contingency arises whereby the attachment would be dissolved under provisions of a state law, the attachment will be deemed dissolved in a federal court, as provided in this section. Mather v. Nesbit (C. C. 1882) 13 Fed. 872; Bates v. Days (C. C. 1883) 17 Fed. 167.

A cession made by the surviving members of a partnership, who are in possession of the partnership property, carries that property into insolvency, and defeats all claims of attaching creditors upon it. Lafollye v. Carriere (C. C. 1885) 24 Fed. 346, judgment affirmed Tua v. Carriere (1886) 6 S. Ct. 565, 117 U. S. 201, 29 L. Ed. 855.

By the law of the state of Louisiana, as construed by its supreme court, a cession of property made by insolvents dissolves all writs of attachment which have not matured into judgment prior to the cession; and under this section the rule must be the same as to attachments issued from the federal courts. Id.

An attachment is not dissolved by an amendment of the writ and declaration increasing the amount claimed, made after another attachment has intervened, where the first attaching creditor, upon obtaining judgment for the increased amount and taking out execution, directs the sheriff to levy only for the amount originally claimed. Cutler v. Lang (C. C. 1887) 30 Fed. 173.

Under R. S. § 915, ante, § 1539, entitling plaintiff in a common-law case in a federal court to remedies by attachment or other process similar to those provided by the laws of the state in which the court is held, and requiring similar preliminary proof and security, and this section, proceedings in an action in which an attachment has been levied will be stayed where insolvency proceedings against the debtor are instituted in the state courts. Neufeld v. Neufeld (C. C. 1889) 37 Fed. 560.

The lien of the attachment is discharged by the rendition of a judgment against plaintiff, and cannot be continued by the failure of the clerk to perform the merely ministerial duty of certifying the judgment to the register of deeds, as provided by the state law. Meloy v. Orton (C. C. 1890) 42 Fed. 513.

An attachment is dissolved by insolvency proceedings in which defendants made and the proper court accepted a surrender of all their property. H. B. Claflin Co. v. Kern (C. C. 1893) 55 Fed. 578, 583.

Parties entitled to move for dissolution.—Under the provisions of Mansf. Dig. Ark., a defendant in attachment may move to vacate the attachment though he disclaims any interest in the property. Salmon v. Mills (1892) 49 Fed. 333, 1 C. C. A. 278, judgment reversed (1895) 68 Fed. 180, 15 C. C. A. 356.

The second attaching creditors are entitled to the relief against fraud given by Act Mass. Feb. 21, 1824, though their writ be not returnable to the same term of court as the first attachment. Lodge v. Lodge (C. C. 1829) Fed. Cas. No. 8,460.

An attachment issued by a federal court will not be quashed at the instance of the debtor's assignee for benefit of creditors under the Missouri law, the proper practice being for him to intervene in the suit. Boltz v. Eagon (C. C. 1888) 34 Fed. 445.

Time of motion.—A motion to discharge an attachment for irregularity of its issue, may, under the Idaho law, be made even after the attached property has been redelivered to the defendant upon his giving the counter undertaking provided for by statute. Glidden v. Whittier (C. C. 1891) 46 Fed. 437.

Under the Code of the state of Washington (2 Hill's Code, § 318), which provides that "the defendant may, at any time after he has appeared in the action, * * * apply on motion * * * that the writ of attachment be dissolved," a defendant has no right to move to dissolve the attachment, without first entering a general appearance in the action. Feurer v. Stewart (C. C. 1897) 82 Fed. 294.

Pleading and evidence.—The affidavit for attachment charged that the defendant had (1) fraudulently conveyed or assigned his property so as to hinder and delay his creditors; (2) fraudulently concealed, removed, or disposed of his property with the same intent; and (3) fraudulently contracted the debt sued for. Held, that proof of all the grounds stated in the affidavit was not necessary to entitle the plaintiff to a recovery, but that proof of one or more was sufficient. Strauss v. Abrahams (C. C. 1887) 32 Fed. 310.

Where an attachment is based upon a charge of fraud on the part of the debtor, the burden of proof upon that question is on the plaintiff. Id.

A motion to discharge an attachment should be supported by an affidavit traversing the facts set out in the af-

fidavit of plaintiff upon which the attachment was issued. Jenks v. Richardson (C. C. 1895) 71 Fed. 365.

On a motion to dissolve an attachment the sufficiency of the petition as showing a cause of action on the part of plaintiffs cannot be considered. Id.

Though a complaint on which a writ of attachment is issued fails to allege facts necessary to give the court jurisdiction, the defect is cured by an amendment, made on the hearing of a motion to discharge the attachment, showing that such facts existed when the complaint was originally filed and the writ issued. Nevada Co. v. Farnsworth (C. C. 1898) 89 Fed. 164.

When an assignment provides for the payment of a simulated debt, the presumption is that the grantor knew it if the debt was created by him; but the presumption is rebuttable, and, on an issue as to the validity of an attachment sought to be sustained on the ground that the debtor has made a fraudulent assignment, it is a question for the jury whether the grantor knew, or had reasonable cause to know, that the debt was fictitious. Bickham v. Lake (D. C. 1883) 51 Fed. 892.

Bond.—Hill's Ann. Laws Or. 1892, § 159, provides that, whenever the defendant in attachment has appeared in the action, he may apply for an order to discharge the attachment on the execution of an undertaking mentioned in section 160, which authorizes such discharge on the execution of a bond "to the effect that the sureties will pay to plaintiff the amount of the judgment that may be recovered against the defendant in the action." Held, that a bond by which the sureties undertook and promised, in case plaintiff recovered a judgment in the action, that the defendant would, on demand, pay to plaintiffs the amount of said judgment, together with the costs and disbursements of the action, was a substantial compliance with the statute and was enforceable as a statutory bond. Ebner v. Heid (1903) 125 Fed. 680, 60 C. C. A. 370.

Where a bond to release an attachment was under seal, and recited as a consideration the release of all the property attached, and the discharge of the attachment, it was based on a sufficient consideration to render it enforceable as a common-law obligation. Id.

Code Civ. Proc. N. Y. § 688, which provides for the discharge of an attachment upon the giving by the defendant of a bond conditioned for the payment of any judgment that may be recovered, does not apply where the attached property is current money. U. S. v. Neely (C. C. 1907) 154 Fed. 496.

Order of discharge.—Where the bond for the release of an attachment was approved by the United States district judge, and was filed with the papers in the case in the office of the clerk of the court and the order discharging the attachment recited that it was based on the notice of motion and motion, on all the records in the cause, and on the execution of a good and sufficient undertaking, such order was conclusive evidence of the delivery of the undertaking to the court, and its acceptance by the court as a delivery bond. Ebner v. Heid (1903) 125 Fed. 680, 60 C. C. A. 370.

Effect of dissolution.—The Missouri statute provides that attachments may be dissolved on motion on defendant's behalf at any time before final judgment when defendant appears and pleads to the action and gives bond conditioned that the property, effects, and credits shall be forthcoming and abide the judgment rendered, or when the defendant shall appear and plead and give a bond conditioned that defendant will pay to plaintiff the amount which may be adjudged in plaintiff's favor on or before the first day of the next term after judgment; and declares that when any attachment shall be dissolved all proceedings touching the property and effects attached, and the garnishee summoned, shall be vacated, and the suit shall proceed as if commenced by summons only. Held that, where an attachment was dissolved on the giving of a forthcoming bond, defendant could not thereafter join issue on and demand a trial of the grounds originally alleged for the attachment; and this, though plaintiff took leave to amend his grounds of attachment after the attachment had been dissolved. Blount v. American Lead & Baryta Co. (1908) 161 Fed. 714, 88 C. C. A. 574.

Waiver.—Under Mansf. Dig. Ark. §§ 381, 383 (in force in the Indian Territory), a motion to vacate an attachment was not waived by filing affidavits controverting the facts stated in the affidavit of attachment, and the motion might be heard and disposed of after the questions raised by the affidavits have been decided by the verdict of a jury, and such verdict has been set aside by the court on motion for a new trial. Salmon v. Mills (1892) 49 Fed. 333, 1 C. C. A. 278.

By giving bond and receiving restitution of the property seized, defendants waive the objection that the property was not subject to attachment. Wolf v. Cook (C. C. 1889) 40 Fed. 432.

Under the Connecticut statute, providing that an attaching creditor shall lose his rights if he fails to take out and levy an execution within 60 days after recovery of judgment unless such issue or levy is prevented or stayed by some legal proceeding, an attachment creditor who, prior to judgment, has surrendered the attached property to a receiver, under a stipulation and order of court that it should be without prejudice to his rights, and that in case the property should be sold by the receiver

his rights should be transferred to the proceeds, does not lose his rights by failing to take out execution on his judgment within 60 days, since the possession of the receiver effectually prevented a levy. Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C. 1902) 114 Fed. 659.

§ 1560. (R. S. § 934.) Property taken under revenue laws irrepleviable.

All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Act March 2, 1833, c. 57, § 2, 4 Stat. 632. Act July 13, 1866, c. 184, § 67, 14 Stat. 172.

Notes of Decisions

Validity.—This section remains in full force notwithstanding the customs act of June 10, 1890, and in the case of seized goods and particularly in case of goods liable for forfeiture this section leaves nothing for custom officers to decide or control in the regular line of the duties imposed on them as such officers. In re Chichester (C. C. 1891) 48 Fed. 281, 286.

Property within purview of statute.—A pleasure yacht brought from a foreign country to the United States was seized by the collector of customs for failure to pay duty. The owner thereupon libeled her in the federal district court, and caused the marshal to seize her, claiming that she was not an imported article, within the meaning of the tariff laws, and that her seizure by the collector was a marine tort. The collector answered the libel, putting in issue these claims. Held, in view of this section, that the district court had jurisdiction of the yacht, with authority to determine whether or not she was an imported article. Ex parte Fassett (1892) 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087.

In an action against a collector of customs for the seizure of a vessel, it is no defense that plaintiff could not libel the vessel after its seizure, since probably, by this section, such a remedy would not lie. De Lima v. Bidwell (1901) 21 Sup. Ct. 743, 746, 182 U. S. 1, 45 L. Ed. 1041.

Vouchers or documents filed with the treasury department to justify the settlement of a public account cannot be replevied. Brent v. Hagner (C. C. 1836) Fed. Cas. No. 1,839.

Under Act July 13, 1866, post, § 5910, replevin does not lie for property of plaintiff seized under a warrant by a collector of internal revenue as the property of another. Treat v. Staples (C. C. 1870) Fed. Cas. No. 14,162.

Property seized to enforce collection of taxes is in custodia legis and irrepleviable. Dixwell v. Jones (C. C. 1873) Fed. Cas. No. 3,937.

Property distrained under authority of the revenue laws is not repleviable. Brice v. Elliott (C. C. 1876) Fed. Cas. No. 1,854.

Property released to the defendant on a forthcoming bond is still in the custody of the court, and not subject to seizure under a writ issued out of another court. U. S. v. Dantzler (C. C. 1877) Fed. Cas. No. 14,917.

Distilled liquors in a bonded warehouse cannot be seized under state process. (1894) 21 Op. Atty. Gen. 73.

The dispensary law of South Carolina of 1893 is ineffective and inoperative as against distilled liquors held in a United States bonded warehouse under the control of the collector of internal revenue. Id.

That law does not authorize any officer of that state to tender the taxes due to the United States on such liquors. Id.

If cigars are offered for sale contrary to the revenue laws of the United States, a right of forfeiture and seizure by the government arises, and if the cigars are actually sold pursuant to such offer, a subsequent seizure by the government operates to vest the title of the government thereby acquired as of the time of the offer of sale, and to devest the paper title made by the sale pursuant to the offer. Gethner v. Salomon (1910) 157 Ill. App. 196.

Under this section as formerly enacted, and Act Feb. 23, 1887, post, § 5698, property introduced from without the United States and in the possession of a carrier for transportation in bond, is beyond the jurisdiction of the state courts. Galveston, H. & S. A. Ry. Co. v. Terrazas (Tex. Civ. App. 1914) 171 S. W. 303.

Suit for possession of irrepleviable goods.—A bill in equity may be maintained to obtain possession of goods which, being in the custody of a collector, are irrepleviable. Pollard v. Reardon (1895) 65 Fed. 848, 13 C. C. A. 171, reversing decree Same v. Saltonstall (C. C. 1893) 56 Fed. 861.

Cited without definite application, Schoenfeld v. Hendricks (1894) 14 Sup. Ct. 754, 756, 152 U. S. 691, 38 L. Ed. 601; Sheridan v. Allen (1907) 153 Fed. 568, 82 C. C. A. 522; Eaton v. Calhoun (C. C. 1880) 15 Fed. 155, 157.

§ 1561. (R. S. § 935.) Garnishees in suits by the United States, on notes, etc.

In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States: Provided, That no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, nor until the sum in which the garnishee stands indebted is actually due.

Act April 20, 1818, c. 83, § 8, 3 Stat. 443.

§ 1562. (R. S. § 936.) Issue tendered when garnishee denies indebtedness.

When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit.

Act April 20, 1818, c. 83, § 9, 3 Stat. 443.

§ 1563. (R. S. § 937.) Garnishee failing to appear.

If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.

Act April 20, 1818, c. 83, § 10, 3 Stat. 444.

§ 1564. (R. S. § 938.) Bailing of property seized under customs laws.

Upon the prayer of any claimant to the court, that any vessel, goods, wares, or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers, for the faithful discharge of their duty; and the appraisement shall be made at the expense of the party on whose prayer it is granted. If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage-duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, as to the

whole or any part of such vessel, goods, wares, or merchandise, and the claimant does not within twenty days thereafter pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares, or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay.

Act Aug. 4, 1790, c. 35, § 67, 1 Stat. 176. Act Dec. 31, 1792, c. 1, § 29, 1 Stat. 298. Act Feb. 18, 1793, c. 8, § 35, 1 Stat. 317. Act June 9, 1794, c. 64, § 1, 1 Stat. 395. Act March 2, 1799, c. 22, § 89, 1 Stat. 695, 696.

The oath of the appraisers was provided for by Jud. Code, § 61, ante, § 1043.

Notes of Decisions

1. Validity and scope of act.
2. Right to delivery on bail.
3. Property bailable.
4. Payment of costs.
5. Payment of duties.
6. Certificate of payment.
7. Order for delivery.
8. Stipulation as to value.
9. Second seizure.
10. Bond and actions thereon.

See § 5779 et seq., post, as to claim for property seized under customs laws.

1. Validity and scope of act.—This section remains in full force notwithstanding the Customs Act of June 10, 1890, and in case of seized goods, and particularly in case of goods liable for forfeiture, this section leaves nothing for customs officers to decide or control in the regular line of their duties. In re Chichester (C. C. 1891) 48 Fed. 281, 286.

This section as formerly enacted in the act of 1799 was merely declaratory of the common law. U. S. v. One Thousand Two Hundred and Ninety-One Bales of Tobacco (D. C. 1872) Fed. Cas. No. 15,965.

2. Right to delivery on bail.—A delivery on bail is not compulsory on the court, but is a matter of sound discretion. Fifteen Pieces of Black Silk (D. C. 1869) Fed. Cas. No. 4,779.

Vessels and cargoes liable for forfeiture may be delivered to the claimants upon giving a bond for value. U. S. v. The Pitt (D. C. 1818) Fed. Cas. No. 16,052.

3. Property bailable.—Section 89 of the act of 1799, substantially re-enacted herein, applied only to seizures for violations of that act. The Struggle (C. C. 1813) Fed. Cas. No. 13,550; Fifteen Pieces of Black Silk (D. C. 1869) Fed. Cas. No. 4,779.

Under this and the two following sections a vessel libeled for forfeiture for violation of the neutrality laws, in that she was fitted out and armed to be employed in the service of a body of Cuban insurgents to commit hostilities against the subjects of the king of Spain, should not, in the exercise of a sound discretion, be released on bond, pending the continuance of the insurrection, prior to the determination of the cause. U. S. v. The Three Friends (1897) 17 Sup. Ct. 495, 503, 166 U. S. 1, 41 L. Ed. 897.

4. Payment of costs.—Under this section, a claimant of goods seized by the United States for undervaluation, under the customs laws, on giving the bond therein required, is entitled to have the goods delivered to him, and cannot be required, as a condition precedent to such delivery, to pay the costs incident to such seizure. The government is amply protected as to such costs by the bond in case of recovery, and the omission of the section to require their payment in advance must be regarded as intentional. U. S. v. Eight Cases of Paper (D. C. 1899) 98 Fed. 416.

5. Payment of duties.—The requirement of this section of payment of duties in like manner as if the same had been legally entered means only that the claimant shall as a condition precedent to obtaining the goods pay the duties as claimed by the United States, to be summarily estimated and determined by the collector, on the theory of a lawful entry of the goods, taking it for granted that such lawful entry could have been made. In re Chichester (C. C. 1891) 48 Fed. 281, 286.

The jurisdiction conferred on the board of general appraisers, by § 5595, post, to review the decision of the collector as to the rate and amount of duties, extends only to merchandise lawfully entered and regularly invoiced and appraised; and they have no jurisdiction, in the case of goods seized and libeled for forfeiture in the federal courts, to review the collector's determination of duty to be paid thereon, as required by this section, in order to secure delivery of such goods to the claimant. Id.

The amount of duties payable on giving bond for the value of goods seized is only that demandable if the fairness of the importation had not been impeached. U. S. v. Segars (D. C. 1859) Fed. Cas. No. 16,249.

6. Certificate of payment.—Under this section as formerly enacted it was necessary that the certificate show payment of all burdens or taxes imposed upon the property by the United States as the condition of allowing it to be imported, including additional sums levied under the statute where the appraised value exceeded the value at which the goods were entered. U. S.

v. Three Horses (C. C. 1870) Fed. Cas. No. 16,500.

7. Order for delivery.—Where property has been seized by a collector of customs, and reported for libel and attached, and the claimant has given bond for the payment of duties as provided by this section, a warrant or order for the delivery of goods should run to the marshal, who will serve a certificate thereof upon the collector. The G. G. King (D. C. 1883) 16 Fed. 921.

8. Stipulation as to value.—Where a stipulation for value is given in a sum agreed upon, the stipulators are not entitled to any reduction for erroneous estimation of value, or for injury by careless handling of the goods by the collector's employés. U. S. v. Two Trunks (D. C. 1879) Fed. Cas. No. 16,592.

9. Second seizure.—A vessel which is seized under a libel of forfeiture for violating the revenue laws, and is released on bond, is not subject to seizure in a different district under a libel alleging other violations committed during the same period. U. S. v. The Haytian Republic (1893) 59 Fed. 476, 8 C. C. A. 182, distinguishing The Langdon Cheves (C. C. 1819) Fed. Cas. No. 8,063, affirming (D. C. 1893) 57 Fed. 508, and judgment reversed (1894) 14 S. Ct. 992, 154 U. S. 118, 38 L. Ed. 930.

10. Bond and actions thereon.—The bond must be for the actual cash value of the property at the time and place of seizure, without any deduction for duties paid, whether the property has been seized in warehouse or in the hands of the importer. U. S. v. Three Horses (C. C. 1870) Fed. Cas. No. 16,500; U. S. v. Segars (D. C. 1859) Fed. Cas. No. 16,249; Four Cases Silk Ribbons (D. C. 1867) Fed. Cas. No. 4,986; U. S. v. 12,347 Bags of Sugar (D. C. 1868) Fed. Cas. No. 16,555; Same v. One Thousand Two Hundred and Ninety-One Bales of Tobacco (D. C. 1872) Fed. Cas. No. 15,965; Same v. Cargo of Sugar (D. C. 1874) Fed. Cas. No. 14,721. CONTRA, U. S. v. One Thousand Three Hundred and Eighty-Two Hogsheads of Sugar (D. C. 1862) Fed. Cas. No. 15,962.

Judgment cannot be rendered on the bail bond until after 20 days from the decree of condemnation, and then in open court. McLellan v. U. S. (C. C. 1812) Fed. Cas. No. 8,895.

A bond voluntarily given upon the delivery of property on bail is good, although the condition does not exactly conform to the statute. The Struggle (C. C. 1813) Fed. Cas. No. 13,550.

Even if a bond given upon delivery were void for not exactly conforming to the statute, the court would, by attachment, enforce a redelivery of the property by the claimant. Id.

Where the goods have been seized in warehouse, it seems that the duties may be deducted, in determining the amount of the bond. U. S. v. Three Horses (C. C. 1870) Fed. Cas. No. 16,500.

Judgments upon duty bonds against a surety are valid, although the suits were protracted until the principal obligor and cosurety became insolvent. Laches cannot be imputed to the government. (1827) 2 Op. Atty. Gen. 51.

Judgments upon duty bonds against a surety are valid, although the suits were protracted until the principal obligor and cosurety became insolvent. It is settled law that no laches can be imputed to the government, and that no voluntary forbearance, either to institute or to press a suit against the principal, can discharge the sureties. Id.

The supreme court has jurisdiction of an action on a bond given to the collector of customs of the United States, conditioned for the delivery on demand of certain property seized or forfeited to the United States, where the facts of forfeiture and of the seizure are conceded by the bond, since those facts are the only questions for the federal court. Sailly v. Cleveland (N. Y. 1833) 10 Wend. 156.

Cited without definite application, Hoyt v. U. S. (1850) 10 How. 109, 137, 13 L. Ed. 348; U. S. v. Ames (1878) 99 U. S. 35, 39, 25 L. Ed. 295; Same v. One Purple Cloth Costume (D. C. 1907) 158 Fed. 899.

§ 1565. (R. S. § 939.) Sale after condemnation.

All vessels, goods, wares, or merchandise which shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising, a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such

sale by the person selling the same to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed.

Act Aug. 4, 1790, c. 35, § 68, 1 Stat. 177. Act Dec. 31, 1792, c. 1, § 29, 1 Stat. 298. Act Feb. 18, 1793, c. 8, § 35, 1 Stat. 317. Act March 2, 1799, c. 22, § 90, 1 Stat. 696.

The sale of prize property found to be perishing, perishable, or liable to deteriorate, etc., was authorized and regulated by R. S. §§ 4627–4629, post, §§ 8406–8408.

Notes of Decisions

See notes under § 1564, ante.

See § 5780, post, as to sale of property seized under customs laws.

See § 5783, post, as to sale of perishable articles seized under customs laws.

Rights of innocent purchasers.—The innocent purchaser of a brig under forfeiture for smuggling takes her subject to the confiscation as much as the purchaser of a stolen horse takes it subject to the claim of the true owner. (1820) 1 Op. Atty. Gen. 338.

Disposition of proceeds.—The marshal must pay into the treasury of the court the gross proceeds of the sale, less expenses of the sale, including the marshal's commissions, while all other expenses are to be paid by order of court after the proceeds are paid into the registry. The Phebe (D. C. 1837) Fed. Cas. No. 11,065; U. S. v. Fifty-One Dozen Pieces of Merchandise (D. C. 1864) Fed. Cas. No. 15,094.

Cited without definite application, U. S. v. Fifty-Nine Demijohns Aguadiente and Four Barrels of Cigarettes (D. C. 1889) 39 Fed. 401, 402.

§ 1566. (R. S. § 940.) In cases of seizure, bailing of property in vacation.

In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same authority to order any vessel, or cargo, or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term time, and to appoint appraisers, and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale, as are had in like cases when ordered in term time: Provided, That upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases.

Act Aug. 4, 1790, c. 35, § 67, 1 Stat. 176. Act Dec. 31, 1792, c. 1, § 29, 1 Stat. 298. Act Feb. 18, 1793, c. 8, § 35, 1 Stat. 317. Act March 2, 1799, c. 22, § 89, 1 Stat. 695, 696. Act April 5, 1832, c. 66, 4 Stat. 503.

Notes of Decisions

See notes under § 1564, ante, and § 8405, post.

Suit on bond.—In a suit on a bond for the redelivery of property seized, the amount of the judgment is the highest price for the property between the date of the bond and the date of the judgment. U. S. v. The Rob Roy (C. C. 1870) Fed. Cas. No. 16,179.

Cited without definite application, U. S. v. Ames (1878) 99 U. S. 35, 40, 25 L. Ed. 295; Hawgood & Avery Transit Co. v. Dingman (1899) 94 Fed. 1011, 1014, 36 C. C. A. 627; The John D. Dailey (D. C. 1907) 158 Fed. 642.

§ 1567. (R. S. § 941, as amended, Act March 3, 1899, c. 441.) Delivery bond in admiralty proceedings; general bond by owner of vessel.

When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay

the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libelant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. And the owner of any vessel may cause to be executed and delivered to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the court in which he is marshal, conditioned to answer the decree of said court in all or any cases that shall thereafter be brought in said court against the said vessel, and thereupon the execution of all such process against said vessel shall be stayed so long as the amount secured by such bond or stipulation shall be at least double the aggregate amount claimed by the libelants in such suits which shall be begun and pending against said vessel; and like judgments and remedies may be had on said bond or stipulation as if a special bond or stipulation had been filed in each of said suits. The court may make such orders as may be necessary to carry this section into effect, and especially for the giving of proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed, and further security may at any time be required by the court. If a special bond or stipulation in the particular cause shall be given under this section, the liability as to said cause on the general bond or stipulation shall cease.

Act Aug. 4, 1790, c. 35, § 67, 1 Stat. 176. Act Dec. 31, 1792, c. 1, § 29, 1 Stat. 298. Act Feb. 18, 1793, c. 8, § 35, 1 Stat. 317. Act March 2, 1799, c. 22, § 89, 1 Stat. 695, 696. Act March 3, 1847, c. 55, 9 Stat. 181. Act March 3, 1899, c. 441, 30 Stat. 1354.

This section, as enacted in the Revised Statutes, closed with the words, "may be recovered at the time of rendering the decree in the original cause." The further provisions, beginning with the words, "And the owner of any vessel may cause," etc., to the end of the section as set forth here, were added by amendment by Act March 3, 1899, c. 441, cited above.

The delivery of prize property to the claimants on stipulation, deposit, or other security, was restricted and regulated by R. S. § 4626, post, § 8405.

Notes of Decisions

1. Construction of section in general.
2. Presumption as to stipulation given.
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4. —— Bond for delivery under state law.
5. Bonding proceeds.
6. Authority to take.
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15. Validity of stipulations in general.
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17. Conditions in stipulations in general.
18. Amount of bond.
19. —— Additional security and keeping security good.
20. —— Reducing amount of stipulation.
21. Effect of giving stipulation.
22. —— Waiver of defects in process, etc.
23. —— Pre-existing and subsequent liens on vessel.
24. —— Judgment against vessel after release.
25. —— Recall or rearrest of property after release.
26. Accrual of liability of sureties or stipulators.
27. Estoppel of sureties to resist liability.
28. Extent of liability of sureties.
29. —— Interest.
30. —— Liability to persons intervening after stipulations.
31. Release and discharge of sureties.
32. —— Amendment of libel.
33. —— Rearrest of vessel.
34. —— Taking other security.
35. —— Dismissal of suit.
36. Death of stipulator.
37. Death of libelant.
38. Cancellation of stipulations on dismissal of libel.
39. Rights of sureties claiming by subrogation.
40. Set-off against libelant of cost of stipulation.
41. Enforcement of liability on bond or stipulation—Right to judgment in general.
42. —— Amount of judgment.
43. —— Proceedings for entry of judgment in general.
44. —— Demand against claimant.

45. — Time of entering judgment.
46. — Effect of judgment in general.
47. — Lien of judgment.
48. — Summary judgment.
49. — Enforcement by contempt.
50. — Enforcement by attachment.

See, also, notes under § 1536, Admiralty Practice, lines 260 et seq.

1. Construction of section in general.—This section is only a limit on the marshal's power to stay admiralty process, and does not affect the court's action. The Three Friends (D. C. 1897) 78 Fed. 173.

2. Presumption as to stipulation given.—A stipulation in admiralty proceedings, nothing to the contrary being shown, will be presumed to have been given under this section. Ex parte Warden (1883) 2 Sup. Ct. 383, 384, 108 U. S. 153, 27 L. Ed. 685.

3. Suits or proceedings in which stipulation may be given or required.—In salvage proceedings neither party is of right entitled to have a delivery of the property on bail, and the vessel owner is not in default in waiting for the regular termination of the salvage proceedings. The Nathaniel Hooper (C. C. 1839) Fed. Cas. No. 10,032.

A libel in rem for breach of charter party demanding a stated sum in damages is sufficient to hold the res to bail, although specific breaches showing specific amounts of damage are not alleged. Peru v. The North America (D. C. 1853) Fed. Cas. No. 11,017a.

When property is taken for security by a warrant of attachment, the attachment may be dissolved and the property restored to the claimant on his filing a stipulation, with sureties, according to the form used by the court. Poland v. The Spartan (D. C. 1828) Fed. Cas. No. 11,246.

On a dispute between the master and owners of a British vessel, the court ordered possession to be delivered to the owners on payment of a sum to secure the payment of any sum found due to the master on a suit to be instituted by him within 20 days. Muir v. The Brisk (D. C. 1870) Fed. Cas. No. 9,901.

Act March 3, 1851 (sections 8020–8027, this compilation), to limit the liability of shipowners, confers no power on the court to discharge the vessel from all liens upon her, on the filing of a stipulation by the owners in the full value of the vessel and freight, for the benefit of all parties having claims upon her. But this may be done under the general admiralty powers of the court. Place v. The City of Norwich (D. C. 1866) Fed. Cas. No. 11,202.

In an action in rem against the vessel alone by a single freighter a court of admiralty cannot order the release of the owners on giving a stipulation for value of vessel and freight. Id.

Where, in an action to enforce a lien for wages on freight money due the boat, the cargo was arrested, the owners of the cargo should pay into court the freight acknowledged to be due, and thus obtain a release of the property and a discharge of their liability. They cannot be compelled to give bail for the value of the cargo. The Monadnock (D. C. 1871) Fed. Cas. No. 9,704.

All seizures are embraced within this section without regard to the cause of action, and owners are empowered to retain possession in all cases on giving security. The Poconoket (D. C. 1894) 61 Fed. 106, 109. And see U. S. v. The Pitt (D. C. 1818) Fed. Cas. No. 16,052.

A vessel libeled for forfeiture for violation of the neutrality laws may, in the court's discretion, be released on bond; and such release will be granted where the government is not ready for hearing, and there is no reason to suppose that the vessel will again violate the law. The Three Friends (D. C. 1897) 78 Fed. 173.

Where a steam tug was seized for forfeiture under R. S. § 4189, post, § 7775, relating to fraudulent registry, and R. S. § 5283 (repealed, and reenacted as Cr. Code, § 11, being section 10175, post), relating to arming vessels against friendly powers, on a libel charging, upon responsible authority, that she had been fitted out for, and was about to depart upon, a hostile expedition against Hayti, and was registered under a false certificate of ownership, and application was made by the alleged owner, under rule 11, for appointment of appraisers for the purpose of bonding the vessel, it was held that rule 11 was not designed for such a case, and that the vessel should not be released on bond, and the application for appraisers denied. The Mary N. Hogan (D. C. 1883) 17 Fed. 813.

The right of a vessel owner to protect himself from loss resulting from a seizure under admiralty process, by giving bond and retaining possession, extends to possessory actions; and, if he fails to exercise the right, he cannot require the libelant to give security for such damages. The Poconoket (D. C. 1894) 61 Fed. 106.

In a suit between equal part owners for partition of a schooner which is in commission, the vessel will not be seized and kept in custody of the marshal under expense, provided the respondent will give a bond for her delivery sufficient to protect the interest of libelant. The Emma B. (D. C. 1905) 140 Fed. 770.

It seems that upon a seizure of a vessel on an attachment the master may bind the owners by a bond requir-

ed to procure her release. Stedman v. Patchin (N. Y. 1861) 34 Barb. 218.

4. —— **Bond for delivery under state law.**—See Rouse v. Jayne (1848) 14 Ala. 727.

5. **Bonding proceeds.**—The claimants and not the libelants will be allowed to bond the proceeds of a vessel where libelants' claim is denied in the pleadings. On a libel on a bottomry bond, where the vessel is sold and the proceeds paid into court, one claiming as a mortgagee in possession under an overdue and unpaid mortgage will be allowed to bond the proceeds, rather than the libelant, whose claim is denied in the pleadings. The Archer (D. C. 1878) Fed. Cas. No. 508.

6. **Authority to take.**—The clerk is not authorized to take a stipulation for the discharge of a vessel, but the same must be done in court or at chambers, or before a commissioner. The Jeanie Landles (D. C. 1883) 17 Fed. 91.

7. **Time for giving.**—A bond in the general form of a common-law bond, admittedly given to secure the release of a vessel, approved by the judge and filed with the clerk, is sufficient as a delivery bond for possession of the property by the claimant as against the libelant, pending suit, though given before the vessel was actually arrested, where process for that purpose had been previously issued to the marshal. Munks v. Jackson (1895) 66 Fed. 571, 13 C. C. A. 641, affirming judgment Jackson v. Munks (C. C. 1893) 58 Fed. 596. Where a libel in rem is filed against a vessel then within the jurisdiction, and, without issuance of monition or seizure of the vessel, the claimants voluntarily give a stipulation for value conditioned to perform and pay any decrees rendered, the court has jurisdiction to proceed with the cause just as if the vessel had first been seized, and a stipulation then given. The Frank Vanderkerchen (D. C. 1898) 87 Fed. 763.

Quære, if a delivery on bail can be ordered by the court in vacation before the return term of the process. Ex parte Robbins (C. C. 1814) Fed. Cas. No. 11,879.

Where, after entry of a decree on a libel to recover possession of a vessel, respondent gave notice of appeal, but did not immediately perfect his appeal, an application by the owner to bond the vessel was refused, with direction that the decree be executed unless the appeal was perfected in two days. Muir v. The Brisk (D. C. 1870) Fed. Cas. No. 9,901.

A vessel may be released on bond at any time before default is entered on the return of process; but whether it can be so bonded as a matter of right after a default, quære. The Martha C. Burnite (D. C. 1878) Fed. Cas. No. 9,147.

8. **Notice of taking.**—Where the stipulation for the discharge of a vessel is taken before the judge at chambers, notice thereof must be given to the marshal by writ of supersedeas issued by the clerk. Where the stipulation is taken before a commissioner, notice must be given by order issued by the commissioner. The Jeanie Landles (D. C. 1883) 17 Fed. 91.

Before property can legally be delivered on bail in cases in which the United States are a party, due notice must have been given to the district attorney. Ex parte Robbins (C. C. 1814) Fed. Cas. No. 11,879.

9. **Appraisement of vessel.**—An appraisement by an appraiser nominated by the clerk without notice to the opposite party will be set aside. Alliance Ins. Co. v. The Morning Light (D. C. 1862) Fed. Cas. No. 246a.

Where, under rule 54, a stipulation is given for the value of the vessel, instead of the "transfer" provided for by statute, a "due appraisement" of the vessel is requisite to the validity of the proceeding. As, however, it is competent for a court, having ordered an ex parte appraisement, to order a reappraisement and further security on cause shown by any creditor, the mere fact that the first appraisement and giving of the stipulation were ex parte does not render the proceeding void, or invalidate an ex parte injunction against other suits; and a subsequent suit in another district, for the same cause, should be dismissed. The H. F. Dimock (D. C. 1892) 52 Fed. 598.

10. **Form of bond or stipulation in general.**—District court in admiralty may deliver property on bail, either in the form of bond or stipulation, on which judgment may be rendered. The Alligator (C. C. 1812) Fed. Cas. No. 248.

Though Nonimportation Act March 1, 1809, c. 91, revived by Act March 2, 1811, c. 96, refers to this section as to the mode of prosecution, it does not follow that all interlocutory proceedings of the court are governed by it; and therefore a bond given to release a vessel attached under the nonimportation law need not conform to the provisions of this section. A bond voluntarily given upon the delivery of property on bail, on application of the claimant, is good, although the condition does not exactly conform to this section. If such a bond is void, because it does not conform to the terms of the statute, the court will enforce the redelivery of the property. The Struggle (C. C. 1813) Fed. Cas. No. 13,550.

11. —— **Stipulation under § 6950.**—Inasmuch as a suit brought in the district court in admiralty to enforce a lien on a vessel given by state laws is not a "proceeding under the laws of any state," but is under the laws of

the United States, the government, if claimant in such suit, is not entitled to have the res discharged from arrest by giving stipulation under R. S. § 3753, post, § 6950, providing that when property of the United States shall in a "proceeding under the laws of any state" be seized, etc., the secretary of the treasury may cause a stipulation to be entered into, etc. The Revenue Cutter (D. C. 1876) Fed. Cas. No. 11,-712.

12. Competency of sureties.—A married woman will not be accepted as surety on a stipulation in admiralty. The Antelope (D. C. 1867) Fed. Cas. No. 481.

13. Justification of sureties.—Until satisfactory proof is put in that the officer, in accepting a bond in admiralty proceedings, was deceived or did not properly perform his duty, the court will assume that the security is sufficient; and when the surety has made oath that he is worth a sufficient sum, over and above all his just debts and liabilities, the stipulation is prima facie good. The Snap (D. C. 1884) 24 Fed. 510.

14. Opening default on application for bond.—The default of libelant on an application to bond a vessel, held should be opened with leave to file objections to the right of the applicant to appear as claimant. The Two Marys (D. C. 1879) Fed. Cas. No. 14,300.

15. Validity of stipulations in general.—A release bond for a vessel seized for violation of the revenue laws, which contains no condition, and is for double the value of the vessel as if drawn under this section, is valid, under R. S. § 938, ante, § 1564, as an obligation to pay at least the value of the vessel, since the condition is contained in the statute. The bond is not rendered invalid by the mere omission from the condition clause of a specified sum to be paid in case of default, when the bond contains a distinct obligation to pay the appraised value. The Haytian Republic (1893) 59 Fed. 476, 8 C. C. A. 182, affirming (D. C. 1893) 57 Fed. 508.

Stipulators cannot avoid a bond conditioned to pay the judgment or return the vessel, though the statute requires that such bonds shall be conditioned to pay the judgment, as the condition of the bond, as executed, is not as stringent as the statute requires. Rouse v. Jayne (1848) 14 Ala. 727. And see Whitsett v. Womack (1845) 8 Ala. 466.

A bond taken by an officer for the discharge of a vessel, which had been attached, is not taken in colore officii, but for the benefit of the parties who attached, and therefore is not void for not complying with all the requisitions of the statute. The bond need not show on its face that it was taken by or before the officer who issued the attachment, and it is sufficient that it binds the obligor to pay all claims, which shall be established to have been subsisting liens, without the words of the statute "at the time of exhibiting the same, respectively, any defects or irregularities in the preliminary affidavits do not avoid the bond, when it is made voluntarily." Franklin v. Pendleton (1850) 5 N. Y. Super. Ct. (3 Sandf.) 572.

16. —— Common-law bond.—If a bond for the delivery of a boat seized under process, in a libel suit, is good as a common-law bond, it may be proceeded on as a stipulation, although it does not conform to the statute. Bell v. Thomas (1845) 8 Ala. 527.

In the case of a libel against a steamboat for work and labor, where the bond of the stipulators is conditioned in the alternative for the payment of the judgment which may be rendered, or for the forthcoming and delivery of the boat to answer the sentence and decree of the court, the stipulators cannot assert that they are discharged by reason of the alternative condition of the bond, as the bond in fact imposes a less obligation than the statute requires; and, moreover, the obligation would be good as a common-law bond, upon which the court would have jurisdiction to render judgment as an incident in the cause. Murphy v. Roberts (1857) 30 Ala. 232.

17. Conditions in stipulations in general.—The court may permit a stipulation to be given to satisfy the decree, reserving to the stipulator the right to deny the legality of the custody claimed by the marshal, and, if successful in such denial, to ask to be relieved therefrom. The Roslyn (D. C. 1877) Fed. Cas. No. 12,068.

18. Amount of bond.—This section does not abridge the power of a court of admiralty in a suit in rem to accept bail for less than double the amount of libelant's demand. Peru v. The North America (D. C. 1853) Fed. Cas. No. 11,017a.

In fixing the amount of the stipulation for the release of a libeled vessel where there is a dispute as to its value, which is less than libelant's claim, the bond will be required for the highest amount, subject to the right of the claimant on final hearing to prove the value, to which libelant's recovery will be limited. The Twilight (D. C. 1905) 138 Fed. 1005.

A vessel, cargo, and freight attached on a libel on a bottomry bond will be bonded for their full amount, although the proceeds of the vessel are alone sufficient to meet the claim. The Archer (D. C. 1878) Fed. Cas. No. 507.

The vessel may be discharged on stipulation for its full value, though the claims for which libels are filed exceed such amount. The Antelope (D. C. 1867) Fed. Cas. No. 481.

On a libel against a vessel, though the

claims exceed her value, the amount of the freight is not to be included in the stipulation. The Vivid (D. C. 1869) Fed. Cas. No. 16,977.

An agreement fixing the amount of penalty or liquidated damages is not conclusive upon a court of admiralty as to the amount of bail in a suit in rem. Peru v. The North America (D. C. 1853) Fed. Cas. No. 11,017a.

19. —— **Additional security and keeping security good.**—Courts of admiralty, by virtue of their general powers, as well as under Rule 46, have power to require the security upon any bond or stipulation given as a substitute for property arrested in rem to be kept good, and to require additional security to be filed, and in default thereof that the defense be stricken out. Cases of this kind, not provided for by the general rule, may be met by order in the cause. The Virgo (C. C. 1876) Fed. Cas. No. 16,976; The City of Hartford (D. C. 1882) 11 Fed. 89. Accordingly it has been held that where, after an appeal by libelant from a decree dismissing the libel, the stipulators for value become insolvent. the court would require the claimant to furnish new stipulators. The Virgo (C. C. 1876) Fed. Cas. No. 16.976. That where one of the sureties to the stipulation given for the release of a vessel died insolvent, and claimant was a foreign corporation which had made an assignment for creditors, an additional surety must be given. The City of Hartford (D. C. 1882) 11 Fed. 89. But see Gaines v. Travis (D. C. 1848) Fed. Cas. No. 5,179, and Barney Dumping Boat Co. v. The Mutual (D. C. 1897) 78 Fed. 144, holding that after a vessel has been released on stipulation, she is freed forever of the lien, and the court therefore has no authority to require the claimant to give any additional security.

Under the admiralty rules of the district court for the Eastern district of New York, where the original sureties in a stipulation for the release of a vessel in an action in rem have become insolvent the court may order the security to be strengthened, and, in default of obedience to such order, may strike out the claimant's answer, and allow libelant to have a decree, enforceable against the claimant and such sureties, to the same extent as would be proper if no issue had been raised on the merits. And such procedure could not be deemed a punishment of the claimant for failure to obey the court's order, but was proper to bring to an end a proceeding in rem in which, through the fault of the claimant, the libelant had neither the res nor security. The Fred M. Lawrence (1899) 94 Fed. 1017, 36 C. C. A. 631.

Increased security, under rule 55, will not be required where the security given under rule 44 is not apparently insufficient, where a single libel is filed against a cargo belonging to numerous persons. Edwards v. Thirty-Five Boxes of Gold Dust, Saved from Wreck of the Union (D. C. 1851) Fed. Cas. No. 4,299a.

20. —— **Reducing amount of stipulation.**—If a vessel and cargo are attached upon the allowance of a libel for salvage wherein no amount is named, and if a release of the property attached is subsequently effected, out of court, and, by agreement of the parties, a motion to reduce the amount of the stipulation given in advance of a hearing of the cause upon its merits, made after the vessel and cargo are no longer within the jurisdiction, will be denied; but, if a stipulation is executed under an order of court, or under this section the rule is otherwise. The Monarch (D. C. 1887) 30 Fed. 283.

In the case of separate suits for salvage by different salvors in different jurisdictions, for services rendered on the same voyage, where claimants have once bonded the property, the court will reduce the bail to a reasonable security for the claim. Forbes v. The Merrimac (D. C. 1866) Fed. Cas. No. 4,927.

Where the claimant of a vessel seized in admiralty upon a libel for the enforcement of liens thereon, for which such claimant is not personally liable, to secure its release gives a stipulation without first having the vessel appraised, he may be permitted, on seasonable application, to show that such stipulation was given under a misapprehension either as to the nature of the obligation or the value of the vessel; and, if it appears that he is equitably entitled thereto, the court should reduce the amount of the stipulation to the actual value of the vessel. The Iris (1900) 100 Fed. 104, 40 C. C. A. 301, reversing decree (D. C. 1898) 88 Fed. 902.

21. **Effect of giving stipulation.**—The bond becomes the substitute for the property, and the remedy of libelants in case they prevail is transferred from the property to the bond or stipulation. The Palmyra (1827) 12 Wheat. 1, 6 L. Ed. 531; The Steamer Webb (1871) 14 Wall. 406, 20 L. Ed. 774; The Wanata (1877) 95 U. S. 600, 24 L. Ed. 461; U. S. v. Ames (1878) 99 U. S. 35, 42, 25 L. Ed. 295; The Belgenland (1883) 108 U. S. 153, 2 Sup. Ct. 860, 29 L. Ed. 152.

Where, on motion of a libelant in rem, the court made an order, which it had power to make, setting aside a sale of the libeled vessel under a decree entered at the same term in another suit, on the ground of fraud and collusion, unless a bond was given by the claimant, and he furnished an ordinary claimant's bond, on which the vessel was released, he cannot thereafter

be heard to deny that the bond stands in the place of the vessel, and is available to libelant in case of his recovery, unaffected by the prior decree and sale. The New York (1902) 113 Fed. 810, 51 C. C. A. 482.

Where a vessel has been released on stipulation for her value, the amount of damages recoverable in a collision case cannot exceed her actual value, though the bond is for a greater sum. Wells v. The Ann Caroline (C. C. 1861) Fed. Cas. No. 17,389b.

The vessel is absolutely discharged by a release upon a bond or stipulation given on its arrest for a claim. U. S. v. Ames (C. C. 1876) Fed. Cas. No. 14,440. Where the possession of a vessel is delivered up on the giving of a bond for value, it must be defended as if it had never been in the custody of the court. An attachment for contempt will not lie for its forcible taking. U. S. v. Towns (D. C. 1874) Fed. Cas. No. 16,534.

Where, a vessel is released upon a stipulation given for her value, and by subsequent amendment, in the progress of the cause, is allowed to plead the statutes in limitation of liability, the owners are not estopped by the stipulation from showing that the stipulated value included the value of subsequent repairs. The Doris Eckhoff (D. C. 1887) 30 Fed. 140.

Upon ordinary arrests of property in suits in rem in admiralty, when a bond for the release of vessel or goods arrested is given to the marshal it has been the long and constant practice of the courts to require the delivery of the property without any payment to the marshal of his fees or costs, since the statute does not attach any such requirement to the obligation to discharge the vessel or property from arrest. U. S. v. Eight Cases of Paper (D. C. 1899) 98 Fed. 416, 417.

A bond, having been executed to relieve the ship from liability under a libel for injuries to a stevedore, was continued in force after libelant's death to secure any judgment which libelant's personal representative might subsequently recover. The City of Belfast (D. C. 1905) 135 Fed. 208.

A stipulation for the release of a libeled vessel takes the place of the vessel, so far as the claim of the libelant is concerned, and the surety cannot, by taking an assignment of such claim, keep it alive as a lien on the vessel as against a prior mortgagee. The Vigilant (D. C. 1909) 175 Fed. 226.

A stipulation for value given by the claimant for the release of a libeled vessel, pursuant to a rule of the court in admiralty, takes the place of the vessel itself for all purposes of the suit, and is available for the payment of all sums decreed in favor of the libelant against the vessel, including interest and costs, notwithstanding the fact that an additional stipulation for costs has been given, and the amount recoverable thereon, and for which execution may issue, includes interest on the agreed value of the vessel from the date of the stipulation where it is so conditioned in accordance with the practice of the court. The Mt. Desert (D. C. 1911) 186 Fed. 395.

The sureties become parties to the cause, and are bound by orders subsequently made therein to the same extent as the claimant. A decree rendered upon an amended libel, which the court had power to permit to be filed, is as binding upon the sureties as upon their principal. Fairgrieve v. Marine Ins. Co., Limited, of London (1901) 112 Fed. 364, 50 C. C. A. 286, writ of certiorari denied (1902) 22 S. Ct. 943, 186 U. S. 484, 46 L. Ed. 1261.

A final decree, awarding damages in the suit, may be entered against both principal and surety at the time of its rendition. The Columbia (1901) 109 Fed. 660, 48 C. C. A. 596.

When a stranger to an original libel in rem, claiming to be the owner, gives a release bond conditioned to restore the vessel as the court shall direct, pay damages for its use and detention, and "perform any other judgment which the court may render," etc., he thereby becomes a party to the cause, and is bound by a default decree thereafter entered in accordance with stipulations of the bond. Briggs v. Taylor (1898) 84 Fed. 681, 28 C. C. A. 518.

A bond given under this section to release a vessel does not convert the proceeding in rem into a proceeding in personam, and the vessel seized continues subject to the jurisdiction of the court notwithstanding such bond has been given, so that a final decree may be enforced against her by sale, if within reach of process, and saving the rights of intervening parties. Thompson v. The J. D. Morton (1858) 8 Ohio St. 222.

22. —— Waiver of defects in process, etc.—The giving of a stipulation of value to obtain the release of the vessel waives all defects in the service of process. The Acadia (D. C. 1859) Fed. Cas. No. 24.

The execution of a delivery bond by the owner of a vessel in a proceeding in rem for a penalty or forfeiture is a waiver of the objection of the want of a prior seizure. The Lewellen (D. C. 1868) Fed. Cas. No. 8,307; The Lewellen (D. C. 1868) Fed. Cas. No. 8,308.

23. —— Pre-existing and subsequent liens on vessel.—A vessel discharged on stipulation of value fixed at the amount claimed in the libel returns into the hands of her owner subject to all previously existing liens or charges, the same as before her seizure, except that on account of which she was seized; and she is subject to any subsequently accruing liens or charges in the hands

of her owner, or in the hands of any person to whom she may be transferred. The Union (C. C. 1857) Fed. Cas. No. 14,346; Roberts v. The Huntsville (C. C. 1877) Fed. Cas. No. 11,904; Carroll v. The Leathers (D. C. 1853) Fed. Cas. No. 2,455.

Where a vessel has been released from arrest on stipulation for value, she may contract new debts which will operate as liens, which will have preference over the claim of the sureties who are subrogated to the rights of libelant. Carroll v. The Leathers (D. C. 1853) Fed. Cas. No. 2,455.

A libelant who consents to the release of a vessel libeled and seized under process waives his priority of claim as against subsequent lienors under whose libels the vessel is condemned and sold. The A. R. Gray (D. C. 1874) Fed. Cas. No. 519.

24. —— **Judgment against vessel after release.**—After bond has been given for the discharge of an attachment on a boat, a judgment ordering the sale of the boat cannot be rendered. St. Louis Perpetual Ins. Co. v. Ford (1848) 11 Mo. 295.

After a stipulation discharging the lien created by the acts of 1824 and 1836 on vessels, a condemnation of the vessel on final judgment under the acts cannot be awarded. Richardson v. Cleaveland (Ala. 1837) 5 Port. 251.

25. —— **Recall or rearrest of property after release.**—A vessel discharged from arrest upon giving the required bond or stipulation is forever discharged from the lien which was the foundation of the action, and the court has no jurisdiction over her for the same cause of action, and cannot order her rearrest. The White Squall (C. C. 1857) Fed. Cas. No. 17,570; The Thales (C. C. 1872) Fed. Cas. No. 13,856 (affirming [D. C. 1869] Fed. Cas. No. 13,855); U. S. v. Ames (C. C. 1876) Fed. Cas. No. 14,440; Roberts v. The Huntsville (C. C. 1877) Fed. Cas. No. 11,904; Home Ins. Co. v. The Concord (D. C. 1870) Fed. Cas. No. 6,659; The Old Concord (D. C. 1870) Fed. Cas. No. 10,482; Senab v. The Josephine (D. C. 1877) Fed. Cas. No. 12,663; The Nahor (D. C. 1881) 9 Fed. 213; Johnson v. The Hattie Bell (D. C. 1894) 65 Fed. 119; The Cleveland (D. C. 1899) 98 Fed. 631; Allison v. The Lavelle Young (1903) 2 Alaska, 104. And see The William F. McRae (D. C. 1885) 23 Fed. 557. Even by consent of the parties. Senab v. The Josephine (D. C. 1877) Fed. Cas. No. 12,663. Unless her discharge was obtained through fraud or mistake, even where the libel is dismissed without prejudice. The Union (C. C. 1857) Fed. Cas. No. 14,346; The Favorite (D. C. 1877) Fed. Cas. No. 4,698; The Cleveland (D. C. 1899) 98 Fed. 631. In which case it would be competent for the court to relieve the parties concerned, on an application within a reasonable time, by ordering the vessel back into the custody of the officer. The Union (C. C. 1857) Fed. Cas. No. 14,346. And where the bond is void because it does not conform to the terms of the statute, the court will enforce the redelivery of the property. The Struggle (C. C. 1813) Fed. Cas. No. 13,550. The discharge of a vessel on the execution and improvident acceptance of a bond in which the only surety was a married woman does not prevent the rearrest of the vessel. The Favorite (D. C. 1877) Fed. Cas. No. 4,698.

The question whether a case is made for the recall of property seized in admiralty, to release which bond has been given, must be determined before a final decree on the bond is rendered in the district court or in the circuit court on appeal. Action on that question cannot be reviewed in the supreme court. U. S. v. Ames (1878) 99 U. S. 35, 25 L. Ed. 295.

Where a vessel is discharged on stipulation of value fixed at the amount claimed in the libel, which is subsequently amended so as to claim a larger amount, she cannot, after a sale to a third person, be ordered again into the custody of the marshal, nor can the claimants be required to pay the purchase money into court. The Union (C. C. 1857) Fed. Cas. No. 14,346.

After the release of a vessel on bond an attachment for contempt will not lie for its forcible taking. U. S. v. Towns (D. C. 1874) Fed. Cas. No. 16,534.

The United States is entitled to but one decree of forfeiture against a vessel for several past violations of the revenue laws, and where a vessel has been once libeled for several such violations, and released on bond, she is not thereafter subject to a second seizure for alleged violations committed during the same period as those for which she has already been seized. U. S. v. The Haytian Republic (D. C. 1893) 57 Fed. 508, distinguishing The Langdon Cheves (C. C. 1819) Fed. Cas. No. 8,063, and decree affirmed (1893) 59 Fed. 476, 8 C. C. A. 182.

26. **Accrual of liability of sureties or stipulators.**—On appeal in admiralty, the circuit court has jurisdiction, under this section, to render judgment on the stipulation against both principals and stipulators, without waiting until the time for perfecting an appeal to the supreme court has expired; and a mandamus will not be granted to vacate the decree because it is a lien on the stipulators' real estate, nor will the supreme court set aside the decree for that reason. Ex parte Warden (1882) 108 U. S. 153, 2 Sup. Ct. 383, 27 L. Ed. 685.

On an appeal to the supreme court, duly entered, with stipulations approved by the court, a judgment will be entered against the stipulators in the district and circuit courts, and such judgment will remain as a lien against them

until the appeal to the supreme court shall have been finally determined. The Belgenland (C. C. 1883) 16 Fed. 430, decree affirmed (1885) 5 S. Ct. 860, 114 U. S. 355, 29 L. Ed. 152.

A bond executed in the district court to secure the release of a vessel, conditioned that the parties shall perform the decree of "the court," means the court which shall ultimately decide the cause; so that where the district court dismissed the libel, but its decree was afterwards reversed on appeal, execution may issue on the bond. U. S. v. The Little Charles (C. C. 1819) Fed. Cas. No. 15,613.

Where property under seizure is delivered to a claimant on his giving a bond conditioned that he would pay the value of the property into court if it were condemned as forfeited by the final decree, the liability of sureties on the bond is fixed on the rendering of such a decree, though the libel on which it was rendered was amended subsequently to the execution of the bond. U. S. v. Mosely (D. C. 1881) 8 Fed. 688.

In the case of a libel against a steamboat for work and labor, where the bond of the stipulators is conditioned in the alternative, for the payment of the judgment which may be rendered "at the next term of the court," or for the forthcoming and delivery of the boat to answer the sentence and decree of the court, it binds them for the performance of the condition, on the final disposition of the cause, although the judgment may be delayed. Murphy v. Roberts (1857) 30 Ala. 232.

Where, during the pendency of a suit in rem to enforce a shipwright's lien, the vessel was delivered to one of the owners under a bond for her return, the principal and sureties in the bond were bound to pay into court the sum stipulated or sufficient to satisfy the lien, where it was adjudged that the shipwright had a lien on the vessel, although the vessel was lost in the meantime. The Two Marys (D. C. 1883) 16 Fed. 697.

27. Estoppel of sureties to resist liability.—The sureties on a bond or stipulation for value cannot take advantage of any irregularity in the proceedings. The Alligator (C. C. 1812) Fed. Cas. No. 248.

One who voluntarily executes a bond to a marshal for the purpose of being substituted for a vessel, and with full knowledge of the valuation, will not be permitted to resist execution on the ground that the bond was erroneously executed to the marshal, and that the valuation should have been made by commissioners appointed by the court. United States v. The Little Charles (C. C. 1819) Fed. Cas. No, 15,613.

Where, on motion of a libelant in rem, the court made an order, which it had power to make, setting aside a sale of the libeled vessel under a decree entered at the same term in another suit, on the ground of fraud and collusion, unless a bond was given by the claimant, and he furnished an ordinary claimant's bond, on which the vessel was released, he cannot thereafter be heard to deny that the bond stands in the place of the vessel, and is available to libelant in case of his recovery, unaffected by the prior decree and sale. The New York (1902) 113 Fed. 810, 51 C. C. A. 482.

Where, after a vessel was attached in a suit by a journeyman for injuries sustained, one C., without filing any formal claim, entered stipulation on behalf of the owners, and received the vessel, but the owners were not named in the stipulation, and afterwards C. filed an answer, by which it appeared that he was merely a consignee, and afterwards one J. filed an answer, alleging that before the attachment he had, as agent for one D., received a bill of sale of the vessel, and that he adopted C.'s answer, the stipulators could not take advantage of the neglect to file a formal claim or to name the owners in the bond, and a decree pro confesso could be entered against them. Todd v. The Tulchen (D. C. 1880) 2 Fed. 600.

28. Extent of liability of sureties.—Stipulators in admiralty, who have entered into stipulations to procure the discharge of a vessel attached under a libel for collision, cannot be made liable for more than the amount assumed in their stipulation as the amount which the offending vessel is worth, with costs as stipulated for. The Ann Caroline (1864) 69 U. S. (2 Wall.) 538, 17 L. Ed. 833. And see The Wanata (1877) 95 U. S. 600, 24 L. Ed. 461.

The undertaking of stipulators, on a libel in rem for the loss of a vessel and cargo by collision, is for their value, and they cannot interfere, in questions relating to the equity of the parties, to amend their pleadings so as to bring within the action all rights which may be legally determined by it. McCready v. The Brother Jonathan (D. C. 1853) Fed. Cas. No. 8,732a.

A bond or stipulation given for the release of a vessel libeled in a suit for collision, brought jointly by the owner of the vessel sunk and the owner and bailee of her cargo, which runs to the libelants jointly and severally and to their and each of their successors and assigns, and is conditioned that the claimant of the vessel shall abide and answer the decree of the court in the cause, is not a mere personal security given to the libelants individually, but stands as well for the payment of any sums which may be decreed in favor of cargo insurers who have paid the loss thereon, and have intervened in the cause by leave of court, claiming to be subrogated to the rights of one of the libelants who sued in behalf of all the cargo owners. The Livingstone (D. C. 1900) 104 Fed. 918, reversed (1902) 113 Fed. 879, 51 C. C. A. 560.

Libelants in salvage proceedings are

not answerable to claimants for sums deposited on bonding the attached property, as rule 68 changes the former practice by securing the return of costs to successful claimants. Edwards v. Thirty-Five Boxes of Gold Dust Saved from Wreck of the Union (D. C. 1851) Fed. Cas. No. 4.299a.

The amount due upon an accounting between the majority and minority owners cannot be applied to diminish the liability of the stipulators on a bond given for the safe return of a vessel. The Susan E. Voorhis (D. C. 1879) Fed. Cas. No. 13,633.

Where the contents of a stipulation after a libel in rem for collision showed libelant's intention to treat the claimant stipulating for release and payment of the award as the only one for that purpose, they could not have the same relief against the other claimant under the 11th admiralty rule as if he had signed the stipulation. The Zodiac (D. C. 1881) 5 Fed. 220, 224.

The necessity for obtaining the release of a vessel from seizure does not necessarily imply that the release was obtained on such conditions as to bind owners personally. Mitchell v. Chambers (1880) 5 N. W. 57, 43 Mich. 150, 38 Am. Rep. 167.

Where a vessel libeled in a suit in rem is released on a stipulation for value, the court is without jurisdiction to enter a decree against the stipulators for a greater sum than that named in the stipulation. The Wanata v. Avery (1877) 95 U. S. 600, 618, 24 L. Ed. 461; The James McCaulley (1910) 181 Fed. 932, 105 C. C. A. 186, modifying decree The Marie Palmer (D. C. 1907) 155 Fed. 894. Unless they are guilty of default or contumacy, in which event they may become liable for interest and costs incurred by delay; but the respondent may become liable for costs beyond the security given for the same, and for additional damages in the nature of interest in case of appeal. The Wanata v. Avery (1877) 95 U. S. 600, 618, 24 L. Ed. 461.

The stipulation or bond in a suit joining the remedy in rem with that in personam only covers the value of the property attached and surrendered. Draper v. The O. C. Clary (D. C. 1863) Fed. Cas. No. 4,071.

Under a release bond, with a penalty for double the amount of the libelant's claim, conditioned to answer and abide by the decree of the court, issued to the marshal, a decree may be entered against the obligors for the amount of the libelant's claim and the costs, although a separate stipulation may have been filed for the costs, provided the decree does not exceed the amount of the penalty of the bond. The Madgie (D. C. 1887) 31 Fed. 926.

The obligations of the sureties of a vessel are not increased by amending the libel by increasing the amount claimed. Darrell v. The Alice Gray (D. C. 1865) Fed. Cas. No. 3,579.

29. —— Interest.—To limit their liability to the value of the vessel, the owners had her appraised under the provisions of R. S. §§ 4283–4289, post, §§ 8021–8027. They then filed a stipulation to perform the final decree in the case. Held, that the allowance of interest upon the amount of the stipulation from the day it was filed in court rested in the discretion of the court below. The Maggie J. Smith (1887) 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

Under a stipulation for value upon the release of a vessel, the obligors are not liable for interest on the sum stipulated, except on default in complying with the terms of the stipulation. Providence Washington Ins. Co. v. The Sydney and The William Worden (C. C. 1891) 47 Fed. 260. And see The Maggie M. (D. C. 1888) 33 Fed. 591.

Under a stipulation for value, making the rules of court a part thereof, where the decree is in excess of the amount, interest is recoverable. The Belle (D. C. 1871) Fed. Cas. No. 1,270.

Adm. Rule 71 provides that where judgment is entered on a bond or stipulation the clerk shall receive, in addition to the amount of the bond, interest for the time which shall "intervene between the entry of the judgment or date of the stipulation and the day when the money shall be paid into court." Held, that where a stipulation given on the release of a vessel from custody recites that it was entered into pursuant to the rules of court, and a decree is afterwards entered against the vessel for more than the sum fixed in the stipulation, interest on the sum so fixed must be computed from the date of the stipulation. The Belle (D. C. 1871) Fed. Cas. No. 1,270.

30. —— Liability to persons intervening after stipulations.—A stipulation given for the release of a vessel upon the original libel to recover damages done to a vessel with which she collided, although it purports to be "for the benefit of whom it may concern," does not bind the sureties to respond to claims set up by intervening petitions filed subsequently to the release; and hence the court should not entertain jurisdiction of such intervening petitions. The Oregon (1895) 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943 (reversing [D. C. 1891] 45 Fed. 62); The Willamette (1895) 70 Fed. 874, 18 C. C. A. 366 (modifying judgment [D. C. 1894] 59 Fed. 797, and decree modified [1895] 72 Fed. 79, 18 C. C. A. 373).

A vessel arrested in a suit to recover damages done to the hull of another vessel by a collision was released on bond. Afterwards an insurance company intervened in the suit, claiming that the cargo of the other vessel had been insured by the company, and had been totally destroyed by the collision. A decree was rendered finding the libeled vessel guilty. Held, that the insur-

ance company should not be allowed to be let in to share in the decree to the extent of what might remain of the penalty of the bond after satisfying the decree in regard to the damage to the other vessel, since the bond was given only to satisfy the cause of action set out in the original libel. Griswold v. The T. W. Snook (D. C. 1892) 51 Fed. 244.

31. **Release and discharge of sureties.**—Sureties of claimant in admiralty proceedings become principal debtors after final judgment against them, and are not discharged by extension of execution against claimant. Act March 3, 1847. The Col. Howard v. Hayden (D. C. 1850) Fed. Cas. No. 3,026.

Where a vessel could not be subjected to any decree in rem for the breach of an executory charter party, the sureties on the bond executed for her release were necessarily discharged. The Monte A. (D. C. 1882) 12 Fed. 331, 333.

Where a stipulation for value given by the claimant of a libeled vessel was conditioned for the payment of the amount awarded by final decree of the trial court "or by any appellate court if an appeal intervene, with interest," the waiving by libelant of further security on an appeal does not release the surety on the stipulation from the further payment of interest thereon, in accordance with its terms, or of costs of the appellate court. The Mt. Desert (D. C. 1911) 186 Fed. 395.

32. —— **Amendment of libel.**—An amendment, neither increasing nor diminishing their liability, will not discharge the sureties to the usual bond given on release of a vessel seized by process of the admiralty. Newell v. Norton (1865) 70 U. S. (3 Wall.) 257, 18 L. Ed. 271. An amendment by adding a colibelant does not discharge the surety on the stipulation. The Maggie Jones (D. C. 1877) Fed. Cas. No. 8,947. Nor by making a third person a party respondent to the libel. Boden v. Demwolf (D. C. 1893) 56 Fed. 846.

The amendment of a libel by striking out the name of a sole libelant, and substituting another in its place, is virtually the institution of a new suit, and discharges the sureties upon the stipulation. The Detroit (C. C. 1874) Fed. Cas. No. 3,832.

33. —— **Rearrest of vessel.**—A stipulator will be discharged from his undertaking where the vessel is subsequently rearrested on libels by others, and sold, and the proceeds brought into court. Livingston v. The Jewess (D. C. 1854) Fed. Cas. No. 8,412.

34. —— **Taking other security.**—The taking of notes and mortgages from the owners as collateral security, after the seizure and bonding of the vessel, held not to operate to stay the suit nor to discharge the surety. The Maggie Jones (D. C. 1877) Fed. Cas. No. 8,947.

35. —— **Dismissal of suit.**—Sureties on a bond given by the wife who filed a claim to property attached on a libel against the husband and wife are discharged where the suit is dismissed against the wife, though a decree is rendered against the husband. Jaycox v. Chapman (D. C. 1879) Fed. Cas. No. 7,243.

36. **Death of stipulator.**—In proceedings in rem upon a bond for the appraised value, given jointly and severally, if one of the obligors dies, the court will proceed against the survivors, or, at the option of the plaintiffs, against the representative of the deceased also. The Octavia (C. C. 1816) Fed. Cas. No. 10,423. And see The C. F. Ackerman (C. C. 1877) Fed. Cas. No. 2,564.

A decree rendered against a stipulator after his death, although in ignorance of that fact, is void, and will be set aside on motion. The Clara Davidson (D. C. 1879) Fed. Cas. No. 2,791.

37. **Death of libelant.**—A bond, having been executed to relieve the ship from liability under a libel for injuries to a stevedore, was continued in force after libelant's death to secure any judgment which libelant's personal representative might subsequently recover. The City of Belfast (D. C. 1905) 135 Fed. 208.

38. **Cancellation of stipulations on dismissal of libel.**—Motion to remand vessel into custody, and cancel stipulation, held premature where made before process returned on other libels by which the security of the stipulators was endangered. The Empire (D. C. 1866) Fed. Cas. No. 4,472.

Where a libel in rem is dismissed by default, the claimant may, without notice to libelant, enter an order canceling the stipulation and bond. But where this has been done the claimant may, by waiving the decree and consenting to the reinstatement of the cause, revive the liability of the sureties on the stipulation, provided such proceedings do not affect them injuriously. And where he agrees to open the default, waives the decree and order of cancellation, and the court may vacate them so as to hold the stipulators liable. The Antelope (D. C. 1867) Fed. Cas. No. 480.

39. **Rights of sureties claiming by subrogation.**—Where a libeled vessel is released on stipulation, which provides that in such case execution shall be by the same process as on decrees in personam, and especially where the stipulation expressly provides that if it remains in force execution may issue at one and the same time against any and all parties, on payment of the decree by the surety it is entitled to a writ of fieri facias against the principal. Leary v. Murray (1910) 178 Fed. 209, 101 C. C. A. 529, 21 Ann. Cas. 868.

Evidence held insufficient to show that the surety on a stipulation for the

release of a vessel libeled for salvage agreed to look to the insurers alone for indemnity and release the owners, which precluded it from the right to issue execution against the latter on payment of the decree. The White Seal (D. C. 1909) 166 Fed. 640.

When sureties in a release bond have paid a decree thereon, they may be subrogated to the claim of the libelant against their principal, the claimant of the vessel. The Madgie (D. C. 1887) 31 Fed. 926.

Where a surety, on a bond given to release a vessel from attachment in admiralty, has been compelled to pay the whole amount decreed against his principal, he is entitled to be subrogated to the rights of the libelants against the principal, but he has no lien upon the vessel. Carroll v. The T. P. Leathers (D. C. 1853) Fed. Cas. No. 2,455.

Where a vessel has been released from arrest on stipulation for value, she may contract new debts which will operate as liens, which will have preference over the claim of the sureties who are subrogated to the rights of libelant. Carroll v. The Leathers (D. C. 1853) Fed. Cas. No. 2,455.

40. Set-off against libelant of cost of stipulation.—The court will, on a summary application, relieve against an exorbitant demand of damages in a libel; and a claimant who has given bonds for the full amount of such claim is therefore not entitled to set off against libelant's damages the amount paid to the stipulator as compensation for signing his stipulation for value. The Stelvio (D. C. 1887) 30 Fed. 509.

41. Enforcement of liability on bond or stipulation—Right to judgment in general.—The surety on a stipulation in admiralty for release of vessel is not in the attitude of an ordinary surety on a common-law bond or undertaking, but the stipulation runs to the marshal, and the entry of a judgment is, under this section, a matter of course. Perriam v. Pacific Coast Co. (1904) 133 Fed. 140, 66 C. C. A. 206.

Judgments against a vessel on a claim against her and against her managing owner and the surety upon a recognizance for her release from detention are part of a general adjudication of the liability. Mitchell v. Chambers (1880) 5 N. W. 57, 43 Mich. 150, 38 Am. Rep. 167.

Where the claimants secure the release of the vessel libeled by bond, the judgment may go against both principals and sureties on the bond. The City of Seattle (1902) 1 Alaska, 471.

42. —— Amount of judgment.—Where in a libel against a steamer, she was discharged from custody on a bond, a decree in admiralty for a greater sum than that for which the sureties were bound will be reformed by the Supreme Court, so as not to exceed that sum. The Webb (1871) 14 Wall. 406, 418, 20 L. Ed. 774.

The claimant of a ship who contests a suit in rem against it to recover damages, whether for a maritime tort or for breach of a contract of carriage, is liable for interest and costs, although the damages awarded to the libelant, together with the interest, may exceed the amount of the stipulation given for the vessel's release; the decree in such case to be entered against the stipulators to the extent of their contract liability, and against the claimant for the remainder of the interest and the costs. The Southwark (D. C. 1904) 129 Fed. 171.

43. —— Proceedings for entry of judgment in general.—Where a bond is given for the release of a vessel attached for injuries to property on shore, under a statute providing that, "if, upon the trial, judgment shall pass for the petitioner, and the vessel has been discharged from custody as herein provided, said judgment or decree shall be rendered against the principal and sureties in the bond," the statute forms part of the bond, and the surety cannot object that judgment is given against him without notice or due process of law. Johnson v. Chicago & Pac. Elevator Co. (1886) 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447.

The regular proceeding against a surety in a stipulation for costs is by petition after notice, and the decree may be final and peremptory. Upon proceeding by motion after personal demand, a conditional decree only is awarded. The Baltic (D. C. 1830) Fed. Cas. No. 826.

44. —— Demand against claimant.—Under a stipulation given by a claimant in admiralty, conditioned that, if the stipulators fail to pay the amount of any decree against them, execution may issue against both claimant and his surety, both are principals, and no demand is necessary upon the claimant in order to justify a demand on the surety. The Mt. Desert (D. C. 1911) 186 Fed. 395.

45. —— Time of entering judgment.—Where bond has been given by the claimant of a libeled vessel, a final decree, awarding damages in the suit, may be entered against both principal and surety at the time of its rendition. The Columbia (1901) 109 Fed. 660, 48 C. C. A. 596, affirming decree The Ravenscourt (D. C. 1900) 103 Fed. 668.

Judgment on a bail bond or stipulation taken in a case arising under the revenue laws cannot, it seems, be rendered until after 20 days from the decree of condemnation, and then in open court. McLellan v. U. S. (C. C. 1812) Fed. Cas. No. 8,895.

It is premature to render judgment upon a replevy bond, conditioned for the delivery of a steamboat to the sheriff at the same time that the boat is

condemned. Bell v. Thomas (1845) 8 Ala. 527.

In case of a libel against a steamboat, where the bond of the stipulators is conditioned for the payment of the judgment which may be rendered at the next term of court, or for the forthcoming and delivery of the boat to answer sentence and decree of the court, it is erroneous to render judgment against the stipulators on the bond at the same time the judgment of condemnation is rendered against the boat. Murphy v. Roberts (1857) 30 Ala. 232.

46. —— **Effect of judgment in general.**—A stipulation given for the release of a libeled vessel takes the place of the released property, and the sureties become parties to the cause, and are bound by orders subsequently made therein to the same extent as the claimant. A decree rendered upon an amended libel, which the court had power to permit to be filed, is as binding upon the sureties as upon their principal. Fairgrieve v. Marine Ins. Co. (1901) 112 Fed. 364, 50 C. C. A. 286.

47. —— **Lien of judgment.**—Upon an appeal to the supreme court, duly entered, with stipulations approved by the court, a judgment will be entered against the stipulators in the district and circuit courts, and such judgment will remain as a lien against them until the appeal to the supreme court shall have been finally determined. The Belgenland (C. C. 1883) 16 Fed. 430, decree affirmed (1885) 5 S. Ct. 860, 114 U. S. 355, 29 L. Ed. 152.

48. —— **Summary judgment.**—A summary judgment may be rendered on a stipulation in the nature of recognizance given for the delivery of property for the appraised value thereof and costs. The Alligator (C. C. 1812) Fed. Cas. No. 248.

After affirmance of the sentence of condemnation of the district court, for a breach of the revenue or nonimportation laws, the court will forthwith, on motion, give judgment against the claimant and his sureties, on the bond given upon the delivery of the cargo to him at the appraised value. Nelson v. U. S. (C. C. 1816) Fed. Cas. No. 10,116.

Where, in the case of an appeal in admiralty transferred to another circuit, a commissioner in the former circuit certifies to the giving of a stipulation by respondents with sureties, but such stipulation is not filed in court, a summary judgment cannot be entered against the sureties on the affirmance of the decree. Sawyer v. Oakman (C. C. 1873) Fed. Cas. No. 12,403.

Where the circuit court, on appeal by the claimant, decrees against him for a sum allowing of an appeal to the supreme court, which may be a supersedeas, the circuit court can enter no summary judgment against the sureties on the appeal bond until 10 days from its decree. The New Orleans (C. C. 1879) Fed. Cas. No. 10,181.

The right of the libelant to summary judgment against a stipulator is not affected by the fact that he has not exhausted his remedy against the claimant of the vessel. The C. F. Ackerman (C. C. 1877) Fed. Cas. No. 2,564.

Stipulators in a bond conditioned for the payment of the judgment which may be rendered at the next term of court, or for the forthcoming and delivery of the boat to answer sentence and decree of the court, are not entitled to notice before the rendition of the judgment against them. Murphy v. Roberts (1857) 30 Ala. 232.

Under Act 1847, c. 55, 9 Stat. 181, which authorizes the courts, in cases of admiralty and maritime jurisdiction, to render summary personal judgment upon the bond given to procure the discharge of any vessel against which proceedings are pending, such personal judgment does not conclude the defendants, in an action upon the judgment, from disputing the jurisdiction of the district court by showing that they never executed the bond, or that the attorney who assumed to execute it in their names had no authority to do so. Gardner v. Tyler (N. Y. 1863) 25 How. Prac. 215, 16 Abb. Prac. 17.

49. —— **Enforcement by contempt.**—A court of admiralty has no power to punish sureties on a stipulation for value for contempt in failing to comply with the provisions of the decree. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

50. —— **Enforcement by attachment.**—The liability of sureties on a stipulation for value cannot be enforced by an attachment to compel them to comply with its stipulations. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

Cited without definite application, The Three Friends (1897) 17 Sup. Ct. 495, 166 U. S. 1, 41 L. Ed. 897; Bryan v. Ker (1911) 32 Sup. Ct. 26, 222 U. S. 107, 56 L. Ed. 114; The Glide (1896) 72 Fed. 200, 202, 18 C. C. A. 504; Hawgood & Avery Transit Co. v. Dingman (1899) 94 Fed. 1011, 1014, 36 C. C. A. 627; Love v. Export Storage Co. (1906) 143 Fed. 1, 74 C. C. A. 155; Bailey v. Sundberg (D. C. 1891) 44 Fed. 807 (reversed [1892] 49 Fed. 583, 1 C. C. A. 387); The Berkeley (D. C. 1893) 58 Fed. 920, 921; The Charles E. Falk (D. C. 1907) 157 Fed. 780; The John D. Dailey (D. C. 1907) 158 Fed. 642.

§ 1568. (R. S. § 942.) Special bail required in suits for duties and penalties.

In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any State where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject to the rules which prevail in civil suits in which special bail is required.

Act March 2, 1799, c. 22, § 65, 1 Stat. 676. Act Feb. 28, 1839, c. 35, 5 Stat. 321. Act Jan. 14, 1841, c. 2, 5 Stat. 410.

Persons liable, under R. S. § 3490, post, § 6411, to suit for penalties and double damages for presenting false claims against the United States, may be arrested and held to bail, by R. S. § 3492, post, § 6413.

Notes of Decisions

Laws abolishing imprisonment for debt.—The insolvent law of Massachusetts, which prohibits imprisonment in certain cases, is not a law abolishing imprisonment for debt, nor a law allowing it under certain restrictions and conditions, within the meaning of this act. Catherwood v. Gapete (C. C. 1854) Fed. Cas. No. 2,513.

Cause for bail.—A certificate in the usual form, by the treasury officials, that a certain balance is due by the defendant to the United States, is not sufficient cause for bail. U. S. v. Smith (C. C. 1838) Fed. Cas. No. 16,331.

Probable cause, on oath, must be set forth, to justify the court in holding defendant to special bail, under Act Feb. 26, 1795. Leonard v. Caskin (D. C. 1799) Fed. Cas. No. 8,257.

Necessity of mittimus.—A United States marshal may, without a mittimus, on attachment for debt, commit a defendant to prison for want of bail, though by the state law and practice, a mittimus must be obtained. Palmer v. Allen (1813) 7 Cranch, 550, 563, 3 L. Ed. 436.

Survival of actions.—The rule that actions arising ex delicto die with the person is not affected by the act giving special bail in suits by the United States for penalties. U. S. v. Korn (D. C. 1829) Fed. Cas. No. 15,543.

Cited without definite application, In re Ah Tai (D. C. 1903) 125 Fed. 795; In re Chin Wah (D. C. 1910) 182 Fed. 256 (affirmed [1911] 187 Fed. 592, 109 C. C. A. 422).

§ 1569. (R. S. § 943.) When defendant giving bail in one district is committed in another.

When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending, shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail or to his attorney a duplicate thereof. Upon the return of said certificate, the court which made the said order, or any judge thereof, may direct that an exoneretur be entered upon the bail-piece, where special bail shall have been found, or otherwise discharge such bail.

Act March 2, 1799, c. 32, § 1, 1 Stat. 727.

Cited without definite application, In re Chin Wah (D. C. 1910) 182 Fed. 256, affirmed (1911) 187 Fed. 592, 109 C. C. A. 422.

§ 1570. (R. S. § 944.) Defendant held until judgment in the first suit.

When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which

he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is.

Act March 2, 1799, c. 32, § 3, 1 Stat. 727.

Cited without definite application, In re Chin Wah (D. C. 1910) 182 Fed. 256, affirmed (1911) 187 Fed. 592, 109 C. C. A. 422.

§ 1571. (R. S. § 945.) Bail and affidavits may be taken by commissioners of circuit courts.

Bail and affidavits, when required or allowed in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of bail and affidavits shall have the same effect as if taken before any judge of such courts.

Act Feb. 20, 1812, c. 25, § 1, 2 Stat. 679. Act March 1, 1817, c. 30, 3 Stat. 350.

The office of circuit court commissioner was abolished, the office of United States commissioner created in place thereof, and the powers and duties theretofore vested in circuit court commissioners vested in United States commissioners, by Act May 28, 1896, c. 252, § 19, as amended by Act March 2, 1901, c. 514, § 1, ante, § 1333.

Notes of Decisions

Authority to take bail.—Where an arrest is made on a commissioner's warrant, the officer making the arrest has no authority in law to take bail, and if he voluntarily allows the defendant to depart from custody before the case has been heard by the magistrate, it is a voluntary escape; the liability of the officer is absolute, and cannot be relieved by subsequent arrest of the defendant, but the warrant is not invalidated, and the defendant may be retaken under the same warrant by the same officer. U. S. v. Ebbs (D. C. 1881) 10 Fed. 369, 370.

Cited without definite application, U. S. v. Curtis (1883) 2 Sup. Ct. 507, 510, 107 U. S. 671, 27 L. Ed. 534; Same v. Allred (1895) 15 Sup. Ct. 231, 233, 155 U. S. 591, 39 L. Ed. 273; Barber v. U. S. (D. C. 1887) 35 Fed. 886, 888 (reversed [1891] 11 Sup. Ct. 751, 140 U. S. 177, 35 L. Ed. 398); U. S. v. Hom Hing (D. C. 1892) 48 Fed. 635, 638; Same v. Garcelon (D. C. 1897) 82 Fed. 611, 614; In re Ah Tai (D. C. 1903) 125 Fed. 795; In re Chin Wah (D. C. 1910) 182 Fed. 256 (affirmed [1911] 187 Fed. 592, 109 C. C. A. 422).

§ 1572. (R. S. § 946.) Calling of bail in Kentucky.

When a bail-bond is given for the appearance of any person to answer in the district or circuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies.

Act May 15, 1862, c. 71, § 10, 12 Stat. 387.

§ 1573. (R. S. § 947.) When clerks may take bail de bene esse.

Recognizances of special bail may be taken de bene esse by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable.

Act May 8, 1792, c. 36, § 10, 1 Stat. 278.

§ 1574. (Act March 3, 1887, c. 359, § 4.) Proceedings in suits against United States.

The jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this

act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt. (24 Stat. 506.)

This section and the four sections next following were sections 4–7 and 10 of an act known as the "Tucker Act," entitled "An act to provide for the bringing of suits against the Government of the United States," cited above, which is referred to in said sections as "this act."

Other provisions of the act, relating to the jurisdiction and proceedings of the Court of Claims in suits against the United States, were incorporated in the Judicial Code, in chapter 7 thereof, ante, §§ 1127–1178 and the act, except said sections 4–7, and 10, set forth here, was repealed by section 297 of said Code, ante, § 1274.

Of the provisions of this act conferring jurisdiction on the courts, mentioned in this section, section 1, giving jurisdiction to the Court of Claims of suits on claims against the United States and of set-offs, counterclaims, etc., of the United States against claimants therein, was incorporated in Jud. Code, § 145, ante, § 1136, and section 2 of the act, giving jurisdiction of all said matters, where the claim did not exceed certain specified amounts, to the district courts and circuit courts, respectively, concurrent with the Court of Claims, was incorporated in Jud. Code, § 24, par. 20, ante, § 991 (24), which vested said jurisdiction in the district courts, the circuit courts having been abolished by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

Power to prescribe conditions.—Since a sovereign can be sued only by his own consent, he may prescribe the conditions on which he will be sued. Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98, affirming judgments Central Trust Co. of New York v. Treat (C. C. 1909) 171 Fed. 301, and Farmers' Loan & Trust Co. v. Same, Id. 302.

Estoppel against the United States.—If officers of the United States are authorized to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, their acts or omissions may in a proper case work an estoppel against the government. U. S. v. Walker (1906) 148 Fed. 1022, 79 C. C. A. 392, affirming judgment Walker v. U. S. (C. C. 1905) 139 Fed. 409.

Decrees against the United States.—Interest and costs can be awarded against the United States only by congressional warrant. Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98, affirming judgments Central Trust Co. of New York v. Treat (C. C. 1909) 171 Fed. 301, and Farmers' Loan & Trust Co. v. Same, Id. 302.

It may be assumed that the United States, whenever it comes into court and brings its suit against a citizen, consents to submit to and carry out whatever decrees may be lawfully made against it in the ordinary course of legal procedure, but there is no jurisdiction to decree against the United States for the delivery up of its property, or of that of a citizen in its possession, or to order accounts against its executive agents, or to decree the payment by them of the money of the United States, and the court certainly cannot enforce contracts against the United States, although it may have jurisdiction to enforce them in its favor. U. S. v. Wickersham (C. C. 1882) 10 Fed. 505, 508.

Review.—Under this act the case, if at law, will be reviewed by the Supreme Court on writ of error; if in equity or admiralty, on appeal. Chase v. U. S. (1894) 15 Sup. Ct. 174, 175, 155 U. S. 489, 39 L. Ed. 284.

The right of appeal is the same right as is given to aggrieved parties to appeal from the court of claims. Reid v. U. S. (1909) 29 Sup. Ct. 171, 211 U. S. 529, 53 L. Ed. 313.

§ 1575. (Act March 3, 1887, c. 359, § 5.) Petition in suit against United States.

The plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. (24 Stat. 506.)

See notes to section 4 of this act, ante, § 1574.

Section 2 of this act, mentioned in this section, giving jurisdiction as to all matters named in section 1 thereof, when the claim did not exceed cer-

tain specified amounts, to the district courts and circuit courts respectively, was incorporated in Jud. Code, § 24, par. 20, ante, § 991 (24), which vested said jurisdiction in the district courts.

Notes of Decisions

Nature and scope of section.—The material provisions of this section are similar to those ordinary provisions of practice acts or rules of court regulating plaintiff's pleadings in law or equity. Conners v. U. S. (1905) 141 Fed. 16, 72 C. C. A. 272.

Venue.—The Tucker Act of March 3, 1887, authorizes suits against the United States as respects the claims specified therein by aliens as well as citizens, and the requirement of this section that such suits shall be brought "in the district where the plaintiff resides" if applicable to suits by nonresident aliens is not jurisdictional and is waived by a general appearance by the law officers of the government. Eldorado Coal & Mining Co. v. Mariotti (1914) 215 Fed. 51, 131 C. C. A. 359.

A federal court in a district other than that in which plaintiff resided had no jurisdiction, under this section of a suit for a claim against the United States. Reid Wrecking Co. v. U. S. (D. C. 1913) 202 Fed. 314.

Statement of claim.—A petition filed under the act of March 3, 1887, must, as required by this section, contain a succinct statement of the facts on which the claim is based. And, in a petition by a United States commissioner to recover for fees, general statements of items—such as "Per diems for taking bail," "Charges for per diems in certain cases," "Charges of all fees in case v. Holloway," etc.—are insufficient. U. S. v. Stratton (1898) 88 Fed. 54, 31 C. C. A. 384.

Under the Tucker Act, if claimant's petition show that the claim is not founded upon torts of officers of the government, but on acts of theirs authorized by legislation of congress, it is immaterial whether the petition claims compensation as on an implied contract or as for damages. Chappell v. U. S. (C. C. 1888) 34 Fed. 673.

Verification.—The United States objected that a claim was invalid because not reverified after an error in computation, discovered by a deputy collector, had been corrected as required by the regulations, and such objection involved in this case a finding of fact, and was therefore not reviewable. U. S. v. Hyams (1906) 146 Fed. 15, 76 C. C. A. 523, affirming decree Hyams v. U. S. (C. C. 1905) 139 Fed. 997.

Waiver.—Pleading to the merits, without objecting that suit was brought in the wrong federal district, waives requirement that suits against the United States must be brought in the district where the claimant resides. U. S. v. Hvoslef (1915) 35 S. Ct. 459, 237 U. S. 1, 59 L. Ed. 813, affirming judgment Hvoslet v. U. S. (D. C. 1913) 217 Fed. 680.

The requirement as to the proper district for suits on claims against the United States held waived by demurrer; the demurrer being in substance a general appearance by the United States. Thames & Mersey Marine Ins. Co. v. U. S. (1915) 35 S. Ct. 496, 237 U. S. 19, 59 L. Ed. 821, Ann. Cas. 1915D, 1087, reversing judgment (D. C. 1914) 217 Fed. 685.

Failure of a plaintiff, in a suit against the United States under this section, to file his petition in the district of his residence, may be and was waived by the appearance of the Attorney General and his appearing at the examination of witness without objection. New York & O. S. S. Co. v. U. S. (D. C. 1912) 202 Fed. 311.

Cited without definite application, Ribas y Hijo v. U. S. (1904) 24 Sup. Ct. 727, 728, 194 U. S. 315, 48 L. Ed. 994.

§ 1576. (Act March 3, 1887, c. 359, § 6.) Service of petition in suit against United States; district attorney to appear and defend; proceedings on his failing to defend.

The plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the

premises: Provided, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. (24 Stat. 506.)

See notes to section 4 of this act, ante, § 1574.

The preceding section of this act, mentioned in this section, is section 5 thereof, ante. § 1575.

Notes of Decisions

Provision mandatory.—This section is mandatory, so that service cannot be obtained in any other method. Reid Wrecking Co. v. U. S. (D. C. 1913) 202 Fed. 314.

Failure to file in time.—A failure to file answer and notice of counterclaim within the period prescribed by this section is not a jurisdictional defect, but only an irregularity which may be waived. Charles Warner Co. v. U. S. (C. C. 1900) 101 Fed. 884.

Establishment of claim.—It seems that under this section it is the duty of the court to examine into the evidence, even if the pleading of the government presents no defense. McDonald v. U. S. (C. C. 1894) 66 Fed. 255, 257.

§ 1577. (Act March 3, 1887, c. 359, § 7.) Opinion, findings, and conclusions of court in suit against United States; proceedings in suit in equity or admiralty.

It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts. (24 Stat. 506.)

See notes to section 4 of this act, ante, § 1574.

All cases under this act were to be tried by the court without a jury, by a provision of section 2 of the act, which was incorporated in Jud. Code, § 24, par. 20, ante, § 991 (20).

Notes of Decisions

Power to render judgment.—In a proceeding under Act June 10, 1890, § 15, substantially incorporated in § 1186, ante, to review the decision of the board of general appraisers, the award of the court is not limited to giving a certificate showing the amount due claimant, but its duty is to hear, decide, and adjudge, under Act March 3, 1887, and a judgment "that the petitioner recover" is not erroneous. U. S. v. Davis (1893) 54 Fed. 147, 4 C. C. A. 251.

Opinion as part of record.—The opinion is not the usual opinion of the trial judge, but constitutes part of the record. U. S. v. Swift (1905) 139 Fed. 225, 71 C. C. A. 351; Hyams v. U. S. (C. C. 1905) 139 Fed. 997, decree affirmed U. S. v. Hyams (1906) 146 Fed. 15, 76 C. C. A. 523.

Sufficiency of opinion.—Where no answer is interposed, and questions of law only are argued on plaintiff's pleadings, an opinion in writing, which expressly or impliedly finds the necessary facts, and gives judgment for the amount allowed, is sufficient, though it does not state separately the findings of fact and conclusions of law. U. S. v. Tinsley (1895) 68 Fed. 433, 15 C. C. A. 507.

In an action by a United States marshal against the United States to recover fees disallowed by the auditing department, a finding of facts by the trial judge, merely reciting the service, and that the marshal was entitled to recover therefor, but not sufficiently specific to enable the appellate court to determine the government's liability, is not a sufficient compliance with this section. U. S. v. Tisdale (1902) 114 Fed. 883, 52 C. C. A. 503.

Where the trial judge, in a suit to recover a tobacco tax rebate, filed two papers, one entitled a decree for the petitioner, and the other the opinion of the court, which the statute makes in effect a part of the record, the two setting out sufficient findings of fact to sustain the court's conclusions, such papers were sufficiently formal to constitute a compliance with the section. U. S. v. Hyams (1906) 146 Fed. 15, 76 C. C. A. 523, affirming decree Hyams v. U. S. (C. C. 1905) 139 Fed. 997.

Conclusiveness of findings.—The finding of the court of claims as to what is a reasonable royalty for the use of a patented invention is a finding of fact which is binding on the supreme court, in the absence of other findings which satisfy the latter court that the finding as to royalty is erroneous. U. S. v. Berdan Firearms Mfg. Co. (1895) 15

Sup. Ct. 420, 427, 156 U. S. 552, 39 L. Ed. 530.

The findings of the court of claims in an action at law determine all matters of fact, precisely as the verdict of a jury. Stone v. U. S. (1896) 17 Sup. Ct. 71, 164 U. S. 380, 41 L. Ed. 477.

Findings of fact have the weight of a verdict, and cannot ordinarily be revised by the appellate court; but where the record contains all the testimony, the appellate court may examine if there is competent evidence to support the findings, and, if there is not, may disregard them and reverse the judgment. Conners v. U. S. (1905) 141 Fed. 16, 72 C. C. A. 272.

Where the proofs taken in the lower court are not before the circuit court of appeals, the findings of fact cannot be reviewed. U. S. v. Hyams (1906) 146 Fed. 15, 76 C. C. A. 523.

Sufficiency of findings to support judgment.—A judgment will be reviewed only where the record contains findings and conclusions, and then only as to the sufficiency of the findings to support the judgment. Chase v. U. S. (1894) 15 Sup. Ct. 174, 155 U. S. 489, 39 L. Ed. 284, affirming judgment (C. C. 1890) 44 Fed. 732.

The findings must exhibit exactly the services for which compensation is asked; and, in a suit by a United States commissioner to recover for fees, a finding that he has rendered services as follows: "Charges for per diems for taking bail under capias, etc., $160.-00"—is insufficient, because it cannot be inferred therefrom what the charges are for. U. S. v. Stratton (1898) 88 Fed. 54, 31 C. C. A. 384.

The requirements of this section are not complied with in a suit by a former marshal, based upon items of his accounts of fees and disbursements which had been disallowed by the treasury department, by findings which merely state that during a period named the plaintiff "performed at divers and sundry times services for the defendant, the compensation for which was provided by law," and only specify the items in the account which the court holds to have been properly rejected by the treasury officials, and holds as a conclusion of law that all other disallowances "were improper, and in violation of law," and amounted to a sum stated; and such findings will not support a judgment. U. S. v. Kelly (1898) 89 Fed. 946, 32 C. C. A. 441.

The question of whether a judgment is supported by the facts found may be reviewed, though not covered by a specific assignment of error. Id.

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Cited without definite application, Clough v. U. S. (C. C. 1891) 47 Fed. 791, 793, modified (1893) 55 Fed. 374, 5 C. C. A. 140.

§ 1578. (Act March 3, 1887, c. 359, § 10.) Judgment adverse to Government in suit against United States to be certified to Attorney-General; taking and perfecting appeal; limitation of appeals; interest on judgments.

When the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney-General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: Provided, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree. (24 Stat. 507.)

See notes to section 4 of this act, ante, § 1574.

Section 6 of this act, mentioned in this action, is set forth ante, § 1576.

Notes of Decisions

Fees for transcripts.—The clerk's fees for making transcripts required by this section, when ordered by the district attorney, are chargeable to the

premises: Provided, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. (24 Stat. 506.)

See notes to section 4 of this act, ante, § 1574.

The preceding section of this act, mentioned in this section, is section 5 thereof, ante, § 1575.

Notes of Decisions

Provision mandatory.—This section is mandatory, so that service cannot be obtained in any other method. Reid Wrecking Co. v. U. S. (D. C. 1913) 202 Fed. 314.

Failure to file in time.—A failure to file answer and notice of counterclaim within the period prescribed by this section is not a jurisdictional defect, but only an irregularity which may be waived. Charles Warner Co. v. U. S. (C. C. 1900) 101 Fed. 884.

Establishment of claim.—It seems that under this section it is the duty of the court to examine into the evidence, even if the pleading of the government presents no defense. McDonald v. U. S. (C. C. 1894) 66 Fed. 255, 257.

§ 1577. (Act March 3, 1887, c. 359, § 7.) Opinion, findings, and conclusions of court in suit against United States; proceedings in suit in equity or admiralty.

It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts. (24 Stat. 506.)

See notes to section 4 of this act, ante, § 1574.

All cases under this act were to be tried by the court without a jury, by a provision of section 2 of the act, which was incorporated in Jud. Code, § 24, par. 20, ante, § 991 (20).

Notes of Decisions

Power to render judgment.—In a proceeding under Act June 10, 1890, § 15, substantially incorporated in § 1186, ante, to review the decision of the board of general appraisers, the award of the court is not limited to giving a certificate showing the amount due claimant, but its duty is to hear, decide, and adjudge, under Act March 3, 1887, and a judgment "that the petitioner recover" is not erroneous. U. S. v. Davis (1893) 54 Fed. 147, 4 C. C. A. 251.

Opinion as part of record.—The opinion is not the usual opinion of the trial judge, but constitutes part of the record. U. S. v. Swift (1905) 139 Fed. 225, 71 C. C. A. 351; Hyams v. U. S. (C. C. 1905) 139 Fed. 997, decree affirmed U. S. v. Hyams (1906) 146 Fed. 15, 76 C. C. A. 523.

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The requirements of this section are not complied with in a suit by a former marshal, based upon items of his accounts of fees and disbursements which had been disallowed by the treasury department, by findings which merely state that during a period named the plaintiff "performed at divers and sundry times services for the defendant, the compensation for which was provided by law," and only specify the items in the account which the court holds to have been properly rejected by the treasury officials, and holds as a conclusion of law that all other disallowances "were improper, and in violation of law," and amounted to a sum stated; and such findings will not support a judgment. U. S. v. Kelly (1898) 89 Fed. 946, 32 C. C. A. 441.

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§ 1578. (Act March 3, 1887, c. 359, § 10.) Judgment adverse to Government in suit against United States to be certified to Attorney-General; taking and perfecting appeal; limitation of appeals; interest on judgments.

When the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney-General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: Provided, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree. (24 Stat. 507.)

See notes to section 4 of this act, ante, § 1574.

Section 6 of this act, mentioned in this action, is set forth ante, § 1576.

Notes of Decisions

Fees for transcripts.—The clerk's fees for making transcripts required by this section, when ordered by the district attorney, are chargeable to the

United States. Goodrich v. U. S. (D. C. 1890) 42 Fed. 392, 394.

Interest.—This section does not repeal or modify R. S. § 1091, ante, § 1168, nor authorize the recovery of interest on judgments of the court of claims from their rendition until an appropriation is made for their payment. U. S. v. Barber (1896) 74 Fed. 483, 486, 20 C. C. A. 616.

This section does not apply to an action in the court of claims, under a special act (Act March 2, 1889), to recover damages for injuries to a vessel by collision with a government pier. Walton v. U. S. (C. C. 1894) 61 Fed. 486.

Interest cannot be recovered in the United States circuit court on a judgment rendered in the court of claims; the question being incidental to the original suit, and the court of claims being the proper forum for its determination. Walton v. U. S. (C. C. 1894) 61 Fed. 486; Bunton v. U. S. (C. C. 1894) 62 Fed. 171.

Interest is not recoverable on a judgment in the court of claims, where the judgment was founded on a tort, and the case had been referred to the court under a special act (25 Stat. 1334), which contained no provision in relation to interest. Bunton v. U. S. (C. C. 1894) 62 Fed. 171.

Interest on the judgments of the court of claims is regulated by Act Sept. 30, 1890, and not by this section. Pacific Coast S. S. Co. v. U. S. (1897) 33 Ct. Cl. 36; Mosby v. Same, Id. 58.

Only such judgments of the Court of Claims as have been appealed from to the Supreme Court and affirmed by the latter are interest-bearing under R. S. § 1090, and they become interest-bearing from the date of their presentation in good faith for payment. (1887) 18 Op. Atty. Gen. 547.

Semble that a presentation of a copy of a judgment made by a claimant who afterwards takes an appeal from the judgment is of no avail as to interest. (1887) 18 Op. Atty. Gen. 548.

Review.—Under this act, showing a purpose in its provisions, as to actions commenced in the district and circuit courts, to preserve the distinction between cases at law, in equity, and in admiralty, and authorizing appeal or writ of error, the case, if at law, will be reviewed by the supreme court on writ of error; if in equity or admiralty, on appeal. Chase v. U. S. (1894) 15 Sup. Ct. 174, 155 U. S. 489, 39 L. Ed. 284, affirming judgment (C. C. 1890) 44 Fed. 732.

A petition by a clerk of court, to recover fees, is properly regarded as an action at law when debt or assumpsit would lie on the facts stated; and the judgment can be reviewed only by writ of error, and not by appeal. U. S. v. Fletcher (1894) 60 Fed. 53, 8 C. C. A. 453.

The United States may appeal from any judgment, of any amount, rendered against it. U. S. v. Yukers (1894) 60 Fed. 641, 9 C. C. A. 171, following Same v. Davis (1889) 9 S. Ct. 657, 131 U. S. 36, 33 L. Ed. 93.

One H. was arrested on the charge of obtaining money from post offices on forged money orders, and while in the custody of the marshal a sum of money was taken from his person by a special agent of the post-office department. Afterwards H. gave to his attorney an order upon the said post-office agent for the money, a specified sum thereof to be retained by the attorney as fees, and the remainder to be paid over to H.'s wife, to whom he was indebted. This order was not recognized, and the money was ultimately covered into the United States treasury. Subsequently H. gave the attorney an assignment of his rights to such money in trust for the same purposes. Thereafter the attorney filed a petition against the United States to recover the money for the use of himself and H.'s wife. The wife, on the same day, was allowed to become a party plaintiff, and afterwards, the cause having been partly heard, H. himself was substituted as petitioner, for the use of his attorney and his wife. Held that, as the attorney had only an equitable title under the assignment, and as H. also, after his substitution, sued merely as a trustee, the suit was at all times of an equitable character, and consequently the proper method of reviewing the judgment rendered was by an appeal. U. S. v. Harris (1896) 76 Fed. 241, 22 C. C. A. 149.

On appeal from a judgment of the circuit court rendered in a suit against the United States, the question whether the findings of fact of the lower court support its conclusions of law may be reviewed on seasonable assignments of error, without exceptions having been taken. U. S. v. Ady (1896) 76 Fed. 359, 22 C. C. A. 223.

§ 1579. (Act May 17, 1898, c. 339, § 2.) Proceedings in suits for partition of lands of which United States is one of the tenants in common or joint tenants; district attorney to appear and defend; purchase by United States at sale of property.

When such suit is brought by any person owning an undivided interest in such land, other than the United States, against the United States alone or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of

the same by registered letter to the Attorney-General of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service and of the mailing of such letter. It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid to appear and defend the interests of the Government, and within sixty days after service upon him as hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer, or demurrer on the part of the Government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons. Whenever in such suit the court shall order a sale of the property or any part thereof the Attorney-General of the United States may, in his discretion, bid for the same in behalf of the United States. If the United States shall be the purchaser, the amount of the purchase money shall be paid from the Treasury of the United States upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney-General. (30 Stat. 416.)

This section was one of the sections of an act entitled "An act to confer jurisdiction upon the circuit courts in certain cases," cited above.

Section 1 of said act was as follows:

"That the several circuit courts of the United States shall have jurisdiction of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suit to be brought in the circuit court of the district in which such land is situate."

The provisions of said section were incorporated in Jud. Code, § 24, par. 25, ante, § 991 (25), which vested jurisdiction of such suits in the district courts, the circuit courts having been abolished by Jud. Code, §§ 289–291, ante, §§ 1266–1268, and said section 1 of this act was superseded thereby.

The suits referred to in this section are suits in equity for partition described in said section 1 of the act and in Jud. Code, § 24, par. 25, ante, § 991 (25).

§ 1580. (R. S. § 948.) Amendment of process.

Any [circuit or] district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues.

Act June 1, 1872, c. 255, § 3, 17 Stat. 197.

The words of this section inclosed in brackets, "circuit or," became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Further provisions for the amendment of process and pleadings were made by R. S. 954, post, § 1591.

Notes of Decisions

1. Amendments allowable.
2. Amendment by consent.
3. Amendment of return.
4. Affidavits for attachment or garnishment.
5. Change or correction of names or description of parties.
6. Date.
7. Demand for relief.
8. Filing nunc pro tunc.
9. Place of appearance.
10. Removal of causes.
11. Signature and seal.
12. Substitution of parties.
13. Surprise.
14. Time of appearance.
15. Title.

See, also, notes to § 1591, post.

1. Amendments allowable.—The limitation in this section that the amendment shall not injure the party defendant exists by implication in section 1591, post, for the court may not convert the means defined for promoting justice into a means for perpetrating wrong. Hernan v. American Bridge Co. (1909) 167 Fed. 930, 93 C. C. A. 330.

The power conferred by this section is a power to amend a defect or to amend a want of form in process. Dwight v. Merritt (C. C. 1880) 4 Fed. 614.

2. Amendment by consent.—A writ may be amended, by consent of parties. Elliott v. Holmes (C. C. 1839) Fed. Cas. No. 4,392.

3. Amendment of return.—A court has discretion to permit an officer to

amend a return with or without notice, and at any time after the date thereof, so as to bind the parties to the action or those claiming under them as privies, but not third persons who acquire rights in good faith prior to such amendment. Rickards v. Ladd (C. C. 1879) Fed. Cas. No. 11,804.

An amended return, as between the parties to the action or their privies, whether made with or without notice, cannot be questioned by them collaterally. Id.

Courts have the power to permit officers to amend their returns to both mesne and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to be affected by the amendment. Phœnix Ins. Co. v. Wulf (C. C. 1880) 1 Fed. 775.

The marshal may amend his return to process after he goes out of office. Act Sept. 24, 1789, §§ 28, 32. Cushing v. Laird (D. C. 1870) Fed. Cas. No. 3,508.

4. Affidavits for attachment or garnishment.—The power of amendment extends to the affidavit for a writ of attachment, as well as the writ which is based on it, though the courts of the state do not so apply a similar statutory provision for amendments, for the power to amend conferred by this section is unconditional and positive, and applies to distinctive and special proceedings in attachment authorized against defaulting and delinquent postmasters, contractors, and other officers, agents, and employés of the post office, as regulated by section 1550, ante. Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65.

The power of amendment conferred by this section extends to affidavits for attachment or garnishment. Booth v. Denike (C. C. 1894) 65 Fed. 43, 47.

5. Change or correction of names or description of parties.—Plaintiff sued in a federal court in Ohio against a bridge company to recover for a personal injury while an employé of the company. The summons was served on an agent of the company designated by it for that purpose under the statute of Ohio. The summons did not designate the citizenship of the defendant, but the petition described it as a corporation of New York. An answer was filed admitting that defendant was a corporation of New York and containing a general denial. A motion for more specific statement was sustained, and later, after a new action was barred by limitation, an amended answer was filed denying that defendant ever employed plaintiff or that it operated the plant referred to in the petition. In fact, there was a corporation of New York and one of New Jersey, having the same name and the same agent in Ohio, the latter being plaintiff's employer and the one intended to be sued. Held, that the New Jersey corporation was in fact the defendant, as the petition disclosed, and that, service having been properly made on its agent, the court had power under this section and section 1591, post, to permit plaintiff to amend his petition by correctly stating its place of incorporation. Hernan v. American Bridge Co. (1909) 167 Fed. 930, 93 C. C. A. 330.

The object of this section and section 1591, post, is to give effect to the substance of things, and when it is made to appear to the court that the party who asks to amend has sought in good faith to bring suit against another for a cause of action stated, but by mistake has misdescribed the other, he should be allowed to correct the mistake, provided the correction will not injure defendant. Id.

The court will not grant leave to amend the writ by changing the name of one of the plaintiffs. Comegyss v. Robb (C. C. 1817) Fed. Cas. No. 3,049.

Mistake in name of plaintiff in writ made by the clerk may be corrected by the memorandum filed by counsel. Furniss v. Ellis (C. C. 1822) Fed. Cas. No. 5.162.

After service on the right party, the writ, return, and bill may be amended by correcting an error in defendant's corporate name. Noblet v. Ohio & M. R. Co. (C. C. 1876) Fed. Cas. No. 10,-283.

6. Date.—Where a summons dated July 16, 1908, and returnable "on the first Tuesday of October next," was not served until May 10, 1909, the court had power, under this section, to allow an amendment of the date by inserting the date of actual service. Speare v. Stone (1912) 193 Fed. 375, 113 C. C. A. 301, affirming judgment Stone v. Speare (C. C. 1910) 175 Fed. 584.

In an action on an account beginning August, 1901, and continuing until January, 1902, a summons bearing date "the 8th day of February, nineteen hundred and ——, and the one hundred and twenty-sixth year of the independence of the United States," though insufficient, having the complaint attached to it, would be amendable, within this section. Gilbert v. South Carolina Interstate & West Indian Exposition Co. (C. C. 1901) 113 Fed. 523.

7. Demand for relief.—The court must allow amendments most liberally, and on motion may allow an amendment increasing the damages demanded, so as to give the court jurisdiction of the amount in controversy, subject to the penalty imposed by section 1609, post. Davis v. Kansas City, S. & M. R. Co. (C. C. 1887) 32 Fed. 863.

Where the notice on a summons refers to the complaint, which is served with it, thus giving notice of the nature of the relief demanded, defendant

is not prejudiced by a defect in the notice as to the nature of the relief asked; and the notice may be amended, under this section. Chamberlain v. Bittersohn (C. C. 1891) 48 Fed. 42.

8. Filing nunc pro tunc.—The court to which the cause has been removed may, on good cause shown, enlarge the time for filing the transcript, or allow the transcript to be filed nunc pro tunc. Woolridge v. McKenna (C. C. 1881) 8 Fed. 650, 662.

9. Place of appearance.—Where the declaration in an action in a federal court, a copy of which was served upon defendants with the summons, was properly entitled, but through mistake the summons required appearance in another division of the district, such fact was not ground for abatement of the suit; but the court might, under this section, permit an amendment of the summons and its reservice as amended. Wm. Caraway & Sons v. Kentucky Refining Co. (1908) 163 Fed. 189, 90 C. C. A. 59.

10. Removal of causes.—Leave to amend a petition for removal to a federal court for diverse citizenship, so as to show the citizenship of the plaintiffs, may, in the exercise of general power of federal courts, under this section and section 1591, post, be granted after the filing of the removal papers, but before any action taken in the federal court on the merits, where there was a general averment of diverse citizenship, and the citizenship of defendant had been clearly stated, and it appeared from the face of the trust deed, which was the subject-matter in controversy, that the plaintiffs were, at the time of its execution, residents of another state. Kinney v. Columbia Savings & Loan Ass'n (1903) 24 Sup. Ct. 30, 32, 191 U. S. 78, 48 L. Ed. 103.

Defects in a removal bond are within this section. Harris v. Delaware, L. & W. R. Co. (C. C. 1884) 18 Fed. 833, 835.

See, also, notes under §§ 1010, 1011, et seq., ante.

11. Signature and seal.—A writ of error may be amended by addition of a seal. Semmes v. U. S. (1875) 91 U. S. 21, 27, 23 L. Ed. 193.

A writ in the usual form of a monition and warrant of arrest in a suit in rem, issued from the office of the clerk of a federal district court, and bearing the seal of that court, will protect the marshal in seizing and detaining a vessel in conformity to the command of the writ, although the purported signature of the deputy clerk, was affixed under an attempted but ineffectual delegation of authority, since under this section it was an amendable defect. Bryan v. Ker (1911) 32 Sup. Ct. 26, 27, 222 U. S. 107, 56 L. Ed. 114.

A summons cannot be amended by the addition of the signature of the clerk and the seal of the court. Peaslee v. Haberstro (C. C. 1879) Fed. Cas. No. 10,884; Dwight v. Merritt (C. C. 1880) 4 Fed. 614.

A process which has been issued by the attorney when it should have been issued by the clerk is no process at all, and cannot be amended as in the case of an irregularity. Under such a summons the court gets no jurisdiction of the case, and there is nothing to amend. Middleton Paper Co. v. Rock River Paper Co. (C. C. 1884) 19 Fed. 252.

12. Substitution of parties.—The court may permit plaintiff to amend by substituting the name of the real defendant intended. Bainum v. American Bridge Co. of New York (C. C. 1905) 141 Fed. 179; Clemmens v. Washington Park Steamboat (C. C. 1909) 171 Fed. 168.

13. Surprise.—Where the summons misleads or tends to mislead defendant, or to put him off his guard, an amendment which will work a surprise on him should not be allowed. Chamberlain v. Bittersohn (C. C. 1891) 48 Fed. 42, 43.

14. Time of appearance.—A writ of error may be amended as to return day. Hampton v. Rouse (1873) 15 Wall. 684, 21 L. Ed. 250; Semmes v. U. S. (1875) 91 U. S. 21, 27, 23 L. Ed. 193.

Under this section an amendment of a writ held not to prejudice defendants, who had due notice to appear on Sunday, and who did appear, though under protest, on Monday. Duy v. Knowlton (C. C. 1882) 14 Fed. 106, 107.

15. Title.—A writ of error may be amended as to mistake in title of the writ. Semmes v. U. S. (1875) 91 U. S. 21, 27, 23 L. Ed. 193.

Cited without definite application, Gulf, C. & S. Ry. Co. v. James (1891) 48 Fed. 148, 150, 1 C. C. A. 53; Deford, Hinkle & Co. v. Mehaffy (C. C. 1882) 13 Fed. 481, 490; Wolf v. Cook (C. C. 1889) 40 Fed. 432, 436; Manitowoc Malting Co. v. Fuechtwanger (C. C. 1909) 169 Fed. 983 (reversed [1911] 187 Fed. 713, 109 C. C. A. 461).

§ 1581. (R. S. § 949.) Priority of cases in which a State is a party.

When a State is a party, or the execution of the revenue laws of a State is enjoined or stayed, in any suit in a court of the United States, such State or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any

time after it is docketed, in preference to any civil cause pending in such court between private parties.

Act June 30, 1870, c. 181, 16 Stat. 176.

Notes of Decisions

Parties entitled to have cause advanced.—One convicted of a criminal offense, who has brought the case to the Supreme Court by a writ of error to the state court, is not entitled to have the cause advanced for that reason. Ward v. Maryland (1870) 12 Wall. 163, 164, 20 L. Ed. 260.

State as nominal party.—Where the state is a mere nominal party, as in quo warranto, the relator is not entitled to have the cause advanced. Miller v. New York (1870) 12 Wall. 159, 161, 20 L. Ed. 259.

Cases of great public importance.—A case which does not fall within the provisions of rule 32, or of rule 26, par. 4, or of this section, for the advancement of cases on the docket, will not be advanced merely because of great public importance. Poindexter v. Greenhow (1883) 3 S. Ct. 8, 109 U. S. 63, 27 L. Ed. 860; White v. Same, Id.; Carter v. Same (1883) 3 S. Ct. 8, 109 U. S. 64, 27 L. Ed. 860.

Stay in revenue cases.—The term "revenue laws of the state" does not include municipal ordinances levying taxes. Davenport v. Dows (1872) 15 Wall. 390, 392, 21 L. Ed. 96.

The supreme court will not give a cause a preference on the calendar because, in the suit, the execution of the revenue laws of a state has been enjoined, unless it sufficiently appears that the operations of the government of the state will be embarrassed by delay. Hoge v. Richmond & D. R. Co. (1876) 93 U. S. 1, 23 L. Ed. 781.

A suit against a tax collector for alleged wrongs, where he is not restrained from discharging his duties, is not within the statute. Poindexter v. Greenhow (1883) 3 Sup. Ct. 8, 109 U. S. 63, 27 L. Ed. 860.

Cases in which the execution of the revenue laws of a state have been enjoined or stayed are only to be advanced on motion of the state, or the party claiming under such laws, when it appears that the operations of the state government will be embarrassed by delay. Central R. Co. v. Bourbon County (1886) 6 Sup. Ct. 601, 116 U. S. 538, 29 L. Ed. 725.

Under this section federal courts may enjoin and stay the revenue officers of the state. Parsons v. Marye (C. C. 1885) 23 Fed. 113, 122, reversed (1885) 5 Sup. Ct. 932, 962, 114 U. S. 325, 29 L. Ed. 205.

§ 1582. (R. S. § 950.) Notice of case for trial.

In all civil actions in the courts of the United States either party may notice the same for trial.

Act Feb. 28, 1871, c. 99, § 17, 16 Stat. 439.

Notes of Decisions

Notice after continuance by consent.—Where a cause has been continued from term to term by consent, the parties are bound to be ready for trial at any subsequent time, and notice of intention to try is not requisite. King of Spain v. Oliver (C. C. 1816) Fed. Cas. No. 7,812.

Necessity of notice.—A case is not regularly for trial unless it has been put at issue at a preceding term. Boyer v. Roberts (C. C. 1802) Fed. Cas. No. 1,754; Schnertzel v. Purcell (C. C. 1805) Fed. Cas. No. 12,472.

Plaintiff in an action at law cannot be ruled to trial without notice where defendant has filed a bill in equity on the ground that the remedy at law was not adequate. Baptist Missionary Union v. Turner (C. C. 1853) Fed. Cas No. 968.

§ 1583. (R. S. § 566.) Trial of issues of fact.

The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it.

Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76. Act Feb. 26, 1845, c. 20, 5 Stat. 726.

Provisions similar to some extent to those of this section, for trial of issues

of fact in the circuit courts, were made by R. S. § 649, and Act Feb. 16, 1875, c. 77, §§ 1, 2, post, §§ 1585–1587.

See notes to said sections.

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28. Nonsuit.
29. Rendition and form of verdict.
30. Special verdicts.
31. Appointment of auditor.
32. New trial.
33. Review of findings of fact.

1. Validity and scope of provision.—See, also, Const. Amend. 7, and notes thereunder.

Without a waiver of the right of trial by jury in a United States court by consent of the parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon, and for such error the judgment will be reversed and the cause remanded for a new trial. Baylis v. Travelers' Ins. Co. (1885) 5 Sup. Ct. 494, 113 U. S. 316, 28 L. Ed. 989.

The trial of issues of fact, with certain exceptions, must be by jury. U. S. v. Louisville & N. R. Co. (1909) 167 Fed. 306, 93 C. C. A. 58; Low v. U. S. (1909) 169 Fed. 86, 88, 94 C. C. A. 1; Frank v. Same (1911) 192 Fed. 864, 113 C. C. A. 188.

There is no statute providing for trial by a federal court without a jury, except in cases of equity or maritime jurisdiction, or in bankruptcy. Low v. U. S. (1909) 169 Fed. 86, 94 C. C. A. 1.

This section was not repealed by R. S. § 914, ante, § 1537. Wear v. Mayer (C. C. 1881) 6 Fed. 658, 660.

While the United States courts, in cases at law, follow as near as practicable the practice, pleadings, forms, and modes of proceeding of the state courts of record, yet the constitution and laws of the United States require all issues of fact in common-law cases to be determined by a jury, unless the same is waived in writing by the parties. Lanning v. Lockett (C. C. 1882) 10 Fed. 451, 11 Fed. 814.

An application for a trial by jury, made by defendant under the act of congress providing therefor, is to be determined in the discretion of the court; and, if it appears that the questions involved can be determined more properly by a chancellor, the application for a jury will be refused. Keyes v. Pueblo Smelting & Refining Co. (C. C. 1887) 31 Fed. 560.

A trial by jury being expressly provided for and required by the laws of the United States, no other mode of trial can be taken from the state procedure and substituted for it, without the consent of the parties in the form prescribed by those laws. Sulzer v. Watson (C. C. 1889) 39 Fed. 414, 415.

2. Right to jury trial and questions for jury in particular proceedings.—The question of the negligence of the foreman of a railway bridge gang in failing to discover a spike maul upon or near the bridge, immediately prior to the passage of a train, is for the jury in an action to recover damages from the railroad company for personal injuries received by a member of such gang, for which there is no other cause assignable than that the train in passing struck the maul and threw it against the workman, although the foreman testified that he looked for and did not discover any obstruction to the approaching train, where there was nothing to prevent its discovery if it was there and the glance of the foreman was anything more than a casual or formal one. Texas & P. R. Co. v. Carlin (1903) 23 Sup. Ct. 585, 588, 189 U. S. 354, 47 L. Ed. 849.

Bonds were advanced in payment for building a railroad on security given to apply the proceeds to the construction. Held, that it was a question for the jury whether the goods purchased with the proceeds belonged to the contractor or the surety. Comstock v. Carnley (C. C. 1857) Fed. Cas. No. 3,081.

Whether an instrument is of itself a fraud in law must be determined from the instrument alone. The existence of a collateral understanding different from the written instrument is a question for the jury. Miller v. Jones (C. C. 1876) Fed. Cas. No. 9,576.

The construction of an oral contract is for the jury, where there is a conflict as to the words used or ambiguity; otherwise, it is for the court. Detroit Stove Works v. Perry (C. C. 1879) Fed. Cas. No. 3,835.

Where both parties testify that a note appearing at the trial to have been duly stamped was not stamped when nego-

tiated, held, that defendant was entitled to go to the jury on the question. Platt v. Broach (D. C. 1868) Fed. Cas. No. 11,216.

3. —— **Actions under anti-trust acts.**—An action by a shipper, authorized by the Sherman anti-trust law (Act July 2, 1890, § 7, post, § 8829), to recover treble damages to his business and property by reason of a conspiracy and combination by interstate carriers to charge excessive and unlawful rates for the shipment of coal from the mines to tide water, was an action at law as to which the parties were entitled to a jury trial. Meeker v. Lehigh Valley R. Co. (C. C. 1908) 162 Fed. 354.

4. —— **Breach of contract.**—A cause of action for damages for breach of a contract cannot be tried in a suit in equity in a federal court to foreclose the contract as a chattel mortgage securing advances made thereunder; the claims for damages being separable from that for a lien, and a legal demand upon which defendants were entitled to a jury trial unless they waived the right. Lilienthal v. McCormick (1902) 117 Fed. 89, 54 C. C. A. 475.

Where an action to recover a balance on a contract to deliver beef was brought under Act March 3, 1887, c. 359, § 2, providing that the circuit courts should have concurrent jurisdiction with the court of claims in certain cases against the United States, and that the judge should be the trior of the facts in such cases, the question of the right of parties to a trial by jury was not involved. Torrey v. U. S. (C. C. 1890) 42 Fed. 207.

A defendant entitled to a jury trial in an action for breach of contract cannot be deprived thereof by plaintiff's uniting it with a demand for equitable relief incidental to the collection of his judgment on the legal demand. American Creosote Works v. C. Lembcke & Co. (C. C. 1908) 165 Fed. 809.

5. —— **Cancellation of naturalization certificate.**—A suit for the cancellation of a certificate of naturalization, brought under Act June 29, 1906, § 15, post, § 4374, is not one in which defendant is entitled as of right to a jury trial. U. S. v. Mansour (D. C. 1908) 170 Fed. 671; Same v. Luria (D. C. 1911) 184 Fed. 643.

6. —— **Chinese exclusion and deportation proceedings.**—Proceedings for the deportation of Chinese persons are not "causes." Toy Tong v. U. S. (1906) 146 Fed. 343, 347, 76 C. C. A. 621.

The constitutional and statutory provisions guaranteeing trial by jury, have no application to Chinese exclusion proceedings. U. S. v. Ngum Lun May (D. C. 1907) 153 Fed. 209; In re Chin Wah (D. C. 1910) 182 Fed. 256, order affirmed Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422.

7. —— **Eminent domain proceedings.**—In a proceeding taken by the government under Act Aug. 18, 1890, to condemn lands to the use of the United States, the owner of the land was not entitled as a matter of right to a trial by jury. U. S. v. Engerman (D. C. 1891) 46 Fed. 176.

The provision does not apply to proceedings to condemn land for public use, brought under Act Aug. 1, 1888, post, § 6910. U. S. v. Beaty (D. C. 1912) 198 Fed. 284, judgment reversed Beatty v. U. S. (C. C. A. 1913) 203 Fed. 620.

In condemnation proceedings, the property owner is entitled to a jury trial on the question of compensation, but not on the question of appropriation. Cuyahoga River Power Co. v. City of Akron (D. C. 1913) 210 Fed. 524.

8. —— **Heirship proceedings.**—A petition filed by an illegitimate child, in administration proceedings, claiming a share in the estate, and alleging that his paternity was acknowledged by deceased in conformity with the Nevada statute, which allegation is denied, presents an issue of fact, which, when the cause is removed to a federal court, must be tried, not as an equitable proceeding, but as an action at law, in which there is a right to a jury trial. In re Foley (C. C. 1896) 76 Fed. 390.

9. —— **Malicious prosecution.**—Whether or not there was probable cause for the institution of a criminal proceeding, where the facts are undisputed, is a question of law for the court; otherwise, one of fact for the jury. Brown v. Selfridge (1912) 32 S. Ct. 444, 224 U. S. 189, 56 L. Ed. 727 (affirming judgment [1910] 34 App. D. C. 242); Staunton v. Goshorn (1899) 94 Fed. 52, 36 C. C. A. 75; Cragin v. De Pape (1908) 159 Fed. 691, 86 C. C. A. 559; Castro v. De Uriarte (D. C. 1883) 16 Fed. 93.

Plaintiff rented of defendants a farm, for a term of years. Before the term expired, defendants commenced proceedings to dispossess him. Pending these proceedings, plaintiff rented a neighboring farm, and caused certain logs and posts to be removed thereto from defendants' farm. On the complaint of defendants, plaintiff was arrested for larceny, but on trial he was acquitted. He then commenced an action for malicious prosecution. He gave evidence that he cut the posts on an adjoining farm, belonging to defendants, and carried them to the farm he occupied, under an arrangement with defendants by which he was to use them to repair the fences. There was also evidence that the logs were cut by him on the leased farm to clear up one of the lots, upon the understanding that he was to have them for his trouble. Evidence was given for defendants that the posts and the logs were not cut by

plaintiff, but were on the farm when he went into occupation of it, having been cut by a former tenant, and piled in various places for defendants' use. Held, that the judge properly refused to direct a verdict for defendants, as the plaintiff was a bailee of the property, if the testimony given for him was true, and as the truth or falsity of the plaintiff's contention was necessarily within the actual knowledge of defendants. Sanders v. Palmer (1893) 55 Fed. 217, 5 C. C. A. 77.

Defendants were entitled to an unqualified instruction that if the jury believed that plaintiff was not a bailee of the property at the time he carried it away, and appropriated it to his own use, plaintiff had not established want of probable cause, and it was error to leave the jury to decide whether the facts proved constituted probable cause. Id.

A former clerk was arrested on a charge of stealing public records with intent to destroy them, but defended on the ground that his purpose was simply to examine the same in order to ascertain their validity. Certain public officials had been informed by a deputy clerk of the intent of such former clerk to steal the papers, and, on finding him in possession of the papers, caused his arrest. Held, in an action against such officials and the deputy clerk for malicious prosecution, it was error to instruct the jury that if the purpose of such former clerk in taking the papers was to examine them, and not to destroy them, and the person giving the information to the public officials had knowledge of such intent, that the arrest and prosecution of such clerk for taking the papers was without probable cause, in that it made no distinction between the public officials and the deputy clerk, as such public officials had no knowledge of the facts other than as communicated to them by said deputy clerk. Staunton v. Goshorn (1899) 94 Fed. 52, 36 C. C. A. 75.

A request to charge in an action for malicious prosecution held properly refused for failure to limit the request to the question of malice. Lindsey v. Testa (1912) 200 Fed. 124.

Where in an action for malicious prosecution, the facts as proved were sufficient to rebut the presumption of want of probable cause arising from plaintiff's acquittal, the court would have been warranted in directing a verdict for defendant. Carroll v. Central R. Co. of New Jersey (C. C. 1905) 134 Fed. 684.

10. —— Mandamus.—When the material facts involved in an application for a mandamus are admitted by the pleadings, a jury trial is unnecessary, and a refusal thereof is not error. Marion County v. Coler (1896) 75 Fed. 352, 21 C. C. A. 392.

11. —— Penal actions.—An action of debt upon a bond given under the embargo laws is a penal action, and the jury are judges both of the law and the facts. U. S. v. Poyllon (D. C. 1812) Fed. Cas. No. 16,081.

12. —— Personal injury actions.—Where the uncontradicted facts establish the negligence of the company and its agents in causing an injury to a fireman, and his right to recover damages therefor, no error can be predicated on a peremptory instruction in his favor. Mexican Cent. Ry. Co. v. Glover (1901) 107 Fed. 356, 46 C. C. A. 334.

A federal court is not bound under all circumstances to submit the question of contributory negligence to the jury. Delaware & H. R. Co. v. Wilkins (1907) 153 Fed. 845, 83 C. C. A. 27.

Where, in foreclosure of a street railroad mortgage, persons injured by the operation of the road by a receiver intervened for an allowance of damages, the court could have submitted the question of negligence and damages to a jury, but was not bound to do so. Nashville Ry. & Light Co. v. Bunn (1909) 168 Fed. 862, 94 C. C. A. 274.

When the printed rules of a master as to the duties of a servant in given circumstances contain no terms which cannot be made plain, their interpretation is for the court. Great Northern Ry. Co. v. Hooker (1909) 170 Fed. 154, 95 C. C. A. 410.

Railroad rules, governing the operation of trains, claimed to have been violated by a servant, suing for injuries resulting from a collision, are to be interpreted by the court, and not by the jury. Chicago, R. I. & P. Ry. Co. v. Ship (1909) 174 Fed. 353, 98 C. C. A. 257.

An action by an employé against the master to recover for a personal injury was properly submitted to the jury where the testimony as to the material facts was in direct conflict; the question of preponderance being for the jury. American Mfg. Co. v. Bigelow (1911) 188 Fed. 34, 110 C. C. A. 77.

13. —— Scire facias on recognizance.—A defendant in a proceeding by scire facias on a forfeited recognizance is entitled to a trial by jury, unless the right is waived. Hollister v. U. S. (1906) 145 Fed. 773, 780, 76 C. C. A. 337.

14. —— Seizures on land.—In the case of seizure on land, a trial by jury is not necessary when there is a default. Miller v. U. S. (1870) 11 Wall. 268, 304, 20 L. Ed. 135.

15. —— Suits on stockholder's liability.—A stockholder in an insolvent bank, sued to recover double liability imposed by a state statute, may have a trial of an issue of fact by a jury, whether the action is at law or in equity. Conway v. Owensboro Sav. Bank & Trust Co. (C. C. 1908) 165 Fed. 822.

16. —— Title to real estate.—A court of equity has no jurisdiction, upon a

petition of a receiver appointed by it, for an order requiring the delivery of possession of real estate, to try a claim of title to such real estate, set up by the occupant thereof, but the claimant is entitled to a trial by jury. Coles v. Northrup (1895) 66 Fed. 831, 14 C. C. A. 138.

17. —— Wrongful attachment.—Where an action for wrongfully and maliciously suing out an attachment is defended on the ground that the advice of counsel was sought and followed, the fact that the counsel was a director and secretary of the defendant, renders the issue of malice peculiarly for the jury. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (1903) 121 Fed. 233, 57 C. C. A. 469.

While the issue of probable cause in an action for wrongfully and maliciously suing out an attachment is, as a general rule, for the court, yet where it depends on disputed facts and conflicting evidence as to defendant's good faith and just belief, it is for the jury. Id.

Evidence in an action for damages for wrongfully and maliciously suing out writs of attachment examined, and held to require the submission to the jury of the issues as to the want of probable cause and the existence of malice. Id.

In an action for wrongfully and maliciously suing out writs of attachment, a motion for a directed verdict for defendant on the ground that "it appears from the evidence herein" that the defendant had probable cause, and that "it appears from the overwhelming weight of the testimony" that the defendant had no malice, is improperly granted, such matters being for the jury. Id.

In an action for wrongfully and maliciously suing out an attachment, the issue of malice per se is for the jury. Id.

In an action for wrongful attachment, it was shown that defendants commenced an action in attachment against plaintiff as a nonresident, alleging in the affidavit filed that the amount due them was $5,100, although they had the same day received, to apply on such debt, the sum of about $2,900. It further appeared that such credit was in fact made as of a previous date on another note of plaintiff, not due, and which defendants did not then own, and on which they were not liable. Held that such fact was properly submitted for consideration by the jury on the question of defendants' good faith or malicious intent in suing out the attachment. Tamblyn v. Johnston (1903) 126 Fed. 267, 62 C. C. A. 601.

18. Questions for court in general.—The construction of a bill of sale is a question of law. Nason v. U. S. (C. C. 1812) Fed. Cas. No. 10,024.

The construction of unwritten laws or usages of foreign countries, when duly proved, is for the court. Consequa v. Willings (C. C. 1816) Fed. Cas. No. 3,128.

The constitutionality of an act of congress is not a proper subject for the consideration of a jury. U. S. v. Shive (C. C. 1832) Fed. Cas. No. 16,278.

When, by pleading or by special verdict or demurrer to evidence, the law is separated from the fact, the jury have no right to decide the law. Stettinius v. U. S. (C. C. 1839) Fed. Cas. No. 13,387.

Question of usury in written contract is for court. Bank of Washington v. Walker (C. C. 1841) Fed. Cas. No. 955.

If a contract is to be made out through a correspondence, the question of its construction is one for the court, regardless of its extent. U. S. v. Shaw (C. C. 1859) Fed. Cas. No. 16,266.

The effect of bankruptcy and death of a party to prevent the barring, by lapse of time, of a judgment against him, is a question of law for the court. In re Morris (D. C. 1837) Fed. Cas. No. 9,825.

19. Equity suits.—Where an intervening petition is filed in a chancery suit, setting up against the receiver appointed in such suit a cause of action at law, it is proper to direct the trial of the issues raised by such petition by jury. Rouse v. Hornsby (1895) 67 Fed. 219, 14 C. C. A. 377, affirming judgment Hornsby v. Eddy (1893) 56 Fed. 461, 5 C. C. A. 560.

The verdict of a jury on an issue out of chancery is merely advisory, and the chancery court may grant a new trial, or dismiss the bill, in opposition to the verdict. On a motion for new trial, the party submitting it must procure, for the use of the chancellor, notes of the proceedings and the evidence. These then become a part of the record, and are subject to review on an appeal taken from the decree entered by the chancery court. Clyde v. Richmond & D. R. Co. (1896) 72 Fed. 121, 18 C. C. A. 467.

A "feigned issue" is one submitted to the jury in an equity case for the assistance and advice of the court. Nashville Ry. & Light Co. v. Bunn (1909) 168 Fed. 862, 94 C. C. A. 274.

The submission of questions of fact to a jury in an equity case rests in the sound discretion of the court. Pacific Coal & Transportation Co. v. Pioneer Mining Co. (1913) 205 Fed. 577, 123 C. C. A. 593.

The right of trial by jury in a proceeding against a receiver, on a common-law cause of action, is not an absolute right, but the granting or withholding thereof lies within the sound discretion of the court. Kennedy v. Indianapolis, C. & L. R. Co. (C. C. 1880) 3 Fed. 97.

Neither party to a suit in equity brought in a federal court has an absolute right to have a question of fact arising in the cause passed on by a ju-

ry. Herdsman v. Lewis (C. C. 1882) 9 Fed. 853.

The United States court may send issues of fact, properly raised by the pleadings in an equity case, to a jury for trial. Fitton v. Phœnix Assur. Co. (C. C. 1885) 23 Fed. 3.

A federal court of equity will not, on demand, after the joining of issue by the pleadings, but before the evidence has been taken in accordance with the usual practice in equity, frame issues to be submitted to a jury, especially when it cannot be known at that stage of the case that such issues will be decisive or even material. Fenno v. Primrose (C. C. 1903) 125 Fed. 635.

Where the court has jurisdiction to award an injunction, it possesses plenary power over the suit, including the ascertainment of disputed facts. U. S. v. Luce (C. C. 1905) 141 Fed. 385; Same v. Brown, Id. 423.

Findings of fact and conclusions of law are not made in equity suits in the federal courts. Whitney v. Whitney Elevator & Warehouse Co. (C. C. 1910) 180 Fed. 187, decree affirmed (1910) 183 Fed. 678, 106 C. C. A. 28, writ of certiorari denied Whitney Elevator & Warehouse Co. v. Whitney (1911) 31 S. Ct. 472, 219 U. S. 588, 55 L. Ed. 348.

A federal court of equity is without jurisdiction of a suit to quiet title by a complainant out of possession as against a defendant who by his answer and the answers to interrogatories attached shows that he is in possession of a portion of the land involved, claiming title by adverse possession, and he alleges facts which, if proved, support such title under the laws of the state, even though a statute of the state authorizes such a suit, the issues therein being of fact, cognizable at law, and on which such defendant is entitled to a jury trial in the federal courts. New Jersey Land & Lumber Co. v. Gardener Lacy Lumber Co. (C. C. 1911) 190 Fed. 861.

20. Bankruptcy proceedings.—R. S. §§ 648, 649, post, §§ 1584, 1587, and this section, provide that except where a jury is waived in a civil action a jury trial may be had, except in cases in equity, and except as otherwise provided in proceedings in bankruptcy. Bankr. Act 1898, § 19, subd. "a," post, § 9603, entitles a person against whom an involuntary petition has been filed to a jury trial of the question of his insolvency and any act of bankruptcy alleged to have been committed. Subdivision "c" declares that the right to submit matters in controversy to a jury shall be determined according to the laws of the United States in relation to trials by jury; and section 18, subd. "d," gives the bankrupt or any of his creditors the right to appear and "controvert the facts alleged in the petition." Held, that the right to a jury trial of the question of an involuntary bankrupt's insolvency and of alleged acts of bankruptcy was limited to the bankrupt, and could not be extended to intervening creditors contesting such issues. In re Herzikopf (1903) 121 Fed. 544, 57 C. C. A. 606.

Where a bill in equity was filed by a bankrupt's trustee to recover an alleged preference, and the facts were not disputed, defendant was not entitled to a trial by jury. In re Plant (D. C. 1906) 148 Fed. 37.

A chattel mortgage creditor of a bankrupt, who consents to the sale of the property by the trustee in bankruptcy, and files his petition in the bankruptcy court to establish his lien on the proceeds, cannot demand a jury trial. In re Standard Telephone & Electric Co. (D. C. 1907) 157 Fed. 106.

21. Admiralty and maritime causes.—The right to a trial by jury is secured to either party to a libel. The Genesee Chief v. Fitzhugh (1851) 12 How. 443, 458, 13 L. Ed. 1058.

Where a libel in admiralty was filed by a passenger of a steamboat on the Great Lakes for an assault and robbery on libelant while occupying her stateroom as a passenger by a member of the crew, during which libelant was chloroformed and robbed of her rings, watch, and $38 in money, and a jury summoned to try the issues of fact as authorized by this section, awarded libelant $15,000, the district judge properly set such verdict aside on the ground that it was the result of passion and prejudice, or a misunderstanding of his charge, and entered a decree for libelant for $5,000, without reference to whether such verdict was conclusive or merely advisory. The Western States (1908) 159 Fed. 354, 86 C. C. A. 354, affirming decree (D. C. 1907) 151 Fed. 929, and writ of certiorari denied Sweeting v. The Western States (1908) 28 S. Ct. 762, 210 U. S. 433, 52 L. Ed. 1136.

This section applies only to the Great Lakes and waters connected therewith, and then only to such issues of fact as arise in cases of contract or tort; the statute having no reference to foreign vessels or those trading between ports of the same state. Id.

An information in rem against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an admiralty proceeding, and does not require a trial by a jury. Clark v. U. S. (C. C. 1811) Fed. Cas. No. 2,837.

A trial by jury is not necessary on a libel for the penalty imposed by law for the failure of the master of a vessel from a foreign port to report his vessel to the consul, or enter the manifest required by law. The Paolina S. (C. C. 1880) 11 Fed. 171.

A libel or forfeiture against a vessel

which has been seized upon water navigable from the sea is a civil cause, of admiralty and maritime jurisdiction, and must be tried to the court sitting as a court of admiralty, without a jury. The Meteor (D. C. 1866) Fed. Cas. No. 9,498.

By this section the law is changed, and the right to a trial by jury is expressly given in admiralty and maritime causes. Gillet v. Pierce (D. C. 1875) Fed. Cas. No. 5,437.

In all maritime cases, it is wholly within the discretion of congress whether it will provide for a trial by jury. In re Long Island, North Shore Passenger & Freight Transp. Co. (D. C. 1881) 5 Fed. 599, 624.

A vessel was chartered to libelant to proceed to Baltimore to take a cargo, but refused to go there, whereupon the libelant sued in rem for damages. The owner appeared, and answered upon the merits, denying the alleged charter party, but did not object to the form of the action. Testimony was taken upon the merits. After two years, upon the calling of the case for hearing, the objection to the form of the action was first taken; the vessel having been bonded at the commencement of the action. Held, upon the amendment of the libel, by the insertion of a prayer for further process and judgment in personam, that the cause could be heard on the proofs already taken and such additional proofs as might be produced. The Monte A. (D. C. 1882) 12 Fed. 331.

In admiralty causes of contract or tort, arising upon the lakes, if either vessel concerned in such action be of 20 tons burden and upward, enrolled and licensed for the coasting trade, and employed in navigation between different states, either party to such action may demand a trial by jury, under this section. But if both vessels be foreign, or engaged in trade between places in the same state, or the action be other than one of contract or tort, it seems that neither party is entitled to a jury trial. The Erie Belle (D. C. 1883) 20 Fed. 63.

The verdict of a jury, in an admiralty cause arising upon the lakes, and tried by jury pursuant to this section, is merely advisory, and may be disregarded by the court, if, in the opinion of the judge, it fails to do substantial justice. The practice of calling nautical assessors approved. The Empire (D. C. 1884) 19 Fed. 558, 559; Sanderson v. The City of Toledo (D. C. 1896) 73 Fed. 220; The Western States (D. C. 1907) 151 Fed. 929 (decree affirmed [1908] 159 Fed. 354, 86 C. C. A. 354, and writ of certiorari denied Sweeting v. The Western States [1908] 28 S. Ct. 762, 210 U. S. 433, 52 L. Ed. 1136).

This section does not give a trial by jury in a cause of admiralty and maritime jurisdiction which concerns a vessel employed in commerce and navigation upon the rivers Monongahela and Ohio. Bigley v. The Venture (D. C. 1884) 21 Fed. 880.

A large number of libelants having separate claims against a vessel, who demand jury trials will not be permitted to join in a single libel. The Rochester (D. C. 1915) 227 Fed. 203.

See, also, notes under § 1536, ante.

22. Showing of right to jury trial.—The party demanding a jury must bring himself by his pleadings within the provisions of the act. Gillet v. Pierce (D. C. 1875) Fed. Cas. No. 5,437.

23. Organization of jury.—The jury is a common-law jury. Chappell v. U. S. (1896) 16 Sup. Ct. 397, 402, 160 U. S. 499, 40 L. Ed. 510; Capitol Traction Co. v. Hof (1899) 19 S. Ct. 580, 584, 174 U. S. 1, 43 L. Ed. 873; U. S. v. Honolulu Plantation Co. (1903) 122 Fed. 581, 586, 58 C. C. A. 279.

24. Trial to court or referee by consent.—R. S. § 649, post, § 1587, authorizing trials of issues of fact by the court without a jury when the parties so stipulate in writing, made applicable to the District Courts by Judicial Code, § 291, ante, § 1268, is not repugnant to this section. Eastern Oil Co. v. Holcomb (1914) 212 Fed. 126, 128 C. C. A. 642.

Under R. S. § 649, post, § 1587, and Judicial Code, § 291, ante, § 1268, issues of fact may by consent be tried in the District Court without a jury, notwithstanding this section. Nashville Interurban Ry. v. Barnum (1914) 212 Fed. 634, 129 C. C. A. 170.

By stipulation of the parties to an action at law, the case was referred to a referee; the stipulation providing that his rulings on the admission or rejection of testimony and conclusions of law should be reviewable on exceptions by the court, and that his findings of fact should have the same force and effect as the verdict of a jury. Held, that the referee's findings of fact were equivalent, under such stipulation, to a special verdict, and could not be modified by the court or reviewed, except in so far as to determine whether they were supported by any evidence. United States Projectile Co. v. Sharpless (C. C. 1902) 115 Fed. 996.

Where an entire case is referred to a master by consent of the parties, his findings of fact are entitled to the weight of the verdict of a jury. Stromberg-Carlson Telephone Mfg. Co. v. Simmons (D. C. 1912) 199 Fed. 256.

25. Waiver of jury trial.—See, also, notes under Const. Amend. 7.

It has always been held that, if the parties waived a jury, a judgment after trial by the court would not be erroneous. Boogher v. New York L. Ins. Co. (1880) 103 U. S. 90, 95, 26 L. Ed. 310.

The right of trial by jury in the district courts may not be waived, though in a suit triable by jury the parties may by stipulation waive a jury and agree on a statement of facts and submit the case to the court thereon for its decision as to the law. Rogers v. U. S. (1891) 12 Sup. Ct. 91, 93, 141 U. S. 548, 35 L. Ed. 853.

A finding by the trial court upon waiver of the jury has the same effect as the jury verdict and settles all questions of fact. Lehnen v. Dickson (1893) 13 Sup. Ct. 481, 482, 148 U. S. 71, 37 L. Ed. 373.

A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default under R. S. § 961, post, § 1599. Brock v. Fuller Lumber Co. (1907) 153 Fed. 272, 82 C. C. A. 402.

Under Code Cr. Proc. Alaska, § 97, where accused refused to plead after the overruling of a demurrer to an indictment, there was no issue; and hence a judgment of conviction and sentence was not objectionable on the ground that he could not waive his right to a trial by jury. Summers v. U. S. (1913) 204 Fed. 976, 123 C. C. A. 298, denying rehearing (1913) 202 Fed. 457, 120 C. C. A. 563.

A trial by jury in the district courts for the trial of issues of fact may not be waived, and judges of the district courts are not acting in their judicial capacity when engaged in finding issues of fact. Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369, 370.

Issues of fact in actions at law in the district courts must be tried by jury, and there is no statutory provision for a waiver of a jury, nor special statutory power conferred on the circuit court to consider any question raised by a bill of exceptions in such an action not tried by a jury. Doty v. Jewett (C. C. 1884) 19 Fed. 337, 338.

26. Instructions.—The judge may give the jury his opinion on questions of fact. Kerr v. Modern Woodmen of America (1902) 117 Fed. 593, 54 C. C. A. 655, writ of certiorari denied (1904) 24 Sup. Ct. 853, 193 U. S. 670, 48 L. Ed. 840; Consequa v. Willings (C. C. 1816) Fed. Cas. No. 3,128; Bollmans v. Parry (C. C. 1850) Fed. Cas. No. 1,612; U. S. v. Fourteen Packages of Pins (D. C. 1832) Fed. Cas. No. 15,151; Same v. Sarchet (D. C. 1832) Fed. Cas. No. 16,224.

Where the evidence is not legally sufficient to warrant a recovery, it is the duty of the court to instruct accordingly; but where there is evidence from which the jury may draw an inference in the matter, the case is for the jury. Schuchardt v. Allen (1863) 1 Wall. 359, 369, 17 L. Ed. 642.

The point in a case being narrowed down to the question which of the antagonistic statements of two witnesses is to be credited, the court should not give the jury an unqualified instruction to credit one rather than the other. Corn Exchange Nat. Bank v. Scheppers (1884) 4 Sup. Ct. 505, 507, 111 U. S. 440, 28 L. Ed. 474.

The court is not bound to instruct the jury after they have retired, unless the jurors request it. Forrest v. Hanson (C. C. 1802) Fed. Cas. No. 4,943; Turner v. Foxall (C. C. 1822) Fed. Cas. No. 14,255.

When the issue is joined upon a matter of law, the court will not, at the prayer of either party, instruct the jury upon the matter of law submitted to the jury by the pleadings. Alexandria v. Brockett (C. C. 1810) Fed. Cas. No. 182.

It is no ground of error that the court refused to instruct the jury on a point of law which was so stated as to involve an opinion on matters of fact. U. S. v. Burnham (C. C. 1816) Fed. Cas. No. 14,690.

The court will not give an instruction unless justified by the evidence. Rules of determining such fact. Bank of Alexandria v. Deneale (C. C. 1824) Fed. Cas. No. 846; Gardner v. Collins, Id. 5,223.

If the jury send a written request for instructions to the court, when not in session, the court, after notice to the counsel, will reply in writing, if it deems it safe and proper to do so. Norris v. Cook (C. C. 1853) Fed. Cas. No. 10,305.

Dates fixed by records of court may be stated to jury as facts. Andrews v. Graves (C. C. 1870) Fed. Cas. No. 376.

It is not error to direct the attention of the jury to the distinction between "reasonable cause to believe" and "actual belief." Lawrence v. Graves (C. C. 1871) Fed. Cas. No. 8,138.

A point of law embraced in the argument need not be noticed in the charge unless the court's opinion upon it is explicitly required. U. S. v. Fourteen Packages of Pins (D. C. 1832) Fed. Cas. No. 15,151.

Where there were two conflicting theories as to how defendant obtained possession of certain money, it was not outside the province of the court, in commenting upon the testimony, to ask the jury whether one theory was not the probable and natural theory rather than the other. U. S. v. Connally (D. C. 1880) 1 Fed. 779, 784.

27. Direction of verdict.—Where it is entirely clear that plaintiff cannot recover, it is proper to direct a verdict for defendant, but not otherwise. Klein v. Russell (1873) 19 Wall. 433, 463, 22 L. Ed. 116.

A case should not be withdrawn from the jury, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound legal discretion, to set aside a

verdict in opposition to it. Connecticut Mut. Life Ins. Co. v. Lathrop (1884) 4 Sup. Ct. 533, 534, 111 U. S. 612, 28 L. Ed. 536.

The court may withdraw a case from the jury and direct a verdict for either party, where the evidence is undisputed, or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict for the adverse party; but cases are not to be lightly taken from the jury, and ordinarily negligence is a question of fact to be submitted to them. Patton v. Texas & P. R. Co. (1901) 21 Sup. Ct. 275, 276, 179 U. S. 658, 45 L. Ed. 361.

A motion to direct a verdict for defendant must be made at the close of plaintiff's case. It is not addressed to the court's discretion, but presents a question of law, the ruling on which is subject to exception. Merchants' Nat. Bank v. State Nat. Bank (C. C. 1868) Fed. Cas. No. 9,449.

Where a finding in favor of plaintiffs would be contrary to evidence, the court may instruct the jury to find a verdict for defendant. Kielley v. Belcher Silver Min. Co. (C. C. 1875) Fed. Cas. No. 7,761; Goddard v. Cunningham (C. C. 1883) Fed. Cas. No. 5,490a.

Where there are material facts in the case, depending upon the weight of evidence and the credibility of witnesses, which are in dispute, and the proper inferences to be drawn from the evidence are not certain, necessary, or undisputed, defendant is not entitled to have a verdict directed. U. S. v. Babcock (C. C. 1876) Fed. Cas. No. 14,486.

The defendant, by introducing evidence in defense, waived its request, made at the close of the plaintiff's evidence, that the court direct a verdict for the defendant. Whitehouse v. Grand Trunk Ry. Co. (C. C. 1877) Fed. Cas. No. 17,565.

It is discretionary with the court whether or not to take a question from the jury, and dispose of it as a matter of law, where the facts are undisputed. In re Jelsh (D. C. 1874) Fed. Cas. No. 7,257.

28. Nonsuit.—The court has no authority to order a peremptory nonsuit against the will of the plaintiff. Doe ex dem. Elmore v. Grymes (1828) 1 Pet. 469, 472, 7 L. Ed. 224; De Wolf v. Rabaud (1828) 1 Pet. 476, 496, 7 L. Ed. 227; Crane v. Morris (1832) 6 Pet. 598, 609, 8 L. Ed. 514; Silsby v. Foote (1852) 14 How. 218, 219, 14 L. Ed. 394; Foote v. Silsby (C. C. 1849) Fed. Cas. No. 4,916; Miller v. Baltimore & O. R. Co. (C. C. 1876) Fed. Cas. No. 9,560; Thompson v. Campbell (Super. Ct. Ark. 1821) Fed. Cas. No. 13,944a.

29. Rendition and form of verdict.—The C. claim, owned by plaintiff, adjoined the S. claim on the south. In an action to determine conflicting locations, the jury gave a general verdict for plaintiff on conflicting evidence that the discovery shaft was partly on both claims, the apex being within the line of the C. claim. To the interrogatory, "was any part of such vein or lode discovered by the locators of said C. claim at a point of discovery south of the south boundary line of the S. lode claim as patented, and within the limits of the said C. lode claim as located?" the answer was "Yes"; and to the interrogatory, "Was the top or apex of such vein within the limits of the S. claim as patented?" the answer was "No." Held, that there was no conflict between the verdict and findings. Larkin v. Upton (1892) 12 S. Ct. 614, 144 U. S. 19, 36 L. Ed. 330, affirming Upton v. Larkin (Mont. 1888) 17 P. 728.

In ejectment to recover a mining vein the complaint described the premises as "so much of said Aliunde Tunnel Lode No. 2 mining claim and premises as lies beneath the depth of 300 feet beneath the surface of the ground, north of the north side line of said Aliunde Tunnel Lode, carrying said north line down vertically, and from thence on the pitch of said lode northwestwardly, and measuring thence along the line of said Aliunde Tunnel Lode No. 2, a distance of 600 feet next west of the northeast line of said claim." Held, that a verdict in favor of plaintiff for "the lode and premises described in the complaint" described the premises with sufficient accuracy. Colorado Cent. Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 2 C. C. A. 67, rehearing denied (1893) 54 Fed. 262, 4 C. C. A. 313, and writ of error dismissed (1893) 14 S. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030.

On a plea in abatement, if the jury find against the plea, they ought to assess the damages on the plaintiff's declaration. If this is omitted, a venire de novo must be awarded. Hollingsworth v. Duane (C. C. 1801) Fed. Cas. No. 6,615.

Form of verdict on bond conditioned to pay money by installments, rendered before all installments are due. Davidson v. Brown (C. C. 1805) Fed. Cas. No. 3,601.

A verdict agreed upon after a juror has separated from his fellows by mistake, and returned, may be allowed to stand, in the discretion of the court. Burrill v. Phillips (C. C. 1812) Fed. Cas. No. 2,200.

Where the statute gives double or triple damages, a general verdict will be deemed for single damages, unless the contrary appear, and the court will double or treble them; but a verdict may be found for double or treble damages. Cross v. U. S. (C. C. 1812) Fed. Cas. No. 3,434.

A verdict which is repugnant or uncertain in a material point is void.

Stearns v. Barrett (C. C. 1816) Fed. Cas. No. 13,337.

Where separate and distinct pleas are taken to different parts of the count, and some of the issues thereon are found for plaintiff, and some for defendant, several damages should be assessed, and judgment rendered for each party as to the issues found for him. Kerr v. Force (C. C. 1826) Fed. Cas. No. 7,730.

A jury may as part of the damages give interest on the value of property converted. Matthews v. Menedger (C. C. 1840) Fed. Cas. No. 9,289.

Where a verdict is rendered on certain counts of the declaration by the express direction of plaintiff, the other counts cannot be referred to as sustaining the verdict. Jones v. Van Zandt (C. C. 1843) Fed. Cas. No. 7,502.

In an action ex contractu against two or more, the verdict must be against all or none. Milne v. Huber (C. C. 1843) Fed. Cas. No. 9,617.

Where, in a joint action of tort, there is no evidence as to one defendant, a verdict against all of them will be set aside. U. S. v. Chaffee (C. C. 1868) Fed. Cas. No. 14,773.

A general finding for the plaintiff or defendant by a jury is good, and disposes of all the issues. Archer v. Morehouse (Super. Ct. Ark. 1832) Fed. Cas. No. 18,225.

30. Special verdicts.—The court propounded to the jury certain questions, covering only a part of the material issues of fact. The questions, with the answers thereto, were returned as a special verdict. There was no general verdict, nor was there a bill of exceptions showing the evidence adduced. The judgment recited that it was rendered against the defendants "upon the special verdict of the jury, and facts conceded or not disputed upon the trial." Held, as the facts set out in the special verdict were insufficient to sustain the judgment, and as, without a waiver of trial by jury, against which every reasonable presumption should be indulged, it was the constitutional right of the defendants to have the jury pass upon all the material facts in issue, the judgment must be reversed, and a new trial had. Hodges v. Easton (1882) 1 Sup. Ct. 307, 106 U. S. 408, 27 L. Ed. 169.

A federal court may refuse to require a jury, in addition to a general verdict, to answer special questions at the request of a party. Parsons v. Trowbridge (C. C. A. 1915) 226 Fed. 15.

The conclusion from facts found in a special verdict must be drawn by the court. Butler v. Hopper (C. C. 1806) Fed. Cas. No. 2,241.

The court is not bound to give an opinion instanter, on the trial of a cause, but may direct the point to be saved by a special verdict. Croudson v. Leonard (C. C. 1806) Fed. Cas. No. 3,439.

Court cannot, upon a special verdict, infer facts not actually found. Bank of Alexandria v. Swann (C. C. 1831) Fed. Cas. No. 853.

After a special verdict, a motion by plaintiff to enter the verdict on certain counts and nol. pros. the others was granted. Stokes v. Kendall (C. C. 1842) Fed. Cas. No. 13,480.

Danger of prejudice to successful party by special finding of facts stated. Clement v. Phœnix Ins. Co. (C. C. 1869) Fed. Cas. No. 2,882.

31. Appointment of auditor.—In an action in a federal court at law to recover damages alleged to have been suffered by mill machinery held by the defendant under an attachment, involving numerous complicated items of damage, the court was authorized to appoint an auditor to state an account to be used at a jury trial; the admission of the report in evidence not being a violation of the parties' constitutional right to trial by jury. Craven v. Clark (C. C. 1911) 186 Fed. 959.

32. New trial.—After a verdict is directed and the jury discharged, the trial judge may set the verdict aside and grant a new trial, but he has no jurisdiction to make new findings on the evidence already given, or add to or subtract from the record. Langdon v. Taylor (1910) 180 Fed. 385, 103 C. C. A. 531.

33. Review of findings of fact.—Where an action at law in a District Court triable by jury under this section is by consent tried to the court, no question of law or fact decided upon in connection with the trial is subject to re-examination on appeal. U. S. v. Cleage (1908) 161 Fed. 85, 88 C. C. A. 249; Same v. Louisville & N. R. Co. (1909) 167 Fed. 306, 308, 93 C. C. A. 58; Same v. St. Louis, I. M. & S. Ry. Co. (1909) 169 Fed. 73, 94 C. C. A. 441.

Since under R. S. § 649, post, § 1587, and Judicial Code, § 291, ante, § 1268, issues of fact may by consent be tried in the District Court without a jury, notwithstanding this section, such a trial no longer amounts to an arbitration and may be reviewed. Nashville Interurban Ry. v. Barnum (1914) 212 Fed. 634, 129 C. C. A. 170.

Conclusions of law arising on facts found by the courts on issues of fact are not reviewable on appeal. Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369, 370.

In the federal appellate courts, where no error of law appears upon the record, a verdict is conclusive. Southern Kansas Ry. Co. v. Briscoe (1892) 144 U. S. 133, 12 S. Ct. 538, 36 L. Ed. 377 (affirming Briscoe v. Southern Kansas Ry. Co. [C. C. 1889] 40 Fed. 273); Standard Oil Co. v. Brown (1910) 30 Sup. Ct. 669, 672, 218 U. S.

78, 54 L. Ed. 939; Herencia v. Guzman (1910) 31 Sup. Ct. 135, 219 U. S. 44, 55 L. Ed. 81, and cases cited; Campbell v. U. S. (1912) 32 Sup. Ct. 398, 224 U. S. 99, 56 L. Ed. 684; Troxell v. Delaware, L. & W. R. Co. (1913) 33 Sup. Ct. 274, 227 U. S. 434, 57 L. Ed. 586; Modern Woodmen of America v. Union Nat. Bank of Omaha (1901) 108 Fed. 753, 47 C. C. A. 667 (writ of certiorari denied [1901] 21 S. Ct. 926, 181 U. S. 623, 45 L. Ed. 1033); Southern Pac. Co. v. Maloney (1905) 136 Fed. 171, 69 C. C. A. 83; Chicago, M. & St. P. Ry. Co. v. Heil (1907) 154 Fed. 626, 83 C. C. A. 400; U. S. v. St. Louis, I. M. & S. R. Co. (1909) 169 Fed. 73, 94 C. C. A. 441.

As to presentation and reservation of grounds of review, see McLaughlin v. Bank of Potomac (1849) 7 How. 220, 227, 12 L. Ed. 675; Hammond v. Crawford (1895) 66 Fed. 425, 14 C. C. A. 109; Adams v. Shirk (1900) 104 Fed. 54, 43 C. C. A. 407 (rehearing denied [1901] 105 Fed. 659, 44 C. C. A. 653); McCutcheon v. Hall Capsule Co. (1900) 101 Fed. 546, 41 C. C. A. 494; Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co. (1901) 106 Fed. 798, 45 C. C. A. 638; Crockett v. Miller (1901) 112 Fed. 729, 50 C. C. A. 447; Kansas City S. Ry. Co. v. Billingslea (1902) 116 Fed. 335, 54 C. C. A. 109; Lydia Cotton Mills v. Prairie Cotton Co. (1907) 156 Fed. 225, 84 C. C. A. 129; Missouri, K. & T. Ry. Co. v. Collier (1907) 157 Fed. 347, 88 C. C. A. 127 (writ of certiorari denied Collier v. Missouri, Kansas & Texas R. Co. [1908] 28 S. Ct. 571, 209 U. S. 545, 52 L. Ed. 920); O'Halloran v. McGuirk (1909) 167 Fed. 493, 93 C. C. A. 129; Louisville & N. R. Co. v. Womack (1909) 173 Fed. 752, 97 C. C. A. 559; Joplin & P. Ry. Co. v. Payne (1912) 194 Fed. 387, 114 C. C. A. 305.

Cited without definite application, The Jas. E. Eagle v. Fraser (1868) 8 Wall. 15, 25, 19 L. Ed. 365; C. Elliott & Co. v. Toeppner (1902) 23 Sup. Ct. 133, 135, 187 U. S. 327, 47 L. Ed. 200; Houghton v. Burden (1913) 33 Sup. Ct. 491, 228 U. S. 161, 57 L. Ed. 780; American Sales Book Co. v. Bullivant (1902) 117 Fed. 255, 54 C. C. A. 287 (writ of certiorari denied [1903] 23 Sup. Ct. 855, 190 U. S. 560, 47 L. Ed. 1184); Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C. A. 360 (certiorari denied [1909] 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068).

§ 1584. (R. S. § 648.) Trial of issues of fact by jury.

The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section.

Act Sept. 24, 1789, c. 20, § 12, 1 Stat. 79. Act March 3, 1865, c. 86, § 4, 13 Stat. 501.

Provisions similar to those of this section, for trial of issues of fact in the district courts, were made by R. S. § 566, ante, § 1583.

The provisions of this section became inoperative as to the circuit courts on the abolition of those courts by Jud. Code, § 289, ante, § 1266, but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts, by Jud. Code, § 291, ante, § 1274.

Provisions for trial by jury in admiralty cases, and in equity in patent cases, were made by Act Feb. 16, 1875, c. 77, §§ 1, 2, post, §§ 1585, 1586.

See notes to said sections.

Notes of Decisions

Purpose and effect of statute.—The general provisions for a jury trial as to issues of fact in the federal courts, contained in this section do not, in view of Act April 12, 1900, § 8, post, § 3755, continuing local laws in force in Porto Rico, prevent the district court for the District of Porto Rico, when exercising, under section 34 of that act (section 3785, post), the jurisdiction of a circuit court, from enforcing the express provisions of Code Civ. Proc. Porto Rico, arts. 1409–1415, for the recovery and assessment of damages for wrongful attachment. Fernandez y Perez v. Perez y Fernandez (1906) 26 Sup. Ct. 561, 566, 202 U. S. 80, 50 L. Ed. 942.

This section, when considered in connection with R. S. § 723, ante, § 1244, shows that Congress intended to preserve to all litigants a right to trial by jury, except in cases of equity and admiralty jurisdiction, and except as otherwise provided by R. S. § 649, post, § 1587. Smith v. American Nat. Bank (1898) 89 Fed. 832, 838, 32 C. C. A. 368.

The object of this provision seems to have been to carry out the constitutional provision guaranteeing the right to trial by jury in common-law cases, and at the same time not to require a trial in that mode in equity and admiralty cases. Fitton v. Phœnix Assur. Co. (C. C. 1885) 23 Fed. 3.

A federal court may send issues of fact, properly raised by the pleadings in an equity case, to a jury for trial. Id.

Hearings before masters and referees.—In view of this section and R. S. § 700, post, § 1668, declares that when an issue of fact in a civil case in a

circuit court is tried by the court without a jury, the rulings of the court, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. Held that in an action at law the trial judge under such sections had no power, even with the acquiescence of both parties, to order a trial before a special master authorized to hear and pass on the issues of fact, and report his findings to the court. Swift & Co. v. Jones (1906) 145 Fed. 489, 76 C. C. A. 253, remanding case to court below (C. C. 1905) 135 Fed. 437, which is affirmed Same v. Ruffin (1907) 154 Fed. 1005, 83 C. C. A. 243.

The defendant in an action at law in a federal court having a constitutional right to a jury trial, unless waived by stipulation under this section, and section 1587, post, the court has no power to appoint a referee to hear and determine the issues, but may appoint an auditor when necessary to simplify the issues. Vermeule v. Reilly (D. C. 1912) 196 Fed. 226.

Under this section and R. S. § 649, post, § 1587, a federal court has no authority to grant a compulsory reference in an action at law, though the issues involved an accounting, and though such procedure is authorized by a state statute. U. S. v. Wells (D. C. 1913) 203 Fed. 146.

Waiver of jury trial.—Despite this provision, a jury trial could be waived even before Act 1865, which provided for trial by the court. Kearney v. Case (1870) 12 Wall. 275, 281, 20 L. Ed. 395.

The right of jury trial conferred by this section may be waived. Capital Traction Co. v. Hof (1899) 19 Sup. Ct. 580, 584, 174 U. S. 1, 43 L. Ed. 873.

Simplification of issues by auditor.—The defendant in an action at law in a federal court having a constitutional right to a jury trial, unless waived by stipulation, the court has no power to appoint a referee to hear and determine the issues, but may appoint an auditor when necessary to simplify the issues. Vermeule v. Reilly (D. C. 1912) 196 Fed. 226.

Issues requiring jury trial.—Under Const. Amend. 7, and this section, a suit by an assignee to recover a beneficiary's interest under a testamentary trust being an action at law, defendants were entitled to jury trial unless waived. Brown v. Fletcher (1913) 206 Fed. 461, 124 C. C. A. 367, modifying decree (D. C. 1912) 203 Fed. 70.

Under this section and section 1587, post, making all issues of fact triable by jury except in proceedings in equity, bankruptcy, admiralty, and in cases of maritime jurisdiction, an action of book account can be tried only by a jury, though R. S. § 914, ante, § 1537, provides that the practice in the federal courts shall be similar to that in the courts of the state in which the case is tried, and the action mentioned is triable under the state practice only by auditors. Sulzer v. Watson (C. C. 1889) 39 Fed. 414.

In view of Const. Amend. 7, which preserves the right to trial by jury in suits at common law, and of R. S. § 649, post, § 1587, which declares that issues of fact in civil cases may be determined by a court without a jury whenever the parties so stipulate, and of this section, held that, on a motion to quash the service of a foreign corporation defendant, it was not entitled to a jury trial of the issues whether it was doing business within the state, and whether the person on whom service was made was its representative. Peper Automobile Co. v. American Motor Car Sales Co. (C. C. 1910) 180 Fed. 245.

Eminent domain proceedings.—If the right to a trial by jury in the federal court in eminent domain proceedings depends on this statutory provision, it is repealed by Act 1888, c. 728. Beatty v. U. S. (1913) 203 Fed. 620, 122 C. C. A. 16.

Bankruptcy proceedings.—This section, section 1587, post, and section 1583, ante, provide that except where a jury is waived in a civil action a jury trial may be had, except in cases in equity, and except as otherwise provided in proceedings in bankruptcy. Bankr. Act 1898, § 19, subd. "a," post, § 9603, entitles a person against whom an involuntary petition has been filed to a jury trial of the question of his insolvency and any act of bankruptcy alleged to have been committed. Subdivision "c" declares that the right to submit matters in controversy to a jury shall be determined according to the laws of the United States in relation to trials by jury; and section 18, subd. "d," gives the bankrupt or any of his creditors the right to appear and "controvert the facts alleged in the petition." Held, that the right to a jury trial of the question of an involuntary bankrupt's insolvency and of alleged acts of bankruptcy was limited to the bankrupt, and could not be extended to intervening creditors contesting such issues. In re Herzikopf (1903) 121 Fed. 544, 57 C. C. A. 606.

This section does not affect the right to a jury trial in bankruptcy proceedings. In re Rude (D. C. 1900) 101 Fed. 805, 807.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Hodges v. Easton (1882) 1 Sup. Ct. 307, 311, 106 U. S. 408, 27 L. Ed. 169; Slocum v. New York Life Ins. Co. (1913) 33 Sup. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D,

1029; Klever v. Seawall (1895) 65 Fed. 393, 396, 12 C. C. A. 661; American Sales Book Co. v. Bullivant (1902) 117 Fed. 255, 54 C. C. A. 287 (writ of certiorari denied [1903] 23 Sup. Ct. 855, 190 U. S. 560, 47 L. Ed. 1184); U. S. v. Honolulu Plantation Co. (1903) 122 Fed. 581, 58 C. C. A. 279; Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369; U. S. v. Ramsey (C. C. 1907) 158 Fed. 488; Gilbert v. Hopkins (C. C. 1909) 171 Fed. 704.

§ 1585. (Act Feb. 16, 1875, c. 77, § 1.) Trial of issues of fact in admiralty causes.

The circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. (18 Stat. 315.)

This section and the section next following were part of an act entitled "An act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," cited above.

The provisions of this act were intended, apparently, in accordance with the purposes expressed in the title, to facilitate the disposition of cases in the Supreme Court, on appeal from the circuit courts. They may be regarded, therefore, as superseded by the provisions of the act establishing the circuit courts of appeals, which conferred the appellate jurisdiction in admiralty and in patent cases on those courts, and made their decisions in such cases final, Act March 3, 1891, c. 517, § 6, 26 Stat. 828, which were incorporated in Jud. Code, § 128, ante, § 1120; particularly as to the review of admiralty cases in the circuit courts of appeals, in which the hearing on appeal is in the nature of a trial de novo on a transcript containing all the testimony. But the express repeal of section 3 of this act by section 14 of Act March 3, 1891, c. 517, 26 Stat. 829, raised a presumption against the repeal by that act, by mere implication, of the sections of this act other than section 3. The subsequent enactment of the Judicial Code, by which the circuit courts were abolished and their powers and duties were transferred to the district courts, Jud. Code, §§ 289–291, ante, §§ 1266–1268, and jurisdiction of patent causes as well as of admiralty causes was vested in the district courts, Jud. Code, § 24, par. 7, ante, § 991 (7), made the provisions of this act relating to the circuit courts inoperative, except in so far as they may be applicable to the district courts. Such provisions of section 1 of this act, regarding the decision of admiralty causes by the circuit courts on appeals from the district courts under R. S. §§ 631, 632, in force at the time of the passage of this act, would seem to be not appropriate to the trial in the district courts of issues of fact in admiralty cases, provided for by R. S. § 566, ante, § 1583.

Notes of Decisions

1. Validity of section.
2. Purpose and scope.
3. Navigable waters within statute.
4. Courts of Alaska.
5. Hearings in circuit court of appeals.
6. Parties entitled to appeal.
7. Matters reviewable.
8. Amount in controversy.
9. Record, presentation of question, and reservation of grounds of review.
10. Effect of findings of fact.
11. Remand.
12. Costs.

1. Validity of section.—It may be doubtful whether this act has not been entirely superseded. Pioneer Fuel Co. v. McBrier (1897) 84 Fed. 496, 28 C. C. A. 466.

Act 1891 repeals this section. Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C. A. 360,

certiorari denied (1909) 29 Sup. Ct. 704. 214 U. S. 526, 53 L. Ed. 1068.

2. Purpose and scope.—Where, in an admiralty case, the decree was entered before this act went into effect, but the ascertainment of the damages by a master was subsequent thereto, the act applies to the master's report, and review thereof was confined to questions of law. The Richmond (1880) 103 U. S. 540, 544, 26 L. Ed. 313, 450.

On an appeal from a decree in admiralty entered before the act went into effect, the whole case came up, and the supreme court examined the questions of fact.—Id.

This act is to be construed as settling the following propositions: That the findings by the court below are conclusive, and have practically the same effect as the special verdict of a jury; that a bill of exceptions cannot be used to bring up the evidence for a review of the findings; that the only rulings on which the supreme court is authorized to pass are such as may be presented by a bill of exceptions prepared as in an action at law; that the lower court is bound to find only the ultimate facts; that the supreme court will not take notice of a refusal to find incidental facts, which only amount to evidence from which an ultimate fact is obtained; and that, where the court below refuses to make a finding as to the existence of a material fact which has been established by uncontradicted evidence or where it finds a fact not supported by evidence, and an exception is taken, the question may be brought to the supreme court for review in that particular. Alexandre v. Machan (1893) 13 Sup. Ct. 211, 213, 147 U. S. 72, 37 L. Ed. 84, affirming decree Macham v. New York (C. C. 1888) 35 Fed. 604.

It was the purpose of this act to relieve the supreme court from the necessity of deciding questions of fact in admiralty cases. The Havilah (1891) 48 Fed. 684, 685, 1 C. C. A. 77.

3. Navigable waters within statute.—The district court, in the trial of cases of seizure made on waters navigable by vessels of 10 tons burden and upwards, sits as a court of admiralty, and the trial is by the court. The Sarah (1823) 8 Wheat. 391, 394, 5 L. Ed. 644.

4. Courts of Alaska.—This act applies to appeals from the district court of Alaska sitting in admiralty. Ex parte Cooper (1892) 12 Sup. Ct. 453, 464, 143 U. S. 472, 36 L. Ed. 232; The Sylvia Handy (1892) 12 Sup. Ct. 464, 465, 143 U. S. 513, 36 L. Ed. 246.

5. Hearings in circuit court of appeals.—The act does not apply to circuit courts of appeals. The Havilah (1891) 48 Fed. 684, 1 C. C. A. 77; The State of California (1892) 49 Fed. 172, 1 C. C. A. 224 (reversing decree [D. C. 1889] 46 Fed. 877); The Philadelphian (1894) 60 Fed. 423, 9 C. C. A. 54 (decree affirmed [1894] 61 Fed. 862, 10 C. C. A. 127); The Coquitlam (1896) 77 Fed. 744, 23 C. C. A. 438; Laidlaw v. Oregon Ry. & Nav. Co. (1897) 81 Fed. 876, 26 C. C. A. 665; Nelson v. White (1897) 83 Fed. 215, 32 C. C. A. 166; The Nyack (1912) 199 Fed. 383, 118 C. C. A. 67.

Appeals from circuit courts to a circuit court of appeals may be heard without separate findings of fact and of law, and without bills of exception. The Havilah (1891) 48 Fed. 684, 1 C. C. A. 77. But see The Trefusis (1899) 98 Fed. 314, 39 C. C. A. 96, as to law governing the court in reviewing decrees in admiralty.

In the circuit courts of appeals an admiralty appeal is to all intents and purposes, a trial de novo, so that the appeal cannot be heard on the merits, where the transcript of the record does not contain the testimony taken below, as required by general admiralty rule 52, and by the rules of the circuit court of appeals. Nelson v. White (1897) 83 Fed. 215, 32 C. C. A. 166.

Under section 11, Act March 3, 1891, creating the circuit courts of appeals, such courts are governed, in reviewing decrees in admiralty, by the provisions of law then in force and applicable to such review by the supreme court; and under this act a decree for salvage services cannot be altered, for the reason that the amount awarded is excessive, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. The Trefusis (1899) 98 Fed. 314, 39 C. C. A. 96.

6. Parties entitled to appeal.—The master of a libeled vessel who enters a claim stating that he is the lawful bailee of the owner named in the claim, and who gives a release bond with surety, may alone appeal from the decree of the trial court, and thereby bring the whole case before the appellate court, though the owner and surety both appear of record, and may join in the appeal if they wish. Aiken v. Smith (1892) 54 Fed. 894, 4 C. C. A. 652, distinguishing Hardee v. Wilson (1892) 13 S. Ct. 39, 146 U. S. 179, 36 L. Ed. 933.

7. Matters reviewable.—While the appellate court may not review facts, the ultimate effect of the facts established is open for review in the supreme court. Sun Mutual Ins. Co. v. Ocean Ins. Co. (1883) 1 Sup. Ct. 582, 593, 107 U. S. 485, 27 L. Ed. 337.

A refusal to find as to any incidental fact which is merely evidence of the ultimate fact will not be reviewed. Merchants' Mut. Ins. Co. v. Allen (1887) 7 Sup. Ct. 821, 824, 121 U. S. 67, 30 L. Ed. 858.

Findings of fact by the trial court cannot be reviewed by the Supreme

Court, but a failure to make a finding one way or the other on a material question may, if preserved in the bill of exceptions, be reviewed. The E. A. Packard (1891) 11 Sup. Ct. 794, 795, 140 U. S. 360, 35 L. Ed. 453.

An order, made in a proceeding for limitation of liability, enjoining damage claimants from bringing actions, held appealable on the facts appearing. In re Oceanic Steam Navigation Co. (1913) 204 Fed. 259, 124 C. C. A. 347.

8. Amount in controversy.—The limitation as to amount in dispute, prescribed by Act March 3, 1887, section 1142, ante, for appeals from or writs of error to a federal district court sitting as a court of claims, remains in force notwithstanding the provisions of this section. Reid v. U. S. (1909) 29 Sup. Ct. 171, 172, 211 U. S. 529, 53 L. Ed. 313.

9. Record, presentation of question, and reservation of grounds of review.—This section makes no change in the law prescribing what should be included in the transcript on appeal. The Adriatic (1880) 103 U. S. 730, 26 L. Ed. 605; The Alice Tainter (C. C. 1876) Fed. Cas. No. 195.

Section 698, R. S. (section 1654, post), was held to give the supreme court power to prescribe by rule what should be done in cases where Act Feb. 16, 1875, c. 77, § 1, applied, and a rule was promulgated as to what the record should contain in cases of admiralty and maritime jurisdiction, where the facts are found below, and the power of review is limited to determining questions of law arising on the record. The Adriatic (1880) 103 U. S. 730, 731, 26 L. Ed. 605.

A bill of exceptions has not necessarily given the supreme court jurisdiction of an appeal in admiralty under the provisions of this section, as the review extends to questions of law arising on the record, and to such rulings of the court, excepted to at the time, as may be presented by bill of exceptions prepared as in actions at law, and at law a bill of exceptions is only used to put into the record that which would not appear without. The S. C. Tryon (1881) 105 U. S. 267, 270, 26 L. Ed. 1026.

The findings which the statute require must be stated by the court become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. The findings are in the nature of a special verdict, as to which the inquiry is always open in the reviewing court whether they are sufficient to support the judgment. Id.

The conclusions of law in an admiralty case stated on the record are open for revision in the supreme court on appeal, without any bill of exceptions. The Potomac (1881) 105 U. S. 630, 631, 26 L. Ed. 1194.

In absence of a bill of exceptions, inquiry on appeal to the supreme court in an admiralty case is reduced simply to whether the findings of the circuit court justify the decree appealed from. The Burlington v. Ford (1890) 11 Sup. Ct. 138, 140, 137 U. S. 386, 34 L. Ed. 731.

Objection to awards made for salvage services to the officers and crew of the salving vessel on the ground that they were not made parties to the libels cannot be raised for the first time in the appellate court. The Flottbek (1902) 118 Fed. 954, 55 C. C. A. 448, modifying decree (D. C. 1902) 112 Fed. 682.

Special findings of fact and law are required in an admiralty suit in the circuit court in all cases where the amount in controversy on appeal is sufficient to give the supreme court jurisdiction to re-examine the decree rendered in the circuit court; but where the sum or value in dispute does not exceed the sum or value of $5,000, a more general finding of those matters in the opinion of the circuit court will be sufficient. The Svend (C. C. 1879) 1 Fed. 54, 67.

The supreme court can, on appeal, determine the question of law arising upon the record and arising on the facts found by the circuit court; but a bill of exceptions to present for review rulings of the circuit court must be based on exceptions taken to the rulings at the time the rulings are made. Richardson v. The Havre (C. C. 1880) 4 Fed. 748, 749.

10. Effect of findings of fact.—In admiralty, findings of fact made by the trial court will not be disturbed by an appellate court, unless it clearly appears that there was error. The Perseverance (1797) 3 Dall. 336, 338, 1 L. Ed. 625; Pentz v. The Ariadne (1871) 13 Wall. 475, 479, 20 L. Ed. 542; Germania Ins. Co. v. The Lady Pike (1874) 21 Wall. 1, 8, 22 L. Ed. 499; The Clara (1880) 102 U. S. 200, 201, 26 L. Ed. 145; The Annie Lindsley v. Brown (1881) 104 U. S. 185, 187, 26 L. Ed. 716; The Potomac (1881) 105 U. S. 630, 631, 26 L. Ed. 1194; Merchants' Mut. Ins. Co. v. Allen (1887) 7 S. Ct. 821, 121 U. S. 67, 30 L. Ed. 858 (affirming decree The Orient [C. C. 1883] 16 Fed. 916); The Hesper (1887) 7 Sup. Ct. 1177, 1180, 122 U. S. 256, 30 L. Ed. 1175; Liverpool & G. W. S. Co. v. Phenix Ins. Co. (1889) 9 Sup. Ct. 469, 470, 129 U. S. 397, 32 L. Ed. 788; The E. A. Packer (1891) 11 Sup. Ct. 794, 140 U. S. 360, 35 L. Ed. 453 (reversing decree The E. A. Packer [D. C. 1884] 20 Fed. 327); Ralli v. Troop (1895) 15 Sup. Ct. 657, 669, 157 U. S. 386, 39 L. Ed. 742; Smith v. Burnett (1898) 19 Sup. Ct. 442, 445, 173 U. S. 430, 43 L. Ed. 756; Deslions v. La Compagnie Generale Transatlantique (1908) 28 S. Ct. 664,

210 U. S. 95, 52 L. Ed. 973 (affirming decree La Bourgogne [1906] 144 Fed. 781, 75 C. C. A. 647); The Warrior (1893) 54 Fed. 534, 537, 4 C. C. A. 498; Philadelphia & G. S. S. Co. v. McCauldin (1913) 202 Fed. 735, 121 C. C. A. 197 (affirming decree McCaldin v. Cargo of Lumber [D. C. 1912] 198 Fed. 328); Philadelphia, B. & W. R. Co. v. Southern Transp. Co. (1913) 205 Fed. 732, 124 C. C. A. 26 (affirming decree Southern Transp. Co. v. Philadelphia, B. & W. R. Co. [D. C. 1912] 196 Fed. 548); New England S. S. Co. v. New York Dock Co. (1913) 207 Fed. 73, 124 C. C. A. 633; Stern v. Fernandez (1915) 222 Fed. 42, 137 C. C. A. 580; The Dolbadarn Castle (1915) 222 Fed. 838, 138 C. C. A. 264 (affirming decree [D. C. 1914] 212 Fed. 565); The Louisville (1880) 14 Sup. Ct. 1190, 154 U. S. 657, 25 L. Ed. 771.

The findings of fact in causes of admiralty and maritime jurisdiction have the same effect as a special verdict in an action at law. The Benefactor (1880) 102 U. S. 214, 218, 26 L. Ed. 157; Marshall v. The Adriatic (1883) 2 S. Ct. 355, 107 U. S. 512, 27 L. Ed. 497; The Maggie J. Smith (1887) 8 S. Ct. 159, 160, 123 U. S. 349, 31 L. Ed. 175.

In the case of a special finding, with conclusions of law thereon, presented to the supreme court on appeal, the question is not whether the statement of facts made by the circuit court might be true as a conclusion of fact, but whether, on the facts found, it must be true as a matter of law. Sun Mutual Ins. Co. v. Ocean Ins. Co. (1883) 1 Sup. Ct. 582, 592, 107 U. S. 485, 27 L. Ed. 337.

The rule that findings of fact by the District Court in admiralty are entitled to great weight in the appellate court is modified when they are based on depositions. Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft v. Gye (1913) 207 Fed. 247, 124 C. C. A. 517.

Findings of fact of a commissioner in admiralty under an ordinary reference, made on conflicting evidence, while presumptively right, are not conclusive and should be reversed if the court, in the exercise of its own judgment, is clearly convinced that they are wrong. Western Transit Co. v. Davidson S. S. Co. (1914) 212 Fed. 696, 129 C. C. A. 232.

The rule that findings of fact made by a commissioner in an admiralty suit are presumptively correct applies, not only where the witnesses appear before him and the testimony is conflicting, but also in cases where his conclusions are based on documentary evidence. The Perry G. Walker (D. C. 1914) 216 Fed. 423.

Where a court of admiralty omits to find facts which are material to the issues in a case, although they are proved by the evidence, the case is reviewable by an appellate court on the facts unaffected by any finding of the trial court. The Fullerton (1914) 211 Fed. 833, 128 C. C. A. 359.

A decree of salvage is not to be altered by the Supreme Court for excess in the amount awarded, unles the excess is so great that, on any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. The Connemara and the Joseph Cooper, Jr. (1883) 2 S. Ct. 754, 108 U. S. 352, 27 L. Ed. 751; The Hesper (1887) 7 S. Ct. 1177, 1181, 122 U. S. 256, 30 L. Ed. 1175; Potomac Steamboat Co. v. Baker Salvage Co. (1887) 8 Sup. Ct. 33, 38, 123 U. S. 40, 31 L. Ed. 75; Thomas v. The Florence (1896) 71 Fed. 527, 18 C. C. A. 240; The R. R. Rhodes v. Fay (1897) 82 Fed. 751, 27 C. C. A. 258; The Trefusis (1899) 98 Fed. 314, 39 C. C. A. 96; The Thornley (1899) 98 Fed. 735, 39 C. C. A. 248; Simpson v. Dollar (1901) 109 Fed. 814, 48 C. C. A. 663 (affirming decree The Grace Dollar [D. C. 1900] 103 Fed. 665); Hume v. J. D. Spreckels & Bros. Co. (1902) 115 Fed. 51, 52 C. C. A. 645; The Eliza Strong (1904) 130 Fed. 99, 64 C. C. A. 433; Perriam v. Pacific Coast Co. (1904) 133 Fed. 140, 66 C. C. A. 206; The Carroll (1908) 167 Fed. 112, 92 C. C. A. 564 (affirming decree [D. C. 1908] 163 Fed. 425); Fountain v. Sawyer (1910) 176 Fed. 92, 99 C. C. A. 612; The Baker (C. C. 1885) 25 Fed. 771.

Before this act the supreme court, on appeal in a salvage case, gave the same weight, and no more, to the decree of the court below that a court of common law would allow to the verdict of a jury, and might revise that decree for manifest error in matter of fact, even if no violation of the just principles which govern the subject was shown. The Connemara and The Joseph Cooper, Jr. (1883) 2 Sup. Ct. 754, 759, 108 U. S. 352, 27 L. Ed. 751.

The evidence having plainly shown that the M. Co. was originally employed by the owner's agents to effect a rescue, and that the I. Co. and another came in as subordinates, and that the rescue was principally due to the efforts and skill of the M. Co., the court will not reverse a decree in its favor on account of a numerical predomination of witnesses in behalf of the I. Co., testifying chiefly to an allegation which all the surrounding circumstances showed unworthy of belief. Insurance Co. of North America v. The Venezuela (1893) 55 Fed. 416, 5 C. C. A. 159, affirming decree (D. C. 1892) 50 Fed. 607.

Where the court valued the vessel salved at $2,000,000, while its actual value was $1,888,500, the error is not material, as, where the total amount salved is so large, the difference between the two sums is too small to affect the amount of award. International Nav. Co. v. The St. Paul (1898) 86 Fed. 340, 30 C. C. A. 70, affirming de-

cree Merritt v. The St. Paul (D. C. 1897) 82 Fed. 104.

An award of an admiralty court for salvage services in towing a disabled vessel into port, based on the value of the vessel salved, and which is many times the value of the towage, on which the award should have been based under the facts shown, is one made upon incorrect principles, and may properly be reviewed, and the amount reduced, by the circuit court of appeals. The New Camelia (1900) 105 Fed. 637, 44 C. C. A. 642.

Since this act, in a salvage case, the United States supreme court may revise the decree of the circuit court for matter of law only, and will not alter such decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, on any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. Hence a decree allowing $5,600 as compensation for safely and expeditiously removing a cargo worth $10,000 from a steamer sunk by a collision, worth $150,000, and pumping out, raising, and towing such steamer several miles into port, at great risk and expense to the salving company, will not be reversed on the ground that the award is excessive. Potomac Steamboat Co. v. Baker Salvage Co. (1887) 123 U. S. 40, 8 Sup. Ct. 33, 31 L. Ed. 75.

The district court in a salvage case awarded a specified sum to libelants, with interest from the date of completion of the salvage services. On appeal, the award was reduced, and the decree and mandate of the appellate court directed the entry of a decree for a specified sum without any mention of interest. Held, that the district court had no authority to give interest on this sum from the date of completion of the salvage services, and that interest should only run from the date of a decree of the appellate court. The Haxby (1897) 83 Fed. 720, 28 C. C. A. 38.

Where, on appeal from a decree allowing salvage, new evidence, not accessible on the trial, is given, showing greater damage to the rescued vessel than was found on the appraisal, the salvage should be reduced accordingly. The Oxford (1895) 66 Fed. 590, 13 C. C. A. 647, reversing decree (D. C. 1894) 66 Fed. 584.

11. Remand.—To justify the supreme court in returning a case to the circuit court for a special statement of the facts required by the act, it must clearly appear that the omission was attributable to the fault or neglect of the court, and not to that of the parties. Winslow v. Wilcox (1881) 104 U. S. 183, 184, 26 L. Ed. 693.

12. Costs.—The clerk may charge for including the evidence in a suit in admiralty in the final record on final decree, notwithstanding the provision of this section in regard to appeals in admiralty to the supreme court. The Alice Tainter (C. C. 1877) Fed. Cas. No. 196.

Cited without definite application, The City of Panama v. Phelps (1879) 101 U. S. 453, 462, 25 L. Ed. 1061; Watts v. Camors (1885) 6 Sup. Ct. 91, 95, 115 U. S. 353, 29 L. Ed. 406; Meissner v. Brun (1888) 9 Sup. Ct. 139, 141, 128 U. S. 474, 32 L. Ed. 496; Rea v. The Eclipse (1890) 10 Sup. Ct. 873, 875, 135 U. S. 599, 34 L. Ed. 269; Central Trust Co. v. McGeorge (1894) 14 Sup. Ct. 286, 287, 151 U. S. 129, 38 L. Ed. 98; The E. A. Packer (1893) 58 Fed. 251, 252, 253, 7 C. C. A. 216; King v. Smith (1901) 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708; The Centennial (C. C. 1881) 7 Fed. 601, 603; In re Long Island North Shore Passenger & Freight Transp. Co. (D. C. 1881) 5 Fed. 599, 625; The Kenilworth (D. C. 1890) 41 Fed. 523, 526.

§ 1586. (Act Feb. 16, 1875, c. 77, § 2.) Trial of issues of fact in equity in patent causes.

Said courts, when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the Supreme Court, and submit to them such questions of fact arising in such cause as such circuit court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings. (18 Stat. 316.)

See notes to section 1 of this act, ante, § 1585.

The courts referred to in the first sentence of this section were the circuit courts, mentioned in the preceding section of the act, ante, § 1585, which were abolished, and their powers and duties conferred on the district courts, by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Jurisdiction of patent causes was vested in the district courts by Jud. Code, § 24, par. 7, ante, § 991 (7).

Notes of Decisions

Purpose of act.—A reference to intelligent experts and practical men was probably in the mind of Congress in passing this act. The court may de-

cide the case without the aid of a jury. Cochrane v. Deener (1876) 94 U. S. 780, 784, 24 L. Ed. 139.

Discretion of court as to jury trial.—Jury trial is a matter of discretion. Keyes v. Pueblo Smelting & Refining Co. (C. C. 1887) 31 Fed. 560.

Chancery practice not affected.—The verdict of the jury on an issue out of chancery is merely advisory. A motion for new trial must be made in the chancery court, and the moving party must procure notes of the proceedings and of the evidence at the trial, which then became a part of the record on appeal, and these rules are not affected by this section. Watt v. Starke (1879) 101 U. S. 247, 250, 25 L. Ed. 826.

Secret trial in patent case.—The established forms of jury trials in other cases cannot be departed from in patent cases, even though patentees may desire secrecy. (1820) 1 Op. Atty. Gen. 376.

§ 1587. (R. S. § 649.) Trial of issues of fact by the court.

Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

Act March 3, 1865, c. 86, § 4, 13 Stat. 501.

The provisions of this section became inoperative as to the circuit courts on the abolition of those courts by Jud. Code, § 289, ante, § 1266, but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts by Jud. Code, § 291, ante, § 1268.

Provisions relating to the review, on writ of error or appeal, where an issue of fact is tried by the court without a jury according to this section, of rulings at the trial, and, where the finding on the facts is special, of the sufficiency of the facts found to support the judgment, were made by R. S. § 700, post, § 1668.

Other provisions relating to the trial of issues of fact were contained in R. S. § 566, ante, § 1583, R. S. § 648, ante, § 1584, and Act Feb. 16, 1875, c. 77, §§ 1, 2, ante, §§ 1585, 1586.

Notes of Decisions

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1. Trial without jury.—Issues of fact may by consent be tried in the District Court without a jury, notwithstanding R. S. § 566, ante, § 1583. Nashville Interurban Ry. v. Barnum (1914) 212 Fed. 634, 129 C. C. A. 170; Eastern Oil Co. v. Holcomb (1914) 212 Fed. 126, 128 C. C. A. 642; Ladd & Tilton Bank v. Lewis A. Hicks Co. (1914) 218 Fed. 310, 134 C. C. A. 106. See, also, In re Herzikopf (1903) 121 Fed. 544, 57 C. C. A. 606; City of Pittsburgh v. Jonathan Clark & Sons Co. (1907) 154 Fed. 464, 83 C. C. A. 262.

Before the abolition of the circuit courts, the provisions for waiver of a jury was held inapplicable to the district courts. See Rogers v. U. S. (1891) 12 Sup. Ct. 91, 93, 141 U. S. 548, 35 L. Ed. 853; U. S. v. Cleage (1908) 161 Fed. 85, 88 C. C. A. 249; U. S. v. Louisville & N. R. Co. (1909) 167 Fed. 306, 93 C. C. A. 58 (affirming judgment [D. C. 1907] 156 Fed. 195); U. S. v. St. Louis, I. M. & S. Ry. Co. (1909) 169 Fed. 73, 94 C. C. A. 441; Low v. U. S. (1909) 169 Fed. 86, 94 C. C. A. 1; Frank v. U. S. (1911) 192 Fed. 864, 113 C. C. A. 188; Blair v. Allen (C. C. 1874) Fed. Cas. No. 1,483; Wear v. Mayer (C. C. 1880) 6 Fed. 658. See, also, Town of Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369.

On the trial of an action at law without a jury, by written stipulation, either party may, by motion, present the question of his right to a judgment as a matter of law upon the whole evidence. World's Columbian Exposition v. Republic of France (1899) 96 Fed. 687, 38 C. C. A. 483.

2. Waiver of jury.—Independently of the statute, parties may waive trial by jury. Kelsey v. Forsyth (1858) 21 How. 85, 16 L. Ed. 32; Kearney v. Case (1870) 12 Wall. 275, 282, 20 L. Ed. 395; Henderson's Distilled Spirits (1871) 14 Wall. 44, 53, 20 L. Ed. 815; State of Louisiana v. U. S. (1887) 22 Ct. Cl. 85. See, also, Guild v. Frontin (1855) 18 How. 135, 15 L. Ed. 290.

Parties to a removed case may waive a jury by consent. Phillips v. Moore (1879) 100 U. S. 208, 213, 25 L. Ed. 603.

It is not competent for the court to try an issue of fact without a jury in

the absence of the counsel of the party and without any written agreement to waive a jury trial. Morgan v. Gay (1873) 19 Wall. 81, 82, 22 L. Ed. 100; Kelly v. Town of Milan (C. C. 1884) 21 Fed. 842, judgment affirmed (1888) 8 S. Ct. 1101, 127 U. S. 139, 32 L. Ed. 77. See, also, Hodges v. Easton (1882) 1 Sup. Ct. 307, 310, 106 U. S. 408, 27 L. Ed. 169.

Without a waiver of the right of trial by jury by consent of parties, the court errs if it substitutes itself for the jury and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon, and for such error the judgment will be reversed and the cause remanded for a new trial. Baylis v. Travelers' Ins. Co. (1885) 5 Sup. Ct. 494, 497, 113 U. S. 316, 28 L. Ed. 989; Gilbert v. Hopkins (C. C. 1909) 171 Fed. 704.

A stipulation submitting a cause to the court for trial on agreed facts is a sufficient stipulation for the waiver of a jury. Wayne County v. Kennicott (1880) 103 U. S. 554, 26 L. Ed. 486; U. S. v. Harris (1882) 1 Sup. Ct. 601, 606, 106 U. S. 629, 27 L. Ed. 290; Citizens' Bank v. Farwell (1893) 56 Fed. 570, 6 C. C. A. 24 (writ of error dismissed [1893] 56 Fed. 539, 6 C. C. A. 30); Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98.

So is a stipulation in writing that the cause be tried by the court. Bamberger v. Terry (1880) 103 U. S. 40, 43, 26 L. Ed. 317.

See, also, Phillips v. Moore (1879) 100 U. S. 208, 213, 25 L. Ed. 603; Anglo-American Land, Mortgage & Agency Co. v. Lombard (1904) 132 Fed. 721, 68 C. C. A. 89 (writ of certiorari denied Lombard v. Anglo-American Land, Mortgage & Agency Co. [1904] 25 Sup. Ct. 793, 196 U. S. 638, 49 L. Ed. 630); Fellman v. Royal Ins. Co. (1911) 184 Fed. 577, 106 C. C. A. 557 (rehearing denied [1911] 185 Fed. 689, 107 C. C. A. 637).

The filing of a stipulation in writing, waiving a jury, is not sufficiently shown by a statement in the record or in the bill of exceptions, that "the issue joined by consent is tried by the court, a jury being waived," or that "the case came on for trial, by agreement of parties, by the court, without the intervention of a jury." Bond v. Dustin (1884) 5 Sup. Ct. 296, 297, 112 U. S. 604, 28 L. Ed. 835; Davenport v. Paris (1890) 10 Sup. Ct. 1064, 136 U. S. 580, 34 L. Ed. 548.

A written stipulation waiving a jury is not necessary to the submission to the court of issues of law on what is virtually an agreed statement of facts. Talcott v. Friend (1910) 179 Fed. 676, 103 C. C. A. 80, judgment affirmed Friend v. Talcott (1913) 33 S. Ct. 505, 228 U. S. 27, 57 L. Ed. 718. And to the same effect, see Rush v. Newman (1893) 58 Fed. 158, 7 C. C. A. 136; U. S. v. Carr (1894) 61 Fed. 802, 10 C. C. A. 80; Cudahy Packing Co. v. Sioux Nat. Bank (1895) 69 Fed. 782, 16 C. C. A. 409 (affirming judgment Sioux Nat. Bank v. Cudahy Packing Co. [C. C. 1894] 63 Fed. 805); Columbus Compress Co. v. United States Fidelity & Guaranty Co. (1911) 186 Fed. 487, 108 C. C. A. 465. But see Shields v. Mongollon Exploration Co. (1905) 137 Fed. 539, 70 C. C. A. 123.

Requests by each party for the direction of a verdict are not equivalent to a submission of the case to the court without a jury. Beuttell v. Magone (1895) 15 Sup. Ct. 566, 157 U. S. 154, 39 L. Ed. 654; Minahan v. Grand Trunk Ry. Co. (1905) 138 Fed. 37, 41, 70 C. C. A. 463. But are an affirmation by both parties that there is no disputed question of fact which can control the question of law, and operate as a request that the court find the facts, so that the parties are concluded by the finding of the court upon which the resulting instruction of law is given, and the reviewing court is limited to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. Beuttell v. Magone (1895) 15 Sup. Ct. 566, 570, 157 U. S. 154, 39 L. Ed. 654.

An agreement at the close of the trial that no questions call for submission to the jury is equivalent to a request that the facts be found by the court. Baglin v. Title Guaranty & Surety Co. (C. C. 1909) 166 Fed. 356 (affirmed [1909] 178 Fed. 682, 102 C. C. A. 182). See Beuttell v. Magone (1895) 15 Sup. Ct. 566, 567, 157 U. S. 154, 39 L. Ed. 654; Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. (1906) 147 Fed. 457, 77 C. C. A. 601 (affirmed [1908] 28 Sup. Ct. 607, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70); Lawton v. Carpenter (1912) 195 Fed. 362, 115 C. C. A. 264 (certiorari denied [1912] 32 Sup. Ct. 840, 225 U. S. 710, 56 L. Ed. 1267).

An unconditional waiver is required. Merrill v. Floyd (1892) 53 Fed. 172, 3 C. C. A. 494 (affirming judgment [1892] 50 Fed. 849, 2 C. C. A. 58); Smith v. Weeks (1893) 53 Fed. 758, 3 C. C. A. 644.

The stipulation does not operate as a waiver of a jury on a second trial, after the judgment has been reversed and the cause remanded. Burnham v. North Chicago St. Ry. Co. (1898) 88 Fed. 627, 32 C. C. A. 64, reversing judgment (1897) 78 Fed. 101, 23 C. C. A. 677.

Unless there is a written waiver of trial by jury the statutes do not apply. Steel v. Lord (1899) 93 Fed. 728, 35 C. C. A. 555.

This section is not applicable to default cases. Midland Contracting Co. v. Toledo Foundry & Machine Co. (1907) 154 Fed. 797, 83 C. C. A. 489;

Brock v. Fuller Lumber Co. (1907) 153 Fed. 272, 82 C. C. A. 402. Nor to a civil suit for unlawful inclosure of public lands. Cameron v. U. S. (1893) 13 Sup. Ct. 595, 597, 148 U. S. 301, 37 L. Ed. 459.

3. —— **Authority for review.**—See, also, notes to § 1668, post.

The provisions of the statute in so far as they prescribe authority for review, are jurisdictional, and, where an action was tried to the court without a written stipulation for such waiver, there could be no review, except of questions arising on the process, pleadings, or judgment. Ladd & Tilton Bank v. Lewis A. Hicks Co. (1914) 218 Fed. 310, 134 C. C. A. 106. See Flanders v. Tweed (1869) 9 Wall. 425, 429, 19 L. Ed. 678; Kearney v. Case (1870) 12 Wall. 275, 284, 20 L. Ed. 395; Brooklyn L. Ins. Co. v. Miller (1870) 12 Wall. 285, 297, 20 L. Ed. 398; Gilman v. Illinois & M. Teleg. Co. (1875) 91 U. S. 603, 614, 23 L. Ed. 405; Bond v. Dustin (1884) 5 Sup. Ct. 296, 297, 112 U. S. 604, 28 L. Ed. 835, and cases there cited; Paine v. Central Vermont R. Co. (1886) 6 Sup. Ct. 1019, 1022, 118 U. S. 152, 30 L. Ed. 193; Dundee Mortg. & T. I. Co. v. Hughes (1888) 8 Sup. Ct. 377, 379, 124 U. S. 157, 31 L. Ed. 357 (distinguishing Boogher v. New York Life Ins. Co. [1880] 103 U. S. 90, 97, 26 L. Ed. 310); Roberts v. Benjamin (1888) 8 Sup. Ct. 393, 397, 124 U. S. 64, 31 L. Ed. 334; Andes v. Slauson (1889) 9 Sup. Ct. 573, 574, 130 U. S. 435, 32 L. Ed. 989; Spalding v. Manasse (1889) 9 Sup. Ct. 649, 131 U. S. 65, 33 L. Ed. 86; Beuttell v. Magone (1895) 15 Sup. Ct. 566, 157 U. S. 154, 39 L. Ed. 654 (reversing judgment [C. C. 1890] 48 Fed. 157); Branch v. Texas Lumber Mfg. Co. (1893) 53 Fed. 849, 4 C. C. A. 52 (judgment reversed [1893] 56 Fed. 707, 6 C. C. A. 92); Rush v. Newman (1893) 58 Fed. 158, 7 C. C. A. 136; U. S. v. Carr (1894) 61 Fed. 802, 10 C. C. A. 80; Wietz v. Lymer (1894) 63 Fed. 758, 11 C. C. A. 410; Duncan v. Atchison, T. & S. F. R. Co. (1896) 72 Fed. 808, 19 C. C. A. 202; Cudahy Packing Co. v. Sioux Nat. Bank (1896) 75 Fed. 473, 21 C. C. A. 428 (affirming judgment Sioux Nat. Bank v. Cudahy Packing Co. [C. C. 1894] 63 Fed. 805); Ham v. Edgell (1901) 106 Fed. 820, 45 C. C. A. 661; City of Defiance v. Schmidt (1903) 123 Fed. 1, 59 C. C. A. 159 (affirming judgment Schmidt v. City of Defiance [C. C. 1902] 117 Fed. 702); West Virginia Northern R. Co. v. U. S. (1904) 134 Fed. 198, 67 C. C. A. 220 (affirming judgment U. S. v. West Virginia Northern R. Co. [C. C. 1903] 125 Fed. 252); Erkel v. Same (1909) 169 Fed. 623, 95 C. C. A. 151; Columbus Compress Co. v. United States Fidelity & Guaranty Co. (1911) 186 Fed. 487, 108 C. C. A. 465. And in such case a judgment on a special finding cannot be reversed and a new trial granted because the attempted waiver of a jury was in good faith on both sides. Ladd & Tilton Bank v. Lewis A. Hicks Co. (1914) 218 Fed. 310, 134 C. C. A. 106. See, also, U. S. v. Harris (1883) 1 Sup. Ct. 601, 605, 106 U. S. 629, 27 L. Ed. 290; Baylis v. Travelers' Ins. Co. (1885) 5 Sup. Ct. 494, 497, 113 U. S. 316, 28 L. Ed. 989; Slocum v. New York Life Ins. Co. (1913) 33 Sup. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D, 1029; Merrill v. Floyd (1892) 50 Fed. 849, 850, 2 C. C. A. 58; Merrill v. Floyd (1892) 53 Fed. 172, 3 C. C. A. 494; Smith v. Weeks (1893) 53 Fed. 758, 3 C. C. A. 644; Willcox v. Jones (1910) 177 Fed. 870, 101 C. C. A. 84; Elkin v. Denver Engineering Works Co. (1910) 181 Fed. 684, 105 C. C. A. 1; Alder v. Edenborn (D. C. 1912) 198 Fed. 928.

Where a case has been tried by the court without a jury, but no stipulation appears in the record on appeal, the appellate court has no authority to review the rulings of the court on the trial as to the exclusion and admission of evidence or on propositions of law. Abraham v. Levy (1896) 72 Fed. 124, 18 C. C. A. 469. See Bond v. Dustin (1884) 5 Sup. Ct. 296, 297, 112 U. S. 604, 28 L. Ed. 835, and cases there cited.

4. **Effect of state statutes and practice.**—See, also, notes to § 1537, ante.

The mode of waiving a jury. Erkel v. U. S. (1909) 169 Fed. 623, 95 C. C. A. 151. See, also, U. S. v. Arnold (1895) 69 Fed. 987, 16 C. C. A. 575 (certiorari denied [1896] 16 S. Ct. 1208, 163 U. S. 709, 41 L. Ed. 315; Swift & Co. v. Jones (1906) 145 Fed. 489, 76 C. C. A. 253; Sulzer v. Watson (C. C. 1889) 39 Fed. 414, 415. As well as the making of special findings by a federal court on waiver of a jury, and the effect thereof, is governed by the federal statutes, and not by state statutes. Jones v. U. S. (1905) 135 Fed. 518, 68 C. C. A. 68. See, also, Stroheim v. Deimel (C. C. 1896) 73 Fed. 430, 431, reversed (1896) 77 Fed. 802, 23 C. C. A. 467.

And so the court may, at its option, make either general or special findings, but it cannot be required to rule on specific propositions of law presented by the parties in accordance with a state practice. Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190. See, also, U. S. v. Indian Grave Drainage Dist. (1898) 85 Fed. 928, 29 C. C. A. 578.

5. —— **Reference.**—A federal court has no authority to grant a compulsory reference in an action at law, though the issues involved an accounting, and though such procedure is authorized by a state statute. U. S. v. Wells (D. C. 1913) 203 Fed. 146. But see Tiernan

v. Chicago Life Ins. Co. (1914) 214 Fed. 238, 131 C. C. A. 284.

6. Findings of court.—Trial by court without jury is not concluded until former findings of facts are made. Clement v. Phœnix Ins. Co. (C. C. 1869) Fed. Cas. No. 2,882.

The court must itself find the facts. Bethell v. Mathews (1871) 13 Wall. 1, 2, 20 L. Ed. 556. And may announce its findings in open court, and have them entered on the record, and need not write them out and file them. Ætna Life Ins. Co. v. Board of Com'rs of Hamilton County (1897) 79 Fed. 575, 25 C. C. A. 94. But it cannot, after deciding a case submitted to it without a jury, and making special findings covering the ultimate facts, make additional findings on request of a party. Lang v. Baxter (C. C. 1895) 69 Fed. 905.

That what purported to be the findings of the court in a case, but were not in fact such findings, were inadvertently entered of record, did not preclude the court from setting them aside when the error was discovered, or deprive it of jurisdiction to proceed with the consideration of the case as though they had not been entered. Syracuse Tp., Hamilton County, Kan., v. Rollins (1900) 104 Fed. 958, 44 C. C. A. 277.

Where the trial court made no findings, an appellate court could not draw inferences from the testimony to establish ultimate facts and hence a stipulation as to what a witness would testify if called would be disregarded. New York Life Ins. Co. v. Dunlevy (1914) 214 Fed. 1, 130 C. C. A. 473, affirming judgment (D. C. 1913) Dunlevy v. New York Life Ins. Co., 204 Fed. 670.

7. General or special findings.—On trial of an action at law without a jury, it is discretionary with the court to make either general or special findings on the facts. Brooklyn L. Ins. Co. v. Miller (1870) 12 Wall. 285, 297, 20 L. Ed. 398; Mercantile Mut. Ins. Co. v. Folsom (1873) 18 Wall. 237, 248, 21 L. Ed. 827; City of Key West v. Baer (1895) 66 Fed. 440, 13 C. C. A. 572; Ætna Life Ins. Co. v. Board of Com'rs of Hamilton County (1897) 79 Fed. 575, 25 C. C. A. 94; City of Pontiac v. Talbot Pav. Co. (1899) 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326; State Nat. Bank v. Smith (1899) 94 Fed. 605, 36 C. C. A. 412; West Virginia Northern R. Co. v. U. S. (1904) 134 Fed. 198, 67 C. C. A. 220; School Dist. No. 11, Dakota County, Neb., v. Chapman (1907) 152 Fed. 887, 82 C. C. A. 35 (writ of certiorari denied [1907] 27 S. Ct. 792, 205 U. S. 545, 51 L. Ed. 923); Jackson v. Mutual Life Ins. Co. of New York (1911) 186 Fed. 447, 108 C. C. A. 369; Clement v. Phœnix Ins. Co. (C. C. 1869) Fed. Cas. No. 2,882; Folsom v. Mercantile Mut. Ins. Co. (C. C. 1871) Fed. Cas. No. 4,903; Marye v. Strouse (C. C. 1880) 5 Fed. 494, 497; Archer v. Morehouse (Super. Ct. Ark. 1832) Fed. Cas. No. 18,225.

The court's finding may be either general or special, but not both, and where a general finding is made, and judgment rendered thereon, it is not superseded by a supposed special finding, which was not entered of record, and is only found in the bill of exceptions, and does not purport to take the place of the general finding. British Queen Min. Co. of Colorado v. Baker Silver Min. Co. (1891) 11 Sup. Ct. 523, 139 U. S. 222, 35 L. Ed. 147; State Nat. Bank v. Smith (1899) 94 Fed. 605, 36 C. C. A. 412; Corliss v. Pulaski County (1902) 116 Fed. 289, 53 C. C. A. 567; Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190; U. S. v. Cleage (1908) 161 Fed. 85, 88 C. C. A. 249; Marye v. Strouse (C. C. 1880) 5 Fed. 494. And see Quinn v. Dimond (1896) 72 Fed. 993, 19 C. C. A. 336.

A special finding should not be accompanied by a general finding. British Queen Min. Co. of Colorado v. Baker Silver Min. Co. (1891) 11 Sup. Ct. 523, 139 U. S. 222, 35 L. Ed. 147; Wesson v. Saline County (1896) 73 Fed. 917, 20 C. C. A. 227; Austin v. Hamilton County (1896) 76 Fed. 208, 22 C. C. A. 128; State Nat. Bank v. Smith (1899) 94 Fed. 605, 36 C. C. A. 412; Wright v. Bragg (1899) 96 Fed. 729, 37 C. C. A. 574.

8. Form and sufficiency of findings.—Special findings by a trial judge in an action at law in a federal court, where a jury has been waived pursuant to this section have the same effect as special verdicts of a jury, and must embrace a finding on every material issue joined in the case, otherwise the result is a mistrial. Packer v. Whittier (1899) 91 Fed. 511, 33 C. C. A. 658 (reversing judgment [C. C. 1897] 81 Fed. 335); Evans v. Kister (1899) 92 Fed. 828, 35 C. C. A. 28; Towle v. First Nat. Bank (1907) 153 Fed. 566, 82 C. C. A. 520.

When a special finding is rendered, it behooves the party having the burden of proof to see that every fact essential to the relief sought is directly and unequivocally stated. Sneed v. Sabinal Mining & Milling Co. (1896) 73 Fed. 925, 20 C. C. A. 230 (denying a petition for a rehearing [1896] 71 Fed. 493, 18 C. C. A. 213, and following Wesson v. Saline County [1896] 73 Fed. 917, 20 C. C. A. 227); U. S. v. Harris (1897) 77 Fed. 821, 23 C. C. A. 483.

Special findings of fact should consist of a concise and specific statement of the ultimate facts found without recitals of the evidence or conclusions of law. Norris v. Jackson (1869) 9 Wall. 125, 127, 19 L. Ed. 608; Minchen v. Hart (1896) 72 Fed. 294, 18 C. C. A. 570 (affirming judgment Hart

v. Minchen [C. C. 1895] 69 Fed. 520); State Nat. Bank v. Smith (1899) 94 Fed. 605, 36 C. C. A. 412; Wilson v. Merchants' Loan & Trust Co. (1901) 22 Sup. Ct. 55, 58, 183 U. S. 121, 46 L. Ed. 113; Corliss v. Pulaski County (1902) 116 Fed. 289, 53 C. C. A. 567; American Nat. Bank of Denver v. Watkins (1902) 119 Fed. 545, 56 C. C. A. 111 (writ of certiorari denied [1903] 23 S. Ct. 854, 190 U. S. 558, 47 L. Ed. 1183); Powers v. U. S. (1903) 119 Fed. 562, 56 C. C. A. 128; Anglo-American Land, Mortgage & Agency Co. v. Lombard (1904) 132 Fed. 721, 68 C. C. A. 89 (writ of certiorari denied Lombard v. Anglo-American Land, Mortgage & Agency Co. [1904] 25 Sup. Ct. 793, 196 U. S. 638, 49 L. Ed. 630); U. S. v. Sioux City Stockyards Co. (1909) 167 Fed. 126, 92 C. C. A. 578; W. L. Perkins & Co. v. Von Baumbach (1911) 185 Fed. 265, 107 C. C. A. 371; Fellman v. Royal Ins. Co. (1911) 185 Fed. 689, 107 C. C. A. 637; Philadelphia Casualty Co. v. Fechheimer (1915) 220 Fed. 401, 136 C. C. A. 25. See, also, Burr v. Des Moines Nav. & R. Co. (1863) 1 Wall. 99, 102, 17 L. Ed. 561; Louisiana Mut. Ins. Co. v. Tweed (1868) 7 Wall. 44, 51, 19 L. Ed. 65; Ex parte French (1875) 91 U. S. 423, 426, 23 L. Ed. 249; Banigan v. Bard (1890) 10 Sup. Ct. 565, 134 U. S. 291, 33 L. Ed. 932 (affirming [C. C. 1889] 39 Fed. 13); Hinkley v. City of Arkansas City (1895) 69 Fed. 768, 16 C. C. A. 395; Insurance Co. of North America v. International Trust Co. (1895) 71 Fed. 88, 17 C. C. A. 616 (certiorari denied [1896] 16 S. Ct. 1202, 163 U. S. 691, 41 L. Ed. 316, and [1896] 16 S. Ct. 1207, 163 U. S. 707, 41 L. Ed. 316); Wright v. Bragg (1899) 96 Fed. 729, 37 C. C. A. 574; Webb v. National Bank of Republic of Chicago (1906) 146 Fed. 717, 77 C. C. A. 143.

A statement of the grounds of decision in an opinion of a case submitted without a jury is not equivalent to a special finding of fact. Louisiana Mut. Ins. Co. v. Tweed (1868) 7 Wall. 44, 51, 19 L. Ed. 65; Dickinson v. Planters' Bank (1872) 16 Wall. 250, 257, 21 L. Ed. 278; Lehnen v. Dickson (1893) 13 Sup. Ct. 481, 483, 148 U. S. 71, 37 L. Ed. 373; Hinkley v. City of Arkansas City (1895) 69 Fed. 768, 16 C. C. A. 395 (judgment affirmed Swan v. City of Arkansas City [C. C. 1894] 61 Fed. 478); York v. Washburn (1904) 129 Fed. 564, 64 C. C. A. 132 (affirming judgment [C. C. 1902] 118 Fed. 316); U. S. v. Sioux City Stockyards Co. (1909) 167 Fed. 126, 92 C. C. A. 578 (affirming judgment [C. C. 1908] 162 Fed. 556). See, also, Adkins v. W. & J. Sloane (1894) 60 Fed. 344, 8 C. C. A. 656 (motion for rehearing denied [1894] 61 Fed. 791, 10 C. C. A. 69); Kentucky Life & Acc. Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42; Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co. (1901) 106 Fed. 798, 45 C. C. A. 638; Olcott v. Ennis-Calvert Compress Co. (1902) 114 Fed. 907, 52 C. C. A. 527; Keeley v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 598, 95 C. C. A. 96; Tiernan v. Chicago Life Ins. Co. (1914) 214 Fed. 238, 131 C. C. A. 284.

A bill of exceptions embodying the evidence is not a special finding allowing review of the sufficiency of the facts. Moller v. U. S. (1893) 57 Fed. 490, 6 C. C. A. 459; Kentucky Life & Acc. Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42; Morris v. Canda (1897) 80 Fed. 739, 26 C. C. A. 128.

Findings of fact are sufficient if, taken together with the pleadings, enough can be seen to justify the judgment, notwithstanding want of precision and the intermixture of matters of fact with conclusions of law. O'Reilly v. Campbell (1886) 6 S. Ct. 421, 116 U. S. 418, 29 L. Ed. 669.

A statement of the facts found should not be mingled with the evidence, or with discussions of law or the reasons for the court's conclusions. National Masonic Acc. Ass'n v. Sparks (1897) 83 Fed. 225, 28 C. C. A. 399 See, also, U. S. v. Harris (1897) 77 Fed. 821, 23 C. C. A. 483.

Where the court has made a separate special finding of the facts on which the judgment has been rendered, the recital of facts in the opinion constitutes no part of the finding, and cannot be invoked to assail it. Webb v. National Bank of Republic of Chicago (1906) 146 Fed. 717, 77 C. C. A. 143.

9. Agreed statement of facts as finding.—An agreed statement of facts, on which judgment is rendered, consisting not of the ultimate facts, but of the evidence to be submitted to the court on the issues presented by the pleadings, is not the equivalent of a special finding of the facts, allowing review of their sufficiency. Raimond v. Terrebonne Parish (1889) 10 Sup. Ct. 57, 132 U. S. 192, 33 L. Ed. 309; Glenn v. Fant (1890) 10 Sup. Ct. 583, 584, 134 U. S. 398, 33 L. Ed. 969; Davenport v. Paris (1890) 10 Sup. Ct. 1064, 136 U. S. 580, 34 L. Ed. 548; Wilson v. Merchants' Loan & Trust Co. (1901) 22 Sup. Ct. 55, 58, 183 U. S. 121, 46 L. Ed. 113, and cases there cited; Kentucky Life & Acc. Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42; Burnham v. North Chicago St. Ry. Co. (1897) 78 Fed. 101, 23 C. C. A. 677; Mutual Reserve Fund Life Ass'n v. Du Bois (1898) 85 Fed. 586, 29 C. C. A. 354 (certiorari denied [1898] 19 S. Ct. 886, 171 U. S. 688, 43 L. Ed. 1178); Packer v. Whittier (1899) 91 Fed. 511, 33 C. C. A. 658 (reversing judgment [C. C. 1897] 81 Fed. 335); Columbus Compress Co. v. United States Fidelity

& Guaranty Co. (1911) 186 Fed. 487, 108 C. C. A. 465.

There need be no finding of a fact stated in an agreed statement of facts. Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98, affirming judgments Central Trust Co. of New York v. Treat (C. C. 1909) 171 Fed. 301, and Farmers' Loan & Trust Co. v. Same (C. C. 1909) 171 Fed. 302.

An agreed statement of facts, so far as it set forth ultimate as distinguished from evidentiary facts, may be considered as taking the place of special findings. New York Life Ins. Co. v. Dunlevy (1914) 214 Fed. 1, 130 C. C. A. 473, affirming judgment Dunlevy v. New York Life Ins. Co. (D. C. 1913) 204 Fed. 670. And see Burr v. Des Moines Navigation & R. Co. (1863) 1 Wall. 99, 102, 17 L. Ed. 561; Geekie v. Kirby Carpenter Co. (1882) 1 Sup. Ct. 315, 324, 106 U. S. 379, 27 L. Ed. 157; Burrows v. Niblack (1898) 84 Fed. 111, 28 C. C. A. 130; Wilson v. Merchants' Loan & Trust Co. of Chicago, Ill. (1900) 98 Fed. 688, 39 C. C. A. 231; Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98, affirming judgments Central Trust Co. of New York v. Treat (C. C. 1909) 171 Fed. 301, and Farmers' Loan & Trust Co. v. Same (C. C. 1909) 171 Fed. 302.

A judgment at law, entered on an agreed statement of facts or case stated, can be reviewed on error only as to questions of law. Burrows v. Niblack (1898) 84 Fed. 111, 28 C. C. A. 130. See Bond v. Dustin (1884) 5 Sup. Ct. 296, 297, 112 U. S. 604, 28 L. Ed. 835.

10. Findings equivalent to verdict.—Findings of the court have the same effect as a verdict of a jury. Bassett v. U. S. (1869) 9 Wall. 38, 40, 19 L. Ed. 548; Brooklyn L. Ins. Co. v. Miller (1870) 12 Wall. 285, 297, 20 L. Ed. 398; French v. Edwards (1874) 21 Wall. 147, 151, 22 L. Ed. 534; Ætna Ins. Co. v. Boon (1877) 95 U. S. 117, 124, 24 L. Ed. 395; The Abbotsford (1878) 98 U. S. 440, 443, 25 L. Ed. 168; Ft. Scott v. Hickman (1884) 5 Sup. Ct. 56, 64, 112 U. S. 150, 28 L. Ed. 636; Allen v. St. Louis Nat. Bank (1887) 7 Sup. Ct. 460, 465, 120 U. S. 20, 30 L. Ed. 573; Lehnen v. Dickson (1893) 13 Sup. Ct. 481, 482, 148 U. S. 71, 37 L. Ed. 373; Dooley v. Pease (1901) 21 Sup. Ct. 329, 331, 180 U. S. 126, 45 L. Ed. 457; U. S. v. United States Fidelity & Guaranty Co. (1915) 35 Sup. Ct. 298, 236 U. S. 512, 59 L. Ed. 696 (affirming judgment United States Fidelity & Guaranty Co. v. U. S. [1912] 194 Fed. 611, 116 C. C. A. 187); Reed v. Stapp (1892) 52 Fed. 641, 643, 3 C. C. A. 244; Skinner v. Franklin (1893) 56 Fed. 783, 785, 6 C. C. A. 118; Pacific Postal Telegraph Cable Co. v. Fleischner (1895) 66 Fed. 899, 14 C. C. A. 166 (reversing judgment Fleischner v. Pacific Postal Tel. Cable Co. [C. C. 1893] 55 Fed. 738); Sayward v. Dexter Horton & Co. (1896) 72 Fed. 758, 769, 19 C. C. A. 176; Ætna Life Ins. Co. v. Board of Com'rs of Hamilton County (1897) 79 Fed. 575, 25 C. C. A. 94; U. S. v. American Bonding & Trust Co. (1898) 89 Fed. 925, 928, 32 C. C. A. 420; Evans v. Kister (1899) 92 Fed. 828, 35 C. C. A. 28; Kruger v. Constable (1904) 128 Fed. 908, 63 C. C. A. 634 (affirming judgment [C. C. 1902] 116 Fed. 722); National Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co. (1906) 145 Fed. 34, 76 C. C. A. 19; United States Fidelity & G. Co. v. Woodson (1906) 145 Fed. 144, 76 C. C. A. 114; Fowler v. Gowing (1908) 165 Fed. 891, 91 C. C. A. 569; Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314; W. L. Perkins & Co. v. Von Baumbach (1911) 185 Fed. 265, 107 C. C. A. 371; National Surety Co. v. U. S. (1912) 200 Fed. 142, 118 C. C. A. 360; Seep v. Ferris-Haggarty Copper Mining Co. (1912) 201 Fed. 893, 120 C. C. A. 191; Elliott v. Peet (1913) 202 Fed. 434, 120 C. C. A. 540 (affirming judgment [D. C. 1912] 192 Fed. 699); Eastern Oil Co. v. Holcomb (1914) 212 Fed. 126, 128 C. C. A. 642. See, also, Generes v. Campbell (1870) 11 Wall. 193, 197, 20 L. Ed. 110; New Orleans Ins. Ass'n v. Piaggio (1872) 16 Wall. 378, 388, 21 L. Ed. 358; Chicago Tire & Springs Works Co. v. Spalding (1886) 6 Sup. Ct. 498, 500, 116 U. S. 541, 29 L. Ed. 720; Newbegin v. Newton Nat. Bank (1895) 66 Fed. 701, 702, 14 C. C. A. 71; St. Louis Southwestern R. Co. v. Holbrook (1896) 73 Fed. 112, 649, 19 C. C. A. 385; Sarrazin v. W. R. Irby Cigar & Tobacco Co. (1899) 93 Fed. 624, 626, 35 C. C. A. 496, 46 L. R. A. 541; Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314; Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co. (1910) 184 Fed. 15, 106 C. C. A. 217; Chicago, R. I. & P. Ry. Co. v. Barrett (1911) 190 Fed. 118, 111 C. C. A. 158; Mason v. Smith (1911) 191 Fed. 502, 112 C. C. A. 146; Meyer v. Everett Pulp & Paper Co. (1912) 193 Fed. 857, 113 C. C. A. 643 (reversing judgment Meyer, Wilson & Co. v. Same [C. C. 1911] 184 Fed. 945); J. Ellwood Lee Co. v. McClain (C. C. 1901) 106 Fed. 164; Black v. Supreme Council American Legion of Honor (C. C. 1903) 120 Fed. 580, affirmed (1903) 123 Fed. 650, 59 C. C. A. 414.

It is only in the absence of any request to find facts specially, or to find for plaintiff in error generally, that a general finding by the court sitting as a jury has the effect of a general verdict. Bunday v. Huntington (1915) 224 Fed. 847, 140 C. C. A. 415.

11. Review.—A trial of issues of fact by the district court on waiver of a jury no longer amounts to an arbitration and may be reviewed. Eastern Oil Co. v. Holcomb (1914) 212 Fed. 126,

128 C. C. A. 642; Nashville Interurban Ry. v. Barnum (1914) 212 Fed. 634, 129 C. C. A. 170. Compare Graham v. Bayne (1855) 18 How. 60, 62, 15 L. Ed. 265; Campbell v. Boyreau (1858) 21 How. 223, 225, 16 L. Ed. 96; O'Reilly De Camara v. Brooke (1908) 28 Sup. Ct. 439, 209 U. S. 45, 52 L. Ed. 676; Campbell v. U. S. (1912) 32 Sup. Ct. 398, 224 U. S. 99, 56 L. Ed. 684 (reversing judgment U. S. v. Campbell [1909] 170 Fed. 318, 95 C. C. A. 114); Nolan v. Colorado Cent. Consol. Min. Co. (1894) 63 Fed. 930, 934, 12 C. C. A. 585; Wear v. Mayer (C. C. 1881) 6 Fed. 658, 660; Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369, 370.

When the record discloses no findings of fact, there is nothing which the Supreme Court can review. Lloyd v. McWilliams, Collector (1890) 11 Sup. Ct. 173, 137 U. S. 576, 34 L. Ed. 788.

Where a jury was waived, and at the conclusion of plaintiff's evidence no counter evidence being introduced, the court struck out plaintiff's evidence as not tending to sustain his issue, the appellate court will, on the exception taken thereto, review the evidence so far as essential to the question whether the facts proved made a prima facie case. American Paper-Bag Co. v. Van Nortwick (1892) 52 Fed. 752, 3 C. C. A. 274.

Where both parties move for a directed verdict, it leaves all issues of fact for determination by the trial judge, and on review the appellate court must accept his findings. U. S. v. Two Baskets (1913) 205 Fed. 37, 123 C. C. A. 310.

12. —— Questions reviewable.—See, also, notes to § 1668, post.

Where a jury is waived by stipulation, and no special finding of facts is requested or made, the only questions reviewable are whether the judgment is supported by the pleadings, whether there is any substantial evidence to support it, and whether error was committed in the admission or exclusion of evidence. City of Mankato v. Barber Asphalt Pav. Co. (1905) 142 Fed. 329, 73 C. C. A. 439. See Norris v. Jackson (1869) 9 Wall. 125, 127, 19 L. Ed. 608; Coddington v. Richardson (1870) 10 Wall. 516, 518, 19 L. Ed. 981; Brooklyn L. Ins. Co. v. Miller (1870) 12 Wall. 285, 300, 20 L. Ed. 398; Dirst v. Morris (1871) 14 Wall. 484, 491, 20 L. Ed. 722; Mercantile Mut. Ins. Co. v. Folsom (1873) 18 Wall. 237, 248, 21 L. Ed. 827; Lehnen v. Dickson (1893) 13 Sup. Ct. 481, 482, 148 U. S. 71, 37 L. Ed. 373; Beuttell v. Magone (1895) 15 Sup. Ct. 566, 567, 157 U. S. 154, 39 L. Ed. 654; Searcy County v. Thompson (1895) 66 Fed. 92, 13 C. C. A. 349 (affirming judgment Thompson v. Searcy County [1893] 57 Fed. 1030, 6 C. C. A. 674); Distilling & Cattle Feeding Co. v. Gottschalk Co. (1895) 66 Fed. 609, 13 C. C. A. 618 (affirming judgment Gottschalk Co. v. Distilling & Cattle Feeding Co. [C. C. 1894] 62 Fed. 901); Kearney County Com'rs v. McMaster (1895) 68 Fed. 177, 15 C. C. A. 353; O'Neil v. Manhattan Life Ins. Co. (1895) 71 Fed. 254, 18 C. C. A. 35; Woodbury v. City of Shawneetown (1896) 74 Fed. 205, 20 C. C. A. 400; Campbell Commission Co. v. Trammell (1896) 74 Fed. 917, 21 C. C. A. 177; O'Hara v. Mobile & O. R. Co. (1896) 76 Fed. 718, 22 C. C. A. 512 (affirming [C. C. 1895] 75 Fed. 130); Keene Mach. Co. v. Barratt (1900) 100 Fed. 590, 40 C. C. A. 571; York v. Washburn (1904) 129 Fed. 564, 64 C. C. A. 132; Phenix Ins. Co. v. Kerr (1904) 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; Kentucky Life & Acc. Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42; United States Mut. Acc. Ass'n v. Robinson (1896) 74 Fed. 10, 20 C. C. A. 262 (affirming judgment Robinson v. United States Mut. Acc. Ass'n of City of New York [C. C. 1895] 68 Fed. 825); Crawford v. Foster (1897) 83 Fed. 975, 28 C. C. A. 242 (petition for rehearing denied [1898] 84 Fed. 939, 28 C. C. A. 576); Fitzgerald v. Bassford (1906) 142 Fed. 134, 73 C. C. A. 352; National Surety Co. v. Cincinnati, N. O. & T. P. Ry. Co. (1906) 145 Fed. 34, 76 C. C. A. 19, and cases cited; Keeley v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 598, 95 C. C. A. 96, and cases therein cited; Marinettee Sawmill Co. v. Scofield (1909) 174 Fed. 562, 98 C. C. A. 344; Continental & Commercial Nat. Bank of Chicago v. Cobb (1912) 200 Fed. 511, 118 C. C. A. 615; Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co. (1913) 205 Fed. 147, 123 C. C. A. 478; Joline v. Metropolitan Securities Co. (C. C. 1908) 164 Fed. 650. And see Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190.

Where a case is submitted to the court without a jury by consent of parties, neither the correctness of a general finding nor refusal to make special findings requested can be reviewed on writ of error. Distilling & Cattle Feeding Co. v. Gottschalk Co. (1895) 66 Fed. 609, 13 C. C. A. 618. See, also, American Credit Indemnity Co. v. Athens Woolen Mills (1899) 92 Fed. 581, 34 C. C. A. 161; National R. Co. v. O'Leary (1903) 126 Fed. 363, 61 C. C. A. 562 (rehearing denied [1904] 127 Fed. 819, 62 C. C. A. 125); Nashville Interurban Ry. v. Barnum (1914) 212 Fed. 634, 129 C. C. A. 170.

Where a jury is waived, and the court makes a general finding upon evidence produced, and not upon an agreed statement of facts or case stated, the appellate court cannot consider alleged error in making the finding. Burrows v. Niblack (1898) 84 Fed. 111, 28 C. C. A. 130.

The question whether there was any evidence to prove the facts found by

sues of fact, and the judge has no such power unless by consent, but can only confirm or reject the findings of the referee, and in case they are set aside the cause stands for trial precisely the same as though it had never been referred. U. S. v. Ramsey (C. C. 1907) 158 Fed. 488.

The court has no power to appoint a referee to hear and determine the issues, but may appoint an auditor when necessary to simplify the issues. Vermeule v. Reilly (D. C. 1912) 196 Fed. 226. See, Fenno v. Primrose (1903) 119 Fed. 801, 56 C. C. A. 313.

16. —— Adoption of referee's findings.—By overruling all exceptions of both parties to the report of a referee, and rendering judgment for the exact sum found by him to be due, the court evidences its intention to adopt the findings of the referee as its own. Philadelphia Casualty Co. v. Fechheimer (1915) 220 Fed. 401, 136 C. C. A. 25.

17. —— Review.—See, also, notes to § 1668, post.

Findings of fact by a master in chancery, to whom, by consent of parties, a case is referred to find the facts, are conclusive, in the absence of anything to show that they are unsupported by the evidence. Davis v. Schwartz (1895) 15 Sup. Ct. 237, 239, 155 U. S. 631, 39 L. Ed. 289. See United States Trust Co. v. Mercantile Trust Co. (1898) 88 Fed. 140, 153, 31 C. C. A. 427; Sandford v. Embry (1907) 151 Fed. 977, 81 C. C. A. 167.

On the review of a judgment ordered on confirmation of the report of a referee, containing his full findings of fact and conclusions of law, only those assignments of error can be considered which present the question whether the judgment is justified by the facts found by the referee. Shipman v. Straitsville Cent. Min. Co. (1895) 15 Sup. Ct. 886, 887, 158 U. S. 361, 39 L. Ed. 1015; Chicago, M. & St. P. R. R. Co. v. Clark (1900) 20 Sup. Ct. 924, 928, 178 U. S. 353, 44 L. Ed. 1099; Chicago, M. & St. P. Ry. Co. v. Clark (1899) 92 Fed. 968, 35 C. C. A. 120; Steel v. Lord (1899) 93 Fed. 728, 35 C. C. A. 555; Hudson River Pulp & Paper Co. v. H. H. Warner & Co. (1900) 99 Fed. 187, 39 C. C. A. 452; Tiernan v. Chicago Life Ins. Co. (1914) 214 Fed. 238, 131 C. C. A. 284. And see Shipman v. Ohio Coal Exchange, 70 Fed. 652, 17 C. C. A. 313. See, also, Cudahy Packing Co. v. Sioux Nat. Bank (1895) 69 Fed. 782, 16 C. C. A. 409, affirming judgment Sioux Nat. Bank v. Cudahy Packing Co. (C. C. 1894) 63 Fed. 805.

When a jury is waived, and special findings made by a referee, which are adopted by the court, the questions open for review are the same as where special findings are made upon trial before the court. Board of Com'rs of Hamilton County v. Sherwood (1894) 64 Fed. 103, 11 C. C. A. 507. See, also, Emerson & Norris Co. v. Simpson Bros. Corp. (1914) 214 Fed. 572, 131 C. C. A. 121; Abbott v. Underwood (1914) 216 Fed. 335, 132 C. C. A. 479; Philadelphia Casualty Co. v. Fechheimer (1915) 220 Fed. 401, 136 C. C. A. 25; Delaware, L. & W. R. Co. v. Caboni (1915) 223 Fed. 631, 139 C. C. A. 177; Brooks v. Kerr (1915) 223 Fed. 1016, 139 C. C. A. 612.

§ 1588. (R. S. § 951.) Suits of United States against individuals, what credits allowed.

In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

Act March 3, 1797, c. 20, § 4, 1 Stat. 515.

Notes of Decisions

Scope and purpose of statute.—The law is intended to prevent surprise by claims for credit. Cox v. U. S. (1832) 6 Pet. 172, 201, 8 L. Ed. 359.

The statute applies: To payments made in cash, as well as to credits. Alexander v. U. S. (1893) 57 Fed. 828, 6 C. C. A. 602. To the claim of an army officer that he turned supplies over to a proper person to receive them. U. S. v. Du Perow (D. C. 1913) 208 Fed. 895. And to a suit brought against one who failed to account for money received during the war as acting regimental quartermaster. U. S. v. Wade (C. C. 1896) 75 Fed. 261. But not to a case where a claim has been allowed and the point in issue is as to the application of the sum so allowed to one of two distinct claims of the government against the claimant. U. S. v. Hough (1880) 103 U. S. 71, 74, 26 L. Ed. 305.

The statute is inapplicable to proceedings in the court of claims in favor of claimants. McKnight v. U. S. (1877) 13 Ct. Cl. 292.

Set-offs against government.—The defendant is entitled at the trial to the full benefit of any credit in his

favor, whether arising out of the particular transaction for which he is sued, or out of distinct and independent transactions, constituting a legal or equitable set-off, in whole or in part, of the debt sued for. U. S. v. Wilkins (1821) 19 U. S. (6 Wheat.) 135, 143, 5 L. Ed. 225; Same v. Buchanan (1850) 8 How. 83, 105, 12 L. Ed. 997. See, also, U. S. v. Robeson (1835) 9 Pet. 319, 324, 9 L. Ed. 142; Same v. Bank of Metropolis (1841) 15 Pet. 377, 392, 10 L. Ed. 774. But a claim for unliquidated damages cannot be pleaded as a set-off. U. S. v. Robeson (1835) 9 Pet. 319, 325, 9 L. Ed. 142.

In assumpsit by the government to recover the exact sum which, in equity, the government admits defendant is entitled to receive for valuable services rendered to the public in a subordinate capacity under the express sanction of the head of an executive department, which sum of money is in the hands of defendant, the latter is entitled to retain the same as an equitable set-off. U. S. v. Macdaniel (1833) 32 U. S. (7 Pet.) 1, 8 L. Ed. 587.

When the United States sue to recover money in the hands of a party who has a claim on them for costs, the courts will permit him to set up such claim in defense, and not subject him to an application to congress. U. S. v. Ringgold (1834) 33 U. S. (8 Pet.) 150, 8 L. Ed. 899.

A defendant, without reference to the disbursing agent employed by the United States, may set off, against any claim of the United States, a claim to which he may prove himself entitled, if such claim has been presented to the treasury department and rejected. U. S. v. Bank of Metropolis (1841) 40 U. S. (15 Pet.) 377, 10 L. Ed. 774.

When a claim against the United States, sustained by no evidence save the claimant's affidavit, was rejected by the accounting officers of the government, it is not a subject of set-off in a suit in which the United States is plaintiff. U. S. v. Lamon (D. C. 1879) 3 MacArthur, 204.

See, also, notes to § 1595, post.

—— **Presentation and disallowance of claim as condition.**—A counterclaim or credit cannot be set up in an action by the United States, unless it is shown to have been presented to the accounting officers of the treasury and been disallowed by them. U. S. v. Giles (1815) 13 U. S. (9 Cranch) 212, 236, 3 L. Ed. 708; Same v. Wilkins (1821) 6 Wheat. 135, 143, 5 L. Ed. 225; Same v. Hawkins (1836) 10 Pet. 125, 132, 9 L. Ed. 369; Same v. Gilmore (1868) 7 Wall. 491, 493, 19 L. Ed. 282; Watkins v. U. S. (1869) 9 Wall. 759, 763, 19 L. Ed. 820; Halliburton v. Same (1871) 13 Wall. 63, 65, 20 L. Ed. 533; Western Union R. Co. v. Same (1879) 101 U. S. 543, 548, 25 L. Ed. 1068; Fitzsimmons v. Same (1893) 54 Fed. 812, 4 C. C. A. 589; U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11 (writ of error dismissed [1898] 18 Sup. Ct. 949, 42 L. Ed. 1216); Yates v. U. S. (1898) 90 Fed. 57, 32 C. C. A. 507; Smythe v. Same (1901) 107 Fed. 376, 46 C. C. A. 354 (affirming judgment U. S. v. Smythe [C. C. 1900] 120 Fed. 30, and affirmed [1903] 23 Sup. Ct. 279, 188 U. S. 156, 47 L. Ed. 425); U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390; Same v. North American Commercial Co. (C. C. 1896) 74 Fed. 145 (judgment reversed North American Commercial Co. v. U. S. [1898] 18 Sup. Ct. 817, 171 U. S. 110, 43 L. Ed. 98); U. S. v. Patterson (C. C. 1899) 91 Fed. 854; Same v. Cantrall (1910) 176 Fed. 949; Same v. Kerr (C. C. 1912) 196 Fed. 503; Same v. Du Perow (D. C. 1913) 208 Fed. 895; Same v. Barnard (1876) 1 Ariz. 319, 25 Pac. 523; Same v. Hart (Ariz. 1888) 19 Pac. 4. See, also, U. S. v. Ripley (1833) 7 Pet. 18, 26, 8 L. Ed. 593; Same v. Fillebrown (1833) 7 Pet. 28, 48, 8 L. Ed. 596; Same v. Laub (1838) 12 Pet. 1, 4, 9 L. Ed. 977; Gratiot v. U. S. (1846) 4 How. 80, 116, 11 L. Ed. 884; U. S. v. Fletcher (1893) 13 Sup. Ct. 434, 435, 147 U. S. 664, 37 L. Ed. 322. Or unless the facts bring the claim within the exception contained in the statute. U. S. v. Patterson (C. C. 1899) 91 Fed. 854.

An account which has been presented to a department, and disallowed, may yet be given in evidence, by way of set-off, in a suit brought by the United States. U. S. v. Macdaniel (1833) 32 U. S. (7 Pet.) 1, 8 L. Ed. 587; Same v. Ripley (1833) 32 U. S. (7 Pet.) 18, 8 L. Ed. 593; Same v. Fillebrown (1833) 32 U. S. (7 Pet.) 28, 8 L. Ed. 596.

The presentation to the Commissioner of Internal Revenue by a collector of a claim for credit in his account, and its rejection by him, is such a presentation and disallowance as will permit the collector to make proof of his claim in a suit by the United States against him to collect the balance of taxes due on account. U. S. v. Kimball (1879) 101 U. S. 726, 728, 25 L. Ed. 835.

—— **Presentation excused.**—Death, preventing one from presenting his vouchers to the treasury officers, is an unavoidable accident, within the statute. U. S. v. Simons (1898) 86 Fed. 71, 29 C. C. A. 584.

—— **Proof of presentation and disallowance.**—Nothing done at the treasury which does not fall within the scope of the authority of the accounting officers can be received in evidence. Cox v. U. S. (1832) 6 Pet. 172, 201, 8 L. Ed. 359.

The statute requires that the claim only shall have been presented, and not the evidence to support it, and

hence such evidence will not be excluded merely because it was never so presented. U. S. v. Patrick (C. C. A. 1896) 73 Fed. 800, writ of error dismissed (1898) 18 Sup. Ct. 949, 42 L. Ed. 1216.

Where, in an action by the United States to recover an alleged shortage due from an Indian agent, the government introduced a transcript from the books and proceedings of the treasury department, which, among other things, contained an opinion by one of the accounting officers disallowing a claim by the agent for one of the items sued for, and discussing the vouchers on which the claim was based, held, that this was conclusive proof that the claim had been presented to, and disallowed by, the accounting officers. Id.

Evidence in some form from the books of the treasury, showing that the claim, accompanied by the proper vouchers, has been presented to the accounting officers, is indispensable, and proof of such presentation cannot be made by parol. Yates v. U. S. (1898) 90 Fed. 57, 32 C. C. A. 507. See Walton v. Same (1824) 9 Wheat. 651, 654, 6 L. Ed. 182.

Affirmative judgment against government not permitted.—The statute does not authorize a judgment for an excess against the government. U. S. v. Eckford (1867) 73 U. S. (6 Wall.) 484, 18 L. Ed. 920; Same v. Nipissing Mines Co. (1913) 206 Fed. 431, 124 C. C. A. 313 (modifying judgment [D. C. 1912] 202 Fed. 803). And see Tillou v. U. S. (1865) 1 Ct. Cl. 220.

§ 1589. (R. S. § 952.) Suits under postal laws, what credits allowed.

No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employé of the Post-Office department, unless the same has been presented to the Sixth Auditor and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said Auditor a claim for such credit by some unavoidable accident.

Act July 2, 1836, c. 270, § 15, 5 Stat. 82.

Notes of Decisions

Object of statute.—The object of the act of 1836 was to provide a more effectual system for the settlement or the accounts of the post office department. U. S. v. Roberts (1850) 9 How. 501, 518, 13 L. Ed. 234.

These provisions relate to actions by the government and are rules of evidence for its convenience, and are not applicable to proceedings in the court of claims in favor of the claimant. McKnight v. U. S. (1877) 13 Ct. Cl. 292.

Claim for credit.—A claim for damages because of the discontinuance of a post office, cannot be sustained as a credit, unless it has been presented and disallowed. Ware v. U. S. (1866) 4 Wall. 617, 629, 18 L. Ed. 389. See, also, U. S. v. Hodge (1851) 13 How. 478, 481, 14 L. Ed. 231.

The statute does not affect the admissibility of evidence offered to show that the defendant never received the amounts with which he is charged. Norton v. U. S. (1897) 81 Fed. 819, 26 C. C. A. 637.

If the party claim unliquidated damages as for breach of contract, then the case is beyond the powers of the accounting officers. (1854) 6 Op. Atty. Gen. 496.

Judgment against government.—See, also, notes to § 1588, ante.

Claims for credit cannot be admitted as a demand for judgment. U. S. v. Tillou (1867) 6 Wall. 484, 489, 18 L. Ed. 920.

§ 1590. (R. S. § 953, as amended, Act June 5, 1900, c. 717, § 1.) Bill of exceptions.

A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes,

or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor.

Act June 1, 1872, c. 255, § 4, 17 Stat. 197. Act June 5, 1900, c. 717, § 1, 31 Stat. 270.

This section, as enacted in the Revised Statutes, contained only the first sentence thereof, ending with the words "without any seal of court or judge being annexed thereto." It was amended by Act June 5, 1900, c. 717, § 1, cited above, by slight verbal changes in said provision, and by adding thereto the further provisions beginning with the words, "and in case the judge before whom," etc., to the end of the section as set forth here.

Power to grant new trials was conferred on the courts by R. S. § 726, which was incorporated in Jud. Code, § 269, ante, § 1246, and repealed by § 297 thereof, § 1274.

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I. OBJECT, FORM, AND CONTENTS OF BILL OF EXCEPTIONS

1. Necessity and sufficiency of objections and exceptions at trial.—A ruling to which no exceptions are taken will not be reviewed. Drumm-Flato Commission Co. v. Edmisson (1908) 28 Sup. Ct. 367, 208 U. S. 534, 52 L. Ed. 606 (affirming judgment [1906] 87 Pac. 311, 17 Okl. 344); Union Pac. Ry. Co. v. James (1893) 56 Fed. 1001, 6 C. C. A. 217; Springer Lithographing Co. v. Falk (1894) 59 Fed. 707, 8 C. C. A. 224 (writ of error dismissed [1896] 17 Sup. Ct. 998, 41 L. Ed. 1179); Netherlands-American Steam Nav. Co. v. Diamond (1904) 128 Fed. 570, 63 C. C. A. 212; H. G. Holloway & Bro. v. White-Dunham Shoe Co. (1906) 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; Fidelity & Casualty Co. of New York v. Thompson (1907) 154 Fed. 484, 83 C. C. A. 324, 11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181; Belding v. King (1908) 159 Fed. 411, 86 C. C. A. 391; Denver & R. G. R. Co. v. Wagner (1909) 167 Fed. 75, 92 C. C. A. 527; Ghost v. U. S. (1909) 168 Fed. 841, 94 C. C. A. 253; Hatcher v. Northwestern Nat. Ins. Co. of Milwaukee, Wis. (1910) 184 Fed. 23, 106 C. C. A. 225; Choctaw, O. & G. R. Co. v. Jackson (1911) 192 Fed. 792, 114 C. C. A. 12 (affirming judgment [C. C. 1910] 182 Fed. 342); Board of Com'rs of City and County of Denver v. Home Savings Bank (1912) 200 Fed. 28, 118 C. C. A. 256; Skeele Coal Co. v. Arnold (1912) 200 Fed. 393, 118 C. C. A. 545.

Objections, other than those going to the jurisdiction of the court, not presented to the trial court, will receive no attention on appeal. King v. McLean Asylum of the Massachusetts General Hospital (1894) 64 Fed. 331, 12 C. C. A. 145; Drexel v. True (1896) 74 Fed. 12, 20 C. C. A. 265; Philip Schneider

Brewing Co. v. American Ice-Mach. Co. (1896) 77 Fed. 138, 23 C. C. A. 89; Reader v. Haggin (1908) 160 Fed. 909, 88 C. C. A. 91.

An exception, taken immediately on a ruling being made, is indispensable to a review of the ruling. Johnson v. Garber (1896) 73 Fed. 523, 19 C. C. A. 556; Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co. (1911) 184 Fed. 15, 106 C. C. A. 217; Board of Com'rs of City and County of Denver v. Home Savings Bank (1912) 200 Fed. 28, 118 C. C. A. 256.

The objections and exceptions must ordinarily be so shaped as to show that the specific question raised on appeal was presented to the trial court. Nashua Iron & Steel Co. v. Brush (1898) 91 Fed. 213, 33 C. C. A. 456; City of Milwaukee v. Shailer & Schniglau Co. (1899) 91 Fed. 858, 34 C. C. A. 112 (affirming judgment [1898] 84 Fed. 106, 28 C. C. A. 286); Pugh v. Bluff City Excursion Co. (1910) 177 Fed. 399, 101 C. C. A. 403; Sandeen v. Tschider (1913) 205 Fed. 252, 123 C. C. A. 456.

No exception is necessary to give a right of appeal from an order of dismissal. Willis v. Davis (1911) 184 Fed. 889, 107 C. C. A. 211.

Where no objections or exceptions have been saved at the trial, only errors apparent on the record are reviewable. Mitsui v. St. Paul Fire & Marine Ins. Co. (1913) 202 Fed. 26, 120 C. C. A. 280.

2. —— **Rulings on evidence.**—Rulings on evidence are not reviewable without objections specifically stating the ground of objection and an exception taken. Charleston Ice Mfg. Co. v. Joyce (1893) 54 Fed. 332, 4 C. C. A. 368 (affirming judgment Joyce v. Charleston Ice Mfg. Co. [C. C. 1892] 50 Fed. 371); Walsh v. Colclough (1893) 56 Fed. 778, 6 C. C. A. 114; St. Louis S. W. Ry. Co. v. Henson (1893) 58 Fed. 531, 7 C. C. A. 349; Walker v. Collins (1893) 59 Fed. 70, 8 C. C. A. 1 (following German Ins. Co. v. Frederick [1893] 58 Fed. 144, 7 C. C. A. 122, and judgment reversed [1897] 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76); Paxson v. Brown (1894) 61 Fed. 874, 10 C. C. A. 135; Tabor v. Commercial Nat. Bank (1894) 62 Fed. 383, 10 C. C. A. 429; Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York (1894) 63 Fed. 48, 11 C. C. A. 96; Hoppenstedt v. Fuller (1895) 71 Fed. 99, 17 C. C. A. 623; Ward v. Cochran (1895) 71 Fed. 127, 18 C. C. A. 1; Sigafus v. Porter (1898) 84 Fed. 430, 28 C. C. A. 443; Felton v. Newport (1899) 92 Fed. 470, 34 C. C. A. 470; Cravens v. Carter-Crume Co. (1899) 92 Fed. 479, 34 C. C. A. 479; Repauno Chemical Co. v. Victor Hardware Co. (1900) 101 Fed. 948, 42 C. C. A. 106; Missouri, K. & T. Ry. Co. v. Elliott (1900) 102 Fed. 96, 42 C. C. A. 188 (judgment affirmed [1902] 22 Sup. Ct. 937, 184 U. S. 695, 46 L. Ed. 763); Eli Mining & Land Co. v. Carleton (1901) 108 Fed. 24, 47 C. C. A. 166; Western Union Tel. Co. v. Burgess (1901) 108 Fed. 26, 47 C. C. A. 168 (writ of certiorari denied [1901] 21 Sup. Ct. 924, 181 U. S. 620, 45 L. Ed. 1031); Ogden City v. Weaver (1901) 108 Fed. 564, 47 C. C. A. 485; Merchants' Ins. Co. v. Buckner (1901) 110 Fed. 345, 49 C. C. A. 80; Barnard v. Randle (1901) 110 Fed. 906, 49 C. C. A. 177 (affirming judgment Randle v. Barnard [C. C. 1900] 99 Fed. 348); Chicago Terminal Transfer R. Co. v. Stone (1902) 118 Fed. 19, 55 C. C. A. 187; Potter v. U. S. (1903) 122 Fed. 49, 58 C. C. A. 231; George Adams & Frederick Co. v. South Omaha Nat. Bank (1903) 123 Fed. 641, 60 C. C. A. 579; Wabash Screen Door Co. v. Black (1903) 126 Fed. 721, 61 C. C. A. 639; Fredrick Mfg. Co. v. Devlin (1904) 127 Fed. 71, 62 C. C. A. 53; Pennsylvania R. Co. v. Palmer (1904) 127 Fed. 956, 62 C. C. A. 588; Jefferson Hotel Co. v. Warren (1904) 128 Fed. 565, 63 C. C. A. 193; Plattner Implement Co. v. International Harvester Co. (1904) 133 Fed. 376, 66 C. C. A. 438; Texas & P. Ry. Co. v. Coutourie (1904) 135 Fed. 465, 68 C. C. A. 177; Thomas China Co. v. C. W. Raymond Co. (1905) 135 Fed. 25, 67 C. C. A. 629; Ætna Indemnity Co. v. Ladd (1905) 135 Fed. 636, 68 C. C. A. 274 (affirming judgment Ladd v. Ætna Indemnity Co. [C. C. 1904] 128 Fed. 298, and writ of certiorari denied Ætna Indemnity Co. v. Ladd [1905] 26 S. Ct. 746, 199 U. S. 606, 50 L. Ed. 330); Tull v. Nash (1905) 141 Fed. 557, 73 C. C. A. 29; Shandrew v. Chicago, St. P., M. & O. Ry. Co. (1906) 142 Fed. 320, 73 C. C. A. 430; Prioleau v. U. S. (1906) 143 Fed. 320, 74 C. C. A. 458; National Bank of Boyertown v. Schufelt (1906) 145 Fed. 509, 76 C. C. A. 187; American Car & Foundry Co. v. Brinkman (1906) 146 Fed. 712, 77 C. A. 138; Katahdin Pulp & Paper Co. v. Peltomaa (1907) 156 Fed. 342, 84 C. C. A. 238 (affirming judgment Peltomaa v. Katahdin Pulp & Paper Co. [C. C. 1906] 149 Fed. 282); Sun Pub. Co. v. Lake Erie Asphalt Block Co. (1907) 157 Fed. 80, 84 C. C. A. 584; Erie R. Co. v. Schomer (1909) 171 Fed. 798, 96 C. C. A. 458; Wellington v. Pelletier (1909) 173 Fed. 908, 97 C. C. A. 458, 26 L. R. A. (N. S.) 719; Lake Shore & M. S. Ry. Co. v. Eder (1909) 174 Fed. 944, 98 C. C. A. 556; Press Pub. Co. v. Monteith (1910) 180 Fed. 356, 103 C. C. A. 502; Mann v. Dempster (1910) 181 Fed. 76, 104 C. C. A. 110; Star Co. v. Madden (1911) 188 Fed. 910, 110 C. C. A. 652; St. Louis & S. F. R. Co. v. Duke (1911) 192 Fed. 306, 112 C. C. A. 564; Mexico International Land Co. v. Larkin (1912) 195 Fed. 495, 115 C. C. A. 405; Felker v. First Nat. Bank of

Cincinnati, Ohio (1912) 196 Fed. 200, 116 C. C. A. 32 (affirming judgment First Nat. Bank of Cincinnati v. Felker [C. C. 1911] 185 Fed. 678); Gibson v. Luther (1912) 196 Fed. 203, 116 C. C. A. 35; Southern Ry. Co. v. Rogers (1912) 196 Fed. 286, 116 C. C. A. 106; Hollweg v. Schaefer Brokerage Co. (1912) 197 Fed. 689, 117 C. C. A. 83; Boland v. Great Northern Ry. Co. (1913) 202 Fed. 485, 120 C. C. A. 624; Fischer v. Neil (C. C. 1881) 6 Fed. 89; In re A. O. Brown & Co. (D. C. 1911) 189 Fed. 432.

An offer of proof in the federal courts without propounding questions to a witness is sufficient to authorize a review of a ruling declining to receive the offer. Platte Valley Cattle Co. v. Bosserman-Gates Live Stock & Loan Co. (1912) 202 Fed. 692, 121 C. C. A. 102, 45 L. R. A. (N. S.) 1137.

3. —— **Conduct of counsel.** — The proper method of bringing before an appellate court for review remarks made by counsel is to call the matter to the attention of the trial court by a seasonable objection, and by taking an exception to the court's action if the objection is overruled, and incorporating the exception, together with a statement of the remarks complained of, or the line of argument pursued, in the bill of exceptions. Cudahy Packing Co. v. Skoumal (1903) 125 Fed. 470, 60 C. C. A. 306.

The exceptions should be taken at the time of the making of the improper argument. Baggs v. Martin (1901) 108 Fed. 33, 47 C. C. A. 175.

An assignment of error based on alleged improper remarks by counsel cannot be considered by an appellate court where no ruling was asked from the trial court as a basis for an exception. Toledo, St. L. & W. R. Co. v. Howe (1911) 191 Fed. 776, 112 C. C. A. 262; Devine v. Chicago, M. & St. P. Ry. Co. (1912) 194 Fed. 861, 114 C. C. A. 607.

4. —— **Submission of issues of fact to jury, and verdict.**—An exception is indispensable to review the action of the trial court in directing a verdict. Smith v. Hopkins (1902) 120 Fed. 921, 57 C. C. A. 193.

A verdict is not reviewable for want of substantial evidence to sustain it without request for a peremptory instruction and an exception taken to the denial thereof. Sun Pub. Co. v. Lake Erie Asphalt Block Co. (1907) 157 Fed. 80, 84 C. C. A. 584; Bidwell v. George B. Douglas Trading Co. (1910) 183 Fed. 93, 105 C. C. A. 385; Pennsylvania Casualty Co. v. Whiteway (1914) 210 Fed. 782, 127 C. C. A. 332.

A general exception to the sustaining of a motion to direct a verdict and to the final judgment is insufficient to justify a review of the court's failure to require the actual rendition and entry of a verdict in accordance with the direction. Bowman v. Atchison, T. & S. F. Ry. Co. (1910) 184 Fed. 697, 106 C. C. A. 651.

A request for a peremptory instruction and exception to its refusal is necessary to review the submission of the case to the jury. Mexico International Land Co. v. Larkin (1912) 195 Fed. 495, 115 C. C. A. 405.

5. —— **Instructions.**—An error in instructions will not be considered by the appellate court, unless specifically objected and excepted to or otherwise called to the attention of the trial court. Texas & P. Ry. Co. v. Ludlam (1892) 52 Fed. 94, 2 C. C. A. 633; United States Sugar Refinery v. Providence Steam & Gas Pipe Co. (1894) 62 Fed. 375, 10 C. C. A. 422; Northern Pac. R. Co. v. Krohne (1898) 86 Fed. 230, 29 C. C. A. 674; Chicago & A. R. Co. v. Ehret (1899) 92 Fed. 321, 34 C. C. A. 369; Felton v. Newport (1899) 92 Fed. 470, 34 C. C. A. 470; Tinsman v. F. R. Patch Mfg. Co. (1900) 101 Fed. 373, 41 C. C. A. 388 (affirming judgment Patch Mfg. Co. v. Tinsman [C. C. 1899] 94 Fed. 1023); Repauno Chemical Co. v. Victor Hardware Co. (1900) 101 Fed. 948, 42 C. C. A. 106; Monarch Cycle-Mfg. Co. v. Royer Wheel Co. (1900) 105 Fed. 324, 44 C. C. A. 523; Cass County v. Gibson (1901) 107 Fed. 363, 46 C. C. A. 341; St. Louis Brewing Ass'n v. Hayes (1901) 107 Fed. 395, 46 C. C. A. 370; Baggs v. Martin (1901) 108 Fed. 33, 47 C. C. A. 175; Tracy v. Eggleston (1901) 108 Fed. 324, 47 C. C. A. 357 (writ of certiorari denied [1901] 22 Sup. Ct. 935, 183 U. S. 699, 46 L. Ed. 396); Lafayette Bridge Co. v. Olsen (1901) 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33; Harkins v. Brown (1901) 108 Fed. 576, 47 C. C. A. 501; Moon-Anchor Consol. Gold Mines v. Hopkins (1901) 111 Fed. 298, 49 C. C. A. 347; South Penn Oil Co. v. Latshaw (1901) 111 Fed. 598, 49 C. C. A. 478; Union Pressed Brick Co. v. Fultonhan Brick & Drain Tile Co. (1902) 112 Fed. 920, 50 C. C. A. 615; Jack v. Mutual Reserve Fund Life Ass'n (1902) 113 Fed. 49, 51 C. C. A. 36; Metropolitan St. Ry. Co. v. Hudson (1902) 113 Fed. 449, 51 C. C. A. 283; Bradford Glycerine Co. v. Kizer (1902) 113 Fed. 894, 51 C. C. A. 524; Louisville & N. R. Co. v. McClish (1902) 115 Fed. 268, 53 C. C. A. 60; American Cotton Co. v. Beasley (1902) 116 Fed. 256, 53 C. C. A. 446; Chicago Terminal Transfer R. Co. v. Stone (1902) 118 Fed. 19, 55 C. C. A. 187; Smith v. Hopkins (1902) 120 Fed. 921, 57 C. C. A. 193; Hodge v. Chicago & A. Ry. Co. (1903) 121 Fed. 48, 57 C. C. A. 388; Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. (1903) 121 Fed. 524, 58 C. C. A. 634; Fitzpatrick v. Graham (1903) 122 Fed. 401, 58 C. C. A. 619; American Bonding & Trust Co. v. Baltimore & O. S. W. R. Co. (1903) 124 Fed. 866, 60 C. C. A. 52 (writ of certiorari denied [1903] 24

Sup. Ct. 846, 191 U. S. 575, 48 L. Ed. 308); H. D. Williams Cooperage Co. v. Schofield (1903) 125 Fed. 916, 60 C. C. A. 564; Issaquah Coal Co. v. United States Fidelity & Guaranty Co. (1903) 126 Fed. 89, 61 C. C. A. 145; Erie R. Co. v. Littell (1904) 128 Fed. 546, 63 C. C. A. 44; Morning Journal Ass'n v. Duke (1904) 128 Fed. 657, 63 C. C. A. 459 (affirming judgment Duke v. Morning Journal Ass'n [C. C. 1903] 120 Fed. 860, and writ of certiorari denied [1904] 24 Sup. Ct. 856, 194 U. S. 632, 48 L. Ed. 1159); Steel Rail Supply Co. v. Baltimore & L. Ry. Co. (1904) 130 Fed. 433, 64 C. C. A. 635; U. S. v. Rossi (1904) 133 Fed. 380, 66 C. C. A. 442; Same v. Thayer (1904) 133 Fed. 1022, 66 C. C. A. 681; Southern Pac. Co. v. Hetzer (1905) 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; Southern Pac. Co. v. Maloney (1905) 136 Fed. 171, 69 C. C. A. 83; Tromp v. William Cramp & Sons Ship & Engine Bldg. Co. (1906) 143 Fed. 867, 75 C. C. A. 75 (writ of certiorari denied [1907] 27 Sup. Ct. 786, 204 U. S. 671, 51 L. Ed. 673); Allen v. Field (1906) 144 Fed. 840, 75 C. C. A. 668 (writ of certiorari denied [1906] 26 Sup. Ct. 762, 201 U. S. 649, 50 L. Ed. 905); Levi v. Mathews (1906) 145 Fed. 152, 76 C. C. A. 122; Porter v. Buckley (1906) 147 Fed. 140, 78 C. C. A. 138; Hinds v. Hinchman-Renton Fireproofing Co. (1908) 165 Fed. 339, 91 C. C. A. 325; Western Inv. Co. v. McFarland (1908) 166 Fed. 76, 91 C. C. A. 504; Cincinnati Traction Co. v. Leach (1909) 169 Fed. 549, 95 C. C. A. 47; Chesapeake & O. Ry. Co. v. Dandridge (1909) 171 Fed. 74, 96 C. C. A. 178; Hebron Mfg. Co. v. Powell Knitting Co. (1909) 171 Fed. 817, 96 C. C. A. 489; Greer v. Catlin & Co. (1909) 171 Fed. 838, 96 C. C. A. 586; American Smelting & Refining Co. v. Karapa (1909) 173 Fed. 607, 97 C. C. A. 517; Louisville & N. R. Co. v. Womack (1909) 173 Fed. 752, 97 C. C. A. 559; Ware v. Pearsons (1909) 173 Fed. 878, 98 C. C. A. 364; Beiseker v. Moore (1909) 174 Fed. 368, 98 C. C. A. 272; Chicago, R. I. & P. Ry. Co. v. Hale (1910) 176 Fed. 71, 99 C. C. A. 379 (judgment reversed on rehearing [1911] 186 Fed. 626, 108 C. C. A. 490); Big Brushy Coal & Coke Co. v. Williams (1910) 176 Fed. 529, 99 C. C. A. 102; Pritchett v. Sullivan (1910) 182 Fed. 480, 104 C. C. A. 624; Partridge v. Boston & M. R. Co. (1910) 184 Fed. 211, 107 C. C. A. 49; Wabash Screen Door Co. v. Lewis (1910) 184 Fed. 260, 106 C. C. A. 402; Gering v. Leyda (1911) 186 Fed. 110, 108 C. C. A. 222; Star Co. v. Madden (1911) 188 Fed. 910, 110 C. C. A. 652; Erie R. Co. v. Kennedy (1911) 191 Fed. 332, 112 C. C. A. 76; Kesterson v. La Moine Lumber & Trading Co., 193 Fed. 355, 113 C. C. A. 279; Winfrey v. Missouri, K. & T. Ry. Co. (1912) 194 Fed. 808, 114 C. C. A. 218; Mexico International Land Co. v. Larkin (1912) 195 Fed. 495, 115 C. C. A. 405; Robinson v. Van Hooser (1912) 196 Fed. 620, 116 C. C. A. 294; Chicago Great Western R. Co. v. McCormick (1912) 200 Fed. 375, 118 C. C. A. 527; Suravitz v. Pristasz (1912) 201 Fed. 335, 119 C. C. A. 573; Stone & Webster Engineering Corporation v. Melovich (1913) 202 Fed. 438, 120 C. C. A. 544; Boland v. Great Northern Ry. Co. (1913) 202 Fed. 485, 120 C. C. A. 624; Royce v. Delaware, L. & W. R. Co. (1913) 203 Fed. 467, 121 C. C. A. 591; Boston & M. R. Co. v. Miller (1913) 203 Fed. 968, 122 C. C. A. 270; Baker Contract Co. v. U. S. (1913) 204 Fed. 390, 122 C. C. A. 560; Pittsburgh, C., C. & St. L. Ry. Co. v. Scherer (1913) 205 Fed. 356, 123 C. C. A. 484; Yazoo & M. V. R. Co. v. Wright (1913) 207 Fed. 281, 125 C. C. A. 25 (affirming judgment Wright v. Yazoo & M. V. R. Co. [D. C. 1912] 197 Fed. 94); C. W. Hull Co. v. Marquette Cement Mfg. Co. (1913) 208 Fed. 260, 125 C. C. A. 460; Maxwell v. Abrast Realty Co. (1914) 218 Fed. 457, 134 C. C. A. 255 (dismissing writ of error Abrast Realty Co. v. Maxwell [D. C. 1913] 206 Fed. 333).

6. Necessity or object of bill of exceptions.—The object of a bill of exceptions is to spread upon the record and preserve the facts of the case, that the party excepting may have them, and the court's action upon them, reviewed. Marion Phosphate Co. v. Cummer (1893) 60 Fed. 873, 9 C. C. A. 279.

The evidence, rulings, and instructions upon which reliance is placed for a reversal must be embodied in the bill before the appellate court can consider them. Suydam v. Williamson (1857) 20 How. 427, 434, 15 L. Ed. 978; Lincoln Sav. Bank & Safe-Deposit Co. v. Allen (1897) 82 Fed. 148, 27 C. C. A. 87; Eldorado Coal & Mining Co. v. Mariotti (C. C. A. 1914) 215 Fed. 51. See, also, Kearney v. Denn ex dem. Sansbury (1872) 15 Wall. 51, 56, 21 L. Ed. 41; Claassen v. U. S. (1891) 12 Sup. Ct. 169, 171, 142 U. S. 140, 35 L. Ed. 966; Clune v. Same (1895) 16 Sup. Ct. 125, 159 U. S. 590, 40 L. Ed. 269; Metropolitan R. Co. v. District of Columbia (1904) 25 Sup. Ct. 28, 32, 195 U. S. 329, 49 L. Ed. 219; U. S. v. United States Fidelity & Guaranty Co. (1911) 32 Sup. Ct. 101, 102, 222 U. S. 283, 56 L. Ed. 200; Guardian Assur. Co. of London v. Quintana (1913) 33 Sup. Ct. 236, 227 U. S. 100, 57 L. Ed. 437; Atchison, T. & S. F. R. Co. v. Howard (1892) 49 Fed. 206, 1 C. C. A. 229; Lincoln Sav. Bank & Safe-Deposit Co. v. Allen (1897) 82 Fed. 150, 27 C. C. A. 87; Porter v. U. S. (1898) 91 Fed. 494, 33 C. C. A. 652; Hildreth v. Grandin (1899) 97 Fed. 870, 38 C. C. A. 516; Consolidated Coal Co. v. Polar Wave Ice Co. (1901) 106 Fed. 798, 45 C. C. A. 638; Jack v. Mutual Reserve Fund Life Ass'n (1902)

113 Fed. 49, 51 C. C. A. 36; Atchison, T. & S. F. Ry. Co. v. Phipps (1903) 125 Fed. 478, 60 C. C. A. 314; Hanaway v. Guarantee Sav. Loan & Investment Co. (1906) 143 Fed. 962, 75 C. C. A. 148; Porter v. Buckley (1906) 147 Fed. 140, 78 C. C. A. 138; Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514; Choctaw, O. & G. R. Co. v. Jackson (1911) 192 Fed. 792, 114 C. C. A. 12 (affirming judgment [C. C. 1910] 182 Fed. 342).

The same purpose may be accomplished by an agreed statement of facts. Suydam v. Williamson (1857) 20 How. 427, 434, 15 L. Ed. 978; In re Grove (1910) 180 Fed. 62, 103 C. C. A. 416 (reversing order International Curtis Marine Turbine Co. v. William Cramp & Sons Ship & Engine Bldg. Co. [C. C. 1910] 176 Fed. 925, and distinguishing Continental Gin Co. v. Murray Co. [1908] 162 Fed. 873, 89 C. C. A. 563).

It is not the office of a bill of exceptions to serve as an instruction. Bunker Hill & Sullivan Mining & Concentrating Co. v. Oberder (1897) 79 Fed. 726, 25 C. C. A. 171.

7. Admiralty causes.—See notes to § 1585, ante.

8. Cases tried by court.—See notes to § 1668, post.

9. Equity practice.—A bill of exceptions is unknown in the equity practice in the federal courts. Ex parte Story (1838) 12 Pet. 339, 343, 9 L. Ed. 1108; Johnson v. Harmon (1876) 94 U. S. 371, 372, 24 L. Ed. 271; Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391; Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co. (C. C. 1900) 99 Fed. 177.

10. Matters apparent on record reviewable without bill of exceptions.—No bill of exceptions is necessary when the error alleged is apparent on the record. Suydam v. Williamson (1857) 20 How. 427, 433, 15 L. Ed. 978; Young v. Martin (1869) 8 Wall. 354, 357, 19 L. Ed. 418; Claassen v. U. S. (1891) 12 Sup. Ct. 169, 142 U. S. 140, 35 L. Ed. 966; Wilson v. Pauly (1896) 72 Fed. 129, 18 C. C. A. 475; St. Paul, M. & M. Ry. Co. v. Drake (1896) 72 Fed. 945, 19 C. C. A. 252; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661; City of Wilmington v. Ricaud (1898) 90 Fed. 212, 32 C. C. A. 578; Porter v. U. S. (1898) 91 Fed. 494, 33 C. C. A. 652; Reliable Incubator & Brooder Co. v. Stahl (1901) 105 Fed. 663, 44 C. C. A. 657; Worthington v. McGough (1912) 192 Fed. 512, 112 C. C. A. 662; U. S. v. Haynes (D. C. 1887) 29 Fed. 691. Nor in proceedings in United States courts in the exercise of the customary jurisdiction of probate courts. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. (1908) 165 Fed. 162, 91 C. C. A. 196.

11. —— Habeas corpus.—On appeal from the order of a district judge in a habeas corpus case, no bill of exceptions is necessary. Solomon v. Davenport (1898) 87 Fed. 318, 30 C. C. A. 664.

12. —— Jurisdiction.—Error in ruling on exceptions raising question of jurisdiction, when apparent on the face of the pleadings, held reviewable without a bill of exceptions. Illinois Cent. R. Co. v. Rogers (1915) 221 Fed. 52, 136 C. C. A. 530.

13. —— Pleading.—Overruling or sustaining a demurrer is a matter of record, which can be reviewed without a bill of exceptions. Board of County Com'rs of City & County of Denver v. Home Sav. Bank (1915) 35 S. Ct. 265, 236 U. S. 101, 59 L. Ed. 485 (affirming judgment [1912] 200 Fed. 28, 118 C. C. A. 256); Guarantee Co. of North American v. Mechanics' Sav. Bank & Trust Co. (1900) 100 Fed. 559, 40 C. C. A. 542; Mitsui v. St. Paul Fire & Marine Ins. Co. (1913) 202 Fed. 26, 120 C. C. A. 280.

No bill of exceptions is necessary to a review of an appeal from an order striking out parts of a petition of intervention. Western Union Telegraph Co. v. United States & Mexican Trust Co. (1915) 221 Fed. 545, 137 C. C. A. 113.

14. —— Verdict.—A verdict is a part of the record, and no exception is necessary to support an assignment of error raising the question of its sufficiency. Patterson v. Robinson Bros. & Co. (1910) 180 Fed. 668, 103 C. C. A. 634, reversing judgment Patterson & Co. v. Robinson Bros. (C. C. 1908) 159 Fed. 303.

15. Common-law right to bill of exceptions.—Under the practice of the federal courts, where an issue is tried by a jury according to the course of the common law, no statutory provision is necessary to entitle a party to have the rulings of the court at such trial made a part of the record by bill of exceptions. Duncan v. Landis (1901) 106 Fed. 839, 45 C. C. A. 666.

16. Common-law form.—The proper form for a bill of exceptions is that in use under Stat. Westm. II. U. S. v. Jarvis (C. C. 1847) Fed. Cas. No. 15,469.

17. Number of bills.—All the alleged errors assigned for reversal on a writ of error may be incorporated in a single bill of exceptions. Lees v. U. S. (1893) 14 Sup. Ct. 163, 165, 150 U. S. 476, 37 L. Ed. 1150; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661; Norfolk & W. Ry. Co. v. Holbrook (1914) 215 Fed. 687, 131 C. C. A. 621 (writ of error to Supreme Court allowed [1914] 215 Fed. 1007, 131 C. C. A. 666, and judgment reversed [1915] 35 S. Ct. 143, 235 U. S. 625, 59 L. Ed. 392).

It is improper to embrace all the pro-

ceedings at the trial, including objections to testimony, motion for nonsuit, and to instruct a verdict, objections to instructions offered and refused to the court's charge, and orders for extension of time to file exceptions, in a single general bill of exceptions. Atlantic Coast Line R. Co. v. Linstedt (1910) 184 Fed. 36, 106 C. C. A. 238.

18. Rules of court.—See notes under §§ 1114, 1232, 1536, 1544.

19. Subject and contents.—A bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge on some matter of law arising on the facts not denied in which either party is overruled by the court. Ex parte Crane (1831) 5 Pet. 190, 199, 8 L. Ed. 92; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661. See, also, Nelson v. U. S. (C. C. 1887) 30 Fed. 112.

It should point out distinctly the errors of which complaint is made, and it ought to show the grounds relied upon to sustain the objection presented so it may appear that the court below was informed as to the point to be decided. Northern Pac. R. Co. v. Charless (1892) 51 Fed. 562, 2 C. C. A. 380 (judgment reversed [1896] 16 Sup. Ct. 848, 162 U. S. 359, 40 L. Ed. 999); Marion Phosphate Co. v. Cummer (1893) 60 Fed. 873, 9 C. C. A. 279; Newman v. Virginia, T. & C. Steel & Iron Co. (1897) 80 Fed. 228, 25 C. C. A. 382; North Chicago St. R. Co. v. St. John (1898) 85 Fed. 806, 29 C. C. A. 634; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661; Case v. Hall (1899) 94 Fed. 300, 36 C. C. A. 259; Massenberg v. Denison (1901) 107 Fed. 18, 46 C. C. A. 120; Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. (1908) 159 Fed. 824, 86 C. C. A. 648; Atlantic Coast Line R. Co. v. Linstedt (1910) 184 Fed. 36, 106 C. C. A. 238. And see The Francis Wright (1881) 105 U. S. 381, 389, 26 L. Ed. 1100. It should contain only the rulings of the court upon matters of law, with so much of the testimony as may be necessary to explain the bearing of the rulings upon the issues involved. Lincoln v. Claflin (1868) 7 Wall. 132, 136, 19 L. Ed. 106; The Francis Wright (1881) 105 U. S. 381, 389, 26 L. Ed. 1100; U. S. v. Rindskopf (1881) 105 U. S. 418, 421, 26 L. Ed. 1131; Alexander v. U. S. (1893) 57 Fed. 828, 6 C. C. A. 602; City of Key West v. Baer (1895) 66 Fed. 440, 13 C. C. A. 572; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661.

20. Incorporating evidence—Necessity.—Rulings on evidence do not come before the appellate court, unless brought up by a bill of exceptions. Suydam v. Williamson (1857) 20 How. 427, 434, 15 L. Ed. 978; Lee Won Jeong v. U. S. (1906) 145 Fed. 512, 76 C. C. A. 190; Lee Joe Yen v. Same (1906) 148 Fed. 682, 78 C. C. A. 427; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. (1907) 151 Fed. 466, 81 C. C. A. 76; Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va. (1907) 153 Fed. 723, 82 C. C. A. 609; Lew Moy v. U. S. (1908) 164 Fed. 322, 90 C. C. A. 254; In re Grove (1910) 180 Fed. 62, 103 C. C. A. 416; Boatmen's Bank v. Trower Bros. Co. (1910) 181 Fed. 804, 104 C. C. A. 314; Thompson v. U. S. (1913) 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206; U. S. v. Dunham (C. C. 1857) Fed. Cas. No. 15,006, and cases there cited; North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co. (1896) 76 Fed. 623 (judgment modified [1897] 83 Fed. 796, 28 C. C. A. 88); Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

The bill may include in its scope rulings of the court as to the admissibility of evidence, which a demurrer to evidence cannot do. Suydam v. Williamson (1857) 20 How. 427, 435, 15 L. Ed. 978.

21. —— Setting out evidence.—The appellate court cannot pass upon the sufficiency of the evidence in the court below, where the bill of exceptions does not set forth all such evidence. Gulf, C. & S. F. R. Co. v. Washington (1892) 49 Fed. 347, 1 C. C. A. 286; Atchison, T. & S. F. R. Co. v. Myers (1894) 63 Fed. 793, 11 C. C. A. 439; Taylor-Craig Corp. v. Hage (1895) 69 Fed. 581, 16 C. C. A. 339; National Masonic Acc. Ass'n v. Shryock (1896) 73 Fed. 774, 20 C. C. A. 3; Denver & R. G. R. Co. v. Lorentzen (1897) 79 Fed. 291, 24 C. C. A. 592; E. H. Rollins & Sons v. Board of Com'rs of Gunnison County (1897) 80 Fed. 692, 26 C. C. A. 91 (judgment reversed Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons [1899] 19 Sup. Ct. 390, 173 U. S. 255, 43 L. Ed. 689); Jefferson v. Burhans (1898) 85 Fed. 924, 29 C. C. A. 487; Brand v. U. S. (C. C. 1880) 4 Fed. 394; Kingory v. Same (C. C. 1891) 44 Fed. 669.

A case cannot be reviewed, on assignments of error relating to the admission or exclusion of evidence and the instructions given and refused, where the bill of exceptions does not purport to contain all the evidence, and, as is shown by references made thereto in the charge of the court, omits important testimony, though it is certified to contain all the material evidence. City of Milwaukee v. Shailer & Schniglau Co. (1899) 91 Fed. 726, 34 C. C. A. 66; Leslie v. Standard Sewing-Mach. Co. (1900) 98 Fed. 827, 39 C. C. A. 314; Guarantee Co. of North America v. Phenix Ins. Co. (1903) 124 Fed. 170, 59 C. C. A. 376; Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642; Elliott v. Canadian Pac. Ry. Co. (1908) 161 Fed. 250, 88 C. C. A. 286; City of Chicago v. Troy Laundry Machinery Co.

(1908) 162 Fed. 678, 89 C. C. A. 470; Bolen-Darnall Coal Co. v. Hicks (1911) 190 Fed. 717, 111 C. C. A. 445. See, also, City of Detroit v. Grummond (1903) 121 Fed. 963, 58 C. C. A. 301; First Nat. Bank v. Moore (1906) 148 Fed. 953, 78 C. C. A. 581.

Only so much of the testimony or proceedings should be set out as is necessary to present clearly each matter excepted to. Johnston v. Jones (1861) 66 U. S. (1 Black) 209, 220, 17 L. Ed. 117; Grand Trunk Ry. Co. v. Ives (1892) 12 S. Ct. 679, 681, 144 U. S. 408, 36 L. Ed. 485; Lees v. U. S. (1893) 14 S. Ct. 163, 150 U. S. 476, 37 L. Ed. 1150; Cincinnati Traction Co. v. Reebusch (1912) 192 Fed. 520, 113 C. C. A. 76; Locke v. U. S. (C. C. 1866) Fed. Cas. No. 8,442. See, also, Cincinnati, H. & D. R. Co. v. Thiebaud (1900) 114 Fed. 918, 52 C. C. A. 538. The bill of exceptions should not contain all the evidence. Hickman v. Jones (1869) 9 Wall. 197, 19 L. Ed. 551; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661. Even if counsel consent to it. Graham v. Bayne (1855) 18 How. 60, 62, 15 L. Ed. 265; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661.

The failure of the bill of exceptions to state in express terms that it contains all the evidence does not prevent the appellate court from considering or determining the case upon questions of fact, if the record shows that all the evidence was contained in such bill. Crowe v. Trickey (1907) 27 Sup. Ct. 275, 204 U. S. 228, 51 L. Ed. 454 (affirming judgment Trickey v. Crowe [Ariz. 1903] 71 P. 965); Crowe v. Harmon (1907) 27 Sup. Ct. 280, 204 U. S. 241, 51 L. Ed. 461 (affirming judgment Harmon v. Crowe [Ariz. 1903] 71 P. 1125).

It is not error to certify in a bill of exceptions merely what the evidence tended to prove, instead of setting it out in full. Prichard v. Budd (1896) 76 Fed. 710, 22 C. C. A. 504. See, also, Bunker Hill & Sullivan Mining & Concentrating Co. v. Oberder (1897) 79 Fed. 726, 25 C. C. A. 171.

The court will not sign a bill of exceptions purporting to contain all the evidence, when the parties do not agree that this is so, and the judge is not satisfied of it. Lyles v. Alexandria (C. C. 1806) Fed. Cas. No. 8,624; Hudson v. Charleston, C. & C. R. Co. (C. C. 1893) 55 Fed. 252.

22. —— **Documents.**—Papers or documents used at the hearing in the court below cannot, in strictness, be examined on appeal to, or writ of error from, the federal Supreme Court, unless they are made part of the record by bill of exceptions or some other proper mode. Bassing v. Cady (1907) 28 Sup. Ct. 392, 208 U. S. 386, 52 L. Ed. 540, 13 Ann. Cas. 905.

Where objections to the admission of written and printed exhibits are relied on on appeal, it is improper to describe them in the bill of exceptions merely by date and general import, but they should be set out in full at the places where they appear to have been offered and read. Balliet v. U. S. (1904) 129 Fed. 689, 64 C. C. A. 201.

Where a bill of exceptions recites that a paper introduced in evidence is made a part thereof, such paper must be identified by some mark or number referred to in the bill. Weaver v. Schumpert (1909) 168 Fed. 43, 93 C. C. A. 465. See, also, Alaska Commercial Co. v. Dinkelspiel (1903) 126 Fed. 164, 61 C. C. A. 108.

23. —— **Identification of testimony.**—Where the evidence in a case is embodied in bills of exceptions duly allowed and certified by the trial judge, the fact that the testimony was not taken down by order of the court or by consent, but by a stenographer employed by one of the parties, is immaterial, and is not ground for striking it from the record. St. Louis Southwestern Ry. Co. v. Purcell (1905) 135 Fed. 499, 68 C. C. A. 211.

A bill of exceptions, containing a direction for the insertion of evidence contained between specified pages of the typewritten copy of the testimony filed, but not actually written in the bill of exceptions, held sufficiently identified and made a part thereof. Norfolk & W. Ry. Co. v. Holbrook (1914) 215 Fed. 687, 131 C. C. A. 621, writ of error to Supreme Court allowed (1914) 215 Fed. 1007, 131 C. C. A. 666, and judgment reversed (1915) 35 S. Ct. 143, 235 U. S. 625, 59 L. Ed. 392.

Bill of exceptions purporting to make a part of the record all testimony, etc., held worthless, where testimony was identified by neither the stenographer, clerk, nor judge. Brown v. Cumberland Telegraph & Telephone Co. (1915) 221 Fed. 261, 137 C. C. A. 206.

24. **Incorporating evidence excluded.**—The exclusion of documentary evidence is not assignable as error where the excluded documents are not set forth in the bill of exceptions. Thompson v. First Nat. Bank (1883) 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507; Clement v. Packer (1887) 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721; Masonic Ben. Ass'n of Central Illinois v. Lyman (1894) 60 Fed. 498, 9 C. C. A. 104; Sipes v. Seymour (1896) 76 Fed. 116, 22 C. C. A. 90.

To render such an exception available in the supreme court, it must affirmatively appear that the ruling excepted to affected or might have affected the decision of the case. Northwestern Union Packet Co. v. Clough (1874) 20 Wall. 528, 542, 22 L. Ed.

406; Florida R. Co. v. Smith (1874) 21 Wall. 255, 261, 22 L. Ed. 513.

25. Incorporating instructions.—A bill of exceptions is the only method of bringing up instructions given or refused. Clune v. U. S. (1895) 16 Sup. Ct. 125, 126, 159 U. S. 590, 40 L. Ed. 269; Morgan v. Same (1906) 148 Fed. 189, 78 C. C. A. 323 (writ of certiorari denied U. S. v. Morgan [1906] 27 S. Ct. 784, 203 U. S. 595, 51 L. Ed. 333); Stewart v. Dallam (1915) 219 Fed. 886, 135 C. C. A. 416.

26. —— Setting out instructions and evidence.—Exceptions taken on a jury trial for the purpose of submitting questions of law decided during the trial cannot be taken in such a form as to bring up the whole charge, in which the trial judge not only states results of the law, from the facts, but sums up all the evidence. Ex parte Crane (1831) 5 Pet. 190, 195, 8 L. Ed. 92.

Each bill of exception must be considered as presenting a substantial case; and it is on the evidence stated in it alone that the court will decide. Jones v. Buckell (1881) 104 U. S. 554, 556, 26 L. Ed. 841; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661.

It should not set forth the charge of the court below in full, but only those parts to which exceptions are taken. U. S. v. Rindskopf (1881) 105 U. S. 418, 421, 26 L. Ed. 1131; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661.

An exception to an instruction must be accompanied by as much of the evidence as is necessary to show the materiality of the instruction, but it is not necessary to set out all the evidence. Phœnix Mut. Life Ins. Co. v. Raddin (1886) 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; New York, L. E. & W. R. Co. v. Madison (1887) 123 U. S. 524, 8 Sup. Ct. 246, 31 L. Ed. 258; Van Gunden v. Virginia Coal & Iron Co. (1892) 52 Fed. 838, 3 C. C. A. 294, affirming judgment (C. C. 1891) 47 Fed. 264.

To enable an appellate court to review exceptions to the giving or refusal of instructions, the bill of exceptions should contain a sufficient statement of the evidence to show whether or not such instructions were applicable to the case. Worthington v. Mason (1879) 101 U. S. 149, 152, 25 L. Ed. 848; U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11 (writ of error dismissed [1898] 18 S. Ct. 949, 42 L. Ed. 1216); Yates v. U. S. (1898) 90 Fed. 57, 32 C. C. A. 507; Sternenberg v. Mailhos (1900) 99 Fed. 43, 39 C. C. A. 408; Guardian Fire Ins. Co. of Pennsylvania v. Central Glass Co. (1912) 194 Fed. 851, 114 C. C. A. 639; B. J. Wolf & Sons v. Royal Ins. Co., Limited, of Liverpool (1912) 194 Fed. 853, 114 C. C. A. 641; U. S. v. Wingate (C. C. 1890) 44 Fed. 740; Same v. Norris (C. C. 1891) 44 Fed. 740, 741. See, also, City of Milwaukee v. Shailer & Schniglau Co. (1899) 91 Fed. 726, 34 C. C. A. 66.

The appellate court may refuse to review instructions, where the bill of exceptions does not contain all the instructions or the evidence. McCarty v. U. S. (1900) 101 Fed. 113, 41 C. C. A. 242; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (1902) 114 Fed. 133, 52 C. C. A. 95; National Cash Register Co. v. Salling (1909) 173 Fed. 22, 97 C. C. A. 334; Thompson v. U. S. (1913) 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206.

27. Conclusiveness of bill.—A bill of exceptions is conclusive as to the evidence that was before the court. Bingham v. Cabbot (1795) 3 Dall. 19, 38, 1 L. Ed. 491; Carson v. Commercial Nat. Bank (1900) 104 Fed. 733, 44 C. C. A. 184.

It cannot be impeached by evidence outside the record. Moss v. Gulf Compress Co. (1913) 202 Fed. 657, 121 C. C. A. 67.

II. ALLOWANCE AND SIGNING OF BILL OF EXCEPTIONS

28. Effect of conformity act and state practice.—See, also, notes to § 1537, ante.

The conformity act does not apply to bills of exceptions. In re Chateaugay Ore & Iron Co. (1888) 9 Sup. Ct. 150, 153, 128 U. S. 544, 32 L. Ed. 508; Missouri Pac. Ry. Co. v. Chicago & A. R. Co. (1889) 10 Sup. Ct. 65, 132 U. S. 191, 33 L. Ed. 309; Fishburn v. Chicago, M. & St. P. Ry. Co. (1890) 11 Sup. Ct. 8, 137 U. S. 60, 34 L. Ed. 585; Van Stone v. Stillwell & Bierce Mfg. Co. (1891) 12 Sup. Ct. 181, 182, 142 U. S. 128, 35 L. Ed. 961; U. S. v. Train (C. C. 1882) 12 Fed. 852, 854; Talbot v. Press Pub. Co. (C. C. 1897) 80 Fed. 567, 568.

It is immaterial to the rule that federal appellate courts will not take cognizance of an exception to a refusal to direct a verdict for defendants before they had rested their case, that the case, as it then stood, was not qualified by anything afterwards proved. Walker v. Windsor Nat. Bank (1893) 56 Fed. 76, 5 C. C. A. 421.

The practice in a state as to bills of exception in actions at law and criminal cases is without effect in the federal courts sitting in the state, and the common law and federal statutes prevail on that subject. Rupert v. U. S. (1910) 181 Fed. 87, 104 C. C. A. 255.

29. Common-law rule as to time for taking exceptions.—Exceptions must be taken for points reserved while the jury are at the bar. Phelps v. Mayer (1853) 15 How. 160, 161, 14 L. Ed. 643; Barton v. Forsyth (1857) 20 How. 532, 533, 15 L. Ed. 1012; Merchants' Exch. Bank v. McGraw (1896) 76 Fed. 930, 22 C. C. A. 622; Yates v.

U. S. (1898) 90 Fed. 57, 32 C. C. A. 507; Berwind-White Coal Mining Co. v. Firment (1909) 170 Fed. 151, 95 C. C. A. 1; Mann v. Dempster (1910) 179 Fed. 837, 103 C. C. A. 325; Bidwell v. George B. Douglas Trading Co. (1910) 183 Fed. 93, 105 C. C. A. 385; Arizona & N. M. Ry. Co. v. Clark (1913) 207 Fed. 817, 125 C. C. A. 305; Beatson Copper Co. v. Pedrin (1914) 217 Fed. 43, 133 C. C. A. 29; Strain v. Gourdin (C. C. 1874) Fed. Cas. No. 13,521; Delta Lumber Co. v. Schwarz Wheel Co. (D. C. 1914) 218 Fed. 85. And see Dalton v. Moore (1905) 141 Fed. 311, 72 C. C. A. 459 (writ of certiorari denied Moore v. Dalton [1906] 26 Sup. Ct. 757, 200 U. S. 619, 50 L. Ed. 623); Locke v. U. S. (C. C. 1866) Fed. Cas. No. 8,442; Babbitt v. Burgess (C. C. 1873) Fed. Cas. No. 693; Campbell v. Strong (Super. Ct. Ark. 1835) Fed. Cas. No. 2,367a.

The exception must show that it was taken and reserved at the trial, but it may be drawn out in form and signed at a later period. Turner v. Yates (1853) 16 How. 14, 28, 14 L. Ed. 824; U. S. v. Breitling (1857) 20 How. 252, 254, 15 L. Ed. 900; Stanton v. Embry (1876) 93 U. S. 548, 555, 23 L. Ed. 983; U. S. v. Carey (1884) 3 Sup. Ct. 424, 425, 110 U. S. 51, 28 L. Ed. 67; Southern Pac. Co. v. Hamilton (1893) 54 Fed. 468, 4 C. C. A. 441; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661; Nicoll v. American Ins. Co. (C. C. 1847) Fed. Cas. No. 10,259.

30. Time for allowance of bill.—A bill of exceptions cannot be considered unless it was duly presented to and allowed by the trial judge during the term at which the trial was had or within the time as extended by an order made during such term, or where there is a rule of court on the subject during the time so fixed, or an extension granted before its expiration or where extraordinary circumstances exist. Muller v. Ehlers (1875) 91 U. S. 249, 250, 23 L. Ed. 319; Hunnicutt v. Peyton (1880) 102 U. S. 333, 354, 26 L. Ed. 113; In re Chateaugay Ore & Iron Co. (1888) 9 Sup. Ct. 150, 153, 128 U. S. 544, 32 L. Ed. 508; Morse v. Anderson (1893) 14 Sup. Ct. 43, 150 U. S. 156, 37 L. Ed. 1037; Northern Pac. R. Co. v. Amato (1892) 49 Fed. 881, 1 C. C. A. 468 (affirming judgment Amato v. Northern Pac. R. Co. [C. C. 1891] 46 Fed. 561, and judgment affirmed [1892] 12 S. Ct. 740, 144 U. S. 465, 36 L. Ed. 506); Richmond & D. R. Co. v. McGee (1892) 50 Fed. 906, 2 C. C. A. 81; Southern Pac. Co. v. Hamilton (1893) 54 Fed. 468, 4 C. C. A. 441; New York & N. E. R. Co. v. Hyde (1893) 56 Fed. 188, 5 C. C. A. 461 (following Michigan Ins. Bank v. Eldred [1892] 12 S. Ct. 450, 143 U. S. 293, 36 L. Ed. 162); Sutherland v. Round (1893) 57 Fed. 467, 6 C. C. A. 428; Missouri, K. & T. Ry. Co. v. Russell (1894) 60 Fed. 501, 9 C. C. A. 108; U. S. v. Carr (1894) 61 Fed. 802, 10 C. C. A. 80; Gulf, C. & S. F. Ry. Co. v. Jackson (1894) 64 Fed. 79, 12 C. C. A. 47; Miller v. Morgan (1894) 67 Fed. 82, 14 C. C. A. 312 (following U. S. v. Jones [1893] 13 S. Ct. 840, 149 U. S. 262, 37 L. Ed. 726); Shreve v. Cheesman (1895) 69 Fed. 785, 16 C. C. A. 413 (certiorari denied [1896] 16 S. Ct. 1206, 163 U. S. 704, 41 L. Ed. 320); Yellow Poplar Lumber Co. v. Chapman (1896) 74 Fed. 444, 20 C. C. A. 503, and cases therein cited (certiorari denied Chapman v. Yellow Poplar Lumber Co. [1899] 19 S. Ct. 883, 173 U. S. 705, 43 L. Ed. 1186); Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661; U. S. v. Kelly (1898) 89 Fed. 946, 32 C. C. A. 441; Reliable Incubator & Brooder Co. v. Stahl (1900) 102 Fed. 590, 42 C. C. A. 522; Koewing v. Wilder (1903) 126 Fed. 472, 61 C. C. A. 312; Roberts v. Bennett (1904) 135 Fed. 748, 68 C. C. A. 386; Minahan v. Grand Trunk Western Ry. Co. (1905) 138 Fed. 37, 70 C. C. A. 463; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. (1907) 151 Fed. 466, 81 C. C. A. 76; Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va. (1907) 153 Fed. 723, 82 C. C. A. 609; Reader v. Haggin (1908) 160 Fed. 909, 88 C. C. A. 91; Dalton v. Gunnison (1908) 165 Fed. 873, 91 C. C. A. 457; Same v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99; McCord v. Baltimore & O. R. Co. (1911) 187 Fed. 743, 109 C. C. A. 491; Wyss-Thalman v. Maryland Casualty Co. of Baltimore (1911) 193 Fed. 53, 113 C. C. A. 383 (dismissing writ of error [C. C. 1910] 193 Fed. 55); Robertson v. Cockrell (1913) 209 Fed. 843, 126 C. C. A. 567; Whalen v. Sheridan (C. C. 1880) 5 Fed. 436; Id., 10 Fed. 661; U. S. v. Train (C. C. 1882) 12 Fed. 852; Coe v. Morgan (C. C. 1882) 13 Fed. 844; Marine City Stave Co. v. Herreshoff Mfg. Co. (C. C. 187) 32 Fed. 822; Libby v. Crossley (C. C. 1889) 40 Fed. 564; Preble v. Bates (C. C. 1889) 40 Fed. 745; Talbot v. Press Pub. Co. (C. C. 1897) 80 Fed. 567; U. S. v. First Nat. Bank (C. C. 1898) 86 Fed. 861. See, also, Western Dredging & Improvement Co. v. Heldmaier (1902) 116 Fed. 179, 53 C. C. A. 625. As to operation of orders extending time, see Reliable Incubator & Brooder Co. v. Stahl (1900) 102 Fed. 590, 42 C. C. A. 522; Koewing v. Wilder (1903) 126 Fed. 472, 61 C. C. A. 312; Minahan v. Grand Trunk Western Ry. Co. (1905) 138 Fed. 37, 70 C. C. A. 463; Sutherland v. Pearce (1911) 186 Fed. 783, 108 C. C. A. 653 (vacating order of dismissal [1911] 183 Fed. 1023, 105 C. C. A. 664); Costello v. Ferrarini (C. C. 1908) 165 Fed. 379.

The rule stated as to when a bill of exceptions may be signed and filed. Western Dredging & Improvement Co.

v. Heldmaier (1902) 116 Fed. 179, 53 C. C. A. 625; Russo-Chinese Bank v. National Bank of Commerce of Seattle, Wash. (1911) 187 Fed. 80, 109 C. C. A. 398; Foote v. Silsby (C. C. 1850) Fed. Cas. No. 4,917; Greenway v. Gaither (C. C. 1853) Fed. Cas. No. 5,-788; Eagle Mfg. Co. v. Draper (C. C. 1877) Fed. Cas. No. 4,234; Herbert v. Butler, Id. 6,397; Costello v. Ferrarini (C. C. 1908) 165 Fed. 379.

The signing of a bill of exceptions after the expiration of the term at which the judgment was rendered is lawful, if done by consent of parties given during that term. Waldron v. Waldron (1895) 15 Sup. Ct. 383, 387, 156 U. S. 361, 39 L. Ed. 453, and cases therein cited; Schmidt v. Standard Steel Car Co. (1913) 202 Fed. 1023, 120 C. C. A. 664.

Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within a certain time, a case may be excepted from its operation when it is just to do so. Marye v. Strouse (C. C. 1880) 5 Fed. 494; U. S. v. Waite (D. C. 1909) 193 Fed. 258.

When, by reason of a motion for a new trial or rehearing, or to set aside the judgment, entered at the term when the judgment was rendered, the power of the court over the judgment is retained, a bill of exceptions may be settled, or time given for preparing it when the motion is overruled, whether at the same or a later term. Woods v. Lindvall (1891) 48 Fed. 73, 1 C. C. A. 34 (writ of certiorari denied In re Woods [1892] 12 S. Ct. 417, 143 U. S. 202, 36 L. Ed. 125); Merchants' Ins. Co. of Newark, N. J., v. Buckner (1899) 98 Fed. 222, 39 C. C. A. 19; Tullis v. Lake Erie & W. R. Co. (1901) 105 Fed. 554, 44 C. C. A. 597; Kentucky Distilleries & Warehouse Co. v. Lillard (1908) 160 Fed. 34, 87 C. C. A. 190; Mahoning Valley Ry. Co. v. O'Hara (1912) 196 Fed. 945, 116 C. C. A. 495.

The filing of a bill of exceptions during the term of court at which judgment is rendered is sufficient to preserve the rights of a party, and to authorize its allowance and settlement after the term. Pacific Bank v. Hannah (1898) 90 Fed. 72, 32 C. C. A. 522.

That an appeal has been allowed, a supersedeas bond filed, and a citation issued does not deprive the trial judge of power to thereafter settle a bill of exceptions during the term at which the decree was entered, where it was duly presented to him for settlement before the appeal was allowed. Cook v. Klonos (1908) 164 Fed. 529, 90 C. C. A. 403, judgment modified on rehearing (1909) 168 Fed. 700, 94 C. C. A. 144.

31. **Authentication.**—It is not necessary to seal a bill of exceptions. Herbert v. Butler (1877) 97 U. S. 319, 24 L. Ed. 958; Origet v. U. S. (1888) 8 Sup. Ct. 846, 848, 125 U. S. 240, 31 L. Ed. 743; Metropolitan R. Co. v. MacFarland (1904) 25 S. Ct. 28, 32, 195 U. S. 322, 49 L. Ed. 219; New York & N. E. R. Co. v. Hyde (1893) 56 Fed. 188, 190, 5 C. C. A. 461; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661. And see Clarke v. Russel (1799) 3 Dall. 415, 420, 1 L. Ed. 660; Lees v. U. S. (1893) 14 Sup. Ct. 163, 150 U. S. 476, 37 L. Ed. 1150. But the judge's signature is still necessary., Origet v. U. S. (1888) 8 Sup. Ct. 846, 848, 125 U. S. 240, 31 L. Ed. 743; Malony v. Adsit (1899) 20 Sup. Ct. 115, 116, 175 U. S. 281, 44 L. Ed. 163; U. S. v. United States Fidelity & Guaranty Co. (1911) 32 Sup. Ct. 101, 102, 222 U. S. 283, 56 L. Ed. 200; Duncan v. Landis (1901) 106 Fed. 839, 45 C. C. A. 666; Reynolds v. Lilly (1901) 107 Fed. 381, 46 C. C. A. 359; Porter v. Buckley (1906) 147 Fed. 140, 78 C. C. A. 138; Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514; Rupert v. U. S. (1910) 181 Fed. 87, 104 C. C. A. 255; Duluth St. Ry. Co. v. Speaks (1913) 204 Fed. 573, 123 C. C. A. 99. See, also, Suydam v. Williamson (1857) 20 How. 427, 438, 15 L. Ed. 978; Young v. Martin (1869) 8 Wall. 354, 357, 19 L. Ed. 418; Herbert v. Butler (1877) 97 U. S. 319, 24 L. Ed. 958; Hanna v. Maas (1887) 7 Sup. Ct. 1055, 1056, 122 U. S. 24, 30 L. Ed. 1117; Cooke v. Avery (1893) 13 Sup. Ct. 340, 344, 147 U. S. 375, 37 L. Ed. 209. And where a bill is neither signed nor sealed by the judge, so that there is nothing to show it was submitted to or in any way sanctioned by him, the judgment will be affirmed. Mussina v. Cavazos (1867) 6 Wall. 355, 363, 18 L. Ed. 810. See, also, Cook v. Porter (1870) 11 Wall. 672, 677, 20 L. Ed. 84.

No bill of exceptions is sufficiently authenticated unless signed by a judge who sat at the trial within the time required by law, and the omission or failure to sign the same cannot be cured by a certificate of the judge that it was allowed, settled, and signed within such time. Oxford & Coast Line R. Co. v. Union Bank of Richmond, Va. (1907) 153 Fed. 723, 82 C. C. A. 609.

Signature of the judge to orders allowing and settling bills of exceptions do not constitute a "signing" of the bills. Dalton v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99.

Where a purported bill of exceptions in the record is not authenticated by the certificate of the trial judge, the proceedings at the trial are not open to review. Warren v. U. S. (1910) 183 Fed. 718, 106 C. C. A. 156, 33 L. R. A. (N. S.) 800.

32. —— **Initials not signature.**—The judge must sign his name and cannot use his initials merely. Origet v. U. S. (1888) 8 Sup. Ct. 846, 849, 125 U. S. 240, 31 L. Ed. 743; U. S. v. United

States Fidelity & Guaranty Co. (1911) 32 Sup. Ct. 101, 102, 222 U. S. 283, 56 L. Ed. 200; Scaife v. Western North Carolina Land Co. (1898) 87 Fed. 308, 30 C. C. A. 661.

33. New trial and allowance of bill of exceptions in case of disability of judge.—An order for a new trial, when the application for it is made in due time, is the proper remedy for the incapacity of the judge who tried the case to settle and sign the bill of exceptions. City of Manning v. German Ins. Co. (1901) 107 Fed. 52, 46 C. C. A. 144, reversing order German Ins. Co. v. Town of Manning (C. C. 1900) 100 Fed. 581.

A party who has not presented to a succeeding judge a bill of exceptions containing a transcript of the evidence, as required by a rule of court, because of his failure to pay the reporter's fees, is not entitled to a new trial as of course. Thorndyke v. Gunnison (1909) 174 Fed. 137, 98 C. C. A. 171.

34. —— Meaning of "disability."—The word "disability" covers all disqualifications. Thus the appointment of a district judge as a circuit judge to serve in the Commerce Court creates a "disability." Sanborn v. Bay (1911) 194 Fed. 37, 114 C. C. A. 57.

The term "other disability" means a physical or mental disability of like character to death or sickness, by which the trial judge is disabled from the performance of judicial functions, and his absence from the district or circuit, merely, does not authorize the allowance and signing of a bill of exceptions by another judge. Western Dredging & Improvement Co. v. Heldmaier (1901) 111 Fed. 123, 49 C. C. A. 264.

35. —— Death of judge.—A controversy over settlement of bill of exceptions tried before a judge, which remained unacted upon at his death, is governed by this section. Guardian Assur. Co. of London v. Quintana (1913) 33 Sup. Ct. 236, 227 U. S. 100, 57 L. Ed. 437.

Where the judge died, leaving a pending motion for a new trial undecided, and there was no record from which his successor could fairly pass upon the motion and allow and sign a bill of exceptions, his only authority under the statute was to grant a new trial. Penn Mut. Life Ins. Co. v. Ashe (1906) 145 Fed. 593, 76 C. C. A. 283, 7 Ann. Cas. 491.

A bill of exceptions can be signed only by the judge who tried the case and, where the defeated party is prevented, without his own fault, from procuring such signature,—as by the illness of the judge before the expiration of the time allowed for filing the bill, and his subsequent death,—the remedy is by a motion for a new trial, which may be entertained in such case, although filed out of time. German Ins. Co. v. Town of Manning, Iowa (C. C. 1900) 100 Fed. 581.

Where the judge dies after the rendition of a verdict and pending a motion for a new trial, his successor has authority to hear and determine the same on the merits, by virtue of this section as well as by the law as it previously existed, where the evidence has been taken in stenographic notes, or he is otherwise satisfied that he can fairly pass upon the motion and allow a true bill of exceptions. U. S. v. Meldrum (D. C. 1906) 146 Fed. 390, judgment affirmed Meldrum v. U. S. (1907) 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324. And such successor has the further power to proceed in the case and to render judgment on the verdict. Id.

36. —— Resignation of judge.—Where the judge who tried the case, in which the evidence was taken stenographically and reported, resigned, his successor, in the exercise of discretion, had jurisdiction to sign and allow a bill of exceptions. McIntyre v. Modern Woodmen of America (1912) 200 Fed. 1, 121 C. C. A. 1.

Where the district judge resigned without ruling on a petition for new trial and settlement of the bill of exceptions, and there was a full stenographic report of the proceedings, the notes of which were extended, the defeated party was not entitled to a new trial as a matter of right. Brent v. Chas. H. Lilly Co. (D. C. 1913) 202 Fed. 335.

37. Filing.—A bill of exceptions should be considered as filed when taken to the clerk's office and placed in the hands of the proper officer for filing. The form of indorsement placed on it by the clerk is immaterial. Preble v. Bates (C. C. 1889) 40 Fed. 745.

As to time, see Harrison v. German-American Fire Ins. Co. (C. C. 1898) 90 Fed. 758.

38. Amendment.—Failure of the bill of exceptions to state that a ruling was excepted to cannot be cured by amendment at a subsequent term by an order nunc pro tunc, especially after a writ of error has been filed in the Supreme Court. Michigan Ins. Bank v. Eldred (1892) 12 Sup. Ct. 450, 452, 143 U. S. 293, 36 L. Ed. 162.

The omission of counsel preparing the bill was a waiver of the exceptions, and the court below was powerless to amend. Sutherland v. Round (1893) 57 Fed. 467, 6 C. C. A. 428. See, also, U. S. v. Claasen (C. C. 1891) 46 Fed. 67.

The allowance of amendments to the bill of exceptions long after the close of the trial term, and after the end of the time for settling the bill as fixed by order of court and stipulation of parties, and after a writ of error has been allowed, and the cause removed

to the appellate court, is unauthorized, and the amendments are void. Honey v. Chicago, B. & Q. R. Co. (1897) 82 Fed. 773, 27 C. C. A. 262. See, also, Libby v. Crossley (C. C. 1889) 40 Fed. 564.

The circuit court of appeals has no power to amend the bill of exceptions. Hobbs v. National Bank of Commerce (1899) 93 Fed. 615, 35 C. C. A. 487.

It will not make an order either allowing an amendment of a bill of exceptions in that court, or authorizing its amendment in the court below, to supply matters omitted from the original bill. Rollins v. Board of Com'rs of Gunnison County, Colo. (1897) 78 Fed. 741, 24 C. C. A. 298; First Nat. Bank v. Wilder (1900) 100 Fed. 223, 40 C. C. A. 340.

Neither testimony nor instructions can be added to a bill of exceptions, after it is signed and filed, by stipulation of counsel in the appellate court. Case v. Hall (1899) 94 Fed. 300, 36 C. C. A. 259.

A bill of exceptions cannot be amended at a term subsequent to that at which it was filed, in order to correct an omission due to the party's own neglect or oversight. Adams v. Shirk (1903) 121 Fed. 823, 58 C. C. A. 159; Franklin County v. Furry (1906) 144 Fed. 663, 75 C. C. A. 465; Bidwell v. Amsinck (1908) 166 Fed. 752, 92 C. C. A. 432.

§ 1591. (R. S. § 954.) Defects of form; amendments.

No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

Act Sept. 24, 1789, c. 20, § 32, 1 Stat. 91.

Other provisions for the amendment of process were made by R. S. § 948, ante, § 1580.

Provisions for the amendment of defective pleadings to show jurisdiction on the ground of diversity of citizenship, were made by Jud. Code, § 274c, ante, § 1251c.

Provisions for the amendment of pleadings in suits at law or in equity to conform them to the proper practice, if found to have been brought on the wrong side of the court, were made by Jud. Code, § 274a, ante, § 1251a.

Notes of Decisions

I. Construction and application of statute

1. Liberal construction.
2. Informations.
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4. Suits in equity.

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I. CONSTRUCTION AND APPLICATION OF STATUTE

1. Liberal construction.—This is a remedial statute and must be liberally construed, and requires the court to disregard niceties of form and give judgment according as the right of the cause and matter in law shall appear. Parks v. Turner (1851) 12 How. 39, 47, 13 L. Ed. 883; Less v. English (1898) 85 Fed. 471, 476, 29 C. C. A. 275 (dissenting opinion); In re Royce Dry Goods Co. (D. C. 1904) 133 Fed. 100; Portland Gold Mining Co. v. Stratton's Independence (D. C. 1912) 196 Fed. 714. And see Walden v. Craig (1840) 14 Pet. 147, 154, 10 L. Ed. 393; Stockton v. Bishop (1846) 4 How. 155, 167, 11 L. Ed. 918; Hodges v. Kimball (1899) 91 Fed. 845, 34 C. C. A. 103; Romaine v. Union Ins. Co. (C. C. 1886) 28 Fed. 625, 626; Davis v. Kansas City, S. & M. R. Co. (C. C. 1887) 32 Fed. 863; Healey Ice Mach. Co. v. Green (C. C. 1911) 184 Fed. 515 (affirmed [1911] 191 Fed. 1004, 111 C. C. A. 668); Meyer & Lange v. U. S. (1913) 4 Ct. Cust. App. 422.

2. Informations.—Informations of seizure for forfeitures are civil proceedings in rem, and controlled by this section. Friedenstein v. U. S. (1888) 8 Sup. Ct. 838, 842, 125 U. S. 224, 31 L. Ed. 736.

3. Suits against government.—The statute applies to actions against the government in the Court of Claims. Molina v. U. S. (1870) 6 Ct. Cl. 269. And see Thomas' Adm'r v. U. S. (1879) 15 Ct. Cl. 335; Great Falls Mfg. Co. v. Same (1880) 16 Ct. Cl. 160. But not to a bill of particulars in a suit to recover excess of duties illegally exacted. Sherman v. Hedden (C. C. 1887) 32 Fed. 757.

4. Suits in equity.—The statute is not confined to civil cases at law, but extends to and includes suits in equity. Dancel v. United Shoe Machinery Co. (C. C. 1903) 120 Fed. 839. See, also, U. S. v. American Bell Tel. Co. (C. C. 1889) 39 Fed. 716; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3. (C. C. 1898) 90 Fed. 598.

II. DEFECTS CURED BY STATUTE

5. Form of action.—An objection to a form of the action must be taken advantage of on special demurrer as a matter of form only and is cured by the statute. Childress v. Emory (1823) 8 Wheat. 642, 672, 5 L. Ed. 705. See, also, Union Pac. R. Co. v. Whitney (1912) 198 Fed. 784, 117 C. C. A. 392, and cases therein cited.

6. Pleadings.—This section is similar to the English statute, but defects in substance are not cured by a verdict. Garland v. Davis (1846) 4 How. 131, 145, 11 L. Ed. 907; Phillips & C. Const. Co. v. Seymour (1875) 91 U. S. 646, 656, 23 L. Ed. 341; Teal v. Walker (1884) 4 Sup. Ct. 420, 422, 111 U. S. 242, 28 L. Ed. 415; Mitsui v. St. Paul Fire & Marine Ins. Co. (1913) 202 Fed. 26, 120 C. C. A. 280; Kohn v. McKinnon (D. C. 1898) 90 Fed. 623. See, also, Buchanan v. Trotter (D. C. 1843) Fed. Cas. No. 2,075.

The failure of the declaration, petition, or complaint, to state a cause of action is not cured by the verdict and may be first raised on appeal. Teal v. Walker (1884) 4 Sup. Ct. 420, 422, 111 U. S. 242, 28 L. Ed. 415; Kentucky Life & Acc. Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42; City of Pontiac v. Talbot Pav. Co. (1899) 94 Fed. 65, 36 C. C. A. 88; Cabaniss v. Reco Min. Co. (1902) 116 Fed. 318, 54 C. C. A. 190; Western Union Tel. Co. v. Sklar (1903) 126 Fed. 295, 61 C. C. A. 281.

Defects of form which could have been cured by amendment, cannot be considered when not made until after verdict or judgment. Ewing v. Howard (1868) 7 Wall. 499, 503, 19 L. Ed. 293; Palmer v. Arthur (1889) 9 Sup. Ct. 649, 131 U. S. 60, 33 L. Ed. 87; Glaspie v. Keator (1893) 56 Fed. 203, 5 C. C. A. 474; Loewer v. Harris (1893) 57 Fed. 368, 6 C. C. A. 394 (judgment reversed Texas & P. Ry. Co. v. Minnick [1894] 61 Fed. 635, 10 C. C. A. 1); Rush v. Newman (1893) 58 Fed. 158, 7 C. C. A. 136; Central Vermont R. Co. v. Soper (1894) 59 Fed. 879, 8 C. C. A. 341; City of Plankinton v. Gray (1894) 63 Fed. 415, 11 C. C. A. 268; Rush v. First Nat. Bank (1895) 71 Fed. 102, 17 C. C. A. 627; World's Columbian Exposition Co. v. Republic of France (1898) 91 Fed. 64, 33 C. C. A. 333 (reversing judgment [C. C. 1897] 83 Fed. 109); Keener v. Baker (1899) 93 Fed. 377, 35 C. C. A. 350; Railway Officials' & Employés' Acc. Ass'n v. Wilson (1900) 100 Fed. 368, 40 C. C. A. 411; Adams v. Shirk (1900) 104 Fed. 54, 43 C. C. A. 407 (rehearing denied [1901] 105 Fed. 659, 44 C. C. A. 653); Mine & Smelter Supply Co. v. Parke & Lacy Co. (1901) 107 Fed. 881, 47 C. C. A. 34; United States v. Lee Yen Tai (1902) 113 Fed. 465, 51 C. C. A. 299; Chicago & N. W. Ry. Co. v. De Clow (1903) 124 Fed. 142, 61 C. C. A. 34; Anglo-American Land, Mortgage

& Agency Co. v. Lombard (1904) 132 Fed. 721, 68 C. C. A. 89 (writ of certiorari denied Lombard v. Anglo-American Land Mortgage & Agency Co. [1904] 25 Sup. Ct. 793, 196 U. S. 638, 49 L. Ed. 630); In re First Nat. Bank (1907) 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; Puget Sound Nav. Co. v. Lavender (1908) 160 Fed. 851, 87 C. C. A. 655; New York Cent. & H. R. R. Co. v. U. S. (1908) 165 Fed. 833, 91 C. C. A. 519; Texas & P. Ry. Co. v. Lacey (1911) 185 Fed. 225, 107 C. C. A. 331; Same v. Jackson (1912) 193 Fed. 948, 113 C. C. A. 576; St. Louis & S. F. R. Co. v. Herr (1912) 193 Fed. 950, 113 C. C. A. 578 (writ of certiorari denied [1912] 32 Sup. Ct. 837, 225 U. S. 705, 56 L. Ed. 1265); Dashley v. Daniel (1913) 202 Fed. 426, 120 C. C. A. 532; Duluth St. Ry. Co. v. Speaks (1913) 204 Fed. 573, 123 C. C. A. 99; Illinois Cent. R. Co. v. Porter (1913) 207 Fed. 311, 125 C. C. A. 55; Bolton-Pratt Co. v. Chester (C. C. A. 1914) 210 Fed. 253; Wilson v. Berry (C. C. 1826) Fed. Cas. No. 17,791; Hudson v. Kansas Pac. R. Co. (C. C. 1882) 9 Fed. 879; Elliott v. Canadian Pac. Ry. Co. (C. C. 1904) 129 Fed. 163 (judgment reversed Canadian Pac. Ry. Co. v. Elliott [1905] 137 Fed. 904, 70 C. C. A. 242); Seymour v. Du Bois (C. C. 1906) 145 Fed. 1003; Crittenden v. Davis (Super. Ct. Ark. 1831) Fed. Cas. No. 3,393b.

The verdict will cure defects in substance in the pleadings if, from the issue in the case, the facts omitted or defectively stated may fairly be presumed to have been proved on the trial. Stanley v. Whipple (C. C. 1839) Fed. Cas. No. 13,286.

Bad pleas which are cured by verdict are those which, though they would be bad on demurrer, because wrong in form, still contain enough in substance to put in issue all the material parts of the declaration. Garland v. Davis (1846) 4 How. 131, 145, 11 L. Ed. 907.

The want of a formal conclusion is cured by the statute. Bank of Metropolis v. Guttschlick (1840) 14 Pet. 19, 27, 10 L. Ed. 335; Laber v. Cooper (1868) 7 Wall. 565, 570, 19 L. Ed. 151. So is the want of distinction between the two characters in which an executor acted when the material facts are alleged. Taylor v. Benham (1847) 5 How. 233, 277, 12 L. Ed. 130. So is the failure to sign a libel. Hardy v. Moore (D. C. 1880) 4 Fed. 843.

The absence of a prayer for process is a defect of form, and is not fatal to the bill. Armstrong Cork Co. v. Merchants' Refrigerating Co. (1910) 184 Fed. 199, 107 C. C. A. 93.

7. —— **Variance.**—A variance between a pleading and proofs is not fatal, unless it be of a character to mislead the opposite party, and this doctrine conforms to the letter and spirit of this section. Schiffer v. Anderson (1906) 146 Fed. 457, 76 C. C. A. 667. See, also, Nash v. Towne (1866) 5 Wall. 689, 698, 18 L. Ed. 527; Grayson v. Lynch (1896) 16 Sup. Ct. 1064, 1068, 163 U. S. 468, 41 L. Ed. 230; Washington & G. R. Co. v. Hickey (1897) 17 Sup. Ct. 661, 665, 166 U. S. 521, 41 L. Ed. 1101; Moses v. U. S. (1897) 17 Sup. Ct. 682, 685, 166 U. S. 571, 41 L. Ed. 1119; Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co. (1903) 23 Sup. Ct. 517, 189 U. S. 221, 47 L. Ed. 782 (affirming judgment [1901] 108 Fed. 764, 48 C. C. A. 15); Standard Oil Co. v. Brown (1910) 30 Sup. Ct. 669, 218 U. S. 78, 54 L. Ed. 939 (affirming judgment [1908] 31 App. D. C. 371); Sheppard v. Newhall (1893) 54 Fed. 306, 4 C. C. A. 352 (reversing judgment [C. C. 1891] 47 Fed. 468); Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York (1894) 63 Fed. 48, 11 C. C. A. 96; Adams v. Shirk (1900) 104 Fed. 54, 43 C. C. A. 407 (rehearing denied [1901] 105 Fed. 659, 44 C. C. A. 653); Salt Lake City v. Smith (1900) 104 Fed. 457, 43 C. C. A. 637; Haley v. Kilpatrick (1900) 104 Fed. 647, 44 C. C. A. 102; Flint & P. M. R. Co. v. McPherson (1900) 105 Fed. 210, 44 C. C. A. 449; Chicago Terminal Transfer R. Co. v. Stone (1902) 118 Fed. 19, 55 C. C. A. 187; Columbia Mfg. Co. v. Hastings (1902) 121 Fed. 328, 57 C. C. A. 504; Ames v. Farrelly (1903) 121 Fed. 820, 58 C. C. A. 258; Chicago, M. & St. P. Ry. Co. v. Voelker (1904) 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264; Schiffer v. Anderson (1906) 146 Fed. 457, 76 C. C. A. 667; Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. (1906) 148 Fed. 159, 78 C. C. A. 293; Preiss v. Zitt (1906) 148 Fed. 617, 78 C. C. A. 56; Thompson-Starrett Co. v. Fitzgerald (1906) 149 Fed. 721, 79 C. C. A. 427; S. H. Greene & Sons v. Freund (1907) 150 Fed. 721, 80 C. C. A. 387; Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. (1908) 159 Fed. 824, 86 C. C. A. 648; Long Pole Lumber Co. v. Gross (1910) 180 Fed. 5, 103 C. C. A. 359; Westinghouse v. Carlton (1913) 202 Fed. 129, 120 C. C. A. 443; Law v. Illinois Cent. R. Co. (1913) 208 Fed. 869, 126 C. C. A. 27; Ingle v. Collard (C. C. 1803) Fed. Cas. No. 7,043; Draper v. Town of Springport (C. C. 1883) 15 Fed. 328; Earnshaw v. McHose (C. C. 1891) 48 Fed. 589 (judgment affirmed [1893] 56 Fed. 606, 6 C. C. A. 51); Boston & A. R. Co. v. O'Reilly (C. C. 1895) 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006; Elliott v. Canadian Pac. Ry. Co. (C. C. 1904) 129 Fed. 163 (judgment reversed Canadian Pac. Ry. Co. v. Elliott [1905] 137 Fed. 904, 70 C. C. A. 242); Coulter v. Independent Order of Foresters (C. C. 1909) 166 Fed. 805; Molina v. U. S. (1870) 6 Ct. Cl. 269.

Where the declaration omits to state a fact which must necessarily have

been proved at the trial to justify the verdict, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof. Dobson v. Campbell (C. C. 1833) Fed. Cas. No. 3,945. See, also, Gray v. James (C. C. 1817) Fed. Cas. No. 5,719.

8. Taking case from jury.—The irregularity, if any, in entering a compulsory nonsuit in accordance with the state practice, instead of directing a verdict for defendant, was one of form only. Dominion Trust Co. v. National Surety Co. (1915) 221 Fed. 618, 137 C. C. A. 342.

9. Verdict and findings.—This statute embraces verdicts, though not included eo nomine. Roach v. Hulings (1842) 41 U. S. (16 Pet.) 319, 10 L. Ed. 979; And under it, the court may give judgment as the right appears, without regarding any imperfection or want of form in the verdict. U. S. v. Quantity of Tobacco (D. C. 1872) Fed. Cas. No. 16,106a.

An allegation of variance between the petition and findings, where there is no claim that the findings were unwarranted by the proofs, or that the judgment does not conform to the law and justice of the case as presented by the findings, will not be sustained. New Orleans, O. & G. W. R. Co. v. Lindsay (1866) 4 Wall. 650, 656, 18 L. Ed. 328.

10. Judgment or decree.—Plaintiff in ejectment will be permitted to strike out all the demises in his declaration but that on which the verdict was given, and the omission to strike out such demises is an omission of form. Van Ness v. Bank of U. S. (1839) 13 Pet. 17, 22, 10 L. Ed. 38.

The clerk's omission to record a waiver or overruling of a demurrer is cured by the statute. Townsend v. Jemison (1849) 7 How. 706, 720, 12 L. Ed. 880.

Where the writ, pleadings, and contract speak only of "Frederick D. Conrad" and the judgment went against "Daniel Frederick Conrad," the defendant, it was too late, after verdict and judgment, to assign the variance as error. Conrad v. Griffey (1850) 11 How. 480, 492, 13 L. Ed. 779.

The omission to render judgment on a bad plea cannot be assigned as error. Morsell v. Hall (1851) 13 How. 212, 215, 14 L. Ed. 117.

The omission to enter a formal order that the bill be taken pro confesso against the defendants will not affect the regularity of a final decree or make it any less absolute. Linder v. Lewis (D. C. 1880) 1 Fed. 378, 381.

11. Writ of error.—The failure to file a formal petition for the writ of error issued is a defect of form remedied by the statute. Alaska United Gold Min. Co. v. Keating (1902) 116 Fed. 561, 53 C. C. A. 655.

III. DEMURRER AS MODE OF RAISING OBJECTIONS

12. Special demurrer.—All defects in form in pleading can be taken advantage of only by special demurrer. Ogden City v. Weaver (1901) 108 Fed. 564, 47 C. C. A. 485; Granite Brick Co. v. Titus (C. C. A. 1915) 226 Fed. 557; Jackson v. Rundlet (C. C. 1846) Fed. Cas. No. 7,-145; U. S. v. Winslow (D. C. 1912) 195 Fed. 578, affirmed (1913) 33 Sup. Ct. 253, 227 U. S. 202, 57 L. Ed. 481.

A special demurrer may be filed in all actions in the courts of the United States. Cage v. Jeffries (C. C. 1839) Fed. Cas. No. 2,287. See, also, Barnes v. Viall (C. C. 1881) 6 Fed. 661, 665; Rosenbach v. Dreyfuss (D. C. 1880) 1 Fed. 391, 393.

An affidavit of defense, stating that the statement of claim shows no cause of action and is insufficient to justify a verdict or judgment, amounts, at most, to a general demurrer, and is insufficient to bar the cause of action. American Alkali Co. v. Campbell (C. C. 1902) 113 Fed. 398.

Multifariousness and surplusage are not defects unless especially assigned. Wyman Partridge & Co. v. Boston Blacking Co. (C. C. 1909) 175 Fed. 834.

13. —— Variance between writ and declaration.—A variance between the writ and declaration may be taken advantage of by special demurrer. How v. McKinney (C. C. 1838) Fed. Cas. No. 6,749. See Duvoll v. Craig (1817) 2 Wheat. 45, 55, 4 L. Ed. 180; Chirac v. Reinicker (1826) 11 Wheat. 280, 302, 6 L. Ed. 474. It cannot be taken advantage of by a general demurrer. Wilkinson v. Pomeroy (C. C. 1873) Fed. Cas. No. 17,675; Wilder v. McCormick (C. C. 1879) Fed. Cas. No. 17,650. But see Triplet v. Warfield (C. C. 1821) Fed. Cas. No. 14,177.

14. Objections to evidence.—On an objection to the introduction of any evidence on the ground that the complaint fails to state a cause of action, every reasonable intendment will be indulged in favor of the complaint. Pennsylvania Mining Co. v. Jarnigan (1915) 222 Fed. 889, 138 C. C. A. 369.

15. Waiver of demurrer.—The filing of a plea to the merits after a demurrer is overruled is a waiver of the demurrer. Gulf, C. & S. F. R. Co. v. Washington (1892) 49 Fed. 347, 1 C. C. A. 286; City of Plankinton v. Gray (1894) 63 Fed. 415, 11 C. C. A. 268. But not where the declaration fails to state a cause of action. Teal v. Walker (1884) 4 Sup. Ct. 420, 422, 111 U. S. 242, 28 L. Ed. 415; City of Pontiac v. Talbot Pav. Co. (1899) 94 Fed. 65, 36 C. C. A. 88.

IV. AMENDMENTS

16. Scope and effect of statute.—The statute authorizes no amendment in

anything but defect or want of form. Russell v. U. S. (1879) 15 Ct. Cl. 168.

The statute is peremptory in requiring courts to amend process, etc., where the error is "for any defect or want of form." All other amendments are left entirely to the discretion of the court. Thomas' Adm'r v. U. S. (1879) 15 Ct. Cl. 335.

17. Effect of conformity act and state practice.—See, also, notes to § 1537, ante.

Allowance of amendments to pleadings in federal courts is governed by this section, and not by state practice acts. Hudgins v. Kemp (1855) 18 How. 530, 534, 15 L. Ed. 511; Mexican Cent. R. Co. v. Duthie (1903) 23 Sup. Ct. 610, 189 U. S. 76, 47 L. Ed. 715; Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282; Lange v. Union Pac. R. Co. (1903) 126 Fed. 338, 62 C. C. A. 48 (writ of certiorari denied [1904] 24 Sup. Ct. 853, 193 U. S. 671, 48 L. Ed. 841); Erie R. Co. v. Schmidt (1915) 225 Fed. 513, 140 C. C. A. 655; Norton v. City of Dover (C. C. 1882) 14 Fed. 106; Phelps v. Elliott (C. C. 1886) 26 Fed. 881; Booth v. Denike (C. C. 1894) 65 Fed. 43; Kent v. Bay State Gas Co. (C. C. 1899) 93 Fed. 887, 889; De Valle Da Costa v. Southern Pac. Co. (C. C. 1909) 167 Fed. 654; Manitowoc Malting Co. v. Fuechtwanger (C. C.) 169 Fed. 983 (judgment reversed Feuchtwanger v. Manitowoc Malting Co. [1911] 187 Fed. 713, 109 C. C. A. 461). But see Truckee River General Electric Co. v. Benner (1914) 211 Fed. 79, 127 C. C. A. 503; Leman v. Baltimore & O. R. Co. (C. C. 1904) 128 Fed. 191; North Chicago St. R. Co. v. Chicago Union Traction Co. (C. C. 1907) 150 Fed. 612; Williams v. William B. Scaife & Sons Co. (D. C. 1915) 227 Fed. 922. See, also, Henderson v. Louisville & N. R. Co. (1887) 8 Sup. Ct. 60, 123 U. S. 61, 31 L. Ed. 92 (affirming judgment [C. C. 1884] 20 Fed. 430); O'Connell v. Reed (1893) 56 Fed. 531, 535, 5 C. C. A. 586; Bowden v. Burnham (1894) 59 Fed. 752, 754, 8 C. C. A. 248, and cases therein cited; Hodges v. Kimball (1899) 91 Fed. 845, 34 C. C. A. 103 (reversing judgment Lusk's Adm'rs v. Kimball [C. C. 1898] 87 Fed. 545); North Chicago St. Ry. Co. v. Burnham (1900) 102 Fed. 669, 42 C. C. A. 584; City of St. Charles v. Stookey (1907) 154 Fed. 772, 85 C. C. A. 494 (certiorari denied [1908] 28 Sup. Ct. 569, 208 U. S. 617, 52 L. Ed. 647); Truckee River General Electric Co. v. Benner (1914) 211 Fed. 79, 127 C. C. A. 503; Person v. Fidelity & Casualty Co. (C. C. 1897) 84 Fed. 759, 760 (reversed [1899] 92 Fed. 965, 35 C. C. A. 117); Oliver v. Raymond (C. C. 1901) 108 Fed. 927; Western Wheeled Scraper Co. v. Gahagan (C. C. 1907) 152 Fed. 648; Stone v. Speare (C. C. 1910) 175 Fed. 584 (affirmed [1912] 193 Fed. 375, 113 C. C. A. 301); Hannum v. Jerome (C. C. 1911) 184 Fed. 179; Reardon v. Balaklala Consol. Copper Co. (C. C. 1912) 193 Fed. 189; Rosenbach v. Dreyfuss (D. C. 1880) 1 Fed. 391, 394.

Where the Code of the state expressly authorizes amendments to defective affidavits, an amendment adding a new ground for an attachment may be allowed on suits brought in the federal court. Fitzpatrick v. Flannagan (1882) 1 Sup. Ct. 369, 371, 106 U. S. 648, 27 L. Ed. 211.

Where it is in accordance with the practice of the state, a federal court should permit amendments of pleadings in actions at law in furtherance of justice. Hodges v. Kimball (1899) 91 Fed. 845, 34 C. C. A. 103.

18. Discretion of court.—The allowance of amendments is within the discretion of the court and is not reviewable. Chirac v. Reinicker (1826) 11 Wheat. 280, 302, 6 L. Ed. 474; U. S. v. Buford (1830) 3 Pet. 12, 32, 7 L. Ed. 585; Murphy v. Stewart (1844) 2 How. 263, 284, 11 L. Ed. 261; Chapman v. Barney (1889) 9 Sup. Ct. 426, 427, 129 U. S. 677, 32 L. Ed. 800; Gormley v. Bunyan (1891) 11 Sup. Ct. 453, 138 U. S. 623, 34 L. Ed. 1086; Mexican Cent. R. Co. v. Duthie (1903) 23 Sup. Ct. 610, 189 U. S. 76, 47 L. Ed. 715; Kinney v. Columbia Savings & Loan Ass'n (1903) 24 Sup. Ct. 30, 32, 191 U. S. 78, 48 L. Ed. 103; U. S. v. Lehigh Valley R. Co. (1911) 31 Sup. Ct. 387, 220 U. S. 257, 55 L. Ed. 458; Dietz v. Lymer (1894) 61 Fed. 792, 10 C. C. A. 71 (petition for rehearing denied [1894] 63 Fed. 758, 11 C. C. A. 410); Watts v. Weston (1894) 62 Fed. 136, 10 C. C. A. 302; Philip Schneider Brewing Co. v. American Ice Mach. Co. (1896) 77 Fed. 138, 23 C. C. A. 89; Sheffield & B. Coal, Iron & Railway Co. v. Newman (1896) 77 Fed. 787, 23 C. C. A. 459 (certiorari denied Neely v. Newman [1897] 18 Sup. Ct. 944, 168 U. S. 708, 42 L. Ed. 1211); Baltimore & O. R. Co. v. Camp (1897) 81 Fed. 807, 26 C. C. A. 626; Chapman v. Yellow Poplar Lumber Co. (1898) 89 Fed. 903, 32 C. C. A. 402; Buchanan v. Cleveland Linseed-Oil Co. (1898) 91 Fed. 88, 33 C. C. A. 351; City of New Orleans v. Fisher (1899) 91 Fed. 574, 34 C. C. A. 15 (certiorari granted [1899] 19 Sup. Ct. 884, 174 U. S. 802); Union Cent. Life Ins. Co. v. Phillips (1900) 102 Fed. 19, 41 C. C. A. 263 (reversing decree Phillips v. Union Cent. Life Ins. Co. [C. C. 1900] 101 Fed. 33); Berliner Gramophone Co. v. Seaman (1902) 113 Fed. 750, 51 C. C. A. 440; Id. (1902) 115 Fed. 806, 53 C. C. A. 376; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (1903) 121 Fed. 233, 57 C. C. A. 469; Lange v. Union Pac. R. Co. (1903) 126 Fed. 338, 62 C. C. A. 48 (writ of certiorari denied [1904] 24 Sup. Ct. 853, 193 U. S. 671, 48 L. Ed. 841); Alaska Com-

mercial Co. v. Williams (1904) 128 Fed. 362, 63 C. C. A. 92; Dunn v. Mayo Mills (1905) 134 Fed. 804, 67 C. C. A. 450; Moore v. Petty (1905) 135 Fed. 668, 68 C. C. A. 306 (writ of certiorari denied [1905] 25 Sup. Ct. 800, 197 U. S. 623, 49 L. Ed. 911); Great Northern Ry. Co. v. Herron (1905) 136 Fed. 49, 68 C. C. A. 599; Montana Min. Co. v. St. Louis Min. & Mill. Co. (1906) 147 Fed. 897, 78 C. C. A. 33 (judgment reversed [1907] 27 Sup. Ct. 254, 204 U. S. 204, 51 L. Ed. 444); Stillwagon v. Baltimore & O. R. Co. (1908) 159 Fed. 97, 86 C. C. A. 287; Herman v. American Bridge Co. (1909) 167 Fed. 930, 93 C. C. A. 330; Brookfield v. Novelty Glass Mfg. Co. (1909) 170 Fed. 960, 96 C. C. A. 127 (affirming decree [C. C. 1908] 170 Fed. 830); McKemy v. Supreme Lodge A. O. U. W. (1910) 180 Fed. 961, 104 C. C. A. 117; Empire Timber Co. v. Woodbine Timber Co. (1910) 183 Fed. 214, 105 C. C. A. 476 (writ of certiorari denied [1911] 31 Sup. Ct. 472, 219 U. S. 589, 55 L. Ed. 348); Loeb v. Eastman Kodak Co. (1910) 183 Fed. 704, 106 C. C. A. 142; Jackson v. Mutual Life Ins. Co. of New York (1911) 186 Fed. 447, 108 C. C. A. 369; Kesterson v. La Moine Lumber & Trading Co. (1912) 193 Fed. 355, 113 C. C. A. 279; Chicago Great Western R. Co. v. McCormick (1912) 200 Fed. 375, 118 C. C. A. 527, 47 L. R. A. (N. S.) 18; Board of Levee Com'rs of Tensas Basin Levee Dist. v. Tensas Delta Land Co. (1913) 204 Fed. 736, 123 C. C. A. 40; Incorporated Town of Stonewall, Okl., v. Stone (1913) 207 Fed. 540, 125 C. C. A. 139; Cœur d'Alene Lumber Co. v. Thompson (1914) 215 Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731; Chicago, St. P., M. & O. Ry. Co. v. Nelson (C. C. A. 1915) 226 Fed. 708; Lamb v. Parkman (C. C.) Fed. Cas. No. 8,019; Fisher v. Rutherford (C. C. 1830) Fed. Cas. No. 4,823; Dowell v. Applegate (C. C. 1881) 8 Fed. 698; U. S. v. Badeau (C. C. 1887) 31 Fed. 697; Same v. American Bell Tel. Co. (C. C. 1889) 39 Fed. 716, 717; Frank v. Union Cent. Life Ins. Co. (C. C. 1904) 130 Fed. 224; Manitowoc Malting Co. v. Fuechtwanger (C. C. 1909) 169 Fed. 983 (judgment reversed Feuchtwanger v. Manitowoc Malting Co. [1911] 187 Fed. 713, 109 C. C. A. 461); Nevitt v. Clarke (D. C. 1846) Fed. Cas. No. 10,138; U. S. v. Batchelder (D. C. 1868) Fed. Cas. No. 14,541; Same v. One Hundred and Twenty-Three Casks of Distilled Spirits (D. C. 1870) Fed. Cas. No. 15,943; Same v. Badeau (D. C. 1886) 33 Fed. 572; Crown Feature Film Co. v. Bettis Amusement Co. (D. C. 1913) 206 Fed. 362; Federal Manufacturing & Printing Co. v. U. S. (1906) 41 Ct. Cl. 318. See, also, Eberly v. Moore (1860) 24 How. 147, 158, 16 L. Ed. 612; Gulf, C. & S. F. Ry. Co. v. James (1891) 48 Fed. 148, 150, 1 C. C. A. 53; Fertig v. Bartles (C. C. 1897) 78 Fed. 866, 867. And this authority extends: To the allowance of an amendment to conform the pleading to the proof, which does not materially enlarge the issue. Mathieson Alkali Works v. Mathieson (1906) 150 Fed. 241, 80 C. C. A. 129 (writ of certiorari denied [1907] 27 Sup. Ct. 787, 204 U. S. 674, 51 L. Ed. 674); Derham v. Donohue (1907) 155 Fed. 385, 83 C. C. A. 657, 12 Ann. Cas. 372; Snare & Triest Co. v. Friedman (1909) 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367 (writ of certiorari denied [1909] 29 Sup. Ct. 700, 214 U. S. 518, 53 L. Ed. 1065); Pennsylvania Co. v. Whitney (1909) 169 Fed. 572, 95 C. C. A. 70; Hoogendorn v. Daniel (1910) 178 Fed. 765, 102 C. C. A. 213; Armour & Co. v. Arbuckle (1913) 205 Fed. 273, 123 C. C. A. 435; Southern Ry. Co. v. Gadd (1913) 207 Fed. 277, 125 C. C. A. 21 (judgment affirmed [1914] 34 Sup. Ct. 696, 233 U. S. 572, 58 L. Ed. 1099); United Kansas Portland Cement Co. v. Harvey (C. C. A. 1914) 216 Fed. 316; Harris v. Egger (1915) 226 Fed. 389, 141 C. C. A. 219; Baker v. Barber Asphalt Pav. Co. (C. C. 1899) 92 Fed. 117; Johnson v. Crawford & Yothers (C. C. 1906) 144 Fed. 905; Manitowoc Malting Co. v. Fuechtwanger (C. C. 1909) 169 Fed. 983, judgment reversed Feuchtwanger v. Manitowoc Malting Co. (1911) 187 Fed. 713. 109 C. C. A. 461. See, also, Crawford v. The William Penn (C. C. 1819) Fed. Cas. No. 3,373. To amendments of a bill of particulars. Rickard v. Barney (C. C. 1887) 32 Fed. 581, judgment reversed Barney v. Rickard (1895) 15 Sup. Ct. 642, 157 U. S. 352, 39 L. Ed. 730. Or to the kind of remedy which the court holds appropriate. U. S. Bank v. Lyon County (C. C. 1892) 48 Fed. 632, 633. But the court has no power to permit a party to revive a cause of action that is barred. The Harmony (C. C. 1812) Fed. Cas. No. 6,081; Dieckerhoff v. Robertson (C. C. 1887) 29 Fed. 781, 782.

19. Time for amendment.—The right to amend may be exercised at any stage of the case, even after trial and judgment. Murphy v. Stewart (1844) 2 How. 263, 281, 11 L. Ed. 261; Mexican Cent. Ry. Co. v. Duthie (1903) 23 Sup. Ct. 610, 189 U. S. 76, 47 L. Ed. 715; McDonald v. Nebraska (1900) 101 Fed. 171, 177, 41 C. C. A. 278; Franklin v. Conrad-Stanford Co. (1905) 137 Fed. 737, 70 C. C. A. 171; Nelson v. Barker (C. C. 1844) Fed. Cas. No. 10,101; U. S. v. American Bell Tel. Co. (C. C. 1889) 39 Fed. 716; Reardon v. Balaklava Consol. Copper Co. (C. C. 1912) 193 Fed. 189. See, also, Smith v. Barker (C. C. 1809) Fed. Cas. No. 13,013; Clarke v. Mayfield (C. C. 1828) Fed. Cas. No. 2,858; Fiedler v. Carpenter (C. C. 1846) Fed. Cas. No. 4,759; Cotten v. Fidelity & Casualty Co. (C. C. 1890) 41 Fed. 506; Southern

Ry. Co. v. North Carolina Corp. Commission (C. C. 1900) 105 Fed. 270.

The court having power to extend the demise after judgment in ejectment, defendant may be considered in court on a motion to amend. Walden v. Craig (1840) 14 Pet. 147, 154, 10 L. Ed. 393.

This section authorizes allowance of amendments during the trial in furtherance of justice, and when such an amendment is permitted the court must, in its discretion, determine whether any submission which has been made ought to be vacated. Bamberger v. Terry (1880) 103 U. S. 40, 43, 26 L. Ed. 317.

The court has no power to allow an amendment to a declaration not applied for until after the close of the term at which a demurrer to such declaration was sustained and final judgment rendered for defendant. Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282.

The district courts may allow amendments of substance on terms, but this must be before final judgment. Smith v. Jackson (C. C. 1825) Fed. Cas. No. 13,065. Or hearing. Clyde v. Richmond & D. R. Co. (C. C. 1894) 59 Fed. 394.

20. Affidavits for process.—Power to amend affidavits for garnishment, attachment, etc,, is given by this section. Booth v. Denike (C. C. 1894) 65 Fed. 43, 47.

21. Process amendable.—See, also, notes to § 1580, ante.

An execution issued in the names of two plaintiffs, after one of them is dead, is voidable, not void, and may be amended. Lane v. Beltzhoover (C. C. 1840) Fed. Cas. No. 8,047.

A writ in a cause removed to a federal court will be regarded as amended by adding the seal. Wolf v. Cook (C. C. 1889) 40 Fed. 432, 436.

It is no ground for quashing a summons that it is not indorsed by the name of an attorney of the court issuing it. Jewett v. Garrett (C. C. 1891) 47 Fed. 625.

22. —— Name of party.—The writ and capias may be amended by inserting given names of plaintiffs. Birch v. Butler (C. C. 1806) Fed. Cas. No. 1,-425.

After a plea of misnomer in abatement, the court will not suffer the record to be amended, but upon payment of costs and a discharge of the bail. Payen v. Hodgson (C. C. 1808) Fed. Cas. No. 10,853.

A sci. fa., in which the name of one person is written for another by mistake, may be amended. Tayloe v. Wharfield (C. C. 1821) Fed. Cas. No. 13,772.

Misnomer not apparent of record is not amendable. Albers v. Whitney (C. C. 1840) Fed. Cas. No. 137.

Where a defendant sued in the wrong name was personally served with process, and he was subsequently given a notice that plaintiff would ask leave to amend, in which his name was properly given he is bound by a judgment, though he failed to appear. King v. Davis (C. C. 1903) 137 Fed. 198, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348.

23. Process not amendable.—A process not under the seal of the court, nor signed by the clerk, is not amendable. Peaslee v. Haberstro (C. C. 1879) Fed. Cas. No. 10,884; Dwight v. Merritt (C. C. 1880) 4 Fed. 614. So is a process issued by an attorney, instead of the clerk. Middleton Paper Co. v. Rock River Paper Co. (C. C. 1884) 19 Fed. 252.

A summons having no indorsement, designed by the state law to give notice of the nature of the action, is defective in a material part, and is not amendable. Brown v. Pond (D. C. 1880) 5 Fed. 31, 39; U. S. v. Rose (D. C. 1882) 14 Fed. 681.

See, also, § 1580, ante, and notes.

24. Return of process.—The marshal may amend his return after the return day, according to the truth of the case, by the data in his sales book. Linthicum v. Remington (C. C. 1839) Fed. Cas. No. 8,377.

Where, on scire facias to revive a default judgment in ejectment, it appeared that the returns of service as to two of the defendants were insufficient to show a valid service on them, the judgment will be held void as to them under either their motions to vacate or their pleas of nul tiel record, but subject to the right of amendment of the returns of service in certain cases. King v. Davis (C. C. 1903) 137 Fed. 198, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348.

Where, pending a motion to vacate a judgment in ejectment, based on invalid returns of constructive service of process, a motion to amend was made, and the amended return disclosed a valid service, the motion will not be granted if the facts stated in the amended return are true. King v. Davis (C. C. 1905) 137 Fed. 222, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348.

An insufficient return may be corrected by an affidavit of the officer showing the facts. Fountain v. Detroit, M. & T. S. L. Ry. Co. (D. C. 1913) 210 Fed. 982.

See, also, § 1580, ante, and notes.

25. Complaint or petition.—The authority to allow amendments extends to jurisdictional as well as other averments. Day v. Chism (1825) 10 Wheat. 449, 453, 6 L. Ed. 363; Kinney v. Columbia Savings & Loan Ass'n (1903) 24 Sup. Ct. 30, 32, 191 U. S. 78, 48 L. Ed. 103, and cases there cited; Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248; In re Plymouth Cordage Co. (1905)

135 Fed. 1000, 68 C. C. A. 434; Goodman v. Ft. Collins (1908) 164 Fed. 970, 91 C. C. A. 98; Ferris v. Williams (C. C. 1805) Fed. Cas. No. 4,749; Brooklyn White Lead Co. v. Pierce (C. C. 1835) Fed. Cas. No. 1,940; Rae v. Grand Trunk R. Co. (C. C. 1882) 14 Fed. 401; Insurance Co. of North America v. Svendsen (C. C. 1896) 74 Fed. 346; American Alkali Co. v. Campbell (C. C. 1902) 113 Fed. 398; Thompson v. Automatic Fire Protection Co. (C. C. 1907) 151 Fed. 945; Baumgarten v. Alliance Assur. Co. (C. C. 1908) 159 Fed. 275; McEldowney v. Card (C. C. 1911) 193 Fed. 475; Thomas' Adm'r v. U. S. (1879) 15 Ct. Cl. 335.

Thus the court may allow: An amendment to cure the failure of a libel to disclose the statute relied on. The Scotia (D. C. 1889) 39 Fed. 429. Or the failure to allege negligence. The Alabama (D. C. 1867) Fed. Cas. No. 122; The Deer (D. C. 1870) Fed. Cas. No. 3,737. Or avoiding limitations. Illinois Surety Co. v. U. S. (C. C. 1914) 215 Fed. 334 (writ of error to Supreme Court granted Id. 1007); Wharton v. Lowrey (C. C. 1796) Fed. Cas. No. 17,481. Or to cure a misnomer. Scull v. Briddle (C. C. 1808) Fed. Cas. No. 12,570; Nelson v. Barker (C. C. 1844) Fed. Cas. No. 10,101; Furniss v. Ellis (C. C. 1822) Fed. Cas. No. 5,162; Tilley v. Tharp (C. C. 1828) Fed. Cas. No. 14,047. Or to cure a mere misnomer of a corporation plaintiff. Baltimore & P. R. Co. v. Fifth Baptist Church (1891) 11 Sup. Ct. 185, 137 U. S. 568, 34 L. Ed. 784. See, also, Mellwood Distilling Co. v. Harper (C. C. 1909) 167 Fed. 389. An amendment of a statement of claim in an action by a corporation to recover unpaid calls on stock by adding an allegation that the balance remaining due on the stock after the first installment thereon had been paid has not since been paid. American Alkali Co. v. Campbell (C. C. 1902) 113 Fed. 398. An amendment correctly stating the place of incorporation of a party. Hernan v. American Bridge Co. (1909) 167 Fed. 930, 93 C. C. A. 330. An amendment to show that foreign administrators had taken out auxiliary letters in the state. Hodges v. Kimball (1899) 91 Fed. 845, 34 C. C. A. 103 (reversing judgment Lusk's Adm'rs v. Kimball [C. C. 1898] 87 Fed. 545); Swatzel v. Arnold (C. C. 1869) Fed. Cas. No. 13,682; McAleer v. Clay County (C. C. 1889) 38 Fed. 707. An amendment averring that plaintiffs' appointment as administrator was by a local court of a different county. Chicago Great Western R. Co. v. McCormick (1912) 200 Fed. 375, 118 C. C. A. 527.

The court is without authority to permit amendments to supply essential jurisdictional averments. Dickinson v. Consolidated Traction Co. (C. C. 1902) 114 Fed. 232, judgment affirmed (1903) 119 Fed. 871, 56 C. C. A. 401, writ of certiorari denied (1903) 24 Sup. Ct. 841, 191 U. S. 567, 48 L. Ed. 305.

Where the amendment is specific, it is not necessary to interline it in the declaration. Walden v. Craig (1840) 14 Pet. 147, 154, 10 L. Ed. 393.

26. —— **Citizenship of parties.**—See, also, notes to § 991, ante.

The court may allow: An amendment of the allegation as to citizenship of the parties. Maddox v. Thorn (1894) 60 Fed. 217, 8 C. C. A. 574; Baltimore & O. R. Co. v. McLaughlin (1896) 73 Fed. 519, 19 C. C. A. 551; Houston v. Filer & Stowell Co. (1900) 104 Fed. 163, 43 C. C. A. 457; Newcomb v. Burbank (1910) 181 Fed. 334, 104 C. C. A. 164; Birdsall v. Perego (C. C. 1865) Fed. Cas. No. 1,435; Van Horn v. Kittitas (C. C. 1901) 112 Fed. 1; Seymour v. Du Bois (C. C. 1906) 145 Fed. 1003. See, also, Carnegie, Phipps & Co. v. Hulbert (1895) 70 Fed. 209, 16 C. C. A. 498. An amendment after verdict to cure the failure to allege the requisite diversity of citizenship. Mexican Cent. R. Co. v. Duthie (1903) 23 Sup. Ct. 610, 189 U. S. 76, 47 L. Ed. 715; Atchison, T. & S. F. Ry. Co. v. Gilliland (1912) 193 Fed. 608, 113 C. C. A. 476. See, also, Maddox v. Thorn (1894) 60 Fed. 217, 8 C. C. A. 574; Hodges v. Kimball (1899) 91 Fed. 845, 850, 34 C. C. A. 103; Smith v. Jackson (C. C. 1825) Fed. Cas. No. 13,065; Maddux v. Usher (C. C. 1878) Fed. Cas. No. 8,936.

The averment of citizenship may be added at any stage if the amendment be moved for in a reasonable time after the defect is suggested. Conolly v. Taylor (1829) 2 Pet. 556, 565, 7 L. Ed. 518; Fisher v. Rutherford (C. C. 1830) Fed. Cas. No. 4,823.

An amendment showing diverse citizenship cures any invalidity in a previous attachment, arising from failure of the record to show federal jurisdiction. Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248.

27. —— **Amount in controversy or damages.**—See, also, notes to § 991, ante.

The court may allow: An amendment increasing the damages laid. Gregg v. Gier (C. C. 1847) Fed. Cas. No. 5,799; Northrop v. Mercantile Trust & Deposit Co., of Baltimore, Md. (C. C. 1903) 119 Fed. 969. An amendment alleging the amount involved, so as to give the court jurisdiction. Davis v. Kansas City, S. & M. R. Co. (C. C. 1887) 32 Fed. 863; Home Ins. Co. v. Nobles (C. C. 1894) 63 Fed. 641; Thompson v. Automatic Fire Protection Co. (C. C. 1907) 151 Fed. 945. An amendment as to the amount of damages in a collision case, to remove a formal difficulty to the way of a just

award. The St. John (C. C. 1870) Fed. Cas. No. 12,224.

28. —— **Change of parties or their capacity.**—The court may permit a petition filed by a state officer to be amended by the substitution of the name of the state as plaintiff. McDonald v. State of Nebraska (1900) 101 Fed. 171, 41 C. C. A. 278. It may allow an amendment changing plaintiff's capacity. St. Louis & S. F. R. Co. v. Herr (1912) 193 Fed. 950, 113 C. C. A. 578, writ of certiorari denied (1912) 32 S. Ct. 837, 225 U. S. 705, 56 L. Ed. 1265. As executor or administrator. Missouri, K. & T. Ry. Co. v. Wulf (1913) 33 S. Ct. 135, 226 U. S. 570, 57 L. Ed. 355, Ann. Cas. 1914B, 134 (affirming judgment [1911] 192 Fed. 919, 113 C. C. A. 665); Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282; Leahy v. Haworth (1905) 141 Fed. 850, 73 C. C. A. 84, 4 L. R. A. (N. S.) 657; Sandeen v. Tschider (1913) 205 Fed. 252, 123 C. C. A. 456; Hall v. Louisville & N. R. Co. (C. C. 1907) 157 Fed. 464; Reardon v. Balaklala Consol. Copper Co. (C. C. 1912) 193 Fed. 189; Bixler v. Pennsylvania R. Co. (D. C. 1913) 201 Fed. 553; Williams v. William B. Scaife & Sons Co. (D. C. 1915) 227 Fed. 922. But not after the expiration of the period of limitation. Alessandrelli v. Arbogast (D. C. 1913) 209 Fed. 126.

The court may allow a party to amend by substituting the name of the real defendant intended. Bainum v. American Bridge Co. (C. C. 1905) 141 Fed. 179; Clemmens v. Washington Park Steamboat Co. (C. C. 1909) 171 Fed. 168. See, also, Eddy v. Powell (1892) 49 Fed. 814, 1 C. C. A. 448; Needham v. Washburn (C. C. 1874) Fed. Cas. No. 10,082. Or by inserting the names of the persons who compose a firm. Tibbs v. Parrott (C. C. 1804) Fed. Cas. No. 14,022. Or by striking out the name of one of the defendants. Tobey v. Claflin (C. C. 1838) Fed. Cas. No. 14,066. Or by striking out "administrator" and inserting "executor." Randolph v. Barrett (1842) 16 Pet. 138, 142, 10 L. Ed. 914. Or to cure a nonjoinder. Douglas v. Butler (C. C. 1881) 6 Fed. 228; Seymour v. Du Bois (C. C. 1906) 145 Fed. 1003. Or misjoinder. Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520. And so where one of two defendants dies after submission of the case to an appellate court, which subsequently affirms a decree in favor of the deceased below, its failure to make a substitution for the deceased party is not a substantial error or defect, and it may be disregarded and corrected in a higher court on appeal from the judgment of affirmance. Wilhite v. Skelton (1906) 149 Fed. 67, 70, 78 C. C. A. 635.

The statute does not go to the extent of allowing the court, where an action was originally brought without authority or sanction in law, to so amend the original writ and declaration as to make new parties plaintiff, and thereby sustain an action that was originally brought without authority to institute the same. Hodges v. Kimball (1899) 91 Fed. 845, 34 C. C. A. 103, reversing judgment Lusk's Adm'rs v. Kimball (C. C. 1898) 87 Fed. 545. Nor an amendment to bring in a use plaintiff beyond the court's jurisdiction. Frank v. Union Cent. Life Ins. Co. (C. C. (1904) 130 Fed. 224. And does not permit the striking out of a sole defendant and the substitution of another in his stead. Portland Gold Mining Co. v. Stratton's Independence (D. C. 1912) 196 Fed. 714. So the court may refuse to allow the declaration to be amended by striking out the name of one of the plaintiffs in the suit. Moores v. Carter (Super. Ct. Ark. 1828) Fed. Cas. No. 9,782a. See, also, Raphael v. Trask (C. C. 1902) 118 Fed. 678. An amendment making new parties will not be allowed. Morris v. Barney (C. C. 1805) Fed. Cas. No. 9,-826.

A bill against a stockholder of a corporation, to which the company is a necessary party, brought in a federal court other than the district of which the company was a resident, cannot be amended so as to bring the company in as a defendant. Swan Land & Cattle Co. v. Frank (C. C. 1889) 39 Fed. 456, decree modified (1893) 13 Sup. Ct. 691, 148 U. S. 603, 37 L. Ed. 577.

29. —— **Change of form of action.**—The court will not allow an amendment changing the form of the action from debt to covenant. Tyson v. Belmont (D. C. 1849) Fed. Cas. No. 14,-315a. From case to covenant. Scholfield v. Fitzhugh (C. C. 1802) Fed. Cas. No. 12,474. From trespass on the case to debt. Ten Broeck v. Pendelton (C. C. 1838) Fed. Cas. No. 13,827. From one for a penalty into one on contract. Venable Bros. v. Louisville & N. R. Co. (C. C. 1905) 137 Fed. 981. Or from contract to tort. Haas Bros. v. Hamburg-Bremen Fire Ins. Co. (1910) 181 Fed. 916, 104 C. C. A. 354; Inman & Co. v. Seaboard Air Line Ry. Co. (C. C. 1908) 159 Fed. 960.

30. —— **New cause of action.**—An amendment which will introduce a new cause of action will not be permitted. Union Pac. Ry. Co. v. Wyler (1895) 15 Sup. Ct. 877, 158 U. S. 285, 39 L. Ed. 983; Lyon v. McKeefrey (1909) 171 Fed. 384, 96 C. C. A. 340; McGlinchy v. U. S. (C. C. 1875) Fed. Cas. No. 8,803; Land Co. of New Mexico v. Elkins (C. C. 1884) 20 Fed. 545; Blalock v. Equitable Life Assur. Soc. of the U. S. (C. C. 1896) 73 Fed. 655 (judgment reversed [1896] 75 Fed. 43, 21 C. C. A. 208); Seymore v. Franklin (C. C. 1899) 92 Fed. 122; Kramer

v. Gille (C. C. 1905) 140 Fed. 682; Western Wheeled Scraper Co. v. Gahagan (C. C. 1907) 152 Fed. 648; Postmaster General v. Ridgway (D. C. 1829) Fed. Cas. No. 11,313; In re Leonard (D. C. 1871) Fed. Cas. No. 8,255. And see U. S. v. Dwight Mfg. Co. (D. C. 1913) 210 Fed. 85. And this rule applies where the statute of limitations has become a bar. Atlanta, K. & N. Ry. Co. v. Hooper (1899) 92 Fed. 820, 35 C. C. A. 24; Whalen v. Gordon (1899) 95 Fed. 305, 37 C. C. A. 70; U. S. v. Norton (1901) 107 Fed. 412, 46 C. C. A. 387; Boston & M. R. Co. v. Hurd (1901) 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193 (writ of certiorari denied Hurd v. Boston & M. R. Co. [1902] 22 Sup. Ct. 939, 184 700, 46 L. Ed. 765); Patillo v. Allen-West Commission Co. (1904) 131 Fed. 680, 65 C. C. A. 508; The Harmony (C. C. 1812) Fed. Cas. No. 6,081; Buntin v. Chicago, R. I. & P. Ry. Co. (C. C. 1890) 41 Fed. 744; Smith v. Missouri Pac. Ry. Co. (C. C. 1892) 50 Fed. 760 (judgment reversed [1893] 56 Fed. 458, 5 C. C. A. 557); Leeds v. Evans (C. C. 1900) 99 Fed. 28; Despeaux v. Pennsylvania R. Co. (C. C. 1904) 133 Fed. 1009; Hall v. Louisville & N. R. Co. (C. C. 1907) 157 Fed. 464; De Valle Da Costa v. Southern Pac. Co. (C. C. 1909) 167 Fed. 654; Tiller v. St. Louis & S. F. R. Co. (C. C. 1911) 189 Fed. 994.

An amendment which is only an amplification of the cause of action alleged in the original pleading is proper. Smith v. Missouri Pac. Ry. Co. (1893) 56 Fed. 458, 5 C. C. A. 557 (reversing [C. C. 1892] 50 Fed. 760, and distinguishing Scovill v. Glasner [1883] 79 Mo. 449); Atlantic & Pac. R. Co. v. Laird (1893) 58 Fed. 760, 7 C. C. A. 489 (judgment affirmed [1896] 17 Sup. Ct. 120, 164 U. S. 393, 41 L. Ed. 485); Johnson v. Staenglen (1898) 85 Fed. 603, 29 C. C. A. 369; Cross v. Evans (1898) 86 Fed. 1, 29 C. C. A. 523; Johnsonburg Vitrified Brick Co. v. Yates (1910) 177 Fed. 389, 101 C. C. A. 553; Smith v. Atlantic Coast Line R. Co. (C. C. A. 1913) 210 Fed. 761; Chamberlain v. Mensing (C. C. 1892) 51 Fed. 511; Bowen v. Needles Nat. Bank (C. C. 1897) 79 Fed. 49. See, also, Atlantic & P. Ry. Co. v. Laird (1896) 17 Sup. Ct. 120, 164 U. S. 393, 41 L. Ed. 485, affirming (1893) 58 Fed. 760, 7 C. C. A. 489. And saves the suit from the statute of limitations. Middlesex Banking Co. v. Smith (1897) 83 Fed. 133, 27 C. C. A. 485; McDonald v. State of Nebraska (1900) 101 Fed. 171, 41 C. C. A. 278; Cincinnati, N. O. & T. P. Ry. Co. v. Gray (1900) 101 Fed. 623, 41 C. C. A. 535, 50 L. R. A. 47; Patillo v. Allen-West Commission Co. (1904) 131 Fed. 680, 65 C. C. A. 508; Crotty v. Chicago Great Western Ry. Co. (1909) 169 Fed. 593, 95 C. C. A. 91; Schurmeier v. Connecticut Mut. Life Ins. Co. (1909) 171 Fed. 1, 96 C. C. A. 107 (writ of certiorari dismissed [1911] 31 Sup. Ct. 470, 219 U. S. 586, 54 L. Ed. 347); Viscount De Valle Da Costa v. Southern Pac. Co. (1910) 176 Fed. 843, 100 C. C. A. 313 (writ of certiorari denied Southern Pac. Co. v. Viscount De Valle Da Costa [1910] 30 Sup. Ct. 696, 217 U. S. 606, 54 L. Ed. 900); Armstrong Cork Co. v. Merchants' Refrigerating Co. (1910) 184 Fed. 199, 107 C. C. A. 93 (modifying judgment [C. C. 1909] 171 Fed. 778); Bison State Bank v. Billington (1915) 228 Fed. 116, 142 C. C. A. 522; Marshalltown Stone Co. v. Louis Drach Const. Co. (C. C. 1903) 123 Fed. 746; Dittgen v. Racine Paper Goods Co. (C. C. 1908) 164 Fed. 85, decree affirmed Racine Paper Goods Co. v. Dittgen (1909) 171 Fed. 631, 96 C. C. A. 433.

An amendment introducing an additional cause of action of the same nature, and growing out of the same transaction, will be allowed. Oliver v. Raymond (C. C. 1901) 108 Fed. 927.

31. Plea or answer.—The court may allow amendments: To pleas of contributory negligence and assumed risk. Owl Creek Coal Co. v. Goleb (C. C. A. 1914) 210 Fed. 209. To the verification of a plea at the trial. Bank of Edgefield v. Farmers' Co-operative Manuf'g Co. (1892) 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201. To a plea of set-off which is defective, in that it is not supported by the affidavit required by law and is not in the form prescribed by the rules of court. Bedford v. J. Henry Miller (1914) 212 Fed. 368, 129 C. C. A. 44.

Amendment not permitted at trial unless defense is just. Allen v. Magruder (C. C. 1826) Fed. Cas. No. 230.

An amendment to a plea, when not affecting the vital question on which the defense is based, should be allowed after commission issued. Buchanan v. Trotter (D. C. 1843) Fed. Cas. No. 2,075.

32. —— Equity.—A motion by one defendant in equity to withdraw an answer and file the same plea as is filed by its codefendant will be granted when not made for the purpose of setting up a merely technical defense, nor after evidence has been taken, and it is probable that it will be more convenient to try the issue raised by the plea first, and where a replication has been filed to the codefendant's plea. U. S. v. American Bell Tel. Co. (C. C. 1889) 39 Fed. 716.

33. Equity pleadings under rules of court.—See notes to § 1536, ante.

34. Pleadings in admiralty.—Under this section a libel in admiralty may be amended while the proceedings are in fieri and before judgment. The Meteor (D. C. 1866) Fed. Cas. No. 9,498; Com-

ings v. The Ida Stockdale (Dak. T. 1874) Fed. Cas. No. 3,052.

35. —— **Admiralty rules.**—See notes to § 1536, ante.

36. **Conditions on granting amendment.**—Where leave is granted to amend the declaration, the defendant to file an answer to the amended pleading within a certain time after a service upon him of a copy thereof, it is error to proceed to trial and enter judgment for plaintiff; no notice having been given to the defendant of the amendment. Chapman v. Barney (1889) 9 Sup. Ct. 426, 129 U. S. 677, 32 L. Ed. 800.

An amendment of the ad damnum clause in a declaration after verdict for a greater amount will only be allowed upon condition of a new trial and payment of costs. Elting v. Campbell (C. C. 1863) Fed. Cas. No. 4,422.

Where the court grants a trial amendment, which enables plaintiff to rely on a federal statute instead of the state law, it should impose such conditions as will prevent prejudice to defendant. Koennecke v. Seaboard Air Line Ry. (S. C. 1915) 85 S. E. 374, judgment affirmed Seaboard Air Line Ry. v. Koennecke (1915) 36 Sup. Ct. 126, 239 U. S. 352, 60 L. Ed. —.

37. —— **Costs.**—The payment of costs, given on leave to amend, is not a condition precedent. Wigfield v. Dyer (C. C. 1807) Fed. Cas. No. 17,622; Butts v. Chapman (C. C. 1809) Fed. Cas. No. 2,257. And see Milburne v. Kearnes (C. C. 1802) Fed. Cas. No. 9,543; Georgetown v. Beatty (C. C. 1804) Fed. Cas. No. 5,344.

38. **Demurrer.**—The court will not give leave to amend a demurrer unless it goes to the merits of the case. Offutt v. Beatty (C. C. 1804) Fed. Cas. No. 10,448.

39. **Bankruptcy proceedings.**—A want of a proper jurisdictional averment in the petition is curable by amendment. In re Plymouth Cordage Co. (1905) 135 Fed. 1,000, 68 C. C. A. 434; Dodge v. Kenwood Ice Co. (C. C. A. 1913) 204 Fed. 577, affirming order In re Kenwood Ice Co. (D. C. 1911) 189 Fed. 525. So is a defective claim for exemption. Burke v. Guarantee Title & Trust Co. (1905) 134 Fed. 562, 67 C. C. A. 486; In re Maxson (D. C. 1909) 170 Fed. 356; In re Kelly (D. C. 1912) 199 Fed. 984. And so are defective specifications in opposition to the discharge of the bankrupt. In re Glass (D. C. 1902) 119 Fed. 509.

40. **Informations.**—An amendment of an information in rem will not be disallowed merely because it may affect the rights of sureties. The Harmony (C. C. 1812) Fed. Cas. No. 6,081.

Informations filed by United States attorneys are amendable even after pleas filed and in substance. U. S. v. Three Hundred and Ninety-Six Barrels of Distilled Spirits (D. C. 1866) Fed. Cas. No. 16.503.

The amendment of a libel of information in the district court will not be allowed where the same introduces a new, substantive cause of action, and a new charge against defendant. Otherwise where the new cause of action corresponds in character, and is kindred in nature, to that presented in the original libel. U. S. v. One Hundred and Twenty-Three Casks of Distilled Spirits (D. C. 1870) Fed. Cas. No. 15,-943.

An information against a vessel for smuggling may be amended so as to change the allegations as to the ownership of the vessel. U. S. v. The Queen (D. C. 1870) Fed. Cas. No. 16,107.

41. **Mandamus proceedings.**—Amendments in form and in substance may be allowed in mandamus proceedings in any stage thereof, where justice will be thereby promoted. U. S. v. Union Pac. R. Co. (C. C. 1875) Fed. Cas. No. 16,601.

42. **Proceedings for removal of causes to federal court.**—Defects in a removal bond are within this section. Deford, Hinkle & Co. v. Mehaffy (C. C. 1882) 13 Fed. 481, 490; Harris v. Delaware, L. & W. R. Co. (C. C. 1884) 18 Fed. 833, 835.

The court may enlarge the time for filing the transcript, or allow the transcript to be filed nunc pro tunc. Woolridge v. McKenna (C. C. 1881) 8 Fed. 660.

The court may grant leave to amend a petition for removal, so as to show diverse citizenship, after the filing of the removal papers, but before any action taken on the merits. Kinney v. Columbia Savings & Loan Ass'n (1903) 24 Sup. Ct. 30, 32, 191 U. S. 78, 48 L. Ed. 103.

When the nature of a suit as originally brought in a state court was not such as to give the court jurisdiction over a nonresident defendant brought in by substituted service, a federal court to which the suit is removed has no power to amend the pleadings so as to give jurisdiction over such a defendant. Adams v. Heckscher (C. C. 1897) 80 Fed. 742.

An amendment of the petition will be allowed for the purpose of curing any defects therein. If the state court refuses an order for the removal of the cause, no amendments to the petition will be allowed. Winnemans v. Edginton (C. C. 1886) 27 Fed. 324.

See, also, notes under § 1011 et seq.

43. **Verdicts.**—A verdict may be amended with reference to both matters of form and substance during the term, either by reference to the judge's notes taken at the trial, or by other satisfactory evidence. Swofford Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co. (1898) 85 Fed. 417, 29 C. C. A. 239; Pressed Steel Car Co. v. Steel

Car Forge Co. (1906) 149 Fed. 182, 79 C. C. A. 130; Miller v. Steele (1907) 153 Fed. 714, 82 C. C. A. 572; Chandler v. Andrews (1911) 192 Fed. 543, 113 C. C. A. 15; Paige v. Loring (C. C. 1873) Fed. Cas. No. 10,672; Burlingame v. Central Railroad of Minn. (C. C. 1885) 23 Fed. 706; Christ v. Schell (C. C. 1887) 31 Fed. 550; Elliott v. Gilmore (C. C. 1906) 145 Fed. 964.

The statute authorizes the amendment of verdicts. Murphy v. Stewart (1844) 2 How. 263, 281, 11 L. Ed. 261; Parks v. Turner (1851) 12 How. 39, 47, 13 L. Ed. 883; Koon v. Phœnix Mut. L. Ins. Co. (1881) 104 U. S. 106, 107, 26 L. Ed. 670; Snyder v. U. S. (1884) 5 Sup. Ct. 118, 112 U. S. 216, 28 L. Ed. 697; Osborne v. Altschul (1899) 93 Fed. 381, 35 C. C. A. 354; Bernard v. Abel (1907) 156 Fed. 649, 84 C. C. A. 361; Gay v. Joplin (C. C. 1882) 13 Fed. 650.

The record of the verdict will be amended in the case of a clerical mistake to conform to the verdict as rendered. Tomes v. Redfield (C. C. 1870) Fed. Cas. No. 14,085.

44. Judgment and record.—Federal courts can amend only as to defects of form. Albers v. Whitney (C. C. 1840) Fed. Cas. No. 137; U. S. v. One Hundred and Sixty-Three, etc., Barrels of Whisky (D. C. 1871) Fed. Cas. No. 15,937. See, also, Gagnon v. U. S. (1904) 24 Sup. Ct. 510, 511, 193 U. S. 451, 48 L. Ed. 745; Brush v. Robbins (C. C. 1844) Fed. Cas. No. 2,059; Gagnon v. U. S. (1902) 38 Ct. Cl. 10.

The Supreme Court may order its judgment to be reformed by supplying a clerical omission of the clerk. Bank of Kentucky v. Wistar (1830) 3 Pet. 431, 432, 7 L. Ed. 731.

A judgment may be amended at any time to make it correspond with the decision rendered. Gilmer v. City of Grand Rapids (C. C. 1883) 16 Fed. 708.

A clerical mistake in a decree may be corrected on petition. Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co. (C. C. 1898) 84 Fed. 744.

45. —— Power of court during and after term.—See, also, notes to § 976, ante.

A judgment may be corrected, on motion, at a subsequent term, where sufficient cause is shown. City of Manning v. German Ins. Co. (1901) 107 Fed. 52, 46 C. C. A. 144 (reversing Manning [C. C. 1900] 100 Fed. 581); Bernard v. Abel (1907) 156 Fed. 649, 84 C. C. A. 361; Barnes v. Lee (C. C. 1807) Fed. Cas. No. 1,018; Pierce v. Turner, Id. 11,148; U. S. v. Fearson (C. C. 1836) Fed. Cas. No. 15,081; Bradley v. Eliot (C. C. 1837) Fed. Cas. No. 1,778; Crabtree v. Neff (C. C. 1863) Fed. Cas. No. 3,315; Bank v. Labitut (C. C. 1870) Fed. Cas. No. 842; Muscatine v. Mississippi & M. R. Co., Id. 9,971; A. J. Woodruff & Co. v. U. S. (C. C. 1896) 154 Fed. 861; U. S. v. Bennett (D. C. 1857) Fed. Cas. No. 14,573; Same v. Harmison (D. C. 1876) Fed. Cas. No. 15,308.

The court has power at a subsequent term by nunc pro tunc order to correct its record. Wight v. Nicholson (1890) 10 Sup. Ct. 487, 490, 134 U. S. 136, 33 L. Ed. 865; Bernard v. Abel (1907) 156 Fed. 649, 84 C. C. A. 361; Mason v. Smith (1911) 191 Fed. 502, 112 C. C. A. 146; Brown v. U. S. (1912) 196 Fed. 351, 116 C. C. A. 171; Lynah v. U. S. (C. C. 1901) 106 Fed. 121; Evans v. Freeman (C. C. 1906) 140 Fed. 419, order reversed James v. Evans (1906) 149 Fed. 136, 80 C. C. A. 240.

46. Causes of appellate jurisdiction.—This section embraces causes of appellate as well as original jurisdiction. Kennedy v. Bank of Georgia (1850) 8 How. 586, 610, 12 L. Ed. 1209; Warren v. Moody (C. C. 1881) 9 Fed. 673. See, also, Wilhite v. Skelton (1906) 149 Fed. 67, 78 C. C. A. 635.

The supreme court has the power to allow amendments to be made to the record before it, though the general practice is to remand the case to the circuit court for that purpose. Kennedy v. Bank of Georgia (1850) 8 How. 586, 611, 12 L. Ed. 1209. And see Jackson v. Ashton (1836) 10 Pet. 480, 481, 9 L. Ed. 502.

Where an amendment to the record is made by consent in the supreme court, which amendment sets forth the jurisdiction, a mandate containing the amendment ought to prevent any subsequent objection to the jurisdiction in the lower court. Kennedy v. Bank of Georgia (1850) 8 How. 586, 611, 12 L. Ed. 1209.

47. —— Writ of error.—See, also, notes to § 1664, post.

Formerly a writ of error could not be amended in the supreme court. Insurance Co. of Valley of Virginia v. Mordecai (1858) 21 How. 195, 201, 16 L. Ed. 94; Porter v. Foley (1858) 21 How. 393, 394, 16 L. Ed. 154; Hodge v. Williams (1859) 22 How. 87, 16 L. Ed. 237; Freeborn v. The Protector (1870) 11 Wall. 82, 86, 20 L. Ed. 47.

A clerical mistake in a writ of error may be amended by the citation. McVeigh v. U. S. (1869) 8 Wall. 640, 19 L. Ed. 511.

The court has power to permit the amendment of a writ of error or appeal bond. Ferguson v. Dent (C. C. 1886) 29 Fed. 1, 12. As where a necessary part to the writ has been omitted. Teel v. Chesapeake & O. Ry. Co. of Virginia (1913) 204 Fed. 914, 123 C. C. A. 210.

48. —— Change of parties.—The successor to a receiver may be substituted as plaintiff and appellant. Bowden v. Johnson (1883) 2 Sup. Ct. 246, 256, 107 U. S. 251, 27 L. Ed. 386.

Where the parties to an appeal by the government agree to an amendment as to the officer by whom an appeal

was taken, the amendment may be made in the appellate court. U. S. v. Hopewell (1892) 51 Fed. 798, 800, 2 C. C. A. 510.

Where one of two defendants dies after submission of a case to the appellate court, which subsequently affirms a decree in favor of decedent, its failure to make a substitution of his personal representative is not a substantial error, and may be disregarded and corrected in a higher court on appeal from the judgment of affirmance, Wilhite v. Skelton (1906) 149 Fed. 67, 78 C. C. A. 635.

V. DEFECTS OR ERRORS REGARDED HARMLESS ON REVIEW

49. Prejudice from error.—No judgment will be reversed for error when it is clear that such error did not and could not have prejudiced the rights of the party complaining. Gilmer v. Higley (1884) 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Vicksburg & M. R. Co. v. O'Brien (1886) 119 U. S. 99, 7 S. Ct. 118, 30 L. Ed. 299; Kalanianaole v. Smithies (1913) 33 S. Ct. 169, 226 U. S. 462, 54 L. Ed. 303; Seaboard Air Line Ry. v. Moore (1913) 33 S. Ct. 580, 228 U. S. 433, 57 L. Ed. 907 (affirming judgment [1912] 193 Fed. 1022, 113 C. C. A. 668); Southern Pac. Co. v. Rauh (1892) 49 Fed. 696, 1 C. C. A. 416; Citizens' Bank v. Farwell (1893) 56 Fed. 570, 6 C. C. A. 24 (writ of error dismissed [1893] 56 Fed. 539, 6 C. C. A. 30); Hinds v. Keith (1893) 57 Fed. 10, 6 C. C. A. 231; W. B. Grimes Dry-Goods Co. v. Malcolm (1893) 58 Fed. 670, 7 C. C. A. 426 (judgment affirmed [1896] 17 S. Ct. 158, 164 U. S. 483, 41 L. Ed. 524); Atchison, T. & S. F. R. Co. v. McClurg (1894) 59 Fed. 860, 8 C. C. A. 322; National Bank of Commerce v. First Nat. Bank (1894) 61 Fed. 809, 10 C. C. A. 87; St. Louis, I. M. & S. Ry. Co. v. Needham (1894) 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; Chicago, R. I. & P. Ry. Co. v. Caulfield (1894) 63 Fed. 396, 11 C. C. A. 552; St. Louis, I. M. & S. Ry. Co. v. Phillips (1895) 66 Fed. 35, 13 C. C. A. 315; Brown v. Cranberry Iron & Coal Co. (1896) 72 Fed. 96, 18 C. C. A. 444 (cause remanded to circuit court [1896] 72 Fed. 103, 18 C. C. A. 462); National Masonic Acc. Ass'n v. Shryock (1896) 73 Fed. 774, 20 C. C. A. 3; Crawford v. Foster (1897) 83 Fed. 975, 28 C. C. A. 242 (affirming judgment Foster v. Crawford [C. C. 1897] 80 Fed. 991, and petition for rehearing denied [1898] 84 Fed. 939, 28 C. C. A. 576); New York, N. H. & H. R. Co. v. O'Leary (1899) 93 Fed. 737, 35 C. C. A. 562; Central of Georgia Ry. Co. v. Paul (1899) 93 Fed. 878, 35 C. C. A. 639; New Orleans & N. E. R. Co. v. Clements (1900) 100 Fed. 415, 40 C. C. A. 465; Harkison v. Same (1900) 101 Fed. 71, 41 C. C. A. 201; Burt v. C. Gotzian & Co. (1900) 102 Fed. 937, 43 C. C. A. 59 (writ of certiorari denied [1900] 21 S. Ct. 916, 179 U. S. 684, 45 L. Ed. 385; Board of Com'rs of Lake County v. Keene Five Cents Sav. Bank (1901) 108 Fed. 505, 47 C. C. A. 464 (rehearing denied [1901] 110 Fed. 79, 49 C. C. A. 31, and writ of certiorari denied [1902] 22 S. Ct. 936, 46 L. Ed. 1264); Becker v. Oliver (1901) 111 Fed. 672, 49 C. C. A. 533; Johnson v. Roy (1901) 112 Fed. 256, 50 C. C. A. 237; New York Dry Goods Store v. Pabst Brewing Co. (1902) 112 Fed. 381, 50 C. C. A. 295; West v. East Coast Cedar Co. (1902) 113 Fed. 737, 51 C. C. A. 411 (affirming decree [C. C. 1901] 110 Fed. 725); Choctaw, O. & G. R. Co. v. Holloway (1902) 114 Fed. 458, 52 C. C. A. 260 (judgment affirmed [1903] 24 Sup. Ct. 102, 191 U. S. 334, 48 L. Ed. 207); Westall v. Osborne (1902) 115 Fed. 282, 53 C. C. A. 74; U. S. v. Gentry (1902) 119 Fed. 70, 55 C. C. A. 658; Smith v. Hopkins (1902) 120 Fed. 921, 57 C. C. A. 193; U. S. v. Honolulu Plantation Co. (1903) 122 Fed. 581, 58 C. C. A. 279; Sebeck v. Plattdeutsche Volksfest Verein (1903) 124 Fed. 11, 59 C. C. A. 531 (writ of certiorari denied [1904] 24 Sup. Ct. 858, 194 U. S. 634, 48 L. Ed. 1160); Marande v. Texas & P. Ry. Co. (1903) 124 Fed. 42, 59 C. C. A. 562 (writ of error dismissed [1905] 25 Sup. Ct. 800, 197 U. S. 626, 49 L. Ed. 912); Resurrection Gold Min. Co. v. Fortune Gold Min. Co. (1904) 129 Fed. 668, 64 C. C. A. 180; Union Pac. R. Co. v. Field (1905) 137 Fed. 14, 69 C. C. A. 536; National Biscuit Co. v. Nolan (1905) 138 Fed. 6, 70 C. C. A. 436; Bank of Havelock v. Western Union Telegraph Co. (1905) 141 Fed. 522, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515; Armour & Co. v. Russell (1906) 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602; Inman Bros. v. Dudley & Daniels Lumber Co. (1906) 146 Fed. 449, 76 C. C. A. 659; Cook v. Foley (1907) 152 Fed. 41, 81 C. C. A. 237 (writ of certiorari denied [1908] 28 Sup. Ct. 570, 209 U. S. 543, 52 L. Ed. 919); Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. (1907) 154 Fed. 545, 83 C. C. A. 431 (writ of certiorari denied [1907] 28 S. Ct. 256, 207 U. S. 589, 52 L. Ed. 354); U. S. v. Ute Coal & Coke Co. (1907) 158 Fed. 20, 85 C. C. A. 302; Simpson v. Pennsylvania R. Co. (1908) 159 Fed. 423, 86 C. C. A. 403; Mutual Reserve Life Ins. Co. v. Heidel (1908) 161 Fed. 535, 88 C. C. A. 477; Pennsylvania Co. v. Whitney (1909) 169 Fed. 572, 95 C. C. A. 70; Kern v. U. S. (1909) 169 Fed. 617, 95 C. C. A. 145; Norfolk & P. Traction Co. v. Miller (1909) 174 Fed. 607, 98 C. C. A. 453; Stewart v. Brune (1910) 179 Fed. 350, 102 C. C. A. 534; Press Pub. Co. v. Monteith (1910) 180 Fed. 356, 103 C. C. A. 502; Klauder-Weldon Dyeing

Mach. Co. v. Gagnon (1910) 183 Fed. 962, 106 C. C. A. 302 (affirming judgment Gagnon v. Klauder-Weldon Dyeing Mach. Co. [C. C. 1909] 174 Fed. 477); California Fruit Canners' Ass'n v. Lilly (1911) 184 Fed. 570, 106 C. C. A. 550; Cummins Grocer Co. v. Talley (1911) 187 Fed. 507, 109 C. C. A. 273; Southern Pac. Co. v. De Valle Da Costa (1911) 190 Fed. 689, 111 C. C. A. 417; Winfrey v. Missouri, K. & T. Ry. Co. (1912) 194 Fed. 808, 114 C. C. A. 218; Hoogendorn v. Daniel (1913) 202 Fed. 431, 120 C. C. A. 537; Western Union Telegraph Co. v. American Bell Telephone Co. (1913) 203 Fed. 785, 122 C. C. A. 103 (affirming decree [C. C. 1911] 187 Fed. 425); Donohue v. Boston & M. R. R. (1913) 209 Fed. 824, 126 C. C. A. 548; U. S. v. Carlton (C. C. 1813) Fed. Cas. No. 14,725; Schmeider v. Barney (C. C. 1875) Fed. Cas. No. 12,462; Simonds v. Georgia Iron & Coal Co. (C. C. 1904) 133 Fed. 776 (judgment affirmed Georgia Iron & Coal Co. v Simonds [1904] 133 Fed. 1019, 66 C. C. A. 458).

50. Errors favorable to party complaining.—Such errors are harmless, as in case of rulings on evidence. Eli Mining & Land Co. v. Carleton (1901) 108 Fed. 24, 47 C. C. A. 166; Fredrick Mfg. Co. v. Devlin (1904) 127 Fed. 71, 62 C. C. A. 53; Mann v. Dempster (1910) 181 Fed. 76, 104 C. C. A. 110. Or instructions. Northern Pac. Ry. Co. v. Mix (1903) 121 Fed. 476, 57 C. C. A. 592; Delaware, L. & W. R. Co. v. Devore (1903) 122 Fed. 791, 58 C. C. A. 543 (writ of certiorari denied [1903] 23 Sup. Ct. 855, 190 U. S. 561, 47 L. Ed. 1184); Easton v. George Wostenholm & Son (1905) 137 Fed. 524, 70 C. C. A. 108; Waters-Pierce Oil Co. v. Van Elderen (1905) 137 Fed. 557, 70 C. C. A. 255; Shields v. Norton (1906) 143 Fed. 802, 74 C. C. A. 254 (affirming judgment Norton v. Shields [C. C. 1904] 132 Fed. 873); National Fire Proofing Co. v. Andrews (1907) 158 Fed. 294, 85 C. C. A. 526; Wyman v. Lehigh Valley R. Co. (1908) 158 Fed. 957, 86 C. C. A. 161; Haines v. Spencer (1909) 167 Fed. 266, 92 C. C. A. 658; Hebron Mfg. Co. v. Powell Knitting Co. (1909) 171 Fed. 817, 96 C. C. A. 489; Friedly v. Giddings (C. C. 1902) 119 Fed. 438 (judgment affirmed Giddings v. Freedley [1904] 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327).

51. Pleadings.—For harmless rulings, see Pollak v. Brush Electric Ass'n (1888) 128 U. S. 446, 9 Sup. Ct. 119, 32 L. Ed. 474; Peeler v. Lathrop (1891) 48 Fed. 780, 1 C. C. A. 93; Hudmon v. Cuyas (1893) 57 Fed. 355, 6 C. C. A. 381; Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York (1894) 63 Fed. 48, 11 C. C. A. 96; Board of Com'rs of Kearney County v. McMaster (1895) 68 Fed. 177, 15 C. C. A. 353; McCrea v. Parsons (1902) 112 Fed. 917, 50 C. C. A. 612; Des Moines Life Ass'n v. Crim (1904) 134 Fed. 348, 67 C. C. A. 330; Michigan Home Colony Co. v. Tabor (1905) 141 Fed. 332, 72 C. C. A. 480; Crucible Steel Co. of America v. Moen (1909) 167 Fed. 956, 93 C. C. A. 356; Stewart v. Southern Ry. Co. (1909) 168 Fed. 685, 94 C. C. A. 171; Davis v. McEwen Bros. (1912) 193 Fed. 305, 113 C. C. A. 229; Hoogendorn v. Daniel (1913) 202 Fed. 431, 120 C. C. A. 537; Feidler v. Bartleson (1908) 161 Fed. 30, 88 C. C. A. 194 (affirming decree Bartleson v. Feidler [C. C. 1906] 149 Fed. 299); Locker v. American Tobacco Co. (D. C. 1912) 200 Fed. 973.

For prejudicial errors, see Great Western Coal Co. v. Chicago G. W. Ry. Co. (1899) 98 Fed. 274, 39 C. C. A. 79; Montgomery Water Power Co. v. William A. Chapman & Co. (1903) 126 Fed. 68, 61 C. C. A. 124 (writ of certiorari denied [1904] 24 S. Ct. 849, 192 U. S. 605, 48 L. Ed. 585); American Plate Glass Co. v. Struthers-Wells Co. (1912) 201 Fed. 6, 119 C. C. A. 344.

52. Rulings on evidence.—Error in the admission of evidence is not ground for reversal if not prejudicial to the rights of the complaining party. Klein v. Hoffheimer (1889) 132 U. S. 367, 10 S. Ct. 130, 33 L. Ed. 373; Fidelity Mut. Life Ass'n v. Mettler (1902) 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922; Louisville & N. R. Co. v. White (1900) 100 Fed. 239, 40 C. C. A. 352; Mexican Cent. Ry. Co. v. Wilder (1902) 114 Fed. 708, 52 C. C. A. 410; American Nat. Bank of Denver v. Watkins (1902) 119 Fed. 545, 56 C. C. A. 111 (writ of certiorari denied [1903] 23 Sup. Ct. 854, 190 U. S. 558, 47 L. Ed. 1183); Snowden v. Loree (1904) 128 Fed. 419, 63 C. C. A. 161 (affirming judgment [C. C. 1902] 122 Fed. 493; Security Trust Co. v. Robb (1906) 142 Fed. 78, 73 C. C. A. 302; Cache Creek Mining Co. v. Brahenberg (1914) 217 Fed. 240, 133 C. C. A. 234.

For errors without prejudice, see Kansas City, Ft. S. & M. R. Co. v. Stoner (1892) 51 Fed. 649, 2 C. C. A. 437 (motion to retax costs denied [1894] 60 Fed. 522, 9 C. C. A. 129); Smith v. Sun Printing & Pub. Ass'n (1893) 55 Fed. 240, 5 C. C. A. 91 (affirming judgment [C. C. 1892] 50 Fed. 399); McCracken v. Robison (1893) 57 Fed. 375, 6 C. C. A. 400; Chicago, B. & Q. R. Co. v. Ives (1894) 63 Fed. 791, 11 C. C. A. 433; Western Union Beef Co. v. Thurman (1895) 70 Fed. 960, 17 C. C. A. 542; City of Anthony v. Woonsocket Institution for Savings (1895) 71 Fed. 97, 17 C. C. A. 622; Atlantic Ave. R. Co. v. Van Dyke (1896) 72 Fed. 458, 18 C. C. A. 632 (affirming judgment Van Dyke v. Atlantic Ave. R. Co. [C. C. 1895] 67 Fed. 296); Mutual Life Ins. Co. of New York v. Selby (1896) 72 Fed. 980, 19 C. C. A. 331 (affirming judgment Selby

v Mutual Life Ins. Co. of New York [C. C. 1895] 67 Fed. 490); Coloritype Co. v. Williams (1897) 78 Fed. 450, 24 C. C. A. 163; Moline Malleable Iron Co. v. York Iron Co. (1897) 83 Fed. 66, 27 C. C. A. 442; In re Wong Sing (D. C. 1897) 83 Fed. 147; Atlas Distilling Co. v. Rheinstrom (1898) 86 Fed. 244, 30 C. C. A. 10; Commercial Travelers' Mut. Acc. Ass'n of America v. Fulton (1899) 93 Fed. 621, 35 C. C. A. 493; Chicago G. W. Ry. Co. v. Price (1899) 97 Fed. 423, 38 C. C. A. 239; Frank Waterhouse v. Rock Island Alaska Min. Co. (1899) 97 Fed. 466, 38 C. C. A. 281; Louisville & N. R. Co. v. White (1900) 100 Fed. 239, 40 C. C. A. 352; Farnsworth v. Nevada Co. (1900) 102 Fed. 578, 42 C. C. A. 509; Third Ave. Ry. Co. v. Krausz (1901) 112 Fed. 379, 50 C. C. A. 293; U. S. v. Van Winkle (1902) 113 Fed. 903, 51 C. C. A. 533; Swensen v. Bender (1902) 114 Fed. 1, 51 C. C. A. 627; Sauntry v. U. S. (1902) 117 Fed. 132, 55 C. C. A. 148; Rainey v. Potter (1903) 120 Fed. 651, 57 C. C. A. 113; First Nat. Bank v. Wells Fargo & Co. (1904) 127 Fed. 818, 62 C. C. A. 134; Pennsylvania R. Co. v. Palmer (1904) 127 Fed. 956, 62 C. C. A. 588; U. S. v. Coughanour (1904) 133 Fed. 224, 66 C. C. A. 278; French v. French (1904) 133 Fed. 491, 66 C. C. A. 365; Lynch v. U. S. (1905) 138 Fed. 535, 71 C. C. A. 59; Armour & Co. v. Skene (1907) 153 Fed. 241, 82 C. C. A. 385; Castner Electrolytic Alkali Co. v. Davies (1907) 154 Fed. 938, 83 C. C. A. 510; Gilmore v. McBride (1907) 156 Fed. 464, 84 C. C. A. 274; Rogers v. Petrified Bone Min. Co. (1908) 158 Fed. 799, 86 C. C. A. 59 (affirming judgment Petrified Bone Min. Co. v. Rogers [C. C. 1907] 150 Fed. 445); Puget Sound Nav. Co. v. Lavender (1908) 160 Fed. 851, 87 C. C. A. 655; Alaska-Treadwell Gold Min. Co. v. Cheney (1908) 162 Fed. 593, 89 C. C. A. 351; Pennsylvania Co. v. Whitney (1909) 169 Fed. 572, 95 C. C. A. 70; City of Omaha v. Omaha Water Co. (1909) 171 Fed. 647, 96 C. C. A. 419; Scofield v. U. S. (1909) 174 Fed. 1, 98 C. C. A. 39; Gimbel Bros. v. Gloversville Silk Mills (1910) 176 Fed. 219, 99 C. C. A. 573; Troxell v. Delaware, L. & W. R. Co. (1910) 180 Fed. 871 (judgment reversed Delaware, L. & W. R. Co. v. Troxell [1910] 183 Fed. 373, 105 C. C. A. 593, writ of certiorari denied Troxell v. Delaware, L. & W. R. Co. [1911] 31 S. Ct. 469, 219 U. S. 584, 55 L. Ed. 346); Atlantic Coast Line R. Co. v. Linstedt (1910) 184 Fed. 36, 106 C. C. A. 238; California Fruit Canners' Ass'n v. Lilly (1911) 184 Fed. 570, 106 C. C. A. 550; Katalla Co. v. Rones (1911) 186 Fed. 30, 108 C. C. A. 132 (affirming judgment [C. C. 1910] Rones v. Katalla Co., 182 Fed. 946); American Mfg. Co. v. Bigelow (1911) 188 Fed. 34, 110 C. C. A. 77; Southern Pac. Co. v. De Valle Da Costa (1911) 190 Fed. 689, 111 C. C. A. 417; U. S. v. Whipple Hardware Co. (1911) 191 Fed. 945, 112 C. C. A. 357; Sanborn v. Bay (1912) 194 Fed. 351, 114 C. C. A. 242 (affirming judgment Bay v. Sanborn [C. C. 1911] 189 Fed. 521); Post Pub. Co. v. Peck (1912) 199 Fed. 6, 120 C. C. A. 1; Mammoth Mining Co. v. Thomas (1912) 201 Fed. 297, 119 C. C. A. 535; M. A. Phelps Lumber Co. v. McDonough Mfg. Co. (1913) 202 Fed. 449, 120 C. C. A. 555; Northern Central Coal Co. v. Milburn (1913) 205 Fed. 270, 123 C. C. A. 450; Donohue v. Boston & M. R. R. (1913) 209 Fed. 824, 126 C. C. A. 548; South Memphis Land Co. v. McLean Hardwood Lumber Co. (1914) 210 Fed. 257; Potlatch Lumber Co. v. O'Connell (1914) 210 Fed. 434; Richmond Light & R. Co. v. Blau (1914) 210 Fed. 887; Anglo-South American Bank v. McCleary, Wallin & Crouse (1914) 210 Fed. 891; U. S. v. Peters (C. C. 1898) 87 Fed. 984.

For prejudicial error, see Liggett v. Glenn (1892) 51 Fed. 381, 2 C. C. A. 286 (reversing judgment [C. C. 1891] 47 Fed. 472); Leedy v. Lehfeldt (1908) 162 Fed. 304, 89 C. C. A. 184; Klauder-Weldon Dyeing Mach. Co. v. Gagnon (1908) 166 Fed. 286, 92 C. C. A. 204; Baldi v. Cedar Hill Coal & Coke Co. (1909) 173 Fed. 781, 97 C. C. A. 505.

53. —— **Facts otherwise established.** —The erroneous admission of evidence is harmless, where the same facts are shown by proper evidence. Smith v. Sun Printing & Pub. Ass'n (1893) 55 Fed. 240, 5 C. C. A. 91 (affirming judgment [C. C. 1892] 50 Fed. 399); Glaspie v. Keator (1893) 56 Fed. 203, 5 C. C. A. 474; German Ins. Co. v. Frederick (1893) 58 Fed. 144, 7 C. C. A. 122; Steiner v. Eppinger (1894) 61 Fed. 253, 9 C. C. A. 483; Colorado Cent. Consol. Min. Co. v. Turck (1895) 70 Fed. 294, 17 C. C. A. 128 (denying petition for rehearing [1893] 54 Fed. 262, 4 C. C. A. 313); Newman v. Virginia, T. & C. Steel & Iron Co. (1897) 80 Fed. 228, 25 C. C. A. 382; Metropolitan St. Ry. Co. v. Kennedy (1897) 82 Fed. 158, 27 C. C. A. 136; Pittsburg & W. Ry. Co. v. Thompson (1897) 82 Fed. 720, 27 C. C. A. 333; Jones v. Allen (1898) 85 Fed. 523, 29 C. C. A. 318 (certiorari denied [1898] 18 Sup. Ct. 943, 171 U. S. 687); National Acc. Soc. of City of New York v. Dolph (1899) 94 Fed. 743, 38 C. C. A. 1; Missouri, K. & T. Ry. Co. v. Elliott (1900) 102 Fed. 96, 42 C. C. A. 188 (judgment affirmed [1902] 22 Sup. Ct. 937, 184 U. S. 695, 46 L. Ed. 763); Portland Gold Min. Co. v. Flaherty (1901) 111 Fed. 312, 49 C. C. A. 361; Pond v. U. S. (1901) 111 Fed. 989, 49 C. C. A. 582; Louisville & N. R. Co. v. Summers (1903) 125 Fed. 719, 60 C. C. A. 487 (writ of certiorari denied [1904] 24 Sup. Ct. 851, 192 U. S. 607, 48 L. Ed. 585); Ætna Indemnity Co. v. Ladd (1905) 135 Fed. 636, 68 C. C. A. 274 (affirming judgment Ladd v. Ætna Indemnity Co. [C.

C. 1904] 128 Fed. 298, writ of certiorari denied Ætna Indemnity Co. v. Ladd [1905] 26 Sup. Ct. 746, 199 U. S. 606, 50 L. Ed. 330); U. S. v. Brendel (1905) 136 Fed. 737, 69 C. C. A. 389; Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28; Crichfield v. Julia (1906) 147 Fed. 65, 77 C. C. A. 297 (affirming judgment Julia v. Critchfield [1905] 137 Fed. 969, and writ of certiorari denied Critchfield v. Julia [1906] 27 Sup. Ct. 781, 203 U. S. 593, 51 L. Ed. 332); New York Evening Journal Pub. Co. v. Simon (1906) 147 Fed. 224, 77 C. C. A. 366 (writ of certiorari denied [1906] 27 S. Ct. 776, 203 U. S. 589, 51 L. Ed. 330); Smith v. Au Gres Tp. (1906) 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876; Columbia Box & Lumber Co. v. Drown (1907) 156 Fed. 459, 84 C. C. A. 269; Puget Sound Nav. Co. v. Lavender (1908) 160 Fed. 851, 87 C. C. A. 655; Puget Sound Electric Ry. v. Van Pelt (1909) 168 Fed. 206, 93 C. C. A. 492; Ruth v. Johnson (1909) 172 Fed. 191, 96 C. C. A. 643; St. Louis Stave & Lumber Co. v. U. S. (1910) 177 Fed. 178, 100 C. C. A. 640; St. Louis & S. F. R. Co. v. Duke (1911) 192 Fed. 306, 112 C. C. A. 564; Wilhite v. Houston (1912) 200 Fed. 390, 118 C. C. A. 542; South Memphis Land Co. v. McLean Hardwood Lumber Co. (1914) 210 Fed. 257.

The incompetency of a witness as to the loss of goods shipped is immaterial, where the loss is otherwise sufficiently proved. Brown v. The Elvira Harbeck (D. C. 1851) Fed. Cas. No. 2,005.

54. —— **Error cured by withdrawal or instructions.**—The general rule is that, if inadmissible evidence has been received during the trial, the error is cured by its subsequent withdrawal before the trial closes and by an instruction to disregard it. Northern Pac. R. Co. v. Beaton (1894) 64 Fed. 563, 12 C. C. A. 301 (writ of error dismissed [1897] 17 Sup. Ct. 997, 41 L. Ed. 1185); Guggenheim v. Kirchhofer (1895) 66 Fed. 755, 14 C. C. A. 72; Sunset Telephone & Telegraph Co. v. Day (1895) 70 Fed. 364, 17 C. C. A. 161; Philip Schneider Brewing Co. v. American Ice-Mach. Co. (1896) 77 Fed. 138, 23 C. C. A. 89; Spring Val. Coal Co. v. Patting (1898) 86 Fed. 433, 30 C. C. A. 168; Mohrenstecher v. Westervelt (1898) 87 Fed. 157, 30 C. C. A. 584; Chapman v. Yellow Poplar Lumber Co. (1898) 89 Fed. 903, 32 C. C. A. 402; Harkins v. Brown (1901) 108 Fed. 576, 47 C. C. A. 501; Lazier Gas Engine Co. v. Du Bois (1904) 130 Fed. 834, 65 C. C. A. 172; Pennsylvania R. Co. v. Garcia (1907) 152 Fed. 104, 81 C. C. A. 322; Armour & Co. v. Skene (1907) 153 Fed. 241, 82 C. C. A. 385; Puget Sound Nav. Co. v. Lavender (1908) 160 Fed. 851, 87 C. C. A. 655; Armour & Co. v. Kollmeyer (1908) 161 Fed. 78, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1110; New York Life Ins. Co. v. Rankin (1908) 162 Fed. 103, 89 C. C. A. 103; Ware v. Pearsons (1909) 173 Fed. 878, 98 C. C. A. 364; Chicago. M. & St. P. Ry. Co. v. Newsome (1909) 174 Fed. 394, 98 C. C. A. 1; Western Bank Note & Engraving Co. v. Slentz (1911) 188 Fed. 57, 110 C. C. A. 127; Knickerbocker Trust Co. v. Evans (1911) 188 Fed. 549, 110 C. C. A. 347 (writ of certiorari denied Evans v. Knickerbocker Trust Co. [1912] 32 Sup. Ct. 836, 225 U. S. 702, 56 L. Ed. 1264); Chicago & E. R. Co. v. Ponn (1911) 191 Fed. 682, 112 C. C. A. 228; Hollweg v. Schaefer Brokerage Co. (1912) 197 Fed. 689, 117 C. C. A. 83; Alaska Fishermen's Packing Co. v. Chin Quong (1913) 202 Fed. 707, 121 C. C. A. 169; Lee v. New Haven, M. & W. R. Co. (C. C. 1877) Fed. Cas. No. 8,197.

55. —— **On trial without a jury.**—The admission of improper evidence on a trial to the court without a jury is harmless where there is sufficient proper evidence on which to base the decision. Hinckley v. Pittsburgh Bessemer Steel Co. (1887) 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967 (affirming judgment Pittsburgh Bessemer Steel Rail Co. v. Hinckley [C. C. 1883] 17 Fed. 584); Mammoth Min. Co. v. Salt Lake Foundry & Machine Co. (1894) 151 U. S. 447, 14 Sup. Ct. 384, 38 L. Ed. 229; Dorsheimer v. Glenn (1892) 51 Fed. 404, 2 C. C. A. 309 (distinguishing Liggett v. Glenn [1892] 51 Fed. 381, 2 C. C. A. 286, and reversing judgment Glenn v. Liggett [C. C. 1891] 47 Fed. 472); Reed v. Stapp (1892) 52 Fed. 641, 3 C. C. A. 244; Miller v. Houston City St. Ry. Co. (1893) 55 Fed. 366, 5 C. C. A. 134; Hunt v. U. S. (1894) 61 Fed. 795, 10 C. C. A. 74 (petition for rehearing denied [1894] 63 Fed. 568, 11 C. C. A. 340, and writ of error dismissed [1897] 17 Sup. Ct. 609, 166 U. S. 424, 41 L. Ed. 1063); Migeon v. Montana Cent. Ry. Co. (1896) 77 Fed. 249, 23 C. C. A. 156 (affirming decree Montana Cent. Ry. Co. v. Migeon [C. C. 1895] 68 Fed. 811); Dunlap v. Hopkins (1899) 95 Fed. 231, 37 C. C. A. 52; West v. East Coast Cedar Co. (1902) 113 Fed. 737, 51 C. C. A. 411 (affirming decree [C. C. 1901] 110 Fed. 725); Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190; Engelstad v. Dufresne (1902) 116 Fed. 582, 54 C. C. A. 38; Ajax Forge Co. v. Morden Frog & Crossing Works (1908) 164 Fed. 843, 90 C. C. A. 605 (affirming decree [C. C. 1907] 156 Fed. 591); Sperry & Hutchinson Co. v. O'Neill-Adams Co. (1911) 185 Fed. 231, 107 C. C. A. 337; Wunderlich v. City of New York (C. C. 1888) 33 Fed. 854.

56. **Exclusion of evidence.**—Error cannot be predicated on the exclusion of immaterial evidence. Board of Com'rs of Kearny County v. Irvine (1903) 126 Fed. 689, 61 C. C. A. 607

(modifying decree Coffin v. Board of Com'rs of Kearney County [1902] 114 Fed. 518, and writ of certiorari denied Board of Com'rs of Kearny County, Kan., v. Irvine [1904] 24 Sup. Ct. 851, 192 U. S. 607, 48 L. Ed. 585); Shoup v. Marks (1904) 128 Fed. 32, 62 C. C. A. 540. But where it clearly appears that evidence excluded was competent and of such materiality that its exclusion might have caused injury to the party offering it, reversible error appears. Owl Creek Coal Co. v. Goleb (1914) 210 Fed. 209. See, also, Plattner Implement Co. v. International Harvester Co. of America (1904) 133 Fed. 376, 66 C. C. A. 438; Mutual Reserve Life Ins. Co. v. Heidel (1908) 161 Fed. 535, 88 C. C. A. 477.

For particular errors without prejudice, see Illinois Car & Equipment Co. v. Linstroth Wagon Co. (1902) 112 Fed. 737, 50 C. C. A. 504; City of Chicago v. Le Moyne (1902) 119 Fed. 662, 56 C. C. A. 278; Frizzell v. Omaha St. Ry. Co. (1903) 124 Fed. 176, 59 C. C. A. 382; International Mercantile Marine Co. v. Fleming (1907) 151 Fed. 203, 80 C. C. A. 479; Farbenfabriken of Elberfeld Co. v. Beringer (1908) 158 Fed. 802, 86 C. C. A. 62; Mills Novelty Co. v. Peck (1908) 158 Fed. 811, 86 C. C. A. 71; Feidler v. Bartleson (1908) 161 Fed. 30, 88 C. C. A. 194 (affirming decree Bartleson v. Feidler [C. C. 1906] 149 Fed. 299); Johnsonburg Vitrified Brick Co. v. Yates (1910) 177 Fed. 389, 101 C. C. A. 553; Wabash Screen Door Co. v. Lewis (1910) 184 Fed. 260, 106 C. C. A. 402; Pratt v. North German Lloyd S. S. Co. (1911) 184 Fed. 303, 106 C. C. A. 445, 33 L. R. A. (N. S.) 532; Chesapeake & O. Ry. Co. v. Stojanowski (1911) 191 Fed. 720, 112 C. C. A. 310; Gong Nom Wood v. United States (1911) 191 Fed. 830, 112 C. C. A. 344; Chicago, B. & Q. R. Co. v. Upton (1912) 194 Fed. 371, 115 C. C. A. 379; Hart v. Northern Pac. Ry. Co. (1912) 196 Fed. 180, 116 C. C. A. 12; Alaska Fishermen's Packing Co. v. Chin Quong (1913) 202 Fed. 707, 121 C. C. C. A. 169.

57. —— **Facts proved by other evidence.**—An error in excluding evidence as to a certain fact is harmless where the fact is established by other evidence. Northern Pac. R. Co. v. Mortenson (1894) 63 Fed. 530, 11 C. C. A. 335 (writ of error dismissed [1896] 17 Sup. Ct. 997, 41 L. Ed. 1179); Mohrenstecher v. Westervelt (1898) 87 Fed. 157, 30 C. C. A. 584; Louisville & N. R. Co. v. White (1900) 100 Fed. 239, 40 C. C. A. 352; Repauno Chemical Co. v. Victor Hardware Co. (1900) 101 Fed. 948, 42 C. C. A. 106; Union Cent. Life. Ins. Co. v. Skipper (1902) 115 Fed. 69, 52 C. C. A. 663; Texas State Fair v. Brittain (1902) 118 Fed. 713, 56 C. C. A. 499; Shields v. Mongollon Exploration Co. (1905) 137 Fed. 539, 70 C. C. A. 123; Mathieson Alkali Works v. Mathieson (1906) 150 Fed. 241, 80 C. C. A. 129 (writ of certiorari denied [1907] 27 Sup. Ct. 787, 204 U. S. 674, 51 L. Ed. 674); Standard Marine Ins. Co., Limited, of London, Eng., v. Nome Beach Lighterage & Transportation Co. (1909) 167 Fed. 119, 92 C. C. A. 571 (affirming judgment Nome Beach Lighterage & Transp. Co. v. Standard Marine Ins. Co., Limited, of Liverpool, Eng. [C. C. 1907] 156 Fed. 484); Dempster v. Cochran (1909) 174 Fed. 587, 98 C. C. A. 433; Johnsonburg Vitrified Brick Co. v. Yates (1910) 177 Fed. 389, 101 C. C. A. 553; Patterson v. Iaeger & S. Ry. Co. (1910) 178 Fed. 649, 102 C. C. A. 95; Press Pub. Co. v. Monteith (1910) 180 Fed. 356, 103 C. C. A. 502; Winters v. Childress (1910) 183 Fed. 577, 105 C. C. A. 544; Western Bank Note & Engraving Co. v. Slents (1911) 188 Fed. 57, 110 C. C. A. 127; Sanborn v. Bay (1912) 194 Fed. 351, 114 C. C. A. 242 (affirming judgment Bay v. Sanborn [C. C. 1911] 189 Fed. 521); Chesterfield Mfg. Co. v. Leota Cotton Mills (1912) 194 Fed. 358, 114 C. C. A. 318; Rothe v. Pennsylvania Co. (1912) 195 Fed. 21, 114 C. C. A. 627; Locomotive Engineers' Mut. Life & Accident Ins. Ass'n v. Thomas (1913) 206 Fed. 409, 124 C. C. A. 291; Donohue v. Boston & M. R. R. (1913) 209 Fed. 824, 126 C. C. A. 548.

58. **Direction of verdict.**—For rulings without prejudice, see U. S. v. Norton (1901) 107 Fed. 412, 46 C. C. A. 387; Bank of Havelock v. Western Union Telegraph Co. (1906) 141 Fed. 522, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515; Lamar v. Spalding (1907) 154 Fed. 27, 83 C. C. A. 111; Manufacturers' Automatic Sprinkler Co. v. Galbraith (1912) 196 Fed. 472, 116 C. C. A. 246; McIntyre v. Modern Woodmen of America (1912) 200 Fed. 1, 121 C. C. A. 1.

59. **Submission of issues.**—For rulings without prejudice, see Fireman's Fund Ins. Co. v. McGreevy (1902) 118 Fed. 415, 55 C. C. A. 543; Wilmoth v. Hamilton (1904) 127 Fed. 48, 61 C. C. A. 584; Rockefeller v. Wedge (1906) 149 Fed. 130, 79 C. C. A. 26; Southern Ry. Co. v. Hardin (1907) 157 Fed. 645, 85 C. C. A. 329; Coopersville Co-operative Creamery Co. v. Lemon (1908) 163 Fed. 145, 89 C. C. A. 595; Maritime Ins. Co. v. M. S. Dollar S. S. Co. (1910) 177 Fed. 127, 100 C. C. A. 547; New York, N. H. & H. R. Co. v. Murphy (1913) 204 Fed. 420, 122 C. C. A. 606.

60. **Instructions.**—Errors in instructions will not be cause for reversal, where the interests of the complaining party have not been prejudiced thereby. City of San Juan v. St. John's Gas Co. (1904) 25 Sup. Ct. 108, 195 U. S. 510, 49 L. Ed. 299, 1 Ann. Cas. 796; George A. Fuller Co. v. McCloskey (1913) 33 Sup. Ct. 471, 228 U. S. 194, 57 L. Ed. 795 (affirming judgment [1910] 35 App. D. C. 595); Crosby

Lumber Co. v. Smith (1892) 51 Fed. 63, 2 C. C. A. 97; Park Bros. & Co. v. Bushnell (1894) 60 Fed. 583, 9 C. C. A. 138; Peirce v. Clavin (1897) 82 Fed. 550, 27 C. C. A. 227; Covenant Mut. Ben. Ass'n of Illinois v. Peters (1897) 83 Fed. 60, 27 C. C. A. 435; Barber Asphalt Pav. Co. v. Odasz (1898) 85 Fed. 754, 29 C. C. A. 631; Stewart v. Morris (1899) 96 Fed. 703, 37 C. C. A. 562; Thompson v. Northern Pac. R. Co. (1900) 104 Fed. 501, 43 C. C. A. 668; Portland Gold Min. Co. v. Flaherty (1901) 111 Fed. 312, 49 C. C. A. 361; McKnight v. U. S. (1904) 130 Fed. 659, 65 C. C. A. 37; Mountain Copper Co. v. Van Buren (1904) 133 Fed. 1, 66 C. C. A. 151; Guild v. Andrews (1905) 137 Fed. 369, 70 C. C. A. 49; Indianapolis Traction & Terminal Co. v. Lawson (1906) 143 Fed. 834, 74 C. C. A. 630, 5 L. R. A. (N. S.) 721, 6 Ann. Cas. 666; Erie R. Co. v. Kennedy (1911) 191 Fed. 332, 112 C. C. A. 76; Lehigh Valley Coal Co. v. Shandalla (1913) 205 Fed. 715, 124 C. C. A. 83; Yazoo & M. V. R. Co. v. Wright (1913) 207 Fed. 281, 125 C. C. A. 25 (affirming judgment Wright v. Yazoo & M. V. R. Co. [D. C. 1912] 197 Fed. 94); Friedly v. Giddings (C. C. 1902) 119 Fed. 438 (judgment affirmed Giddings v. Freedley [1904] 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327).

61. —— **Applicability.**—The fact that an instruction is inapplicable does not necessitate a reversal if it appears that the party complaining could not have been prejudiced thereby. Sanger v. Flow (1891) 48 Fed. 152, 1 C. C. A. 56; Baer v. Rooks (1892) 50 Fed. 898, 2 C. C. A. 76 (following Sanger v. Flow [1891] 48 Fed. 152, 1 C. C. A. 56); Hudmon v. Cuyas (1893) 57 Fed. 355, 6 C. C. A. 381; Walker v. Collins (1893) 59 Fed. 70, 8 C. C. A. 1 (judgment reversed [1897] 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76); Manhattan Life Ins. Co. v. O'Neil (1900) 99 Fed. 893, 40 C. C. A. 154 (affirming judgment [1898] 90 Fed. 463, 33 C. C. A. 607); Metropolitan Redwood Lumber Co. v. Davis (1913) 205 Fed. 486, 123 C. C. A. 554.

62. —— **Refusal to charge.**—The refusal to give a proper instruction which would have availed the party nothing, the justice of the case not being affected thereby, does not afford sufficient ground for the reversal of a judgment. Mobile & M. Ry. Co. v. Jurey (1884) 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Hartranft v. Langfeld (1888) 125 U. S. 128, 8 Sup. Ct. 732, 31 L. Ed. 672; W. B. Grimes Dry-Goods Co. v. Malcolm (1893) 58 Fed. 670, 7 C. C. A. 426; Henion v. New York, N. H. & H. R. Co. (1897) 79 Fed. 903, 25 C. C. A. 223; Orient Ins. Co. v. Leonard (1902) 120 Fed. 808, 57 C. C. A. 176 (writ of certiorari denied [1902] 23 Sup. Ct. 845, 187 U. S. 645, 47 L. Ed. 347); Whitney v. Martin (1912) 192 Fed. 843, 113 C. C. A. 167; Schenkemeyer v. Tusek (C. C. A. 1914) 210 Fed. 151.

63. —— **Error cured by verdict.**—Where the verdict is right on the merits, the judgment will not be reversed on account of errors in the instructions. Chicago, M. & St. P. R. Co. v. Ross (1884) 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787 (affirming judgment Ross v. Chicago, M. & St. P. Ry. Co. [C. C. 1881] 8 Fed. 544); Henderson Bridge Co. v. McGrath (1890) 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934; St. Louis & S. F. Ry. Co. v. O'Loughlin (1892) 49 Fed. 440, 1 C. C. A. 311; Eddy v. Lafayette (1892) 49 Fed. 807, 1 C. C. A. 441 (judgment affirmed [1896] 16 Sup. Ct. 1082, 163 U. S. 456, 41 L. Ed. 225); W. B. Grimes Dry-Goods Co. v. Malcolm (1893) 58 Fed. 670, 7 C. C. A. 426 (judgment affirmed [1896] 17 Sup. Ct. 158, 164 U. S. 483, 41 L. Ed. 524); London & Lancashire Fire Ins. Co. v. Storrs (1895) 71 Fed. 120, 17 C. C. A. 645; Ward v. Cochran (1895) 71 Fed. 127, 18 C. C. A. 1; New York, N. H. & H. R. Co. v. O'Leary (1899) 93 Fed. 737, 35 C. C. A. 562; Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. (1903) 121 Fed. 524, 58 C. C. A. 634; Washburn-Crosby Co. v. William Johnston & Co. (1903) 125 Fed. 273, 60 C. C. A. 187; Creary v. Wefel (1905) 135 Fed. 304, 67 C. C. A. 661; Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. (1907) 154 Fed. 545, 83 C. C. A. 431 (writ of certiorari denied [1907] 28 Sup. Ct. 256, 207 U. S. 589, 52 L. Ed. 354); Robinson v. Denver City Tramway Co. (1908) 164 Fed. 174, 90 C. C. A. 160; Philadelphia & W. C. Traction Co. v. Kordiyak (1909) 171 Fed. 315, 96 C. C. A. 207; Quaker Oats Co. v. Grice (1912) 195 Fed. 441, 115 C. C. A. 343; Grand Trunk Western Ry. Co. v. Lindsay (1912) 201 Fed. 836, 120 C. C. A. 166; Albert Miller & Co. v. Wilkins (1913) 209 Fed. 582, 126 C. C. A. 404; Atwater v. Whiteman (C. C. 1890) 41 Fed. 427 (writ of error dismissed Whitman v. Atwater [1891] 11 Sup. Ct. 1031, 140 U. S. 704, 35 L. Ed. 596); Glaspell v. Northern Pac. R. Co. (C. C. 1890) 43 Fed. 900 (judgment reversed [1892] 12 Sup. Ct. 593, 144 U. S. 211, 36 L. Ed. 409); Butler v. Barret & Jordan (C. C. 1904) 130 Fed. 944.

§ 1592. (R. S. § 955.) Death of parties.

When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer

accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

Act Sept. 24, 1789, c. 20, § 31, 1 Stat. 90.

Provisions for taking an appeal or bringing a writ of error, on the death of a party to a final judgment, before the time allowed therefor has expired, were made by Act March 3, 1875, c. 137, § 9, 18 Stat. 473. That act was repealed by Jud. Code, § 297, ante, § 1274.

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I. ABATEMENT OR SURVIVAL OF ACTION

1. Scope and purpose of statute.—The enactment of this section was to provide against the abatement of actions which would otherwise abate at common law, and the court cannot confine its remedy to the cases where death occurs after judgment. Ex parte Connaway (1900) 20 Sup. Ct. 951, 954, 178 U. S. 421, 44 L. Ed. 1134. See, also, McCoul v. Lekamp (1817) 2 Wheat. 111, 115, 4 L. Ed. 197; Green v. Watkins (1821) 6 Wheat. 260, 261, 5 L. Ed. 256; Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257; U. S. v. Bullard (D. C. 1900) 103 Fed. 256, 257.

The statute embraces all cases of death before final judgment. Hatch v. Eustis (C. C. 1812) Fed. Cas. No. 6,-207.

The district court of a territory is not a federal district court, and therefore this section does not apply. U. S. v. Hailey (1882) 2 Idaho, 26, 3 Pac. 263.

2. —— Personal actions.—This section is confined to personal actions. Macker's Heirs v. Thomas (1822) 7 Wheat. 530, 531, 5 L. Ed. 515; Shute v. Patterson (1906) 147 Fed. 509, 78 C. C. A. 75; Kropff v. Poth (C. C. 1883) 19 Fed. 200; Warren v. Furstenheim (C. C. 1888) 35 Fed. 691, 1 L. R. A. 40; McArthur v. Williamson (C. C. 1891) 45 Fed. 154; Currell v. Villars (C. C. 1896) 72 Fed. 330.

3. Survivability of actions.—The laws of the United States prescribe methods for reviving suits only that survive, but do not prescribe what suits shall survive. Witters v. Foster (C. C. 1886) 26 Fed. 737.

The survivability "of the cause of action" is a right of property, and not a matter of procedure, as is the revivability of a "suit." Warren v. Furstenheim (C. C. 1888) 35 Fed. 691, 1 L. R. A. 40.

4. Survivability determined by common law or local statute.—See, also, notes to §§ 1537, 1538, ante.

This section does not define the causes of action which survive. In the absence of some special legislation, the question in each case must be settled by the common law or the law of the state in which the cause of action arose. Gerling v. Baltimore & Ohio R. Co. (1894) 14 Sup. Ct. 533, 540, 151 U. S. 673, 38 L. Ed. 311; Baltimore & O. R. Co. v. Joy (1899) 19 Sup. Ct. 387, 388, 173 U. S. 226, 43 L. Ed. 677; Patton v. Brady (1902) 22 Sup. Ct. 493, 494, 184 U. S. 608, 46 L. Ed. 713; Webber v. St. Paul City Ry. Co. (1899) 97 Fed. 140, 38 C. C. A. 79; Ferguson v. Lambert (C. C.) Fed. Cas. No. 4,739; Jones v. Van Zandt (C. C. 1849) Fed. Cas. No. 7,503; Trigg v. Conway (C. C. 1855) Fed. Cas. No. 14,173; Barker v. Ladd (C. C. 1874) Fed. Cas. No. 990; Witters v. Foster (C. C. 1886) 26 Fed. 737; Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257; U. S. v. De

Goer (D. C. 1889) 38 Fed. 80; Portland Gold Mining Co. v. Stratton's Independence (D. C. 1912) 196 Fed. 714. See, also, Henshaw v. Miller (1854) 17 How. 212, 217, 15 L. Ed. 222; Devereaux v. Brownsville (C. C. 1887) 29 Fed. 742; Warren v. Furstenheim (C. C. 1888) 35 Fed. 691, 1 L. R. A. 40; Walsh v. New York, N. H. & H. R. Co. (C. C. 1909) 173 Fed. 494.

Where plaintiff dies before judgment, his personal representative may become a party to the suit, and prosecute it to final judgment, where the cause of action survives by the local law. Hatfield v. Bushnell (C. C. 1849) Fed. Cas. No. 6,211; Trigg v. Conway (C. C. 1855) Fed. Cas. No. 14,173; Baldwin v. Lamar (C. C. 1869) Fed. Cas. No. 800.

The survivability of actions in matters not within the exclusive control of congress being beyond the power of federal legislation, this section adopts the local law in that regard for the government of the courts in reviving suits abated by the death of parties. Warren v. Furstenheim (C. C. 1888) 35 Fed. 691, 1 L. R. A. 40. See, also, Webber v. St. Paul City Ry. Co. (1899) 97 Fed. 140, 38 C. C. A. 79.

This section refers to the course of procedure only where actions survive, and, in the absence of any federal statute prescribing what actions do survive, the question in revenue cases must be determined by the common law, by which all such actions abate upon the death of the wrongdoer, except only where the acts are divisible, and the wrongdoer's estate has derived benefit from the tort. U. S. v. De Goer (D. C. 1889) 38 Fed. 80.

5. —— **What law governs.**—Whether a cause of action survives by law is not a question of procedure, but of right, and is determinable, when the action is one arising at common law, by the law of the state where the action is brought. Martin v. Wabash R. Co. (1905) 142 Fed. 650, 73 C. C. A. 646, 6 Ann. Cas. 582; Portland Gold Mining Co. v. Stratton's Independence (D. C. 1912) 196 Fed. 714. See Gerling v. Baltimore & O. R. Co. (1894) 14 Sup. Ct. 533, 540, 151 U. S. 673, 38 L. Ed. 311; Baltimore & O. R. Co. v. Joy (1899) 19 Sup. Ct. 387, 388, 173 U. S. 226, 43 L. Ed. 677.

The statute does not determine the plaintiff's right of revivor on death of defendant; that being governed by the law of the state where the suit is brought and prosecuted. Spaeth v. Sells (C. C. 1909) 176 Fed. 797. See, also, Baltimore & O. R. Co. v. Joy (1899) 19 Sup. Ct. 387, 388, 173 U. S. 226, 43 L. Ed. 677; Great Western Min. & Mfg. Co. v. Harris (C. C. 1901) 111 Fed. 38.

The question whether a cause of action created by a state statute survives the death of the plaintiff, or the person for whose benefit it is given, is one of right, and not of procedure, and is governed by the statutes of the state giving such right of action. Sanders' Adm'x v. Louisville & N. R. Co., 111 Fed. 708, 49 C. C. A. 565.

6. —— **Action on contract.**—An action against directors of a national bank to recover for losses resulting from their misconduct or negligence is one on implied contract, and survives against the representative of a deceased director. Boyd v. Schneider (1904) 131 Fed. 223, 65 C. C. A. 209; Stephens v. Overstolz (C. C. 1890) 43 Fed. 465; Allen v. Luke (C. C. 1906) 141 Fed. 694; Id. (C. C. 1908) 163 Fed. 1018; Curtis v. Phelps (D. C. 1913) 208 Fed. 577. And see Witters v. Foster (C. C. 1886) 26 Fed. 737.

The liability of a stockholder to contribute towards debts of the company paid by other stockholders survives him. Allen v. Fairbanks (C. C. 1889) 40 Fed. 188.

The obligation of a surety on a bail bond is a continuing one, and binds his estate after his death. U. S. v. Keiver (C. C. 1893) 56 Fed. 422.

7. —— **Actions of tort.**—A right given by a state statute to revive a pending action for personal injuries in the name of the personal representative is not lost on the removal of the case to a federal court, even when, by the state law, the cause of action would have abated if no action had been commenced before the plaintiff's death. The federal law declaring that the right of revivor exists only when the "cause of action" survives does not apply to such a case. Baltimore & O. R. Co. v. Joy (1899) 19 Sup. Ct. 387, 388, 173 U. S. 226, 43 L. Ed. 677. See Gerling v. Baltimore & O. R. Co. (1894) 14 Sup. Ct. 533, 540, 151 U. S. 673, 38 L. Ed. 311; Shute v. Patterson (1906) 147 Fed. 509, 78 C. C. A. 75; Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257.

A cause of action to recover from a collector of internal revenue a sum alleged to have been paid him under protest to protect property from unlawful seizure for illegal taxes survives the death of the defendant. Patton v. Brady (1902) 22 Sup. Ct. 493, 184 U. S. 608, 46 L. Ed. 713.

At common law, all actions founded on contracts, express or implied, survive, but not actions of tort. Jones v. Van Zandt (C. C. 1849) Fed. Cas. No. 7,503; Id. (C. C. 1849) Fed. Cas. No. 7,504.

In Tennessee, an action of deceit for representations as to the credit of another survives, if pending at the time of defendant's death, and this in a federal court. Warren v. Furstenheim (C. C. 1888) 35 Fed. 691, 1 L. R. A. 40.

Actions ex delicto die with the person. U. S. v. Korn (D. C. 1829) Fed. Cas. No. 15,543.

8. —— **Action on federal statute.**—Recourse cannot be had to a state stat-

ute to determine whether or not a cause of action given by a federal statute survives. Ex parte Schreiber (1884) 3 Sup. Ct. 423, 424, 110 U. S. 76, 28 L. Ed. 65; Walsh v. New York, N. H. & H. R. Co. (C. C. 1909) 173 Fed. 494; U. S. v. De Goer, 38 Fed. 80. See U. S. v. Riley (D. C. 1899) 104 Fed. 275.

A cause of action against an assignee in bankruptcy for wrongfully paying the assets in his hands to other creditors of the bankrupt than plaintiff does not abate on the assignee's death. U. S. v. Dewey (C. C. 1889) 39 Fed. 251.

This rule applies to actions under the federal Employers' Liability Act. Walsh v. New York, N. H. & H. R. Co. (C. C. 1909) 173 Fed. 494.

9. —— Action on federal penal statute.—An action for a penalty prescribed by an act of congress abates by the death of defendant, though the statutes of the state in which the action was brought allows suits on state penal statutes to be prosecuted after the death of the offender. Ex parte Schreiber (1884) 3 Sup. Ct. 423, 424, 110 U. S. 76, 28 L. Ed. 65; Schreiber v. Sharpless (D. C. 1883) 17 Fed. 589. See, also, U. S. v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145.

This rule applies to actions for forfeitures under the revenue laws. U. S. v. De Goer (D. C. 1889) 38 Fed. 80; U. S. v. Riley (D. C. 1899) 104 Fed. 275.

In the absence of an act of congress providing for a survival or adopting a state act, an action for a penalty does not survive. Jones v. Van Zandt (C. C. 1849) Fed. Cas. No. 7,504.

10. —— Action for infringement of patent.—A bill in equity for infringement of a patent, which prays an injunction and an account of profits, is not founded on tort in such a sense that the death of defendant abates the same, so that it cannot be revived. Smith v. Baker (C. C. 1874) Fed. Cas. No. 13,010; Atterbury v. Gill (C. C. 1878) Fed. Cas. No. 638; Kirk v. Du Bois (C. C. 1886) 28 Fed. 460; Hohorst v. Howard (C. C. 1888) 37 Fed. 97; Head v. Porter (C. C. 1895) 70 Fed. 498.

Rights of action for infringements of patents survive to the personal representatives of the patentee. May v. Board of Com'rs of Logan County (C. C. 1887) 30 Fed. 250.

11. —— Real actions.—In real actions the death of the ancestor without having appeared to the suit abates the suit, and it cannot be revived and prosecuted against his heirs. Macker's Heirs v. Thomas (1822) 7 Wheat. 530, 531, 5 L. Ed. 515. See Green v. Watkins (1821) 6 Wheat. 260, 261, 5 L. Ed. 256; Currell v. Villars (C. C. 1896) 72 Fed. 331.

Though an action of ejectment pending in a federal court, when abated by the death of a party, cannot be revived under this and the following section, it may be revived under the provisions of the local law by virtue of the conformity act. McArthur v. Williamson (C. C. 1891) 45 Fed. 154. See, also, Hatfield v. Bushnell (C. C. 1849) Fed. Cas. No. 6,211.

12. Death pending review.—A real or personal action abates at common law by the death of the parties before judgment, and it requires the aid of a statutory provision like this to enable a suit to be prosecuted by or against the personal representative or heirs of the deceased, where the cause of action survives. In real actions the death of either party, after a writ of error sued out, does not abate the suit. Green v. Watkins (1821) 6 Wheat. 260, 261, 5 L. Ed. 256.

Where plaintiff in error died while the cause was held under advisement, the judgment will be entered nunc pro tunc as of the first day of the term. Clay v. Smith (1830) 3 Pet. 411, 7 L. Ed. 723.

A suit for collision, brought on behalf of the owners of vessel and cargo by the master, is one in which the cause of action survives the death of the libelant; and where he has given bond binding himself and his heirs and legal representatives to abide the judgment of the court, and pay the costs adjudged against him, on his death pending an appeal his administrator may be substituted in his stead. The Margaret B. Roper (1901) 106 Fed. 741, 45 C. C. A. 578.

A decree founded upon a tort will survive though the debtor die pending an appeal in which a supersedeas bond has been given. In re First Nat. Bank (C. C. 1891) 49 Fed. 120.

13. Revivor of judgments.—There is no federal statute regulating the revivor of judgments, unless the process acts may be said to require the court to follow the state practice in that regard. Devereaux v. Brownsville (C. C. 1887) 29 Fed. 742, 748.

II. CONTINUANCE OR REVIVAL OF ACTION

14. Nature and necessity of proceedings.—The revivor of a suit by or against the representative of a deceased party is a matter of right, and a mere continuation of the original suit. Clarke v. Mathewson (1838) 12 Pet. 164, 172, 9 L. Ed. 1041; Trigg v. Conway (C. C. 1855) Fed. Cas. No. 14,173; Fitzpatrick v. Domingo (C. C. 1882) 14 Fed. 216; Hone v. Dillon (C. C. 1886) 29 Fed. 465; Howth v. Owens (C. C. 1887) 30 Fed. 910. See, also, McKnight v. Craig's Adm'r (1810) 6 Cranch, 183, 187, 3 L. Ed. 193; Mackaye v. Mallory (1897) 79 Fed. 1, 24 C. C. A. 420; Miller v. Wattier (C. C. 1908) 165 Fed. 359. And see Dolan v.

Jennings (1891) 11 Sup. Ct. 584, 585, 139 U. S. 385, 35 L. Ed. 217.

The only manner in which the suit can be prosecuted after the death of the party is to revive it upon a scire facias sued out for that purpose. Maury's Trustee v. Fitzwater (C. C. 1898) 88 Fed. 768.

After sustaining a demurrer to a bill to set aside a divorce decree, with leave to amend, complainant elected to stand by her bill, after which defendant died. Held, that it was improper, without revivor, for the court, on suggestion of defendant's alleged surviving wife, who had not previously been a party to the proceeding, to render judgment of dismissal nunc pro tunc as of the day following the expiration of the time allowed complainant to amend, and complainant's prayer for appeal having been allowed, to direct service of citation on defendant's administrator and such alleged surviving wife. McNeil v. McNeil (1909) 170 Fed. 289, 95 C. C. A. 485, affirming decree (C. C. 1897) 78 Fed. 834.

A person who proceeds in a suit and takes an order or decree therein without revivor is estopped to object for want of revivor. Id.

15. —— **Filing pleading.**—Upon suggestion to the court of the death of a plaintiff, where the cause of action survives, the executor or administrator may, upon motion, be substituted as plaintiff, and permitted to prosecute the action, without filing any supplemental pleading showing the transfer of the cause of action. Equitable Life Assur. Soc. of United States v. Trimble (1897) 83 Fed. 85, 27 C. C. A. 404.

16. **Suits in admiralty.**—The statute does not relate to or affect suits in admiralty. The James A. Wright (C. C. 1872) Fed. Cas. No. 7,191.

17. **Suits in equity.**—One entitled to revive a suit in equity is not authorized to proceed therefor by motion, but must follow the procedure prescribed by the equity rules. Dillard's Adm'r v. Central Virginia Iron Co. (C. C. 1903) 125 Fed. 157.

The statute applies only to actions at law; nor is there any provision in the equity rules or practice for the compulsory revival of a suit at the instance of defendant after the death of the complainant. Brown v. Fletcher (C. C. 1904) 140 Fed. 639. See, also, Dillard's Adm'r v. Central Virginia Iron Co. (C. C. 1903) 125 Fed. 157.

18. —— **Equity rules and practice.**—See notes to § 1536, ante.

19. **Mode of procedure.**—The mode of procedure of the state may be resorted to for the purpose of continuing the suit. Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257. And see McArthur v. Williamson (C. C. 1891) 45 Fed. 154.

It is not a ground for a motion to dismiss a scire facias to revive a suit upon the death of a defendant that the bill does not state a cause of action, or is not sustained by the proofs. Allen v. Fairbanks (C. C. 1889) 40 Fed. 188.

Death of a party where the cause of action survives results in no disadvantage to either party. A suggestion of the fact apud acta removes the technical difficulty. Nevitt v. Clarke (D. C. 1846) Fed. Cas. No. 10,138.

20. —— **Effect of state law.**—The statute governs the federal court to the exclusion of the provisions of any state law on that subject. Fitzpatrick v. Domingo (C. C. 1882) 14 Fed. 216.

21. **Time of taking proceeding.**—Where there has been no undue delay on the part of a plaintiff in the prosecution of a suit during his lifetime, upon suggestion of abatement by his death, his counsel will be allowed a reasonable time to take proceedings for a revival. Tilghman v. Paxson Co. (C. C. 1902) 115 Fed. 906.

No period is prescribed by the statute within which the personal representatives must come in voluntarily and apply to be substituted, and therefore no laches can be predicated on mere lapse of time. The Norway (D. C. 1867) Fed. Cas. No. 10,357. See, also, Griswold v. Hill (C. C. 1825) Fed. Cas. No. 5,834.

22. —— **Effect of state law.**—The time when the writ may issue under this section is limited by the statute of the state. Barker v. Ladd (C. C. 1874) Fed. Cas. No. 990; Butler v. Poole (C. C. 1890) 44 Fed. 586, 587; Green v. Barret (C. C. 1903) 123 Fed. 349.

23. **Persons who may be made party.**—An executor or administrator of a defendant who dies after the filing of a complaint, which is declared by statute to constitute the commencement of the action, may be made a party by scire facias, although such defendant dies before summons is served upon him, especially if there is another defendant in the case against whom the cause of action survives. Ex parte Connaway (1900) 20 Sup. Ct. 951, 953, 178 U. S. 421, 44 L. Ed. 1134. Compare Connaway v. Overton (C. C. 1899) 98 Fed. 574.

24. —— **Citizenship of personal representative.**—In this section congress manifestly treats the revival of a suit by or against the representatives of the deceased party as a matter of right and as a mere continuance of the original suit, without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is then pending or to another state. Clarke v. Mathewson (1838) 12 Pet. 164, 172, 9 L. Ed. 1041; Hatfield v. Bushnell (C. C. 1849) Fed. Cas. No. 6,211; Trigg v. Conway (C. C.

1855) Fed. Cas. No. 14,173; Hone v. Dillon (C. C. 1886) 29 Fed. 465. See, also, Mellus v. Thompson (C. C. 1858) Fed. Cas. No. 9,405; C. F. Stromeyer Co. v. Aldrich (D. C. 1915) 227 Fed. 960.

25. —— **Competency of personal representative.**—When an alien sues in a federal court and dies, the suit cannot be continued to final judgment by his executor or administrator, unless such executor or administrator has taken out letters testamentary or of administration on the estate in the state where the suit is brought. Kropff v. Poth (C. C. 1883) 19 Fed. 200. See, also, Aspden v. Nixon (1846) 4 How. 467, 497, 11 L. Ed. 1059; Stacy v. Thrasher (1848) 6 How. 58, 12 L. Ed. 337; Mellus v. Thompson (C. C. 1858) Fed. Cas. No. 9,405.

A suit in a federal court cannot be revived against the foreign executors of a deceased defendant, who are not authorized by the laws of the state of their appointment and residence to sue or be sued beyond its own jurisdiction. C. F. Stromeyer Co. v. Aldrich (D. C. 1915) 227 Fed. 960.

26. —— **Indian's successors.**—Mere matters of form must yield to substantive rights, and the court will permit the substitution as plaintiffs of the successors in interest of a deceased Indian under the customs of the tribe. Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257.

27. **Continuance of suit.**—Upon the death of the plaintiff and appearance of his executor, the defendant is not entitled to a continuance, but he may insist on the production of the letters testamentary before the executor is permitted to prosecute. Wilson v. Codman's Ex'r (1805) 3 Cranch, 193, 206, 2 L. Ed. 408. See, also, Griswold v. Hill (C. C. 1825) Fed. Cas. No. 5,834.

The defendant is not, of course, entitled to continuance on death of plaintiff. Alexander v. Patten (C. C. 1806) Fed. Cas. No. 171.

§ 1593. (R. S. § 956.) Death of one of several plaintiffs or defendants.

If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant.

Act Sept. 24, 1789, c. 20, § 31, 1 Stat. 90.

Notes of Decisions

Purpose of statute.—On the death of parties before judgment all personal actions, by the common law, abate; and it required the aid of some statute like this to enable the action to be prosecuted by or against the personal representative when the cause of action survived. Green v. Watkins (1821) 6 Wheat. 260, 262, 5 L. Ed. 256; Ex parte Connaway (1900) 20 Sup. Ct. 951, 956, 178 U. S. 421, 44 L. Ed. 1134. See, also, Brown v. Fletcher (C. C. 1904) 140 Fed. 639; U. S. v. Bullard (D. C. 1900) 103 Fed. 256, 257.

Survivability of actions.—This and the preceding section authorize the executor or administrator to prosecute or defend in those cases only in which the cause of action survives the law, and do not undertake to define what those cases are. Gerling v. Baltimore & O. R. Co. (1894) 14 Sup. Ct. 533, 540, 151 U. S. 673, 38 L. Ed. 311. And see Devereaux v. Brownsville (C. C. 1887) 29 Fed. 742, 748.

—— **Effect of local law.**—Though an action of ejectment in a federal court, when abated by the death of a party, cannot be revived under this and the preceding section, which apply only to personal actions, it may be revived under the provisions of the state law by virtue of the conformity act. McArthur v. Williamson (C. C. 1891) 45 Fed. 154. So, where the local law in force in Alaska at the time an action to determine an adverse claim to mining property was brought, such action survived the death of a party thereto, the fact that during the pendency of the action one of the two defendants died did not abate the action, but it was properly continued as against the surviving defendant. Mackay v. Fox (1903) 121 Fed. 487, 57 C. C. A. 439.

—— **Action on bonds.**—An action brought in a federal court by plaintiffs as joint owners of bonds does not abate by the death of one of the plaintiffs, but under this section, the suit may proceed in the name of the survivors upon the suggestion of the death upon the record. Thomas v. Green County (1906) 146 Fed. 969, 77 C. C. A. 487.

—— **Actions for tort.**—Where a suit for infringement of a trade-mark was instituted against two defendants, such infringement constituted a tort for which both were liable, so that on the death of one the suit did not abate as to the other. Northwestern Consol. Milling Co. v. William Callam & Son (C. C. 1910) 177 Fed. 786.

Revival of action—Necessity and requisites.—In the case of the death of one of several coplaintiffs, no revivor was necessary, a statement on the record being sufficient. Thomas v. Green County (1908) 159 Fed. 339, 89 C. C. A. 405, judgment affirmed Green County, Ky., v. Thomas' Ex'r (1909) 29 Sup. Ct. 168, 211 U. S. 598, 53 L. Ed. 343.

A suggestion on the record either by plaintiffs or defendants that some of the plaintiffs were dead constituted a substantial compliance with this section. Thomas v. Green County (1908) 159 Fed. 339, 89 C. C. A. 405, judgment affirmed Green County, Ky., v. Thomas' Ex'r (1908) 29 Sup. Ct. 168, 211 U. S. 598, 53 L. Ed. 343. See, also, Thomas v. Green County (1906) 146 Fed. 969, 77 C. C. A. 487; Wilhite v. Skelton (1906) 149 Fed. 67, 78 C. C. A. 635.

—— **Jurisdiction acquired.**—While state statutes with reference to revival of actions on death of parties are applicable to actions in the federal courts, except when this section applies, a failure to observe such state statutes in a case where there is a surviving plaintiff does not defeat the court's jurisdiction, and if the defendant permits the suit to go on without a formal entry of revivor and secures a judgment in its favor on the merits, it cannot object that the order of revivor has not been made for the purpose of sustaining such judgment. Thomas v. Green County (1908) 159 Fed. 339, 89 C. C. A. 405, judgment affirmed Green County, Ky., v. Thomas' Ex'r (1909) 29 Sup. Ct. 168, 211 U. S. 598, 53 L. Ed. 343.

Appellate procedure.—Where a cause of action against a partnership survives, on the death of one of the defendants pending appeal, the survivors may, after notice to his legal representatives to appear, and their failure to so appear, move that the action abate as to the deceased, and proceed at their suit as survivors. Moses v. Wooster (1885) 6 Sup. Ct. 38, 115 U. S. 285, 29 L. Ed. 391, following McKinney v. Carroll (1838) 12 Pet. 66, 9 L. Ed. 1002. See, also, McNutt v. Bland (1844) 2 How. 9, 28, 11 L. Ed. 159. And as to necessity of revival, see, also, Amadeo v. Northern Assur. Co. (1906) 26 Sup. Ct. 507, 509, 201 U. S. 194, 50 L. Ed. 722.

§ 1594. (Act Feb. 8, 1899, c. 121.) Death, expiration of term, etc., of officer sued in official capacity, etc.

No suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs. (30 Stat. 822.)

This was an act entitled "An act to prevent the abatement of certain actions," cited above.

Notes of Decisions

Purpose of statute.—It was doubtless to meet difficulties occasioned by decisions of the supreme court that congress passed this act. Murphy v. Utter (1902) 22 Sup. Ct. 776, 778, 186 U. S. 95, 46 L. Ed. 1070.

Proceedings against judge.—The successor in office of a judge of a territorial court may be substituted in the place of his predecessor on appeal from a final judgment denying mandamus to compel the latter to take jurisdiction of an action attempted to be brought in his court. New Mexico ex rel. Caledonian Coal Co. v. Baker (1905) 25 Sup. Ct. 375, 377, 196 U. S. 432, 49 L. Ed. 540.

Proceedings against revenue collector.—An action against a revenue collector does not abate by his death, but his successor may be substituted as defendant; and where a collector has wrongfully received a tax, the liability to refund is enforceable against his successor. Armour v. Roberts (C. C. 1907) 151 Fed. 846.

§ 1595. (R. S. § 957.) Delinquents for public money; judgment at return term, unless, etc.

When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it

shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court, (the United States attorney being present,) makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads non est factum, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided.

Act March 3, 1797, c. 20, § 3, 1 Stat. 514.

Notes of Decisions

Summary judgment.—The provisions of the statute are as much a part of the bonds of delinquent officers as if recited in them, and the officers and their sureties are in contemplation of law apprised of those provisions when their bonds are executed. U. S. v. Hawkins (1836) 10 Pet. 125, 133, 9 L. Ed. 369. And see U. S. v. Giles (1815) 9 Cranch, 212, 236, 3 L. Ed. 709.

When an account has been examined, passed upon, and the balance certified, it is adjusted, within the meaning of this section. U. S. v. Pinson (1880) 102 U. S. 548, 551, 26 L. Ed. 226.

The right of the United States to summary judgment under this section does not extend the suits brought by them as indorsees of promissory notes. U. S. v. Blacklock (C. C. 1819) Fed. Cas. No. 14,604.

The statute is limited to cases in which the principal debtor is a party. U. S. v. Lyon (C. C. 1840) Fed. Cas. No. 15,651.

—— **Suit in equity.**—This section contemplates either a suit on the delinquent's bond, or for a balance found due on adjustment of his accounts, in either of which cases it must be a suit at law; and judgment cannot be so rendered in a suit in equity to set aside fraudulent conveyances by the delinquent or his sureties, and subject their property to the payment of the amount due the United States. U. S. v. Ingate (C. C. 1891) 48 Fed. 251.

Credit or set-off in favor of delinquent.—See, also, notes to § 1588, ante.

Defendant is entitled to the full benefit of any credit in his favor, whether arising out of the particular transaction for which he is sued, or out of distinct and independent transactions, constituting a legal or equitable set-off in whole or in part, of the debt sued for. U. S. v. Wilkins (1821) 6 Wheat. 135, 143, 5 L. Ed. 225. See U. S. v. Hawkins (1836) 10 Pet. 125, 132, 9 L. Ed. 369; U. S. v. Tillou (1867) 6 Wall. 484, 488, 18 L. Ed. 920; U. S. v. Flanders (1884) 5 Sup. Ct. 67, 70, 112 U. S. 88, 28 L. Ed. 630; Fendall v. U. S. (1876) 12 Ct. Cl. 305.

—— **Presentation and disallowance of claim as condition.**—A claim for credit is not available unless it has been presented to the accounting officers of the treasury. Smythe v. U. S. (1903) 23 Sup. Ct. 279, 284, 188 U. S. 156, 47 L. Ed. 425. See U. S. v. Hawkins (1836) 10 Pet. 125, 132, 9 L. Ed. 369.

§ 1596. (R. S. § 958.) Suits under postal laws; judgment at return term, unless, etc.

In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the Post-Office Department, which has been submitted to and disallowed by the Sixth Auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term.

Act March 3, 1825, c. 64, § 38, 4 Stat. 113. Act July 2, 1836, c. 270, § 15, 5 Stat. 82.

§ 1597. (R. S. § 959.) Suits on debentures; judgment at return term, unless, etc.

In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted.

Act March 2, 1799, c. 22, § 80, 1 Stat. 688, 689.

§ 1598. (R. S. § 960.) Suits on bonds for recovery of duties; judgment at return term, unless, etc.

When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court, (the United States attorney being present,) makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice.

Act March 2, 1799, c. 22, § 65, 1 Stat. 676.

Notes of Decisions

Purpose of statute.—This act is intended to prevent delay by sham pleadings. It is not meant to bar a party from any good defense founded upon real merits. Ex parte Davenport (1832) 6 Pet. 661, 663, 8 L. Ed. 537.

Judgment.—The United States are entitled to judgment at the return term upon revenue bonds; and the court will on motion, rule the marshal to return the writ on some day during the term. U. S. v. Johns (C. C. 1805) Fed. Cas. No. 15,480; Same v. May (C. C. 1824) Fed. Cas. No. 15,751.

Error in liquidation of duties.—An error in the liquidation of duties may be predicated upon the fact that the vessel belongs to citizens of the United States and not to foreigners. U. S. v. Willing (D. C. 1804) Fed. Cas. No. 16,727.

Continuance.—Where there is a real defense to the claim on a bond, an opportunity to obtain evidence by a continuance, according to the circumstances of the case, must be given. U. S. v. Phelps (1834) 8 Pet. 700, 703, 8 L. Ed. 1094.

Surety's liability.—The United States, recovering a joint judgment against all the obligors in a bond given for duties, may not proceed in equity against the executor of a deceased surety to hold the assets responsible. U. S. v. Price (1850) 9 How. 83, 91, 13 L. Ed. 56.

§ 1599. (R. S. § 961.) Judgment for sum due in equity on bonds, etc.

In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury.

Act Sept. 24, 1789, c. 20, § 26, 1 Stat. 87.

Notes of Decisions

Application and effect of section.—This section does not apply to a case heard on agreed facts, or tried upon pleadings and proof. Farrar v. U. S. (1831) 5 Pet. 373, 385, 8 L. Ed. 159; Ives v. Merchants' Bank (1851) 12 How. 159, 164, 13 L. Ed. 936.

It was not intended to enlarge the liability of a surety on an official bond. U. S. v. Hillis (C. C. 1878) Fed. Cas. No. 15,369.

The rule declared by this statute is to be generally applied in proper cases in the federal courts. The S. Oteri (1894) 67 Fed. 146, 151, 14 C. C. A. 344; Chicago House-Wrecking Co. v.

U. S. (1901) 106 Fed. 385, 389, 45 C. C. A. 343, 53 L. R. A. 122; U. S. v. Abeel (1909) 174 Fed. 12, 98 C. C. A. 50; U. S. v. Alcorn (C. C. 1906) 145 Fed. 995. See U. S. v. Gurney (1808) 4 Cranch, 333, 346, 2 L. Ed. 638; In re Appel (1908) 163 Fed. 1002, 90 C. C. A. 172, 20 L. R. A. (N. S.) 76; U. S. v. Duys (C. C. 1901) 112 Fed. 875.

—— **Common law.**—While the federal courts, in actions at law, undoubtedly possess the power conferred on the courts of common law by the English statutes, and while recognition of such power was embodied in the judiciary act of 1879, reproduced in this section, the duty of such courts to give effect to the plainly expressed will of contracting parties is as imperatively necessary now as it was at common law after the adoption of the statute. Sun Printing & P. Ass'n v. Moore (1902) 22 Sup. Ct. 240, 248, 183 U. S. 642, 46 L. Ed. 366. See U. S. v. Alcorn (C. C. 1906) 145 Fed. 995.

Enforcement of redelivery bond taken by collector of customs.—The enforcement of the penalty prescribed in a redelivery bond taken by a collector of customs for the nonreturn unopened of any required package of an invoice of imported merchandise is not precluded by the provision of this section. U. S. v. Dieckerhoff (1906) 26 Sup. Ct. 604, 608, 202 U. S. 302, 50 L. Ed. 1041, reversing judgment Dieckerhoff v. U. S. (C. C. A. 1905) 136 Fed. 545, 69 C. C. A. 255.

Equitable defenses in legal actions.—Under this section an equitable defense may be set up in an action on an indemnity bond given under the Immigration Acts. U. S. v. Rubin (D. C. 1915) 227 Fed. 938.

Hearing in equity.—Where a breach of a bond appears on demurrer, defendant is not entitled to a hearing in equity. Greeley v. U. S. (1823) 8 Wheat. 257, 260, 5 L. Ed. 611.

Assessment of damages.—Where the sum for which judgment should be rendered is uncertain, the damages must be assessed by jury where either party requests it; but where the sum is certain the computation may be made by the court or the clerk, and a jury is not necessary. Aurora v. West (1868) 7 Wall. 82, 104, 19 L. Ed. 42. See, also, Gurney v. Hage (C. C. 1869) Fed. Cas. No. 5,875; U. S. v. White (C. C. 1823) Fed. Cas. No. 16,686; Brock v. Fuller Lumber Co. (1907) 153 Fed. 272, 82 C. C. A. 402.

—— **Waiver of jury.**—A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default, under this section. Brock v. Fuller Lumber Co. (1907) 153 Fed. 272, 82 C. C. A. 402.

§ 1600. (R. S. § 962.) Judgment for duties, etc., to state that it is to be collected in coin.

In all suits by the United States for the recovery of duties upon imports, or of penalties for the non-payment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon, and costs, shall be payable in the coin by law receivable for duties; and the execution issued thereon shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution.

Act March 3, 1865, c. 80, § 12, 13 Stat. 494.

A similar provision was made by R. S. § 3014, post, § 5719.

Notes of Decisions

Judgment.—A judgment payable in gold money of the United States for duties, amended so that it is payable in gold and silver, is good. Sun Cheong-Kee v. U. S. (1865) 3 Wall. 320, 326, 18 L. Ed. 72.

Costs.—Generally costs may not be awarded to the United States when it is the prevailing party. U. S. v. Davis (1893) 54 Fed. 147, 153, 4 C. C. A. 251.

§ 1601. (R. S. § 963.) Interest on bonds for duties.

Upon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of six per centum a year, from the time when said bonds became due.

Act March 2, 1799, c. 22, § 65, 1 Stat. 676.

All duties upon imports are to be collected in ready money, and paid in coin or coin certificates or in United States notes, by R. S. § 3009, post, § 5710.

§ 1602. (R. S. § 964.) Interest on balances due Post-Office Department.

In all suits for balances due to the Post-Office Department, interest thereon shall be recovered, from the time of the default, at the rate of six per centum a year.

Act July 2, 1836, c. 270, § 15, 5 Stat. 82.

Notes of Decisions

Judgment on postmaster's bond.—Judgment rendered by appellate court for amount due government with interest at 6 per cent. per annum. See U. S. v. Agee (1901) 108 Fed. 10, 13, 47 C. C. A. 152.

§ 1603. (R. S. § 965.) Interest on debentures.

In suits upon debentures, issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed, at the rate of six per centum per annum, from the time when such debenture became due and payable.

Act March 2, 1799, c. 22, § 80, 1 Stat. 687, 689.

§ 1604. (R. S. § 750.) Final record, how made in equity and admiralty causes.

In equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record.

Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 163.

Transcripts of the record on appeals in equity and admiralty, and the hearing thereon, were provided for by R. S. § 698, post, § 1654.

Notes of Decisions

Necessity and purpose of record.—The final record in equity and admiralty causes, provided for by this section, is intended to answer the purpose of the enrollment of the decree under the former chancery practice, which was primarily to provide a permanent memorial of the rights of the parties as adjudicated; and no final record is required where there has been no adjudication inter partes, except in cases where there has been an adjudication of costs to officers when the record should be made. When a bill has been dismissed voluntarily or by stipulation of the parties, and the costs are paid, no final record is required. Consolidated Store-Service Co. v. Dettenthaler (C. C. 1899) 93 Fed. 307.

In federal courts, and in the American equity practice generally, there has never been an enrollment of the decree in the old English sense; but the decree is regarded as recorded and enrolled at the conclusion of the term. Ommen v. Talcott (D. C. 1910) 180 Fed. 925.

Contents of record.—See, also, notes to § 1585, ante, and § 1654, post.

On an appeal in equity, in the absence of joint stipulation for simplifying the transcript, the clerk should send up the whole of the record, made as directed by this section, except that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted; and, if any parts thereof are omitted, even by joint stipulation, their nature should be indicated. Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp. (1894) 61 Fed. 237, 9 C. C. A. 468, modifying decree (C. C. 1892) 49 Fed. 774.

The final record in cases of admiralty appeals must include the process, pleadings, and decrees, and such record must correspond with the judgment record of the common law. The Thomas Fletcher (C. C. 1884) 24 Fed. 481. See, also, Ex parte Cooper (1892) 12 Sup. Ct. 453, 462, 143 U. S. 472, 36 L. Ed. 232.

Ordinarily under the statute there is annexed to the writ of error or to the order allowing an appeal a complete transcript of the entire record, including not only the record proper as fixed by this section, but all of the evidence considered at the hearing. Dowagiac Mfg. Co. v. Brennan & Co. (C. C. 1907) 156 Fed. 213, 216. And see Teller v. U. S. (1901) 111 Fed. 119, 49 C. C. A. 263.

Rejected documents as part of record.—Pleadings or documents rejected by the trial court, though not a part of the technical record mentioned in this section, may be certified to the appellate court as a part of the record necessary for the hearing on appeal. Southern Building & Loan Ass'n v. Carey (C. C. 1902) 117 Fed. 325, affirmed (1904) 128 Fed. 1022, 62 C. C. A. 684.

Clerk's fees.—See, also, notes to § 1383, ante.

The final record in admiralty cases is required by this section to include "the process, pleadings and decrees,"

hence the clerk is entitled to his fees for copying the process and pleadings into the final record in such cases. The Thomas Fletcher (C. C. 1884) 24 Fed. 481. See, also, Taylor v. U. S. (C. C. 1891) 45 Fed. 531, 539, reversed (1893) 13 Sup. Ct. 479. 147 U. S. 695, 37 L. Ed. 335.

JUDGMENTS, COSTS, EXECUTIONS, AND MONEYS PAID INTO COURT

§ 1605. (R. S. § 966.) Interest on judgments.

Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State.

Act Aug. 23, 1842, c. 188, § 8, 5 Stat. 518.

Notes of Decisions

Interest on judgments or decrees on claims against the government.—See ante, § 1578, and notes.

Construction and operation of section in general.—Prior to the passage of this act, neither interest nor damages for the detention of a debt could have been levied under process of execution upon the judgment of a circuit or district court. Perkins v. Fourniquet (1852) 14 How. 328, 331, 14 L. Ed. 441.

Where a writ of error to review a judgment recovered against a collector of customs for moneys exacted by and paid to him on entries is brought by the collector, the supreme court will, if it affirms the judgment, allow interest on it, under rule 23 of the supreme court, which rule, in its provisions as to interest, is in harmony with this section. Cochran v. Schell (1882) 2 Sup. Ct. 827, 829, 107 U. S. 625, 27 L. Ed. 543.

This section does not exclude the idea of a power in the several states to allow interest on verdicts. Massachusetts Ben. Ass'n v. Miles (1891) 11 Sup. Ct. 234, 235, 137 U. S. 689, 34 L. Ed. 834.

This section does not apply to cases in equity or extend to judgments or decrees of the supreme court. Perkins v. Fourniquet (1852) 14 How. 328, 330, 14 L. Ed. 441; Hagerman v. Moran (1896) 75 Fed. 97, 99, 21 C. C. A. 242.

This section does not apply to decrees. The New York (1901) 108 Fed. 102, 109, 47 C. C. A. 232, affirmed (1903) 23 Sup. Ct. 504, 189 U. S. 363, 47 L. Ed. 854. Nor to the courts of the District of Columbia. Washington & G. R. Co. v. Tobriner (1893) 13 Sup. Ct. 557, 562, 147 U. S. 571, 37 L. Ed. 284.

The question of interest on a judgment is solely for the supreme court to determine, under R. S. § 1010, post, § 1671, unaffected by this section. Washington & G. R. Co. v. Tobriner (1893) 13 Sup. Ct. 557, 563, 147 U. S. 571, 37 L. Ed. 284.

In view of this section and Gen. St. Nev. § 4903, providing that when no different rate of interest is specified, interest shall be allowed on a judgment at a certain rate, it is held that, when the judgment is silent as to interest, no execution calling for payment of interest is authorized, and an execution issued on a judgment rendered in a federal court held in Nevada, which includes interest on the judgment, should be quashed. Moran v. Hagerman (C. C. 1895) 69 Fed. 427.

Judgments on which interest is allowable.—Where a judgment is properly allowed to be set off against another, the decree should include interest thereon at the legal rate from the date of the judgment. National S. S. Co. v. Tugman (1897) 82 Fed. 246, 27 C. C. A. 116, modifying decree (C. C. 1895) 67 Fed. 16.

Under Civ. Code La. art. 1938, and Code Prac. La. art. 554, interest may properly be allowed on the amount of a verdict, where it contains no provision therefor. Guardian Fire Ins. Co. of Pennsylvania v. Central Glass Co. (1912) 194 Fed. 851, 114 C. C. A. 639; B. J. Wolf & Sons v. Royal Ins. Co., Limited, of Liverpool (1912) 194 Fed. 853, 114 C. C. A. 641.

In an action for personal injuries, it is proper to allow interest from the date of the judgment. Arizona & N. M. Ry. Co. v. Clark (1913) 207 Fed. 817, 125 C. C. A. 305.

In a condemnation proceeding by the United States, interest was improperly allowed on the award, as, assuming it was a final judgment, interest would not run against the United States, especially where the owner had the use of the property for the time during which he claimed interest. In re Post Office Site in Borough of the Bronx (1914) 210 Fed. 832.

Damages awarded for a collision which occurred within the jurisdiction

of a state should bear interest, both before and after decree, at the legal rate established by statute in the state. Western Transit Co. v. Davidson S. S. Co. (1914) 212 Fed. 696, 129 C. C. A. 232.

Interest is not recoverable upon judgments against collectors of customs for moneys wrongfully exacted, either as against the government or the collectors. White v. Arthur (C. C. 1882) 10 Fed. 80, 91.

Interest on a judgment revived by scire facias is allowed by this section. Grantland v. Memphis (C. C. 1882) 12 Fed. 287.

As judgments in Colorado draw interest, defendant on accounting should be allowed interest on a judgment credited to him to the time of its payment. Henry v. Travelers' Ins. Co. (C. C. 1890) 42 Fed. 363.

Simple interest may be allowed on an original judgment against a bankrupt even when there has been a conversion of the bankrupt's real estate, when the fund obtained has yielded interest. In re Huddell (C. C. 1891) 47 Fed. 207.

Effect of set-off or counterclaim.—R. S. § 1091, ante, § 1168, provides that no interest shall be allowed on any claim against the government prior to the rendition of judgment thereon by the court of claims, unless it be a contract expressly stipulating for the payment of interest. A postmaster in South Carolina was at the close of his term of office, in 1869, indebted to the government in a certain sum, for which judgment was rendered against him in the district court of that state in 1871. H.'s salary was not readjusted under acts of 1864 and 1866, authorizing the postmaster general to make such readjustments once in two years; but it was readjusted, and a sum larger than the judgment was allowed him as increased salary, under act of 1883, which provided for the readjustment of salaries not already readjusted under act of 1866. Held that, upon the final settlement of the postmaster's account in 1877, he was properly charged with interest on the judgment, and denied interest on the increased salary allowed him, by reason of this section. U. S. v. Verdier (1896) 17 Sup. Ct. 42, 43, 164 U. S. 213, 41 L. Ed. 407.

Where defendant sought to set off a noninterest-bearing demand against one which clearly bore interest from the date judgment was rendered, defendant could not complain that he was not allowed interest on the set-off from the date of the judgment. Schwarz v. Harris (D. C. 1913) 209 Fed. 1000.

Powers of courts with respect to interest.—When a decree for libelant, which included interest, is affirmed, he, when appellee, is entitled to interest on the whole decree, unless special circumstances induce the court to disallow it. The Umbria (1892) 59 Fed. 475, 8 C. C. A. 181, disapproving Deems v. Canal Line (C. C. 1878) Fed. Cas. No. 3,736, and following The Blenheim (C. C. 1883) 18 Fed. 47.

Ordinarily, when an admiralty decree of the district court, which includes interest, is affirmed by the circuit court, interest will be allowed on the full amount of the decree below. The Blenheim (C. C. 1883) 18 Fed. 47.

In an action on a judgment, the amount of which was doubled by 8 per cent. interest, a portion of which was compounded, the court may refuse to allow interest on the judgment. Downs v. Allen (C. C. 1885) 22 Fed. 805.

The clerk of a United States circuit court has no authority to enter judgment for the verdict without interest, even if plaintiff waives interest. That power can be exercised only by the court. Robostelli v. New York, N. H. & H. R. Co. (C. C. 1888) 34 Fed. 507.

A circuit court has no jurisdiction to award interest on a judgment which was rendered by the court of claims without making any provision for interest. Walton v. U. S. (C. C. 1894) 61 Fed. 486; Bunton v. Same (C. C. 1894) 62 Fed. 171.

Period during which interest is computed.—Where there was after verdict a stay of proceedings pending motion for new trial, which motion was overruled, judgment will be entered for the amount of the verdict, with interest from the date of the verdict to the date of the judgment; such allowance being within the equity of the statute. Fowler v. Redfield (C. C. 1862) Fed. Cas. No. 5,003; Dowell v. Griswold (C. C. 1877) Fed. Cas. No. 4,040; Gibson v. Cincinnati Enquirer (C. C. 1877) Fed. Cas. No. 5,391; Griffith v. Baltimore & O. R. Co. (C. C. 1890) 44 Fed. 574, judgment affirmed Baltimore & O. R. Co. v. Griffith (1895) 16 Sup. Ct. 105, 159 U. S. 603, 40 L. Ed. 274.

The court, on rendering judgment on a verdict assessing damages, cannot add interest from a time anterior to the verdict. Byington v. Lemmons (Super. Ct. Ark. 1822) Fed. Cas. No. 2,264a.

Rate of interest.—The law of the state where the contract is made will fix the rate of interest in an action thereon in a federal court sitting in another state. Jaffray v. Dennis (C. C. 1808) Fed. Cas. No. 7,171; Rogers v. Lee County (C. C. 1870) Fed. Cas. No. 12,013.

The South Carolina law of 1815 (6 St. at Large, 4), allowing interest on judgments when the cause of action on which judgment is recovered carries interest, did not provide for interest on costs, and was not repealed by the act of 1866 (13 St. at Large, 463), which fixes the rate of interest on "all money decrees and judgments." Peo-

ple's Bank of Greenville v. Ætna Ins. Co. (C. C. 1896) 76 Fed. 548.

Under Civ. Code S. C. 1902, § 1660, all money judgments of the courts of that state are entitled to draw interest at 7 per cent. Meyer Rubber Co. v. Georgetown & W. R. Co. (C. C. 1909) 174 Fed. 731, decree affirmed Willcox v. Jones (1910) 177 Fed. 870, 101 C. C. A. 84.

Under Hurd's Rev. St. Ill. 1909, c. 3, § 61, and the rules of the probate court of Cook county, where the claim of a foreign creditor of a decedent was filed after the appearance term and allowed, the allowance constituted a judgment which merged the claim and drew interest thereafter at 5 per cent. under Hurd's Rev. St. Ill. 1909, c. 74, §§ 3, 4. Owsley v. Central Trust Co. of New York (D. C. 1912) 196 Fed. 412.

Effect of stipulation for interest in obligation sued on.—A judgment merges the contract, and the interest thereafter accrues only at the statutory rate, irrespective of the agreement of the parties. Evans v. White (Super. Ct. Ark. 1833) Fed. Cas. No. 4,572a; Byrd v. Gasquet (Super. Ct. Ark. 1835) Fed. Cas. No. 2,268a. But see Henderson v. Desha (Super. Ct. Ark. 1834) Fed. Cas. No. 6,351a, holding that judgment may be rendered for 10 per cent. interest until paid, where that rate is expressed in the contract.

Under the law of Virginia, where an obligation bears interest at a specified rate, a judgment thereon should be for the principal and interest thereon at the agreed rate until payment. Where no rate is specified, the judgment should be for interest at the legal rate in the state where the obligation is to be performed, which, in the absence of proof, will be presumed to be the same as in the state where the action is brought. Schofield v. Palmer (C. C. 1904) 134 Fed. 753.

A provision in a note for a higher rate of interest, if not paid at maturity, entitles the holder to the higher rate, as well after as before judgment, and until the debt is paid. Linton v. National Life Ins. Co. of Vermont (1900) 104 Fed. 584, 44 C. C. A. 54.

Cited without definite application, In re John Osborn's Sons & Co. (1910) 177 Fed. 184, 100 C. C. A. 392, 29 L. R. A. (N. S.) 887; Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98.

§ 1606. (Act Aug. 1, 1888, c. 729, § 1.) Judgments of United States courts to be liens on property as are judgments of state courts, when registration authorized under State laws.

Judgments and decrees rendered in a [circuit or] district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: Provided, That whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state. (25 Stat. 357.)

This section and the section next following were sections 1 and 2 of an act entitled, "An act to regulate the liens of judgments and decrees of the courts of the United States," cited above.

The words of the first sentence of this section inclosed in brackets, "circuit court," became inoperative by the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Provisions as to when judgments cease to be liens were made by R. S. § 967, post, § 1608.

Section 3 of the act, as originally enacted, was as follows:

"Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

It was amended by Act March 2, 1895, c. 180, 28 Stat. 814, by some verbal changes, and by adding at the end thereof, the further clause:

"If the clerk of the United States court be required by law to have a per-

manent office and a judgment record open at all times for public inspection in such county or parish."

Said section 3 was repealed by Act Aug. 17, 1912, c. 300, 37 Stat. 311, and the amendatory act, Act March 2, 1895, c. 180, was repealed by Act Aug. 23, 1916, c. 229, § 1, 39 Stat. Section 2 of said Act Aug. 23, 1916, c. 229, 39 Stat., provided that the act was to take effect January 1, 1917.

Notes of Decisions

1. Decisions prior to enactment of the statute as to liens of federal judgments—Effect of state laws.
2. —— Nature of right.
3. —— Judgments creating liens.
4. —— Territorial extent of lien.
5. —— Registering or enrolling.
6. —— Necessity for issuing execution.
7. —— Time of commencement of lien.
8. —— Property affected by lien.
9. —— Priority of lien.
10. —— Discharge or waiver of lien.
11. Applicability to prior judgments or decrees.
12. State laws, applicable to judgments or decrees of federal courts.
13. Persons entitled to lien.
14. Property affected by lien.
15. —— Property of partnership.
16. —— Territorial extent of lien.
17. Effect of purchase with notice of lien.
18. Priority of lien.
19. Construction and application of laws of the several states.

1. Decisions prior to enactment of the statute as to liens of federal judgments—Effect of state laws.—Massingill v. Downs (1849) 7 How. 760, 767, 12 L. Ed. 903; Clements v. Berry (1850) 11 How. 398, 411, 13 L. Ed. 745; Ward v. Chamberlain (1862) 67 U. S. (2 Black) 430, 17 L. Ed. 319; Pierce v. Brown (1868) 7 Wall. 205, 217, 19 L. Ed. 134; Hurst v. Hurst (C. C. 1807) Fed. Cas. No. 6,931; Koning v. Bayard, Jr. (C. C. 1829) Fed. Cas. No. 7,924; Shrew v. Jones (C. C. 1840) Fed. Cas. No. 12,818; Barth v. Makeever (C. C. 1868) Fed. Cas. No. 1,069; In re Boyd (C. C., D. C. 1877) Fed. Cas. No. 1,746; Carroll v. Watkins (D. C. 1870) Fed. Cas. No. 2,457; Pollard v. Cocke (1851) 19 Ala. 188; Andrews v. Wilkes (1842) 7 Miss. (6 How.) 554, 38 Am. Dec. 450; Lawrence v. Belger (1877) 31 Ohio St. 175; In re Morris (Pa. 1866) 6 Phila. 134.

2. —— Nature of right.—Baker v. Morton (1870) 12 Wall. 150, 158, 20 L. Ed. 262; Kemper v. Adams (C. C. 1853) Fed. Cas. No. 7,688; In re Jordan (D. C. 1873) Fed. Cas. No. 7,514.

3. —— Judgments creating liens.—Scriba v. Deane (C. C. 1810) Fed. Cas. No. 12,559; Bank of United States v. Winston (C. C. 1825) Fed. Cas. No. 944; Shrew v. Jones (C. C. 1840) Fed. Cas. No. 12,818; McLean v. Lafayette Bank (C. C. 1848) Fed. Cas. No. 8,889; Ward v. Chamberlain (C. C. 1860) Fed. Cas. No. 17,152; Plant v. Gunn (C. C. 1874) Fed. Cas. No. 11,205; In re Worthington (C. C. 1877) Fed. Cas. No. 18,051, reversing (D. C. 1876) Fed. Cas. No. 18,052; In re Boyd (C. C., D. C. 1877) Fed. Cas. No. 1,746; Prevost v. Healy (C. C. 1879) Fed. Cas. No. 11,408.

4. —— Territorial extent of lien.—Shrew v. Jones (C. C. 1840) Fed. Cas. No. 12,818; Lombard v. Bayard (C. C. 1848) Fed. Cas. No. 8,469; U. S. v. Duncan (C. C. 1850) Fed. Cas. No. 15,003; Cropsey v. Crandall (C. C. 1851) Fed. Cas. No. 3,418; Ludlow v. Clinton Line R. Co. (C. C. 1861) Fed. Cas. No. 8,600; Barth v. Makeever (C. C. 1868) Fed. Cas. No. 1,069; Prevost v. Gorrell (C. C. 1877) Fed. Cas. No. 11,400; U. S. v. Scott (C. C. 1878) Fed. Cas. No. 16,242; Carroll v. Watkins (D. C. 1870) Fed. Cas. No. 2,457; Byers v. Fowler (1851) 12 Ark. (7 Eng.) 218, 44 Am. Dec. 271; Trapnall v. Richardson (1853) 13 Ark. (8 Eng.) 543, 58 Am. Dec. 338; U. S. v. Duncan (1850) 12 Ill. (2 Peck) 523; Simpson v. Niles (Ind. 1848) 1 Smith, 104; Baker v. Chandler (1875) 51 Ind. 85; Lathrop v. Brown (1867) 23 Iowa, 40; Hall v. Green (1882) 60 Miss. 47; Manhattan Co. v. Evertson (N. Y. 1837) 6 Paige, 457; Vance's Heirs v. Johnson (1849) 29 Tenn. (10 Humph.) 214; Branch v. Lowery (1868) 31 Tex. 96.

5. —— Registering or enrolling.—U. S. v. Humphreys (C. C. 1879) Fed. Cas. No. 15,422; Bonnafe v. Lane (1850) 5 La. Ann. 225; Reid v. House (1841) 21 Tenn. (2 Humph.) 576; Vance's Heirs v. Johnson (1849) 29 Tenn. (10 Humph.) 214.

6. —— Necessity for issuing execution.—Bank of United States v. Longworth (C. C. 1829) Fed. Cas. No. 923.

7. —— Time of commencement of lien.—Scriba v. Deane (C. C. 1810) Fed. Cas. No. 12,559; Bank of Metropolis v. Walker (C. C. 1822) Fed. Cas. No. 904; Bank of United States v. Winston (C. C. 1825) Fed. Cas. No. 944; Bank of Cleveland v. Sturges (C. C. 1840) Fed. Cas. No. 861; Sturgess v. Bank of Cleveland (C. C. 1842) Fed. Cas. No. 13,571; McLean v. Rockey (C. C. 1843) Fed. Cas. No. 8,891.

8. —— Property affected by lien.—Law v. Law (C. C. 1828) Fed. Cas. No. 8,128; Jackson v. Bank of United States (C. C. 1836) Fed. Cas. No. 7,131; McLean v. Rockey (C. C. 1843) Fed. Cas. No. 8,891; U. S. v. Butler (C. C. 1851) Fed. Cas. No. 14,696; Ludlow v. Clinton Line R. Co. (C. C. 1861) Fed. Cas. No. 8,600; Barth v. Makeever (C. C. 1868) Fed. Cas. No. 1,069; In re Badenheim (C. C. 1876) Fed. Cas. No. 716; In re Hinds (D. C. 1869) Fed. Cas. No. 6,516; In re Reynolds (D. C.) Fed. Cas. No. 11,724.

9. —— Priority of lien.—Georgetown v. Smith (C. C. 1830) Fed. Cas. No. 5,347; Shrew v. Jones (C. C. 1840)

Fed. Cas. No. 12,818; McLean v. Rockey (C. C. 1843) Fed. Cas. No. 8,-891; Rockhill v. Hanna (C. C. 1849) Fed. Cas. No. 11,980; U. S. v. Butler (C. C. 1851) Fed. Cas. No. 14,696; Howard v. Milwaukee & St. P. Ry. Co. (C. C. 1875) Fed. Cas. No. 6,761; Wolf v. Plunkett (C. C. 1875) Fed. Cas. No. 17,926; Lash v. Hardick (C. C. 1878) Fed. Cas. No. 8,097; Daggs v. Ewell (C. C. 1879) Fed. Cas. No. 3,537; In re Lacy (D. C. 1866) Fed. Cas. No. 7,-970.

10. —— Discharge or waiver of lien.—Scriba v. Deane (C. C. 1810) Fed. Cas. No. 12,559.

11. Applicability to prior judgments or decrees.—This section does not affect the lien of a judgment which had attached prior to its passage. Rock Island Nat. Bank v. Thompson (1898) 50 N. E. 1089, 173 Ill. 593, 64 Am. St. Rep. 137 (affirming judgment [1897] 74 Ill. App. 54); Commercial Bank of St. Louis v. Eastern Banking Co. (1897) 71 N. W. 1024, 51 Neb. 766.

12. State laws applicable to judgments or decrees of federal courts.—Rev. Codes Mont. § 6807, which provides that judgments of the district courts shall be liens on all of the realty of the judgment debtor for six years after their rendition. Great Falls Nat. Bank v. McClure (1910) 176 Fed. 208, 99 C. C. A. 562.

Rev. St. Ohio, § 5056, providing that, when the real property in suit is situate in a county other than the one in which the action is brought, a certified copy of the judgment in the action must be recorded in the other county before the judgment shall operate therein as notice to third persons, does not relate to actions and judgments in the United States courts. Stewart v. Wheeling & L. E. Ry. Co. (1895) 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.

13. Persons entitled to lien.—The federal courts recognize no lien at common law in behalf of an attorney, beyond that given by the local law. Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33.

14. Property affected by lien.—A conveyance with covenant of title, made by a grantor who has a bond for deed, and before he obtains the legal title, vests the title in the grantee eo instante when the grantor obtains it, and there is no space of time in which the liens of a judgment against the grantor, obtained after the conveyance, can attach against the land. Lamprey v. Pike (C. C. 1886) 28 Fed. 30.

One to whom the legal title was conveyed under circumstances creating a resulting trust in favor of another had no such interest as to render the land subject to the lien of an existing judgment against him. Wade v. Sewell (C. C. 1893) 56 Fed. 129.

Where testator devised all of his real and personal property in trust to use the income for the benefit of his wife, unmarried daughters, and minor children until two of them died or became of age, after which he directed that the estate be distributed among his children, the vested remainder to which one of such children was entitled at testator's death was subject to the lien of a judgment properly docketed against him, which lien, in case of a sale of the real estate under a power contained in the will, attached to the proceeds. In re L'Hommedieu (D. C. 1905) 138 Fed. 606, order modified (1906) 146 Fed. 708, 77 C. C. A. 134.

15. —— Property of partnership.—Where a judgment lien on real estate has been obtained under an unauthorized appearance by one partner for the firm, after dissolution, the lien may stand, but all proceedings to enforce the same should be stayed until the nonappearing partner can plead to the merits, and make any proper defense he may have to the original action. Atchison Sav. Bank v. Templar (C. C. 1886) 26 Fed. 580.

A judgment against a partnership for a partnership debt, entered by confession of all the partners, is a lien upon the partnership real estate. In re Codding (D. C. 1881) 9 Fed. 849.

16. —— Territorial extent of lien.—A judgment rendered in a suit which was pending in the United States circuit court for Missouri when that court was divided into circuit courts for the Eastern and Western districts, and was transferred to a court for one of the districts, was a lien on defendant's real estate situated anywhere in the state. Dermott v. Carter (1891) 109 Mo. 21, 18 S. W. 1121.

17. Effect of purchase with notice of lien.—One who takes title to land apparently perfect of record, and which seems of record to be, as in fact and law it is, subject to the lien of a judgment, cannot afterwards, upon learning that fraudulent unrecorded deeds had been made, be allowed to claim title through them, in order to defeat the lien of the judgment, when at the time of his purchase he had no knowledge of the existence of the deeds, and supposed that he was getting the title as it appeared of record. McAlpine v. Hedges (C. C. 1884) 21 Fed. 689.

One who conveyed a lot subject to the lien of a judgment, but without any agreement on the part of the grantee to pay it, the amount of the judgment being neither deducted from the consideration nor part of the price, had no equity to require the grantee to pay the judgment, the lot did not become the primary fund therefor, and the judgment creditor's subsequent release of that property did not prevent his re-

course against other lots on which it was a lien. Scott v. Mead (D. C. 1889) 37 Fed. 865.

18. Priority of lien.—A second mortgage, expressly providing that it was subject to the first mortgage, incumbers only the remnant left after satisfying the first; and the holder of a judgment, who defeats the first mortgage, as against himself, comes in before the second mortgagee, up to the amount of the first mortgage. Simon v. Openheimer (C. C. 1884) 20 Fed. 553.

The judgment lien of the creditor of a corporation against the assets transferred to a second corporation, which assumed the debts of the former, is superior to that of a mortgagee of the second corporation, who took his mortgage with notice of the creditor's claim, though before it had been reduced to judgment. Blair v. St. Louis, H. & K. R. Co. (C. C. 1885) 24 Fed. 148.

One who takes a mortgage after recovery of judgment by a third person against the mortgagor, the record entry of which contains an agreement that enforcement of the judgment shall be suspended till a certain case be decided, takes it subject to the judgment creditor's right to enforce his judgment after such final determination, and within the period limited by statute for the duration of the judgment lien. Mercantile Trust Co. v. St. Louis & S. F. Ry. Co. (C. C. 1895) 69 Fed. 193.

19. Construction and application of laws of the several states.—The laws of the several states relating to liens of judgments have been construed and applied by the federal courts in the following cases: Illinois, Howes v. Cameron (C. C. 1883) 23 Fed. 324. Kansas, Dartmouth Sav. Bank v. Bates (C. C. 1890) 44 Fed. 546. Montana, Great Falls Nat. Bank v. McClure (1910) 176 Fed. 208, 99 C. C. A. 562. Nebraska, Withnell v. Courtland Wagon Co. (C. C. 1885) 25 Fed. 372; Kellerman v. Aultman (C. C. 1887) 30 Fed. 888. New York, Gay v. Hudson River Electric Power Co. (C. C. 1910) 182 Fed. 904; In re Tupper (D. C. 1908) 163 Fed. 766. North Carolina, Alsop v. Moseley (1889) 104 N. C. 60, 10 S. E. 124. Ohio, Pence v. Cochran (D. C. 1881) 6 Fed. 269. Oregon, U. S. v. Griswold (C. C. 1881) 8 Fed. 556; In re Estes (D. C. 1880) 3 Fed. 134. Virginia, Hay v. Alexandria & W. R. Co. (C. C. 1884) 20 Fed. 15; King v. Davis (C. C. 1905) 137 Fed. 222, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348. Washington, U. S. v. Eisenbeis (D. C. 1898) 88 Fed. 4.

§ 1607. (Act Aug. 1, 1888, c. 729, § 2.) Indices of judgment records to be kept by clerks.

The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public. (25 Stat. 357.)

See notes to preceding section.

Notes of Decisions

Persons entitled to inspect records and indices.—A corporation has the same right to inspect the court records under this section as has a private individual. In re Chambers (C. C. 1891) 44 Fed. 786.

A corporation engaged in the business of insuring titles is entitled to permission to inspect the judgment indices kept by a clerk of a circuit court of the United States, in relation to transactions which are at the time depending, under proper regulations and restrictions. Commonwealth Title Ins. & Trust Co. v. Bell (C. C. 1901) 105 Fed. 548, decree affirmed Bell v. Commonwealth Title Ins. & Trust Co. (1901) 110 Fed. 828, 49 C. C. A. 208, which is affirmed (1903) 23 Sup. Ct. 569, 189 U. S. 131, 47 L. Ed. 741.

See, also, ante, § 1383, and notes.

Records open to inspection.—A citizen has not an unlimited right to inspect all the records belonging to the federal courts, but only the books containing docket or minute entries of judgments or decrees. In re Cincinnati Enquirer (C. C. 1879) Fed. Cas. No. 2,719.

Petition for leave to inspect.—A petition for leave to inspect "books containing docket and minute entries of judgments and decrees" of district and circuit courts is sufficient on general demurrer. In re Cincinnati Enquirer (C. C. 1879) Fed. Cas. No. 2,719.

Fee of clerk.—The clerk is entitled to a fee only when he is required to make the search himself. In re Chambers (C. C. 1891) 44 Fed. 786, 788.

§ 1608. (R. S. § 967.) When judgments of United States courts cease to be liens.

Judgments and decrees rendered in a [circuit or] district court, within any State, shall cease to be liens on real estate or chattels

real, in the same manner and at like periods as judgments and decrees of the courts of such State cease, by law, to be liens thereon.

Act July 4, 1840, c. 43, § 4, 5 Stat. 393.

The words of this section inclosed in brackets, "circuit or," became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

Effect of state statutes.—The lien of judgments rendered by federal courts ceases both in the same manner and at like periods as the judgments of state courts. Thompson v. Phillips (C. C. 1830) Fed. Cas. No. 13,974; Cropsey v. Crandall (C. C. 1851) Fed. Cas. No. 3,-418; Perkins v. Brierfield Iron & Coal Co. (1884) 77 Ala. 403; Abbey v. Commercial Bank (1857) 34 Miss. 571, 69 Am. Dec. 401; Chouteau v. Nuckolls (1855) 20 Mo. 442.

While, under this section and section 1540, ante, judgments recovered in federal courts were liens in all cases where they were such by the laws of the states, these sections did not recognize any right in the states to regulate the operation of federal judgments; and, in a case where the laws of the state respecting the liens of judgments were changed after the enactment of these sections into the Revised Statutes, the question whether a judgment thereafter recovered in a federal court constituted a lien upon land was one which depended upon a construction of the federal laws and rules of court, and was therefore a question of federal jurisdiction. Cooke v. Avery (1893) 13 Sup. Ct. 340, 345, 147 U. S. 375, 37 L. Ed. 209.

State statutes applicable to judgments of federal courts.—Rev. St. Mo. 1889, § 6012, limiting the liens of judgments to three years, applies to a judgment of the federal court. Dermott v. Carter (1891) 109 Mo. 21, 18 S. W. 1121.

Comp. Laws Utah, § 3414, providing that a judgment shall only be a lien on the debtor's land for five years, applies to a judgment recovered by the United States for a penalty in a criminal proceeding. Thompson v. Avery (1895) 11 Utah, 214, 39 Pac. 829.

Proceedings necessary to preserve lien.—Levy and condemnation under an execution keep a judgment alive, and preserve the lien, without a scire facias. U. S. v. Mechanics' Bank (D. C. 1829) Fed. Cas. No. 15,756.

Stay or suspension of proceedings.—Lien of judgment on real estate is not lost by suspension of proceedings after levy under execution. Green v. Allen (C. C. 1808) Fed. Cas. No. 5,753.

A stay of execution in the entry of the judgment stays the running of the statute limiting the duration of the judgment lien, though the stay be longer than the period of limitation. Mercantile Trust Co. v. St. Louis & S. F. Ry. Co. (C. C. 1895) 69 Fed. 193.

Extension of lien.—The period for which a judgment lien exists by statute cannot be extended by consent or agreement. Savings & Trust Co. of Cleveland v. Bear Valley Irr. Co. (C. C. 1898) 89 Fed. 32.

Effect of revival of judgment.—The lien of a satisfied judgment cannot be revived in favor of one of the debtors, who was a surety, to the prejudice of third persons. McLean v. Lafayette Bank (C. C. 1846) Fed. Cas. No. 8,888.

The lien of a dormant judgment is lost as against a mortgage executed by the judgment creditor during the continuance of the judgment lien, and a revival will not give it priority. Tracy v. Tracy (C. C. 1853) Fed. Cas. No. 14,128.

Suspension of lien.—The lien of the judgment on property is suspended during imprisonment on a ca. sa. in favor of other levying creditors. Griswold v. Hill (C. C.) Fed. Cas. No. 5,836.

Construction and application of state statutes.—The laws of the several states limiting the lien of judgments have been construed and applied by the federal courts in the following cases: California, in Savings & Trust Co. of Cleveland v. Bear Valley Irr. Co. (C. C. 1898) 89 Fed. 32. Georgia, In re Johnson (1901) 112 Fed. 619, 50 C. C. A. 398. Mississippi, Ford v. Delta & Pine Land Co. (C. C. 1890) 43 Fed. 181, decree affirmed (1897) 17 Sup. Ct. 230, 164 U. S. 662, 41 L. Ed. 590. Missouri, Wonderly v. Lafayette County (C. C. 1896) 74 Fed. 702. New York, Myers v. Tyson (C. C. 1876) Fed. Cas. No. 9,995. Virginia, Irwin v. Henderson (C. C. 1819) Fed. Cas. No. 7,084.

Cited without definite application, Clay v. Waters (1910) 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897; Steam Stone-Cutter Co. v. Sears (C. C. 1881) 9 Fed. 8, 10; Dartmouth Sav. Bank v. Bates (C. C. 1890) 44 Fed. 546, 547.

§ 1609. (R. S. § 968.) Plaintiff or petitioner recovering less than certain amounts to recover no costs.

When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the

amount in dispute, exclusive of costs, exceeds said sum or value; or a libelant, upon his own appeal, recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs.

Act Sept. 24, 1789, c. 20, § 20, 1 Stat. 83. Act March 3, 1803, c. 40, § 2, 2 Stat. 244.

The provisions of this section, as applying to circuit courts, became inoperative by the abolition of those courts by Jud. Code, § 289, ante, § 1266, but were made applicable to parties, actions, etc., in district courts by the transfer of the powers and duties of the circuit courts to the district courts by Jud. Code, § 291, ante, § 1268. The provision at the close of the section relating to costs on appeal by a libelant may be regarded as applicable to such appeals to circuit courts of appeals, under the provision for regulation of appeals to those courts by provisions of law previously in force, made by the Circuit Courts of Appeals Act, Act March 3, 1891, c. 517, § 11, post, § 1651.

The sum or value of $500, the recovery of which was required by this section to entitle a plaintiff to costs, corresponded to the limit of jurisdiction of the circuit courts fixed by Rev. St. § 629, par. 1; but that limit was changed to $2,000 by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, which was incorporated into Jud. Code, § 24, par. 1, ante, § 991 (1), prescribing the jurisdiction of the district courts on the abolition of the circuit courts by said Code.

The amount or taxation of costs against the unsuccessful party in civil proceedings, or against defendants convicted of crimes or misdemeanors, was not to be prevented or affected by the provisions of Act May 28, 1896, c. 252, §§ 6–15, relating to fees, etc., of district attorneys and marshals, by section 17 of that act, ante, § 1429.

Notes of Decisions

Right to costs in general.—The costs in an action at law in a federal court must be taxed against the losing party, except in the cases mentioned in this section and in R. S. § 973, post, § 1614, where the contrary is specially provided; and any resulting hardship or inequity is not cause for modification of this rule. Trinidad Asphalt Pav. Co. v. Robinson (C. C. 1892) 52 Fed. 347.

See, also, post, § 1624, and notes.

Effect of change of jurisdictional amount.—The statutes changing the jurisdictional amount but making no reference to this section do not amend it. Eastman v. Sherry (C. C. 1889) 37 Fed. 844; Johnson v. Watkins (C. C. 1889) 40 Fed. 187.

Actions in which costs may be disallowed.—In an action originally brought in a state court, and removed by defendant, the amount ultimately recovered by plaintiff, although less than $500, is entitled to costs, although, if the action had been commenced originally in the circuit court, no costs could have been recovered. Ellis v. Jarvis (C. C. 1824) Fed. Cas. No. 4,403; Field v. Schell (C. C. 1860) Fed. Cas. No. 4,771; Howard v. American Dairy, etc., Co. (C. C. 1877) Fed. Cas. No. 6,753; Kreager v. Judd (C. C. 1880) 5 Fed. 27; Scripps v. Campbell (D. C. 1876) Fed. Cas. No. 12,562. CONTRA, see Coggill v. Lawrence (C. C. 1851) Fed. Cas. No. 2,957; Brooks v. Phœnix Mut. Life Ins. Co. (C. C. 1879) Fed. Cas. No. 1,960.

A federal court, awarding nominal damages only in an action for violation of the interstate commerce act, is unauthorized to allow attorney's fees to plaintiff. Delaware, L. & W. R. Co. v. Lyne (1912) 193 Fed. 984, 113 C. C. A. 604.

This section applies to actions for infringement of patents. Kneass v. Schuylkill Bank (C. C. 1821) Fed. Cas. No. 7,786.

Where the Bank of the United States recovers less than $500 in a suit in the circuit court, it cannot recover costs, and may be adjudged to pay all costs. Bank of United States v. Roberts (C. C. 1822) Fed. Cas. No. 934.

Plaintiff in a suit against a collector to recover back excess duties removed to the federal court is not entitled to costs where he recovers less than $500. Coggill v. Lawrence (C. C. 1851) Fed. Cas. No. 2,957. CONTRA, see Field v. Schell (C. C. 1860) Fed. Cas. No. 7,771.

Where a patentee cancels a license because of a breach of its conditions, and proceeds against the licensee as an infringer, and the license is renewed after the institution of suit in a circuit court of the United States, and the citizenship of the parties gives the court jurisdiction, but the amount of royalty actually due to plaintiff is less than $500, a decree may be entered for the amount due, neither party will be allowed costs. McKay v. Jackman (C. C. 1883) 17 Fed. 641.

In an action for the recovery of excessive customs duties illegally exacted, which is brought in a state court and removed into a federal circuit court by defendant, and in which plaintiffs recover less than $50, neither plaintiffs nor defendant is entitled to costs. Richter v. Magone (C. C. 1889) 47 Fed. 192.

Under this section, where the court is without jurisdiction, costs are not allowed. National Steamship Co. v. Tugman (C. C. 1895) 67 Fed. 16, 17, modified 82 Fed. 246, 27 C. C. A. 116.

An action by a receiver of a national

bank to recover assets is not within the section. Murray v. Chambers (C. C. 1907) 151 Fed. 142.

Costs to which act applies.—The provision that where "a libelant, upon his own appeal, recovers less than $300, exclusive of costs, he shall not be allowed, but at the discretion of the court may be adjudged to pay, costs," relates to all the costs affected by the appeal. The Cassius (C. C. 1890) 41 Fed. 367.

Denial of costs to plaintiff.—The provision of this section that plaintiff shall not be allowed costs is mandatory, and the court cannot award costs to him where his recovery is less than the stated amount. Cottle v. Payne (C. C. 1808) Fed. Cas. No. 3,268; Curranee v. McQueen, Id. 3,488; Leeds v. Cameron (C. C. 1839) Fed. Cas. No. 8,206; Greene v. Bateman (C. C. 1846) Fed. Cas. No. 5,762; Brooks v. Phœnix Mut. Life Ins. Co. (C. C. 1879) Fed. Cas. No. 1,960; Gibson v. Memphis & C. R. Co. (C. C. 1887) 31 Fed. 553; Van Siclen v. Bartol (C. C. 1899) 96 Fed. 796.

Adjudging plaintiff to pay costs.—When a plaintiff recovers less, he may, in a case where the court has discretion in the matter, be taxed with the defendant's costs. Van Siclen v. Bartol (C. C. 1899) 96 Fed. 796. But plaintiff will not be adjudged to pay costs where no reason for so doing appears. Brooks v. Phœnix Mut. Life Ins. Co. (C. C. 1879) Fed. Cas. No. 1,960.

Defendant should be allowed costs where plaintiff obtained a verdict for $9.50. Coggill v. Lawrence (C. C. 1851) Fed. Cas. No. 2,957.

The court will not adjudge costs against the prevailing party if there be a reasonable expectation of recovering more than $500. Gibson v. Memphis & C. R. Co. (C. C. 1887) 31 Fed. 553.

Where a plaintiff suing on a bill of exchange exceeding $500 recovers only $400, because of the allowance of a counterclaim for breach of warranty, each party must pay his own costs. Hamilton v. Baldwin (C. C. 1890) 41 Fed. 429.

The right or duty of the court to penalize a plaintiff recovering less than $500 by requiring the payment of defendant's costs, depends upon the same facts which authorize the court to dismiss the action under Judiciary Act March 3, 1875, c. 137, § 5, ante, § 1019; and such penalty should not be imposed unless it appears to the satisfaction of the court either from the declaration or on the trial, that the damages were laid in the declaration at a sum in excess of $2,000 for the mere purpose of giving colorable jurisdiction to the court and without any expectation of recovering more than such sum. McCarthy v. American Thread Co. (D. C. 1906) 143 Fed. 678.

Amount of recovery.—Where plaintiff below had no right to recover any part of her future alimony and maintenance, represented by a certain sum, and the excess of the amount of the judgment over that sum was less than $500, exclusive of interest, she was not entitled to recover costs in the action below. Israel v. Israel (1906) 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168, 8 Ann. Cas. 697.

One who recovers damages from three railroad companies aggregating more than $500, but at their request, under the Tennessee Code practice, the verdicts and judgments are separated, and the recovery against each is less than $500, is nevertheless entitled to costs. Johnson v. Mississippi & T. R. Co. (C. C. 1887) 31 Fed. 551.

Amendment of claim for damages.—The court must allow amendments liberally, and may allow an amendment increasing the damages demanded, so as to make the controversy within the jurisdiction of the court, subject to the denial of costs for overestimate of the damages as prescribed by this section. Davis v. Kansas City, S. & M. R. Co. (C. C. 1887) 32 Fed. 863, 864.

Cited without definite application, Tennent-Stribling Shoe Co. v. Roper (1899) 94 Fed. 739, 743, 36 C. C. A. 455; Chesapeake Transit Co. v. Matt (1909) 169 Fed. 543, 95 C. C. A. 41; Blue Grass Canning Co. v. Steward (1909) 175 Fed. 537, 99 C. C. A. 159; Allen v. Fairbanks (C. C. 1891) 45 Fed. 445, 448.

§ 1610. (R. S. § 969.) Costs in internal revenue suits upon information.

When a suit for the recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector, or inspector of internal revenue, the United States shall not be subject to any costs of suit.

Act July 13, 1866, c. 184, § 9, 14 Stat. 111.

§ 1611. (R. S. § 970.) Claimant not entitled to costs when reasonable cause of seizure.

When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure,

judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.

Act March 2, 1799, c. 22, § 89, 1 Stat. 695, 696. Act Feb. 24, 1807, c. 19, § 1, 2 Stat. 422.

Notes of Decisions

Construction and operation of section in general.—The question of the certificate and entry of reasonable cause to protect the seizors from future liability is no part of the issue, and, being posterior to the trial, does not affect the competency of informers as witnesses. Taylor v. U. S. (1845) 3 How. 197, 207, 11 L. Ed. 559.

This section substantially re-enacts Act Feb. 24, 1807 (2 Stat. 422). The Conqueror (1897) 17 Sup. Ct. 510, 515, 166 U. S. 110, 41 L. Ed. 937.

This section is not inconsistent with R. S. § 989, post, § 1635; but their effect, when construed together, is to limit the claimant in case of seizure for probable cause to an action for loss or damage to his property while in the custody of the officer, and to convert the judgment recovered therefor into a claim against the government, where the court certifies that the officer acted either upon probable cause or under the directions of a superior officer. Agnew v. Haymes (1905) 141 Fed. 631, 72 C. C. A. 325.

Seizures to which section is applicable.—A municipal seizure cannot be justified or excused on the ground of probable cause, unless under the special provision of some statute. The Apollon (1824) 9 Wheat. 362, 372, 6 L. Ed. 111.

This section is confined to cases in which the collector or other officer making a seizure, followed by a suit or prosecution in the name of the United States for a penalty or forfeiture, and does not apply where a vessel is simply detained, under R. S. § 2964, post, § 5648, for nonpayment of duties claimed. A certificate given in such a case does not protect the collector from a judgment for damages. The Conqueror (1897) 17 Sup. Ct. 510, 515, 166 U. S. 110, 41 L. Ed. 937.

This section applies to all seizures under any act of Congress, but is of no avail to officers of the revenue in a number of instances in which they may be sued for damages for an act done in the performance of official duty, as the section is confined solely to cases of seizure where there is a prosecution in court against the property seized. Agnew v. Haymes (1905) 141 Fed. 631, 72 C. C. A. 325.

The seizure of a vessel which, under a codfishing license, has incidentally caught mackerel. is a municipal seizure, expressly provided for by acts of congress as justifiable if a certificate of probable cause is given. U. S. v. The Reindeer (C. C. 1848) Fed. Cas. No. 16,145.

Cost of custody of vessel seized on probable cause.—Where a vessel was seized by the collector on probable cause and libeled by the seamen for their wages, but thereafter restored to the owners, the cost of her custody was chargeable to the United States. The Louisetta (C. C. 1814) Fed. Cas. No. 8,535.

"Reasonable cause."—A doubt respecting the law furnishes a proper ground for granting to the collector a certificate of probable cause of seizure. U. S. v. Riddle (1809) 9 U. S. (5 Cranch) 311, 3 L. Ed. 110; Averill v. Smith (1872) 17 Wall. 82, 92, 21 L. Ed. 613; The Friendship (C. C. 1812) Fed. Cas. No. 5,125; U. S. v. The Recorder (C. C. 1849) Fed. Cas. No. 16,-130; Same v. Twenty-Six Diamond Rings (D. C. 1855) Fed. Cas. No. 16,572.

Reasonable and probable cause are synonymous. Stacey v. Emery (1878) 97 U. S. 642, 643, 24 L. Ed. 1035; U. S. v. The City of Mexico (D. C. 1885) 25 Fed. 924.

Concealment and undervaluation of goods are good grounds for a decision of the court that probable cause of prosecution existed. Taylor v. U. S. (1845) 44 U. S. (3 How.) 197, 11 L. Ed. 559.

Where the proof shows that defendant made the seizure by direction of the Commissioner of Internal Revenue, based upon information received from his special agents which justified a suspicion that the plaintiff was violating the law, the court is warranted in charging the jury as matter of law that there was probable cause. Agnew v. Haymes (1905) 141 Fed. 631, 72 C. C. A. 325, reversing judgment Haymes v. Brown (C. C. 1904) 132 Fed. 525.

The fact that the goods seized were not on the manifest shows that there was reasonable ground for seizure, and claimant cannot recover costs. U. S. v. Lot of Silk Umbrellas (C. C. 1881) 12 Fed. 412.

Where the seizure is under circumstances warranting suspicion, the collector is entitled to a certificate of probable cause. U. S. v. Three Bales

of Cloth (D. C. 1840) Fed. Cas. No. 16,495.

On judgment for claimant of property seized by officers of the customs service for forfeiture, on the ground that it was fraudulently imported, a certificate of reasonable cause should be entered, although the verdict of the jury was clearly right, under the evidence, where it is affirmatively shown that the officers who instituted the proceedings acted in good faith and on reasonable ground of suspicion. U. S. v. 83 Sacks of Wool and 5,974 Sheepskins (D. C. 1906) 147 Fed. 747.

Where claimant's goods, which were seized for a violation of section 4130, post, had a store on land open to settlement near the line of a reservation, and traded at his store, without a license, with Indians from the reservation and others, there was no error in refusing a certificate of probable cause under this section. U. S. v. Certain Property (1871) 1 Ariz. 31, 25 Pac. 517.

Duty to grant certificate.—Where it appears to the court that there is a reasonable cause of seizure, it is its duty to cause a proper certificate to be made thereof, and its decision, and the reason entitling defendant to exemption, or the motive for granting the certificate, are no part of the record. Stacey v. Emery (1878) 97 U. S. 642, 643, 24 L. Ed. 1035.

Requisites of certificate.—A certificate of probable cause need not recite the reason which justifies its issuance. Stacey v. Emery (1878) 97 U. S. 642, 24 L. Ed. 1035.

Effect of certificate of reasonable cause, or denial or failure to give it.—Where a suit is brought in a state court against the seizing officer, the certificate of reasonable cause may be pleaded in that court in bar, but the denial of the certificate is conclusive that the seizure was tortious. Gelston v. Hoyt (1818) 3 Wheat. 246, 319, 4 L. Ed. 381.

In an action against an internal revenue officer for a wrongful seizure of property which has been returned to the claimant intact, proof of probable cause for such seizure is a complete defense, and may be made, although the court, in rendering judgment for the claimant in a proceeding for the forfeiture of the property, failed to make the certificate of probable cause. Agnew v. Haymes (1905) 141 Fed. 631, 72 C. C. A. 325, reversing judgment Haymes v. Brown (C. C. 1904) 132 Fed. 525.

Proof of probable cause, shown by the certificate of the district court, is a good defense to an action of trespass brought by the claimant against a collector of internal revenue who seized the property for forfeiture. Averill v. Smith (1872) 84 U. S. (17 Wall.) 82, 21 L. Ed. 613.

Right to appeal from granting or denial of certificate.—The refusal of the court to enter of record a certificate of probable cause is not a final judgment from which an appeal will lie. U. S. v. Frerichs (1882) 1 Sup. Ct. 169, 106 U. S. 160, 27 L. Ed. 128.

Return of property to claimant.—The fact that, after a decree discharging property seized for forfeiture by an internal revenue collector, the collector neglected to return the property, does not make him a trespasser ab initio, where the property was taken out of his possession by process issued by the district court and remained in the custody of the marshal. Averill v. Smith (1872) 84 U. S. (17 Wall.) 82, 21 L. Ed. 613.

A claimant of property seized for forfeiture by a collector of internal revenue should, on the rendition of the decree directing its discharge, move the court for the necessary orders to cause the property or its proceeds to be returned to the rightful owner. Id.

Cited without definite application, Lowe v. Kansas (1896) 16 S. Ct. 1031, 1035, 163 U. S. 81, 41 L. Ed. 78; Ex parte Davis (C. C. 1901) 112 Fed. 139; Haymes v. Brown (C. C. 1904) 132 Fed. 525, reversed (1905) 141 Fed. 631, 72 C. C. A. 325.

§ 1612. (R. S. § 971.) Double costs when plaintiff is nonsuited in action against officer making seizure, etc.

If, in any suit against an officer or other person executing or aiding or assisting in the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs.

Act March 2, 1799, c. 22, § 71, 1 Stat. 678.

§ 1613. (R. S. § 972.) Copyright suits; full costs allowed.

In all recoveries under the copyright laws, either for damages, forfeitures, or penalties, full costs shall be allowed thereon.

Act July 8, 1870, c. 230, § 108, 16 Stat. 215.

Notes of Decisions

Circumstances justifying disallowance of costs.—Where, though plaintiff's copyright was not infringed, he was led to so believe by a combination of circumstances and sued for infringement in good faith, costs should not be awarded against him. Vernon v. Sam S. & Lee Shubert (D. C. 1915) 220 Fed. 694.

§ 1614. (R. S. § 973.) Costs not recoverable in certain suits for infringement of patent, unless disclaimer entered, etc.

When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered, unless the proper disclaimer, as provided by the patent-laws, has been entered at the Patent-Office before the suit was brought.

Act July 8, 1870, c. 230, § 60, 16 Stat. 207.

Notes of Decisions

Construction and operation of section in general.—Where infringement of a patent is both alleged and denied in general terms, without particularizing any claims, but at the trial the issue is confined solely to one claim, which is sustained, there is no necessity for filing any disclaimer, and a failure to do so does not affect the court's discretion to allow costs to complainant. Gamewell Fire-Alarm Telegraph Co. v. Municipal Signal Co. (1896) 77 Fed. 490, 23 C. C. A. 250.

Where a complainant alleges infringement of two claims of a patent, and recovers as to one, but the other is held void for anticipation, he cannot recover costs. Metallic Extraction Co. v. Brown (1901) 110 Fed. 665, 49 C. C. A. 147.

Where one claim of a patent is adjudged void in a suit for infringement, the complainant is precluded from recovering costs, although other claims are held valid and infringed, unless a proper disclaimer as to the void claim was entered before the suit was brought. Fairbanks, Morse & Co. v. Stickney (1903) 123 Fed. 79, 59 C. C. A. 209, reversing decree Fairbanks, Morse & Co. v. C. A. Stickney & Co. (C. C. 1902) 115 Fed. 720.

The costs in an action at law in a federal court must be taxed to the losing party, except in the cases mentioned in this section and in R. S. § 968, ante, § 1609, where the contrary is specially provided; and any resulting hardship or inequity is not cause for modification of this rule. Trinidad Asphalt Pav. Co. v. Robinson (C. C. 1892) 52 Fed. 347.

This section applies only where a disclaimer is necessary to save the patent. National Electric Signaling Co. v. De Forest Wireless Telegraph Co. (C. C. 1905) 140 Fed. 449. And to a suit in which certain claims of a patent are held valid and infringed, while other independent claims infringement of which is alleged are held invalid. General Electric Co. v. Crouse-Hinds Electric Co. (C. C. 1906) 147 Fed. 718.

See, also, post, § 9468, and notes.

Costs on appeal.—This section applies only to costs in the trial court, and not to costs on appeal, the allowance or refusal of which is to be determined by the appellate court in view of the special circumstances of the case. Where the court below denied all relief and dismissed the bill which action was reversed on appeal as to certain claims of the patent, complainant will be awarded costs in the appellate court. Kahn v. Starrels (1905) 136 Fed. 597, 69 C. C. A. 371.

This section does not apply to the costs in an appellate court, where the decree below dismissing the suit is found erroneous, and the complainant was compelled to appeal to obtain the relief to which he was entitled. Johnson v. Foos Mfg. Co. (1906) 141 Fed. 73, 72 C. C. A. 105.

Effect of failure to file disclaimer.—Where, in a suit for infringement of a patent, one claim involved is held valid and infringed, and another void for lack of invention, while the complainant cannot recover costs unless a disclaimer is filed as to the claim adjudged invalid, such disclaimer will not be required as a condition precedent to the recovery of profits or damages for infringement of the valid claim. Plecker v. Poorman (C. C. 1905) 147 Fed. 528.

Cited without definite application, Kirk v. Du Bois (C. C. 1891) 46 Fed. 486, 487, affirmed (1895) 15 Sup. Ct. 729, 158 U. S. 58, 39 L. Ed. 895.

§ 1615. (R. S. § 974.) When costs of prosecution to be paid by defendant.

When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its

discretion, award that the defendant shall pay the costs of the prosecution.

Act May 8, 1792, c. 36, § 5, 1 Stat. 277.

Notes of Decisions

Discretion of court.—Whether the court will impose costs on defendant, convicted of a criminal offense, and, if so, on which count of the indictment, is a matter of discretion. Morris v. U. S. (1911) 185 Fed. 73, 107 C. C. A. 293.

Power of appellate court.—Where a defendant was convicted in a criminal case, in which the court had discretionary power to impose upon him the costs of prosecution, and the court imposed separate sentences on different counts of the indictment, under one of which he was required to pay the costs, on a reversal by the appellate court as to such count only, and the issuance of a mandate affirming the judgment as to the other counts, but directing the trial court to sustain the motion in arrest as to such count, that court had no power to modify the judgment as to any of the other counts, by adding the imposition of costs. Morris v. U. S. (1911) 185 Fed. 73, 107 C. C. A. 293.

Costs of preliminary examination.—A defendant who has been discharged by the commissioner on preliminary examination, and is afterwards indicted and convicted on the same charge, should not be taxed with the costs of the examination before the commissioner. U. S. v. Leopold (D. C. 1890) 43 Fed. 785.

Action for penalty.—An action by the United States to recover from a carrier the penalty imposed by §§ 8651–8654, post, for confining live stock more than 28 consecutive hours, is a civil action, with all the ordinary incidents of such an action, including liability of the defeated party for costs; but, if regarded as penal, on a recovery by the government, the defendant is subject to the payment of costs by the terms of this section. U. S. v. Southern Pac. Co. (C. C. 1909) 172 Fed. 909.

Defendant's witness fees.—The court having no power to order the payment of witness fees, except in cases to which the United States is a party, special authority to the marshal to pay the fees of defendant's witnesses must be asked from the department of justice, if the defendant's witnesses are to be paid by the government. State of Virginia v. Felts (C. C. 1904) 133 Fed. 85.

Liability of prosecutor for costs.—Liability of the prosecutor for costs where defendant is acquitted. U. S. v. Flanakin (Super Ct. Ark. 1825) Fed. Cas. No. 15,119a.

The prosecutor will be required to give security for costs where he has removed from the district, and has no property. U. S. v. Dulany (C. C. Dist. Col. 1809) Fed. Cas. No. 15,000.

§ 1616. (R. S. § 975.) When costs are recovered by defendant in a prosecution.

If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant.

Act May 8, 1792, c. 36, § 5, 1 Stat. 277.

The person prosecuting a suit for violation of R. S. § 3490, post, § 6411, in making a false claim against the United States, is entitled to one-half of the amount of the forfeiture and damages he shall recover and collect, and to all costs the court may award against the defendant, but is liable for all costs incurred by himself in the case, by R. S. § 3493, post, § 6414.

Notes of Decisions

Suit under unconstitutional statute.—Where an action was brought to recover a penalty under the civil rights act of March 1, 1875, post, § 3928, and the same was discontinued, upon the recent decision of the supreme court holding the act unconstitutional, the defendant was entitled to costs, under this section; but, independent of it, costs could not be denied through any want of jurisdiction, since this court has jurisdiction of the subject-matter and the determination of the question of the validity of the act. Cooper v. New Haven Steamboat Co. (D. C. 1883) 18 Fed. 588.

Security for costs by informer.—On a libel for a violation of the act providing for the better security of passengers on steam vessels, the court may require the informer to give security for costs, and on his failure to do so may strike out his name, and let the suit proceed in the name of the United States alone. Aliter, if the informer is an officer whose duty it is to institute the pro-

ceedings. U. S. v. The Planter (D. C. 1852) Fed. Cas. No. 16,054.

Cited without definite application, Francis v. U. S. (1866) 5 Wall. 338, 341, 18 L. Ed. 603; Lowe v. Kansas (1896) 16 Sup. Ct. 1031, 1033, 163 U. S. 81, 41 L. Ed. 78; U. S. v. Stocking (D. C. 1898) 87 Fed. 857, 861.

§ 1617. (R. S. § 976.) Fees of clerk, marshal, etc.; when payable by informer; when by United States.

If any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be alone liable to the clerk, marshal, and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same; in which case the United States shall be responsible for such fees.

Act Feb. 28, 1799, c. 19, § 8, 1 Stat. 626.
See note to preceding section.

Notes of Decisions

Repayment of fees.—Fees paid to the officers of the court by the claimant of property seized are not to be repaid by the United States, under this section, where the libel is dismissed. In re Stover (C. C. 1851) Fed. Cas. No. 13,506.

Cited without definite application, U. S. v. Davis (1893) 54 Fed. 147, 153, 4 C. C. A. 251; Same v. Stocking (D. C. 1898) 87 Fed. 857, 861.

§ 1618. (R. S. § 977.) Costs when several actions are brought against parties who might be joined in one.

If several actions or processes are instituted, in a court of the United States or one of the Territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court.

Act July 22, 1813, c. 14, § 1, 3 Stat. 19.

Notes of Decisions

Purpose of statute.—This and the following section indicate that the legislation of Congress was directed to the trial of cases at the same time by formal consolidation or otherwise, when the time of the court could be thereby saved, costs and expenses avoided, and the rights of the parties litigant not prejudiced. Keep v. Indianapolis & St. L. R. Co. (C. C. 1882) 10 Fed. 454, 459.

Cited without definite application, Pennsylvania v. Wheeling & Belmont Bridge Co. (1855) 18 How. 460, 461, 15 L. Ed. 449.

§ 1619. (R. S. § 978.) Allowance of costs in libels against vessel and cargo.

When proceedings are had before a court of the United States or of the Territories, on several libels against any vessel and cargo, which might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libeling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned.

II. Taxation of costs in general—Cont'd.
7. Stipulation as to costs.
8. Order taxing costs.
9. Taxation on motions, orders, and judgments in general.
10. Retaxation.
11. Appeal from taxation of costs.
12. Liability of United States for costs.

III. Fees and expenses—Taxation as costs
13. In general.
14. Costs unnecessarily incurred.
15. Attorney's fees.
16. Witness fees.
17. Clerk's expenses.
18. Expense of exhibits.
19. Expense of procuring bonds.
20. Expense of printing.
21. Expense of copies.
22. Stenographer's charges.
23. "Exemplifications."
24. Cost of depositions and testimony.
25. —— Traveling expenses.
26. Cost of transcript.
27. Nonpayment of prior costs.
28. Failure to give security.

IV. Persons entitled to, and persons liable for, costs
29. "Prevailing party."
30. —— Partial success.
31. "Losing party."
32. Ownership of costs.

V. Costs in equity and admiralty
33. Taxation.

I. HISTORY, CONSTRUCTION, AND OPERATION OF STATUTE

1. History.—This section is taken bodily from Fee Act Feb. 26, 1853. Before the enactment of the statute the practice had generally been in accordance with the statute of Gloucester (6 Edw. I., c. 2). Trinidad Asphalt Pav. Co. v. Robinson (C. C. 1892) 52 Fed. 347, 348.

The common law gave costs in no case, and the statute of Gloucester gave them only where damages were recoverable before the statute. Kneass v. Schuylkill Bank (C. C. 1821) Fed. Cas. No. 7,876.

As to the allowance of costs in the federal courts prior to the fee bill of 1853, see Costs, Fees, and Compensations in Prize Cases (D. C. 1862) Fed. Cas. No. 18,283.

2. Construction and operation in general.—A judgment entered by a federal court in an action at law, which includes costs against the losing party, is none the less final because a blank is left for the insertion of the amount of such costs when taxed, such taxation and entry being made as of course under this section by the judge or clerk, and requiring no further judicial action, and the time for suing out a writ of error to review such judgment runs from such entry, and not from the time when the blank is filled. Allis-Chalmers Co. v. U. S. (1908) 162 Fed. 679, 89 C. C. A. 471.

3. —— State legislation.—In suits at common law, costs can only be awarded as authorized by statute. Coggill v. Lawrence (C. C. 1851) Fed. Cas. No. 2,957.

In the eastern division of the New York circuit, actual disbursements necessarily incurred have been taxed; this section not being regarded as exclusive. Gunther v. Liverpool, L. & G. Ins. Co. (C. C. 1882) 10 Fed. 830.

The provisions of the Revised Statutes of the United States made no change in the pre-existing laws upon the subject of costs; and the cases of U. S. v. Treadwell (D. C. 1883) 15 Fed. 532, and Cooper v. New Haven Steam-Boat Co. (D. C. 1883) 18 Fed. 588, so far as they intimate the contrary view, are disapproved. Pentlarge v. Kirby (C. C. 1884) 20 Fed. 898.

In cases of original jurisdiction the provision herein for taxation of costs has been regarded as mandatory, and exclusive of all state legislation. Congress having legislated on the subject, it would seem, on familiar principle, that there is no room for the application of any other rule of taxation in such cases than that fixed by the statute. Trinidad Asphalt Pav. Co. v. Robinson (C. C. 1892) 52 Fed. 347, 348.

The right to costs is dependent on statutory provisions; there being no right thereto at common law. Tesla Electric Co. v. Scott (C. C. 1900) 101 Fed. 524.

Prior to the passage of this act the taxing of costs conformed to the practice in the state, and the same since its enactment as to all items of costs not specially covered thereby. Primrose v. Fenno (C. C. 1902) 113 Fed. 375, 376.

As to taxation of costs in conformity with state practice, see §§ 1537, 1538, ante.

II. TAXATION OF COSTS IN GENERAL

4. Want of jurisdiction, dismissal, and nonsuit.—Costs are not allowed if the action is dismissed for want of jurisdiction. Bank of Cumberland v. Willis (C. C. 1839) Fed. Cas. No. 885; Burnham v. Rangeley (C. C. 1847) Fed. Cas. No. 2,177; Pentlarge v. Kirby (C. C. 1884) 20 Fed. 898. Or on reversal in circuit court for want of jurisdiction. Agnew v. Dorman (C. C. 1838) Fed. Cas. No. 100. Therefore a federal court has no authority to award costs on dismissal of an action on the ground that the state court from which it was removed was without jurisdiction. Parks Co. v. City of Decatur, Illinois (1905) 138 Fed. 550, 70 C. C. A. 674. Likewise, where a petition to declare a debtor an involuntary bankrupt is dismissed for want of jurisdiction, the court cannot adjudge costs to the debtor. In re Williams (1903) 120 Fed. 34. But if the court had jurisdiction when the action was commenced, the repeal of the law which gave the jurisdiction will not affect plaintiff's right to costs.

Walker v. Smith (C. C. 1804) Fed. Cas. No. 17,087.

The rule existing in the federal courts that, where the case is one of which the court has no jurisdiction, it is the duty of the court to dismiss it on that ground, without costs, was not changed by the Revised Statutes. Pentlarge v. Kirby (C. C. 1884) 20 Fed. 898, disapproving U. S. v. Treadwell (D. C. 1883) 15 Fed. 532, and Cooper v. New Haven Steamboat Co. (D. C. 1883) 18 Fed. 588.

Where the record on a writ of error failed to show federal jurisdiction, necessitating a reversal, but defendants in error did not raise the jurisdictional question, either in the trial court or in the Circuit Court of Appeals, the judgment would be reversed without costs of the appeal, and in the absence of amendment in the Circuit Court the cause would be dismissed without costs in that court. Newcomb v. Burbank (1910) 181 Fed. 334, 104 C. C. A. 164.

Where plaintiff took a nonsuit in a state court after the hearing of the evidence and the giving of the instructions, and then, within the year, reinstituted the same action in the same court, a motion should have been entertained on removal to stay further proceedings until plaintiff has satisfied the costs in the first proceeding. Buckles v. Chicago, M. & St. P. Ry. Co. (C. C. 1891) 47 Fed. 424.

Plaintiff took a nonsuit in a state court after the hearing of the evidence and the giving of the instructions, and then within a year reinstituted the action in the same court. The cause was then removed, and in the federal court a motion was granted to stay further proceedings until plaintiff had satisfied the costs in the first proceeding. Held, that though the order be not considered as res judicata, the court would not entertain a motion to set it aside, and proceed with the cause, when no new facts were shown, and it did not appear that any new knowledge had come to plaintiff, and her only excuse for failure to pay the costs was her poverty. Buckles v. Chicago, M. & St. P. Ry. Co. (C. C. 1893) 53 Fed. 566.

A suit to recover for a tort will be stayed until the plaintiff pays the costs of a former action between the same parties on the same cause of action in another federal court, in which he submitted to a voluntary nonsuit. Kimble v. Western Union Tel. Co. (C. C. 1900) 99 Fed. 892.

Where plaintiff, in an action for personal injuries, takes a nonsuit, a judgment against him for costs is the only judgment it is proper to enter. Thomason v. Southern Ry. Co. (1902) 113 Fed. 80, 51 C. C. A. 67.

Costs are not given upon reversal in supreme court where the bill is ordered to be dismissed. Conway v. Alexander (C. C. 1812) Fed. Cas. No. 3,146.

A dismissal "without costs to either party" does not relieve the parties from liability to the clerk for fees for services rendered at their request. In re Stover (C. C. 1852) Fed. Cas. No. 13,507.

5. Consolidated cases.—Where the parties consolidate the records in two cases so as to render it impracticable for the appellate court to apportion between the two suits the expense of taking the proofs, it will leave the matter to the circuit court. Davis v. Parkman (1895) 71 Fed. 961, 18 C. C. A. 398, affirming decree (C. C. 1891) 45 Fed. 693.

Where the record in several cases tried together was printed but once, it was proper for the clerk to tax one fee for supervising the record as authorized by rule 23, par. 7, and divide the amount of such fee among the three cases. L. E. Waterman Co. v. Lockwood (C. C. 1904) 128 Fed. 174.

6. Offer of judgment or payment.—An offer to pay wages at the owner's counting house, and a refusal to pay elsewhere, does not exonerate him from costs. The Sarah Jane (D. C. 1833) Fed. Cas. No. 12,348.

A mere attempt to negotiate a compromise of a claim at an amount specified, unaccompanied with a tender or direct offer to pay such amount, does not operate as an equitable bar to costs. The H. B. Foster (D. C. 1848) Fed. Cas. No. 6,290.

Tender made before suit brought, and not repeated in court, does not bar costs. Bounty v. Kerrin (D. C. 1856) Fed. Cas. No. 1,697a.

A tender after suit brought is only effectual to stop costs from the time it is made. Leitch v. Union R. Transp. Co. (D. C. 1875) Fed. Cas. No. 8,224.

A charterer is not relieved from the payment of costs, in a suit against him to recover charter hire, by an offer to pay less than the sum due, renewed after suit brought, but without paying the money into court, or including in the offer costs up to the time it was made. Donaldson v. Severn River Glass Sand Co. (D. C. 1905) 138 Fed. 691; Severn River Glass Sand Co. v. Donaldson, Id. 694.

Costs will be allowed on an offer of judgment, where it did not definitely state to whom the amount of the judgment is due. Flannery v. New England Transp. Co. (D. C. 1908) 168 Fed. 397.

7. Stipulation as to costs.—Where the parties stipulated that complainants were not to be charged with the defendant's costs or expenses, and the defendant's attorney did not object, the subsequent filing of a cost bill for defendant's solicitor's fees is a violation of the agreement. Cahn v. Qung Wah Lung (C. C. 1886) 28 Fed. 396.

It is against public policy to stipulate that any statutory provision as to the expenses of litigation is to be waiv-

ed, and to agree, either with or on behalf of the referee, that anything he and the successful party may agree upon shall be collected from the unsuccessful party, without the power of review by any court, even that by whose order reference is had. New Jersey Terminal Dock & Improvement Co. v. Estates of Long Beach (C. C. 1910) 179 Fed. 973.

8. Order taxing costs.—After continued litigation both parties were in part successful, defendant finally securing a decree for $19,000 and interest for five years against plaintiff. An appeal was taken, on which the appellate court directed that the costs in both the trial court and on appeal should be borne equally between plaintiffs and defendant. Held, that the costs referred to were ordinary costs, incident to the litigation, and did not include the expenses of a receivership. Kell v. Trenchard (1906) 146 Fed. 245, 76 C. C. A. 611.

Where a judgment was reversed on a writ of error, "with costs of this appeal," the Circuit Court, in carrying out such mandate, could not direct that certain of such costs should abide the event. Berthold v. Burton (C. C. 1909) 169 Fed. 495.

9. Taxation on motions, orders, and judgments in general.—Where the time of a court has been taken up in the trial of a cause upon a declaration which does not show jurisdiction, the fault is essentially that of plaintiff or his counsel, and he may properly be charged with the costs; and the court will not undertake to inquire whether counsel for defendant had knowledge of the fact, and failed in his duty to bring it to the court's attention. Houston v. Filer & Stowell Co. (1901) 105 Fed. 538, 44 C. C. A. 583.

Where a mandamus proceeding was brought against a carrier and its president to prohibit discrimination, and, though the mandate was addressed to the railroad company and to its president, "and each of them according to their several and respective powers," the judgment for costs went against the carrier alone, such judgment was not joint, but should be taken distributively, as affecting the president only according to his powers. West Virginia Northern R. Co. v. U. S. (1904) 134 Fed. 198, 67 C. C. A. 220, affirming judgment U. S. v. West Virginia Northern R. Co. (C. C. 1903) 125 Fed. 252.

There is no federal statute nor rule of the Supreme Court giving costs to the prevailing party on a mere order to show cause issued on a petition for a writ of mandamus; and the question of costs in such case is therefore governed by the principles which apply to a bill in equity. In re Haight & Freese Co. (1908) 164 Fed. 688, 90 C. C. A. 285.

On a petition for a writ of mandamus against a judge, even where the writ is granted, costs will not be taxed against the judge, although they may be against the adverse parties if they appear on summons or notice and resist the application on the merits; but, where they merely appear and move to dismiss on the ground that the order complained of has been vacated and the writ has become unnecessary, which motion is granted, costs will not be allowed to either party. Id.

Costs on appeal from a justice of the peace are in the court's discretion, where the judgment is affirmed. Mead v. Scott (C. C. 1807) Fed. Cas. No. 9,368.

The party obtaining a continuance must pay the costs of the term. Patton v. Blackwell (C. C. 1809) Fed. Cas. No. 10,831.

Where a juror is withdrawn on motion of plaintiff and consent of defendant, who elects a continuance of the cause, he is not entitled to costs also. Macomber v. Clarke (C. C. 1828) Fed. Cas. No. 8,918.

It is in the discretion of the trial court to allow or refuse costs upon reversal of a judgment of a justice of the peace. Ward v. Washington (C. C. 1832) Fed. Cas. No. 17,163.

No fees or costs are taxable, in a suit to recover back an excess of duties, on a reference to the collector to adjust the amount of the recovery. Field v. Schell (C. C. 1860) Fed. Cas. No. 4,771.

After hearing the opening of the case the court of its own motion, neither party objecting, discharged the jury and appointed an auditor. After the coming in of his report plaintiff moved to amend his writ so as to embrace all matters which he maintained were within the scope of the report, and, his motion being disallowed, submitted to a discontinuance. Afterwards each party paid one-half of the auditor's fee. Held that, under the circumstances, no part of the fee paid by either party should be taxed in his favor against the other. Primrose v. Fenno (C. C. 1902) 113 Fed. 375.

A dismissal on pleading a defense in the nature of a plea puis darrein continuance, although set up by answer in accordance with the state Code of Procedure, carries with it the right to the plaintiff to recover the costs accruing up to the time the pleading was filed. Petit v. Western Coal & Mining Co. (C. C. 1903) 123 Fed. 840.

In what cases costs may be taxed for motions to postpone the hearing of a cause called in its order on the calendar, see Manchester v. Milne (D. C. 1848) Fed. Cas. No. 9,007.

In what cases costs may be taxed upon motions to enlarge time to answer, for a final decree, for costs, for a reference, etc. Id.

10. Retaxation.—Defendant, having been cast in an action at law, sued out a writ of error and paid the clerk for certifying the record $815.50, which was at the rate of 10 cents a folio. Judgment having been reversed, the clerk certified such amount in a statement of costs to the defendant on which settlement was made between the parties; plaintiffs paying the amount and defendants giving a receipt in full. It being subsequently determined that the clerk was entitled to 15 cents a folio, they were retaxed for the difference demanded. Held, that defendants, having been successful on appeal, were not bound to pay such difference on retaxation, even though the clerk might have exacted the same from them in the beginning, or might sue for them as for unpaid services. Hoysradt v. Delaware, L. & W. R. R. (C. C. 1910) 182 Fed. 880.

Though a taxation or retaxation of costs can only be made at the instance of a party, and must be confined to the compensation of the parties for the expenses of litigation, as distinguished from officers' fees, it is unnecessary that unpaid fees of officers shall be formally taxed as costs in order to support an execution therefor; it being sufficient that they are noted of record or are entered on the writ. Id.

A retaxation will be allowed where, by mistake or other casualty, the original taxation was not opposed. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

11. Appeal from taxation of costs.—An assignment of error in respect to the clerk's taxation of costs cannot be considered when there is nothing in the record to show that the matter was brought to the attention of the judge below. The Robert Graham Dun (1895) 70 Fed. 270, 17 C. C. A. 90, affirming decree Grant v. The Robert Graham Dunn (D. C. 1894) 63 Fed. 167.

A writ of error or appeal cannot be taken to review the decision of the clerk upon a taxation of costs, though a decision of the court affirming or reversing a decision of the clerk upon an appeal taken pursuant to the rules of the circuit court may in some cases be so reviewed. Tyler Min. Co. v. Sweeney (1897) 79 Fed. 277, 24 C. C. A. 578.

In order to lay the foundation for the review by the circuit court of appeals of an order of the circuit court affirming on appeal a taxation of costs by the clerk (if an appeal from such an order will lie), the specific items to which objection is made in the taxation by the clerk should be distinctly pointed out, and the reasons for the objections stated and filed, so as to be shown by the record. Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. (1900) 101 Fed. 282, 41 C. C. A. 351, writ of certiorari denied (1901) 22 Sup. Ct. 933, 183 U. S. 696, 46 L. Ed. 394.

Objections to the costs allowed by the trial court cannot be raised for the first time on appeal. Guffey v. Alaska & P. S. S. Co. (1904) 130 Fed. 271, 64 C. C. A. 517.

A judgment respecting costs will not be reviewed unless the attention of the trial court was called to the grounds of objection thereto, and proper exception was reserved. Bluegrass Canning Co. v. Steward (1909) 175 Fed. 537, 99 C. C. A. 159.

Circuit court rule 23, providing for the taxation of costs by the clerk and for an appeal therefrom to the court within 10 days "after such taxation by the clerk, but not afterwards," requires the taking of an appeal within 10 days after the taxation by the clerk. Snyder v. McCarthy (1912) 197 Fed. 166, 116 C. C. A. 390.

Where an appeal from the taxation of costs by the clerk is taken after the time fixed by circuit court rule 23, and the successful party brings the same on for determination before the court on notice of time of hearing, he does not waive the objection that the appeal was not taken within the 10 days. Id.

Where, upon an appeal from the taxation of costs, a party for the first time applies to the court to declare certain depositions to be incompetent and immaterial, it is a sufficient ground for denying the application that the party did not, at or before the final hearing, or before the taxation of costs, move to strike out the evidence in question. Wooster v. Handy (C. C. 1885) 23 Fed. 49.

No allowance of traveling fees can be made where the party does not appeal from the disallowance thereof by the clerk. Tuck v. Olds (C. C. 1886) 29 Fed. 883.

The discretionary power of the court over the award of costs cannot be exercised on an appeal from taxation. The Caithneshire (D. C. 1848) Fed. Cas. No. 2,294.

12. Liability of United States for costs.—Costs are not to be awarded against the United States. U. S. v. Hooe (1805) 3 Cranch, 73, 92, 2 L. Ed. 370.

A party suing the United States cannot recover costs unless he shows by the act under which he sues that the United States has consented to pay costs. Marine v. Lyon (1894) 62 Fed. 153, 10 C. C. A. 315.

III. FEES AND EXPENSES—TAXATION AS COSTS

13. In general.—Claims for money paid out for printing and for stenographer's services are properly disallowed when it is not shown that the expenditures were proper and necessary. U. S. v. Colman (1896) 76 Fed. 214, 22 C. C. A. 135, writ of error dismissed (1898) 18 Sup. Ct. 948, 42 L. Ed. 1215.

A consent to a taxation of costs

equitably made by the clerk cannot be withdrawn upon the coming in of the master's report. Holbrook v. Small (C. C. 1878) Fed. Cas. No. 6,596; Baker v. Howell (C. C. 1890) 44 Fed. 113.

Since the provision of Sup. Ct. Rule 24, subd. 4, that no costs "shall be allowed in this court for or against the United States," does not prohibit the allowance of costs of the lower courts in favor of the United States, where a mandate from the supreme court directs a decree in favor of the United States, without specifying costs, the circuit court may properly include therein its own costs. U. S. v. Southern Pac. R. Co. (C. C. 1893) 56 Fed. 865.

Where a nontaxable charge for certifying and a taxable charge for printing have been combined in a bill of costs, and the amount of the latter can be separated from the former, it should be allowed, though the former is disallowed. Shaw Electric Crane Co. v. Shriver (C. C. 1897) 80 Fed. 640.

Where a Circuit Court clerk erred in the rate of fees charged defendant for certifying a record on appeal to the Circuit Court of Appeals, and after reversal the parties settled on the basis of a statement of the costs given by the clerk containing the same mistake, the clerk under the Pennsylvania practice was nevertheless entitled to enforce collection of the difference as against plaintiff by a judgment and execution in the name of defendant as the successful party. Hoysradt v. Delaware, L. & W. R. R. (C. C. 1910) 182 Fed. 880.

Specific objections are necessary to reach charges for clerk's fees and affidavits on an appeal from taxation. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,731.

Taxation of costs reformed on motion. Erwin v. Cummins (C. C. 1855) Fed. Cas. No. 4,525.

The expenses for printing pleadings, testimony, and briefs, and of making drawings used on the final hearing, and of reporting arguments of counsel for the court, are not proper items of taxation, unless so stipulated. Hussey v. Bradley (C. C. 1864) Fed. Cas. No. 6,946a; Manchester v. Milne (D. C. 1848) Fed. Cas. No. 9,007.

An irregularity in the taxation of costs may be corrected by the court, on motion, after final decree rendered. Collins v. Hathaway (D. C. 1845) Fed. Cas. No. 3,014.

14. Costs unnecessarily incurred.—The compensation provided for on behalf of officers and persons concerned in the administration of justice, not payable out of the treasury of the United States, is recoverable as costs of the suit. Pennsylvania v. Wheeling & Belmont Bridge Co. (1855) 18 How. 460, 461, 15 L. Ed. 449.

Where writ of error was superfluous, the costs thereof should be taxed against the defendants. Hunt v. Howes (1896) 74 Fed. 657, 21 C. C. A. 356.

Where counsel for both parties have largely increased the costs of a case by irrelevant and improper examination of witnesses, the prevailing party will not be allowed to recover all his costs, but they will be so adjusted as to apportion the unnecessary expense between the parties. Royal Metal Mfg. Co. v. Art Metal Works (1904) 130 Fed. 778, 66 C. C. A. 88, affirming decree (C. C. 1903) 121 Fed. 128.

Where appellees recover costs in the Circuit Court of Appeals, separate costs are taxed for the several appellees who appear separately and file separate briefs. Augusta Trust Co. v. Federal Trust Co. (1907) 153 Fed. 157, 82 C. C. A. 309.

In an infringement suit, where a party extends the cross-examination of his adversary's witnesses beyond legitimate limits, the court may properly take such fact into account in taxing the costs. National Cash Register Co. v. Gratigny (1914) 213 Fed. 463, 130 C. C. A. 109.

Pending an action by petitioner in the state court against defendant company for damages for personal injuries, an action was brought in the federal court to foreclose a mortgage on defendant's property, and a receiver was appointed, whereupon petitioner intervened in the foreclosure proceeding, and obtained a judgment for the damages, testimony previously taken in the state court being used on the trial of the intervention. Held, that the costs incurred in the state courts, as well as those in the federal court, should be allowed to petitioner. Central Trust Co. v. Central Iowa Ry. Co. (C. C. 1889) 38 Fed. 889.

Complainant held not entitled to costs for taking, transcribing, and printing the depositions of an expert, which consist of argumentative departures from the province of expert testimony and which deal in vituperative personalities. Malignani v. Jasper Marsh Consol. Electric Lamp Co. (C. C. 1910) 180 Fed. 442.

15. Attorney's fees.—Where a railroad company brings error to review the judgment in a suit to enforce compliance with an order for the payment of money made by the Interstate Commerce Commission, which is affirmed, an allowance of attorney's fees on account of the appellate proceedings may properly be made in addition to that made by the trial court. Louisville & N. R. Co. v. Dickerson (1911) 191 Fed. 705, 112 C. C. A. 295, affirming judgment Dickerson v. Louisville & N. R. Co. (C. C. 1910) 187 Fed. 874.

16. Witness fees.—A fee to witness for his services in making a preliminary examination of the locus in quo, a certain dock, the exact location of which was in question, cannot be allowed to be taxed as costs, the statute not authorizing such an allowance;

and it is immaterial that the survey was made in order that intelligent testimony might be given upon the question of location. Tuck v. Olds (C. C. 1886) 29 Fed. 883.

17. Clerk's expenses.—The expenses of a clerk attending court away from his place of business may be taxed against defendant in a suit by the United States, in which the latter is successful. Sanborn v. U. S. (1890) 10 Sup. Ct. 812, 816, 135 U. S. 271, 34 L. Ed. 112.

18. Expense of exhibits.—In a suit for the infringement of a patent, copies of plaintiff's models and papers, which he is not obliged to produce, when obtained by defendant, are proper items of costs. Hathaway v. Roach (C. C. 1846) Fed. Cas. No. 6,213.

Models of the invention described in the plaintiff's patent, and procured by the defendant in good faith, may be included in the taxation of costs, but not other models. Woodruff v. Barney (C. C. 1862) Fed. Cas. No. 17,986; Hussey v. Bradley (C. C. 1863) Fed. Cas. No. 6,946a.

Photolithographic exhibits, not being drawings from the patent office, but sketches introduced by witnesses in giving their evidence, fall under the rule as to machine exhibits, and are not taxable as costs. Wooster v. Handy (C. C. 1885) 23 Fed. 49.

The expense of copies of models in the patent office, properly procured for use as a part of the evidence in the suit, may be allowed as part of the taxable costs; but the expense of other models and machines cannot be so taxed. Id.

The clerk, in taxing costs, where complainant on his own motion dismissed his bill when called for hearing, "with usual costs to defendant," should not allow for certified copy of file wrapper, contents of patent in suit, and certified copies of six other patents procured by defendant to properly present his defense. Ryan v. Gould (C. C. 1887) 32 Fed. 754.

Where, in an action at law to recover the possession of certain lands, the defendant is ordered by the court to make his plea more certain, and, in order to enable him to file a proper plea in accordance with such order, it becomes necessary for him to make surveys and plans, the expense of such surveys and plans is not a part of his taxable costs. New Hampshire Land Co. v. Tilton (C. C. 1887) 29 Fed. 764.

A successful party cannot tax as costs certified copies of the muniments of his title, since he must be presumed to have such papers in his possession; but he may tax as costs transcripts of suits on which he relies merely to defeat his adversary's title. Ford v. Louisville, N. O. & T. R. Co. (C. C. 1891) 45 Fed. 210.

The expense of maps necessarily introduced at the trial is taxable. Lillienthal v. Southern Cal. Ry. Co. (C. C. 1894) 61 Fed. 622.

The expense of constructing or procuring models, charts, photolithographing paper exhibits, etc., used at the hearing to illustrate and make clear the oral evidence, is not taxable as costs. Kelly v. Springfield Ry. Co. (C. C. 1897) 83 Fed. 183.

19. Expense of procuring bonds.—Money paid a surety company for furnishing an appeal bond on an appeal to the circuit court of appeals is not taxable as costs. Lee Injector Mfg. Co. v. Penberthy Injector Co. (1901) 109 Fed. 964, 48 C. C. A. 760.

A charge by defendant, for services in putting in special bail a second time, is not taxable, where the second service was made necessary by the failure of the bail first put in to justify. Ferrett v. Atwill (C. C. 1846) Fed. Cas. No. 4,747.

Premiums paid a surety company for appeal bond and supersedeas bond by a successful appellant are taxable in the circuit court as legitimate and proper disbursements. Edison v. American Mutoscope Co. (C. C. 1902) 117 Fed. 192.

The premium paid by a plaintiff in error to a surety company for a supersedeas bond on a writ of error to a Circuit Court, required by a rule of the Circuit Court of Appeals, is properly taxable as costs. Jones v. Edward B. Smith Co. (C. C. 1910) 183 Fed. 990.

Amounts paid sureties on a bond cannot be taxed as costs. Giving such bonds in a surety company is a privilege and convenience, but the fee paid therefor is not taxable as costs under any rule of court. In re Hoyt (D. C. 1903) 119 Fed. 987.

20. Expense of printing.—On denial of an original petition to the supreme court for a writ of mandamus, respondent may tax disbursements for printing objections in the nature of pleadings. Ex parte Hughes (1885) 114 U. S. 548, 5 Sup. Ct. 1008, 29 L. Ed. 281.

Where the record contains a vast amount of irrelevant evidence, consisting of the examination and cross-examination of witnesses, for which the court cannot apportion the responsibility, the costs of taking and embodying the same in the printed record will be taxed equally to the parties. The Sarah v. Bellais (1892) 52 Fed. 233, 3 C. C. A. 56.

Where the printed record is unnecessarily prolix, but it does not appear from the record itself which party is responsible therefor, the facts on that point may be presented to the court of appeals by affidavit or other proof, so that the unnecessary costs may be taxed to the proper party. United States

Sugar Refinery v. Providence Steam & Gas Pipe Co. (1894) 62 Fed. 375, 10 C. C. A. 422.

An order denying a motion for a new trial is not reviewable, and where without special reason therefor such a motion is transcribed and printed as part of the record, its cost will not be taxed against defendant in error. Nederland Life Ins. Co. v. Hall (1898) 86 Fed. 741, 30 C. C. A. 363.

Unless provided for by special rule, the cost of printing briefs on appeal will not be allowed as part of the taxable costs or disbursements. Kursheedt Mfg. Co. v. Naday (1901) 108 Fed. 918, 48 C. C. A. 140.

Disbursements of counsel for printing briefs in the circuit court of appeals are not taxable as costs. Lee Injector Mfg. Co. v. Penberthy Injector Co. (1901) 109 Fed. 964, 48 C. C. A. 760.

The expense of printing the record and evidence in an equity suit is properly taxable as part of the costs. Second Additional Rule, May 25, 1842. Jordan v. Agawam Woolen Co. (C. C. 1869) Fed. Cas. No. 7,516.

The expense of printing testimony for the convenience of the court cannot be taxed as costs against the losing party. Spaulding v. Tucker (C. C. 1871) Fed. Cas. No. 13,221.

Expenses of printing and translating testimony are not taxable by defendant, where the bill is dismissed. Harding v. Altemus (C. C. 1874) Fed. Cas. No. 6,049.

The cost of printing papers which, by a rule of court, a party is required to have printed, can be taxed against the adverse party. Dennis v. Eddy (C. C. 1874) Fed. Cas. No. 3,793; Neff v. Pennoyer (C. C. 1875) Fed. Cas. No. 10,084.

Where the record is printed in the circuit court, and paid for by a receiver under order of the court from funds in his hands, and such printed record is used on appeal in the supreme court without further expense to the parties, the expense of printing the record should be taxed in favor of the party recovering costs. Ferguson v. Dent (C. C. 1891) 46 Fed. 88.

In the second circuit, the charge for printing records in compliance with the circuit court rules will be taxed. Hake v. Brown (C. C. 1891) 44 Fed. 734.

The expense of printing evidence and abstract of record is not taxable in the circuit court, in the absence of any rule or order of court requiring such printing to be done. Atwood v. Jaques (C. C. 1894) 63 Fed. 561.

An order of court, entered upon application of both parties, pursuant to a stipulation between them, that a printed copy of the proofs and records shall be considered, "for all the purposes of this suit," and shall constitute the original record therein, is not an order requiring the printing of the proofs and record, so as to make the cost of such printing taxable against the losing party. Kelly v. Springfield Ry. Co. (C. C. 1897) 83 Fed. 183.

The granting of leave to file supplemental briefs does not make the expense of printing them taxable costs. Id.

The expense of printing briefs is neither by statute nor by rule in the Third circuit made a part of the taxable costs. Luxfer Prism Patents Co. v. Elkins (C. C. 1900) 99 Fed. 29.

The expense of printing exhibits is not taxable as a disbursement in the circuit court in the Second circuit, where no order directing the printing was made, and it does not appear that the original exhibits could not have been used. Edison v. American Mutoscope Co. (C. C. 1902) 117 Fed. 192.

The expense of printing exhibits in a patent case is not a taxable disbursement, in the absence of a rule of court making it so. Keasbey & Mattison Co. v. American Magnesia & Covering Co. (C. C. 1906) 149 Fed. 439.

Though the customary price for printing in a district is 75 cents a page, $1 a page may be allowed as costs, where the page is proportionally larger than the customary page. The Willowdene (D. C. 1899) 97 Fed. 509.

21. Expense of copies.—A sum paid the commissioner of patents for copies of patents for insertion in the printed record on appeal to the circuit court of appeals is a part of the cost of printing the record, and is taxable in that court. Lee Injector Mfg. Co. v. Penberthy Injector Co. (1901) 109 Fed. 964, 48 C. C. A. 760.

Under amended rule 23 (see § 1114, ante), of the rules of the Circuit Court of Appeals for the Third Circuit, which provides that, in case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given, the cost of such printing is so taxable, although it was done at the instance of the plaintiff in error and not of the clerk, as contemplated by the rule, where the record as so printed was accepted by the clerk, and no timely objection was made. Jayne v. Loder (1907) 153 Fed. 739, 82 C. C. A. 625.

The amount paid for copying papers to be used in the suit is not allowable. Hussey v. Bradley (C. C. 1864) Fed. Cas. No. 6,946a.

Copies of an answer, required by the rules to be furnished, are taxable. Yale Lock Mfg. Co. v. Colvin (C. C. 1882) 14 Fed. 269, judgment affirmed Paine v. Central Vermont R. Co. (1886) 6 Sup. Ct. 1019, 118 U. S. 152, 30 L. Ed. 193.

Copies of papers obtained for use on interlocutory or preliminary or incidental motions or hearings are not ob-

tained for use on trials. Wooster v. Handy (C. C. 1885) 23 Fed. 49.

Where copies of papers necessarily obtained for use are put in evidence, and no order is made rejecting them as evidence, it is the duty of the clerk to allow the disbursements paid for the various copies put in evidence and forming part of the record for final hearing. Id.

Fees of a notary public taking depositions for copies furnished to the counsel for each of the parties held not taxable as costs. American Bank Protection Co. v. City Nat. Bank of Johnson City (D. C. 1913) 203 Fed. 715.

22. Stenographer's charges.—Money paid by a party for a copy of the official stenographer's notes for his own convenience is not taxable as costs. The William Branfoot v. Hamilton (1892) 52 Fed. 390, 3 C. C. A. 155, affirming decree (D. C. 1892) 48 Fed. 914.

Where an auditor was appointed in an action at law in a federal court by agreement of the parties, and a stenographer selected by the parties was employed on the hearing before the auditor, the case stands the same legally as to costs as though the stenographer had been expressly selected and appointed by the auditor. Corporation of St. Anthony in New Bedford v. Houlihan (1910) 184 Fed. 252, 106 C. C. A. 394, affirming judgment Houlihan v. Corporation of St. Anthony in New Bedford (C. C. 1909) 173 Fed. 496, and writ of certiorari denied Corporation of St. Anthony in New Bedford v. Houlihan (1911) 31 Sup. Ct. 717, 220 U. S. 613, 55 L. Ed. 609.

The use of stenographers, including their use by auditors and masters, has been so general in late years that it must be assumed that, when a court appoints an auditor, it, by implication, authorizes and directs him to make reasonable use of stenographers, and the charge therefor must be classed with the ordinary charges necessarily incurred by the auditor, which, together with the auditor's fees, are ordinarily taxable against the losing party. Id.

Copies of patents, either that of the plaintiff or others, procured by the defendant, cannot be taxed as costs to the plaintiff. Woodruff v. Barney (C. C. 1862) Fed. Cas. No. 17,986.

A stenographer's charges cannot be taxed as costs, where his employment is not directed by the court and no consent is given to their insertion in the cost bill. Gunther v. Liverpool, L. & G. Ins. Co. (C. C. 1882) 10 Fed. 830.

Payments to stenographer for making carbon copies of testimony for use of the party or his counsel are not taxable. Atwood v. Jaques (C. C. 1894) 63 Fed. 561.

In the absence of a rule of court or of a written stipulation so providing, the expense of procuring copies of the official stenographer's notes of testimony for the use and convenience of the parties, is not taxable as costs. Kelly v. Springfield Ry. Co. (C. C. 1897) 83 Fed. 183.

A copy of testimony taken on the trial of an action at law by a stenographer under a stipulation, which is obtained by a party for the purpose of preparing a bill of exceptions, is not "obtained for use on the trial," and the expense of such copy is not taxable as costs. Monahan v. Godkin (C. C. 1900) 100 Fed. 196.

Where an auditor was appointed by consent of parties, who took a large amount of testimony, not only on plaintiff's claim, but also on a set-off claimed by defendant, which was wholly disallowed, and plaintiff recovered on a jury trial, although only a part of the amount claimed, he was entitled to have the fees of the auditor and stenographer on the hearing before him taxed as costs. Houlihan v. Corporation of St. Anthony in New Bedford (C. C. 1909) 173 Fed. 496, judgment affirmed Corporation of St. Anthony in New Bedford v. Houlihan (1910) 184 Fed. 252, 106 C. C. A. 394, writ of certiorari denied (1911) 31 Sup. Ct. 717, 220 U. S. 613, 55 L. Ed. 609.

Where there is no official stenographer, each party pays half of the cost of taking the testimony, and in case the minutes are transcribed the party securing the transcript pays the additional charge, and if this is done by agreement the successful party taxes his share for taking the testimony to the unsuccessful party. Sedlacek v. Bryan (C. C. 1911) 192 Fed. 361.

In an action tried in the federal court, plaintiff having refused to contribute to the expense of a stenographer, defendant, on being successful, held not entitled to tax the costs of having the testimony taken by a stenographer employed by him, to plaintiff. Id.

The expense of a stenographer is not taxable. Ex parte Jaffray (D. C. 1869) Fed. Cas. No. 7,170.

A direction made in open court that the testimony given in court be taken down by a stenographer is sufficient to entitle the stenographer's fees to be taxed by the successful party. The E. Luckenback (D. C. 1884) 19 Fed. 847.

23. "Exemplifications."—In a suit for infringement of a patent, models cannot be classed as "exemplifications." Parker v. Bigler (C. C. 1857) Fed. Cas. No. 10,726.

24. Cost of depositions and testimony.—The compensation of experts called by a party in its own behalf cannot be taxed against the losing party. The William Branfoot (1892) 52 Fed. 390, 395, 3 C. C. A. 155.

When plaintiff is nonsuited upon the statement of his case by his attorney, the defendant is not entitled, in the taxation of costs, to include a charge for depositions taken against him by

plaintiff, as the depositions are not, in such case, admitted in evidence. Cahn v. Monroe (C. C. 1886) 29 Fed. 675.

Defendants are entitled, in taxing costs, to tax the amount paid by them to the examiner for copies of their own testimony, procured for the necessary purpose of having the record printed; neither the examiner nor the clerk having any authority to let the original testimony be taken from their possession for that purpose. Brewster v. Shuler (C. C. 1889) 38 Fed. 549.

The expense of copies of testimony taken de bene esse, obtained solely for the convenience of counsel, cannot be taxed as part of the costs, in the absence of an agreement to that effect. Roundtree v. Rembert (C. C. 1896) 71 Fed. 255.

A party cannot tax as costs the fees for certifying documents for use in evidence, which, in the absence of stipulation, would require certification, but have not in fact been certified. Shaw Electric Crane Co. v. Shriver (C. C. 1897) 80 Fed. 640.

25. —— **Traveling expenses.**—The expenses of a journey to a distant city to attend the taking of a deposition, on the ground that the notice was so short as to be insufficient for employing and instructing counsel there, since, if the notice was unreasonable, counsel could have had it extended, or perhaps have suppressed the deposition. The William Branfoot (1892) 52 Fed. 390, 395, 3 C. C. A. 155.

The traveling expenses of attorneys to take evidence and attend court, and the expenses of messengers, are no part of taxable costs. Wooster v. Handy (C. C. 1885) 23 Fed. 49. Traveling and other expenses of an attorney in taking depositions to be used in resistance of a motion to set aside the service cannot be taxed as a part of the costs. Michigan Aluminum Foundry Co. v. Aluminum Co. of America (C. C. 1911) 190 Fed. 903.

26. **Cost of transcript.**—Fees for a transcript of record used by a party in preparing a bill of exceptions for an appeal to the circuit court of appeals are not taxable as costs. Pine River Logging & Improvement Co. v. U. S. (1902) 22 Sup. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164, affirming judgment (1900) 105 Fed. 1004, 44 C. C. A. 685.

A large mass of testimony introduced into a patent case, merely in response to a remark by one of plaintiff's witnesses as to the inferiority of the defendants' product, and having no bearing on the real issues, together with nearly 100 pages of printed testimony by an expert witness, consisting mainly of argumentative matter, comments, and criticisms, mingled with opinions, beliefs, and hearsay, held to have been improperly introduced into the record, so that no costs of either court should be allowed therefor. Eastman Co. v. Getz (1898) 84 Fed. 458, 28 C. C. A. 459, modifying decree (C. C. 1896) 77 Fed. 412.

Under rule 31, par. 3, of the rules of the circuit court of appeals of the Sixth circuit (31 C. C. A. clxix, 90 Fed. clxix), the costs of the transcript of record on appeal cannot be taxed in that court in favor of a successful appellant. Lee Injector Mfg. Co. v. Penberthy Injector Co. (1901) 109 Fed. 964, 48 C. C. A. 760.

Stipulations by counsel as to the parts of the record to be embodied in the transcript on appeal, entered into for the purpose of eliminating unnecessary matter, are to be encouraged, and it is the duty of the clerk to recognize such stipulations, and to make the transcript in conformity therewith. Where he refuses to do so, costs will be taxed only for that part of the record embraced in the stipulation. Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. (1903) 120 Fed. 267, 56 C. C. A. 547.

A successful defendant in a patent suit who has overloaded the record with a large amount of matter, mainly the testimony of experts, which is irrelevant or immaterial, and abounding in repetition and prolix disquisitions, will be denied costs in the proportion which such testimony bears to the whole amount of evidence in the record. Edison Electric Light Co. v. E. G. Bernard Co. (C. C. 1899) 91 Fed. 694.

Fees paid to the clerk of the Circuit Court for a citation, writ of error, and for certifying the transcript are none the less "costs of the appeal," and taxable as such, because taxable in the Circuit Court after determination of the appeal. Berthold v. Burton (C. C. 1909) 169 Fed. 495.

If the unsuccessful party wishes a record for appeal, he procures it at his own expense. Sedlacek v. Bryan (C. C. 1911) 192 Fed. 361.

27. **Nonpayment of prior costs.**—The court will not, on motion of the defendant, continue a cause because the costs of non pros. have not been paid. Wheaton v. Love (C. C. 1807) Fed. Cas. No. 17,485.

After notice of trial, defendant cannot demand payment of costs of a former judgment as a condition of proceeding. Den v. Bacon (C. C. 1826) Fed. Cas. No. 3,783.

Plaintiff commenced an action in a state court for injuries. The cause was removed by defendant to the federal court, in which, after the court, on the trial, had instructed the jury to render a verdict for defendant, plaintiff submitted to a nonsuit. Plaintiff afterwards commenced another action against defendant, for the same cause, in the federal court in another district. Held, that proceedings in such second action should be stayed until the costs of the first action were paid, though the first was prosecuted in forma pauperis.

Kimble v. Western Union Tel. Co. (C. C. 1895) 70 Fed. 888.

28. Failure to give security.—Failure to give security for costs is no ground for continuance, where it has not been demanded within a reasonable time. Hawkins v. Willbank (C. C. 1822) Fed. Cas. No. 6,247.

IV. PERSONS ENTITLED TO, AND PERSONS LIABLE FOR, COSTS

29. "Prevailing party."—Costs may be imposed on plaintiff in error where a judgment is reversed for lack of jurisdiction of the circuit court, if the cause was removed into that court at his instance. North American Transportation & Trading Co. v. Morrison (1900) 20 Sup. Ct. 869, 44 L. Ed. 1061 (reversing judgment Morrison v. North American Transportation & Trading Co. [C. C. 1898] 85 Fed. 802); Tug River Coal & Salt Co. v. Brigel (1895) 70 Fed. 647, 17 C. C. A. 367 (denying motion to modify judgment as to costs [1895] 67 Fed. 625, 14 C. C. A. 577); Sneed v. Sellers (1895) 68 Fed. 729, 15 C. C. A. 631 (reversing judgment [1894] 66 Fed. 371, 13 C. C. A. 518).

When a cause is brought from the circuit court to the circuit court of appeals by the defendant, who removed it from a state court, and is there reversed because the record fails to show jurisdiction in the circuit court, the defendant should be taxed with the costs. Southwestern Telegraph & Telephone Co. v. Robinson (1891) 48 Fed. 769, 1 C. C. A. 91.

The indefinite expression in this section as to inclusion in the judgment of an allowance of costs "where by law costs are recoverable in favor of the prevailing party," when construed with section 1375, ante, is quite generally accepted as sufficient authority for a taxation of costs in favor of a successful litigant. Western Coal & Mining Co. v. Petty (1904) 132 Fed. 603, 604, 65 C. C. A. 667.

An action in a federal court against two defendants as joint trespassers was dismissed as to one for want of jurisdiction, and plaintiff then sued such defendant in a state court, and recovered a judgment, which was satisfied in full, and payment accepted. Defendant in the federal court then filed an amended answer, setting up the recovery and satisfaction of such judgment as a defense additional to those previously pleaded, as permitted by the state practice, and plaintiff, conceding the sufficiency of such defense, dismissed the action. Held, that the amended answer was not a waiver of the prior defenses, nor an admission of the justice of plaintiff's original claim, and that there was nothing in the record which took the case out of the general rule, by which defendant, as the prevailing party, was entitled to a judgment for costs. Id.

As to whether costs given to prevailing party on petition for mandamus, see In re Haight & Freese Co. (1908) 164 Fed. 688, 90 C. C. A. 285.

Plaintiff is entitled to recover costs paid on a writ of error to review a judgment against him in which he was successful. Scatcherd v. Love (1908) 166 Fed. 53, 91 C. C. A. 639.

Full costs allowed upon a verdict of nominal damages in an action upon the case against a city for injury done by raising the level of a street. Hooe v. Alexandria (C. C. 1802) Fed. Cas. No. 6,667.

Costs are not usually allowed to the prevailing party where the district and circuit judges sitting together differ. Veazie v. Williams (C. C. 1845) Fed. Cas. No. 16,907.

Costs must share the fate of the principal debt. Emmons v. Sladdin (C. C. 1875) Fed. Cas. No. 4,470.

In an action at law in which the supreme court, upon the defendants' writ of error, has reversed a judgment awarded by the circuit court for the plaintiffs for damages and costs, with a direction in its opinion and mandate, which are both silent as to such costs, that the circuit court enter judgment for the plaintiffs for certain sums and interest thereon, specified by it, the plaintiffs are entitled to judgment in the circuit court for such specified sums and interest, together with such costs. Bartels v. Redfield (C. C. 1891) 47 Fed. 708.

The costs of trials at circuit abide the event, so that the party who ultimately prevails may tax costs of all the trials, including disbursements and witnesses' fees, in his final bill. Berthold v. Burton (C. C. 1909) 169 Fed. 495.

Where plaintiffs recovered a judgment, which was reversed on writ of error, with costs to the plaintiff in error, the appellate court declining to modify the mandate by directing that the costs should abide the event, and they were thereupon paid, and the plaintiff prevailed on a second trial, he is not entitled to tax as a disbursement the amount paid in settlement of the judgment for costs of the first appeal. Jennings v. Burton (C. C. 1910) 177 Fed. 603.

A party cannot recover, as a part of his costs on final judgment in his favor, the costs paid out by him in an unsuccessful intermediate appeal. Troxell v. Delaware, L. & W. R. Co. (D. C. 1913) 205 Fed. 830.

30. —— Partial success.—The appellate courts cannot undertake to apportion the costs therein, between the parties, in all cases in which the judgment is affirmed in part and reversed in part. Tefft v. Stern (1896) 74 Fed. 755, 21 C. C. A. 73, affirming judgment (1896) 73 Fed. 591, 21 C. C. A. 67.

In a suit to contest the right of a homesteader in Alaska to a patent under Act May 14, 1898, as amended by Act March 3, 1903, where neither party establishes a right to the land, nei-

ther is entitled to recover costs. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

Under Comp. Laws Alaska 1913, § 1342, plaintiff is entitled to costs although he does not recover all the land sued for. Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co. (C. C. A. 1914) 210 Fed. 599.

Where a demurrer to a bill is overruled in part and sustained in part, costs not allowed to either party. McGuire v. Briscoe (C. C. 1851) Fed. Cas. No. 8,813a.

Where both parties appeal, and the decree is affirmed, no costs of appeal will be allowed to either. The Parkersburgh (C. C. 1865) Fed. Cas. No. 10,753.

Where both parties prevailed, and failed, to some extent, upon items disputed and litigated, the costs will be apportioned according to the relative importance of the items in dispute won and lost by the respective parties, and the time and expense spent on each. Bridges v. Sheldon (C. C. 1880) 7 Fed. 17.

When two distinct causes of action are united, and one party prevails in each, costs will be allowed to neither. Adams v. Howard (C. C. 1884) 19 Fed. 317.

A complainant who sues on two patents and is defeated on one is not entitled to costs. Schmid v. Scovill Mfg. Co. (C. C. 1889) 37 Fed. 345.

A small undisputed claim, which has never been demanded, cannot be tacked to a contested claim so as to recover costs on the latter. The Swallow (D. C. 1843) Fed. Cas. No. 13,664.

31. **"Losing party."**—Unsuccessful defendants in a civil suit brought by the United States are liable for costs. Pine River Logging & Improvement Co. v. U. S. (1902) 22 Sup. Ct. 920, 927, 186 U. S. 279, 46 L. Ed. 1164, affirming judgment (1900) 105 Fed. 1004, 44 C. C. A. 685.

In a suit against joint wrongdoers as infringers of a patent, it is only in rare and exceptional cases, where one defendant has participated only in a trivial or almost wholly unrelated manner, that the court will exercise its discretion in his favor by relieving him from full liability for costs. Vrooman v. Penhollow (1911) 186 Fed. 495, 108 C. C. A. 502, denying rehearing and modifying decree (1910) 179 Fed. 296, 102 C. C. A. 484.

The entire costs of the case are taxed against the losing party. Crabtree v. Neff (C. C. 1863) Fed. Cas. No. 3,315.

The costs in an action at law in a federal court must be taxed to the losing party, except in the cases mentioned in R. S. §§ 968, 973, ante, §§ 1609, 1614, where the contrary is specially provided; and any resulting hardship or inequity is not cause for modification of this rule. Trinidad Asphalt Pav. Co. v. Robinson (C. C. 1892) 52 Fed. 347.

Where an auditor was appointed by a federal court in Massachusetts, in conformity with the state practice, by consent of parties, it is within the discretion of the court to tax the fees of the auditor and of the stenographer employed at the hearing before him to the losing party. Houlihan v. Corporation of St. Anthony in New Bedford (C. C. 1909) 173 Fed. 496, judgment affirmed Corporation of St. Anthony in New Bedford v. Houlihan (1910) 184 Fed. 252, 106 C. C. A. 394, writ of certiorari denied (1911) 31 Sup. Ct. 717, 220 U. S. 613, 55 L. Ed. 609.

Where a clerk of the Circuit Court charged 10 instead of 15 cents per folio for making and certifying a record on a writ of error for defendant, and after reversal of the judgment the parties settled on the basis of a statement of the costs made by the clerk containing the same mistake, such settlement did not relieve plaintiff, who lost the suit and was cast for the costs, from the obligation to respond to the clerk for the difference. Hoysradt v. Delaware, L. & W. R. R. (C. C. 1910) 182 Fed. 880.

Where a Circuit Court clerk erroneously taxed 10 instead of 15 cents a folio for certifying a record in response to a writ of error at defendant's instance, and on reversal certified a statement of the costs containing the same mistake, on which a settlement was had between the parties, the clerk on discovering the mistake properly called the parties before him and explained the difference and charged the same against plaintiff as the unsuccessful party on the writ of error. Id.

The losing party is liable for the clerk's costs for orders actually entered on behalf of the succeeding party in the progress of the cause. Sancho v. Atwood (D. C. 1848) Fed. Cas. No. 12,291a.

32. **Ownership of costs.**—Taxable costs earned by clerks, marshals, commissioners, and proctors are their individual property, and not that of the parties to the cause in which they have been earned. Aiken v. Smith (1893) 57 Fed. 423, 6 C. C. A. 414.

Allowances of fees belong to the successful party to the suit, and not to his attorney. Celluloid Mfg. Co. v. Chandler (C. C. 1886) 27 Fed. 9. A usage existing in a district in which suit was brought, for the attorney of the successful party to take the fees allowed, to the successful party, is not binding upon such party who lived in a district where the usage did not exist, and who had no knowledge of the existence of such usage in the district where suit was brought. Id.

Though the legal title to costs, including officers' fees, is in the successful party, he holds the same as trustee, and the officers may therefore recover them in his name. Hoysradt v. Delaware, L. & W. R. R. (C. C. 1910) 182 Fed. 880.

V. COSTS IN EQUITY AND ADMIRALTY

See, also, notes under § 1536, ante.

33. Taxation.—When a bill in equity is, after answer, dismissed by plaintiff, either generally or "without prejudice," the granting of such an order is a "final hearing" and the solicitor's docket fee of $20 is taxable, and "recoverable by law in favor of the prevailing party" in the sense of this section. The results from the general law of costs in courts of equity which is adopted by this act of congress, so far as relates to the principles governing the court in the taxation of costs, as between party and party. Where there has been a decree for an account and costs against the defendant, but subsequently the plaintiff dismisses the bill, the docket fee is taxable in favor of the defendant, notwithstanding the former decree. Goodyear v. Sawyer (C. C. 1883) 17 Fed. 2, 7.

Taxation of costs in equity and admiralty cases, see, also, note under § 1536, ante.

Where, after a libel in admiralty had been filed, respondent made default, and settled the case out of court, he was not entitled to have a release executed on such sttlement filed in satisfaction of a judgment recovered against him by default, except on payment of costs authorized by this section. Naretti v. Scully (D. C. 1904) 133 Fed. 828.

CITED WITHOUT DEFINITE APPLICATION

The Baltimore v. Rowland (1869) 8 Wall. 377, 388, 19 L. Ed. 463; U. S. v. Real Estate Sav. Bank (1881) 104 U. S. 728, 732, 26 L. Ed. 908; In re Myers (1913) 208 Fed. 407, 125 C. C. A. 569; Wilson Sewing Machine Co. v. Moreno (C. C. 1879) 7 Fed. 806, 810; Jerman v. Stewart, Gwynne & Co. (C. C. 1882) 12 Fed. 271, 276; In re Moy Chee Kee (C. C. 1887) 33 Fed. 377, 379; Richter v. Magone (C. C. 1889) 47 Fed. 192, 194; Ferguson v. Dent (C. C. 1891) 46 Fed. 88, 99; Rogers v. Riley (C. C. 1897) 80 Fed. 759, 761; Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 491, 2 L. R. A. 229.

§ 1625. (R. S. § 984.) Bill of costs to be sworn to before taxed or allowed.

Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the Treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill, and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated.

Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 169. Act June 23, 1874, c. 469, § 7, 18 Stat. 256.

Notes of Decisions

Verified bill of costs.—This section applies to all cases as well as to government cases, and the bill of costs of an official for taking depositions, or making transcripts of a record to be used as evidence, must be so verified before the costs can be taxed. Jerman v. Stewart (C. C. 1882) 12 Fed. 271.

A party is entitled to a detailed bill under oath of commissioner's fees which are to be taxed against him, showing the items, and that they are legally chargeable. Beckwith v. Easton (D. C. 1870) Fed. Cas. No. 1,212.

Supporting certificates and affidavits.—This section does not require any affidavit to be attached to the memorandum of costs filed by the successful party; and where a rule of court provides for such an affidavit, and what it shall contain, an affidavit which complies with such rule is sufficient, though it does not state in terms that the fees of the witnesses have been actually paid. Chiatovich v. Hanchett (C. C. 1899) 93 Fed. 727.

In taxing witness fees, the certificate of the witness in the usual form is prima facie sufficient without an affidavit. Primrose v. Fenno (C. C. 1902) 113 Fed. 375.

The certificate of the witness need not show that his fees have been actually paid by the successful party, but they may be taxed against the loser notwithstanding, the successful party being alone liable for them. Id.

The certificate of the witness need not show that his fees have been actually paid. Id.

Proof and rebuttal.—Under Cir. Ct. Rules 17, 18, which were designed to conform the practice in regard to the taxation of costs, as nearly as practicable, to that of the state courts under the statute, a bill of costs filed by the successful party within the required time, properly itemized and verified, is prima facie evidence that the items thereof were necessarily incurred and are properly taxable, unless an item should appear otherwise on its face; and the burden of overcoming such prima facie proof rests on the adverse party filing objections, the party filing the bill being required to furnish further proof only in rebuttal. In case the clerk should determine that an item did not appear on its face to be properly taxable, he may receive evidence in support of the same. Colusa Parrot Mining & Smelting Co. v. Anaconda Copper-Min. Co. (C. C. 1900) 104 Fed. 514.

The amount of the costs of a suit in

New York may be proved by parol. Woodward v. Hall (C. C. 1821) Fed. Cas. No. 18,005.

Memorandum of costs.—Under the rule of the circuit court for the Ninth circuit which requires a party in whose favor a judgment or decree is rendered, and who claims costs, to file and serve a memorandum of his costs and disbursements within five days after rendition of the verdict, or "after notice of the decision of the court," and which further provides that "notice of a decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party," the five days do not begin to run in an equity case until notice has been received in one of the three ways specified. It is not sufficient that the solicitor had actual knowledge of the decision, or that his clerk or representative was present at its announcement. Spoor v. Board of Sup'rs of Riverside County (C. C. 1902) 113 Fed. 26.

Cited without definite application, Sellers v. Bell (1899) 94 Fed. 801, 814, 36 C. C. A. 502; Wooster v. Handy (C. C. 1885) 23 Fed. 49, 52; U. S. v. Treadwell (D. C. 1883) 15 Fed. 532, 535.

§ 1626. (Act July 20, 1892, c. 209, § 1, as amended, Act June 25, 1910, c. 435.) Suits and writs of error or appeals, etc., by poor persons without prepayment of or security for fees or costs; affidavit of poverty.

Any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. (27 Stat. 252. 36 Stat. 866.)

This section and the four sections next following were an act entitled, "An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," first cited above, amended by Act June 25, 1910, c. 435, also cited above.

This section, as originally enacted, was as follows:

"That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action."

It was amended by Act June 25, 1910, c. 435, cited above, to read as set forth here.

Courts of the United States shall be open to seamen without giving bond, or prepaying costs, or making deposit to secure costs, for the prosecution of suits for wages or salvage, or to enforce laws made for their health or safety, by a provision in Act July 1, 1916, c. 209, § 1, post, § 1630a.

Notes of Decisions

I. Operation of statute in general
1. Exclusiveness.
2. Stay for nonpayment of costs.

II. Right to prosecute suit in forma pauperis
3. Parties entitled.
4. —— Infants and representatives.
5. —— Creditor.
6. Where attorney employed for contingent fee.
7. Admiralty proceedings.
8. Appellate proceedings.
9. Criminal prosecutions.
10. Enforcement of right.

III. Requisite preliminary showing
11. In general.
12. Affidavit of poverty.

I. OPERATION OF STATUTE IN GENERAL

1. Exclusiveness.—In view of this act, a state statute on the same subject is not applicable to the federal courts. Silvas v. Arizona Copper Co. (1914) 213 Fed. 504.

2. Stay for nonpayment of costs.—Plaintiff commenced an action in a state court for injuries. The cause was removed by defendant to the federal court, in which, after the court, on the trial, had instructed the jury to render a verdict for defendant, plaintiff submitted to a nonsuit. Plaintiff afterwards commenced another action against defendant, for the same cause, in the federal court in another district. Held, that proceedings in such second action should be stayed until the costs of the first action were paid, though the first was prosecuted in forma pauperis. Kimble v. Western Union Tel. Co. (C. C. 1895) 70 Fed. 888.

II. RIGHT TO PROSECUTE SUIT IN FORMA PAUPERIS

3. Parties entitled.—This section does not apply to one who is in receipt of a salary of $20 per week, and who pays a rent of $200 per year for the house he occupies. Wickelman v. A. B. Dick Co. (1898) 85 Fed. 851, 29 C. C. A. 436.

4. —— Infants and representatives.—Although it is the settled practice in Tennessee that infants can neither sue nor defend in forma pauperis, such is not the rule of the federal courts of equity, in which they may so sue or defend. Ferguson v. Dent (C. C. 1883) 15 Fed. 771.

Neither the pauper's oath of an infant plaintiff nor that of his next friend can entitle them to sue without security for costs. Roy v. Louisville, N. O. & T. R. Co. (C. C. 1888) 34 Fed. 276.

A guardian ad litem held not entitled to sue in forma pauperis. Brown v. The Henry Pratt (D. C. 1843) Fed. Cas. No. 2,010.

5. —— Creditor.—A creditor who objects to the discharge of a bankrupt may prosecute his objections in forma pauperis. In re Guilbert (D. C. 1907) 154 Fed. 676.

6. Where attorney employed for contingent fee.—A plaintiff in a federal court, who has made a contract with her attorney to prosecute her case for a contingent fee, in a state where the statute recognizes such contracts as valid, and gives the attorney a special lien for his fee on the judgment recovered, represents as plaintiff not only her own interest, but that of her attorney, as trustee, and cannot sue as a poor person, unless it is shown that all persons beneficially interested in the action come within the terms of the act. Feil v. Wabash R. Co. (C. C. 1902) 119 Fed. 490.

Where plaintiff's attorney was financially interested in the result of an action brought in the federal court, plaintiff could not obtain an order permitting him to sue in forma pauperis, without a showing that plaintiff's attorney was also unable because of poverty to give security. Phillips v. Louisville & N. R. Co. (C. C. 1907) 153 Fed. 795.

Where plaintiff had secured counsel under a contract for a contingent fee, who had commenced the suit, filed pleadings, and prosecuted the case through two mistrials, plaintiff was not thereafter entitled, on the making of an application for security for costs, to an order rescinding his contract with his attorney and permitting him to sue in forma pauperis and to the assignment of counsel by the court. Id.

Where libelant, in a proceeding in admiralty for collision resulting in the loss of libelant's sloop, tackle, apparel, and furniture, alleged that by reason of his poverty he was unable to defray the expense of litigation, and prayed that process might issue and be served in forma pauperis, and there was no proof that libelant's sworn statement as to his poverty was false, the fact that he purchased the sloop for $500 was insufficient to establish that he possessed property at the time the suit was instituted, or had acquired any since that time, justifying the court in requiring him to give security for costs. The Our Friend (D. C. 1904) 131 Fed. 395.

Plaintiff could not secure leave to sue in forma pauperis, where her attorneys were prosecuting the case on a contingent fee basis and were able to give security for costs. Esquibel v. Atchison, T. & S. F. Ry. Co. (D. C. 1913) 206 Fed. 863.

See, also, Whelan v. Manhattan Ry. Co. (C. C. 1898) 86 Fed. 219.

7. Admiralty proceedings.—This section does not take away from the clerk, in actions brought thereunder, the right to charge and collect the same fees as in other causes, but provides only that he shall not be entitled to demand their payment in advance or security therefor; and a libelant who brings a suit in admiralty thereunder, and recovers, but without costs, is not entitled to withdraw the money paid in satisfaction of the judgment from the registry of the court without paying the clerk's fees taxed against him. Davis v. Adams (D. C. 1901) 109 Fed. 271.

Where libelant, in consequence of poverty, is unable to find sureties, his juratory caution will be taken, instead of a stipulation with sureties. Polydore v. Prince (D. C. 1837) Fed. Cas. No. 11,257.

A person may sue in admiralty without giving security for costs on proof

of inability. Wheatley v. Hotchkiss (D. C. 1854) Fed. Cas. No. 17,483.

See note under § 1536, ante.

8. Appellate proceedings.—The fact of poverty does not, of itself, relieve an appellant of the necessity of giving an appeal bond, but there must be statutory authority for an appeal in forma pauperis. The Presto (1899) 93 Fed. 522, 35 C. C. A. 394.

The allowance of a writ of error in forma pauperis under Act July 20, 1892, rests in the discretion of the court in respect to the meritorious character of the cause notwithstanding the amendment of June 25, 1910. Kinney v. Plymouth Rock Squab Co. (1915) 35 Sup. Ct. 236, 236 U. S. 43, 59 L. Ed. 457.

Leave to prosecute a writ of error to a state court without giving security could not be granted under Act July 20, 1892, as it had no application to proceedings in the supreme court of the United States. Gallaway v. State Nat. Bank of Ft. Worth, Tex. (1902) 22 Sup. Ct. 811, 186 U. S. 177, 46 L. Ed. 1111. Nor was the right to prosecute a writ of error from a Circuit Court of Appeals without giving security for costs given, as such act does not apply to appellate proceedings. Bradford v. Southern Ry. Co. (1904) 25 Sup. Ct. 55, 56, 195 U. S. 243, 49 L. Ed. 178.

In several cases, it was held that this section as enacted July 20, 1892, did not apply to appellate proceedings. Taylor v. Adams Express Co. (1908) 164 Fed. 616, 90 C. C. A. 526; The Presto (1899) 93 Fed. 522, 35 C. C. A. 394; In re Bradford's Petition (1905) 139 Fed. 518, 71 C. C. A. 334; Bristol v. U. S. (1904) 129 Fed. 87, 63 C. C. A. 529; Herman Keck Mfg. Co. v. Lorsch (1910) 179 Fed. 485, 103 C. C. A. 65; The George Hill (1912) 192 Fed. 1022, 112 C. C. A. 665.

In other cases, such section was held applicable to proceedings on appeal or writ of error, which were within its equity, and not excluded by its letter. Reed v. Pennsylvania Co. (1901) 111 Fed. 714, 49 C. C. A. 572; Fuller v. Montague (C. C. 1892) 53 Fed. 206; Columb v. Webster Manuf'g Co. (C. C. 1896) 76 Fed. 198; Volk v. B. F. Sturtevant Co. (1900) 99 Fed. 532, 39 C. C. A. 646.

After the Circuit Court of Appeals has twice decided that the clerk of the District Court rightfully refused to enter a default judgment, a writ of error in forma pauperis will not be allowed to review a judgment denying the existence of the default. Kinney v. Plymouth Rock Squab Co. (1915) 35 S. Ct. 236, 236 U. S. 43, 59 L. Ed. 457.

9. Criminal prosecutions.—St. 11 Hen. VII, c. 12, providing that every poor person having a cause of action against another shall have writs, according to the nature of his cause, without payment of fees, and assignment of counsel by the court, who shall act for him without reward, had reference only to a plaintiff prosecuting a civil action, and did not apply to criminal appeals. Bristol v. U. S. (1904) 129 Fed. 87, 63 C. C. A. 529.

This statute does not cover the case of one petitioning for the removal of a criminal prosecution begun against him in a state court. Virginia v. Felts (C. C. 1904) 133 Fed. 85.

10. Enforcement of right.—The federal courts have authority upon petition and by summary proceedings to compel their clerks and other officers to comply with the provisions of the statute. Columb v. Webster Manuf'g Co. (C. C. 1896) 76 Fed. 198.

III. REQUISITE PRELIMINARY SHOWING

11. In general.—The payment of the ordinary costs of proceedings in error in the circuit court of appeals cannot be dispensed with on a showing merely that the plaintiff in error, who is suing in a representative capacity, has no funds in such capacity, but it must also appear that the beneficiaries in whose interest the suit is maintained are unable to pay the required costs. Clay v. Southern Ry. Co. (1898) 90 Fed. 472, 33 C. C. A. 616.

To authorize the granting of leave to proceed in forma pauperis, it must be shown that the petitioner is a citizen of the United States, and, where he sues as representative of a decedent, the financial condition of the estate, as well as his own, must appear; and inasmuch as the statute is expressly limited to those who are unable to pay the fees or costs of the suit, or to give security for the same, a showing of inability, and not merely inconvenience or hardship, is essential. Volk v. B. F. Sturtevant Co. (1900) 99 Fed. 532, 39 C. C. A. 646.

Party allowed to prosecute suit without giving security for costs, where he makes oath to his poverty, and an attorney certifies to merits. Form of such oath. Bradford v. Bradford (C. C. 1878) Fed. Cas. No. 1,766.

The allowance of an appeal by a circuit court is not a matter of course, though a proper application therefor is seldom denied; and where a suit, as disclosed by the bill, is clearly not within the jurisdiction of that or the appellate court, and has been dismissed on that ground, and is, moreover, so manifestly vexatious and without legal merit that it is impossible to be maintained in any court, and the court would have been justified in striking the bill from its files, an application for an appeal in forma pauperis will be denied. Brinkley v. Louisville & N. R. Co. (C. C. 1899) 95 Fed. 345.

Before a federal court should permit an action to be prosecuted in forma pauperis, it should be reasonably satis-

fied that plaintiff is likely to recover something by his action; and where an action has been once tried, and a judgment for plaintiff reversed by the appellate court, which held that on the evidence adduced a verdict should have been directed for defendant, leave will not be granted the plaintiff to continue the action as a poor person, under such statute, unless a showing is made that some new evidence will be produced on another trial. Whittle v. St. Louis & S. F. Ry. Co. (C. C. 1900) 104 Fed. 286.

In a case of forfeiture, on a suggestion that the owners were unable to give security for costs, held, that an affidavit of ownership, inability, and merits would be exacted, before the government would be required to make further proofs. U. S. v. The Lion (D. C. 1858) Fed. Cas. No. 15,607.

A seaman may be required to give security for costs on appeal unless he prove by satisfactory affidavits that he is unable to do so. Wheatley v. Hotchkiss (D. C. 1874) Fed. Cas. No. 17,483.

12. Affidavit of poverty.—An affidavit of poverty made by a plaintiff who sues, as administratrix of her deceased husband, to recover damages for his wrongful death, under a state statute which gives the right of action in favor of the widow and children of the deceased, should show that neither the estate nor the beneficiaries of the action are able to prepay or secure the costs. Reed v. Pennsylvania Co. (1901) 111 Fed. 714, 49 C. C. A. 572.

The sworn statement must show that plaintiff is a citizen, and that there is no person interested who is able to pay or secure the costs. Boyle v. Great Northern Ry. Co. (C. C. 1894) 63 Fed. 539.

Though the affidavit is not filed until after the granting, upon notice to plaintiff, of an order for a cost bond, it is not too late, for the order itself is a "demand" which the plaintiff may thus "answer and avoid." McDuffee v. Boston & M. R. Co. (C. C. 1897) 82 Fed. 865.

Plaintiff may be permitted to sue in forma pauperis on filing a proper affidavit of poverty, and also an affidavit of facts sufficient to show that the cause of action is not frivolous. Whelan v. Manhattan Ry. Co. (C. C. 1898) 86 Fed. 219.

It is the filing of the affidavit, and not the truth of it, that constitutes an "answer" to the defendant's demand. McDuffee v. Boston & M. R. Co. (C. C. 1897) 82 Fed. 865; Woods v. Bailey (C. C. 1902) 113 Fed. 390.

An affidavit of poverty should be so certain in its statements that a charge of perjury could be based thereon if false; and such an affidavit, stating that demand has been made upon plaintiff by defendant to give security for costs in the sum of $1,000, and "that by reason of her poverty she is unable to give security for said costs," is not sufficient, since it might be fairly claimed that the inability had reference to the amount of security demanded, and was relative and not absolute. Woods v. Bailey (C. C. 1901) 111 Fed. 121.

Plaintiff may file a proper affidavit of poverty, though a former affidavit of poverty has been adjudged insufficient, and an order to give security for costs has been made. Woods v. Bailey (C. C. 1902) 113 Fed. 390.

Where, on a rule to give security for costs, a nonresident plaintiff has interposed an affidavit of poverty, the action will be subsequently dismissed, on a rule taken for that purpose, where it is shown by the proofs that the allegation of poverty is not true. Woods v. Bailey (C. C. 1903) 122 Fed. 967.

A showing to obtain leave to maintain a suit in admiralty in forma pauperis, although made in conformity to rules of the court long in force, must also conform to the requirements of this section; but when process has issued without such showing, and a motion has been made to require security for costs, libelant may be permitted to supply the omission, as contemplated by section 1627. Donovan v. Salem & P. Nav. Co. (D. C. 1904) 134 Fed. 316.

13. Supplying omission in showing.—See Whelan v. Manhattan Ry. Co. (C. C. 1898) 86 Fed. 219; note under § 1626, ante.

A showing to obtain leave to maintain a suit in admiralty in forma pauperis, although made in conformity to rules of the court long in force, must also conform to the requirements of Act July 20, 1892; but when process has issued without such showing, and a motion has been made to require security for costs, libelant may be permitted to supply the omission, as contemplated by this section. Donovan v. Salem & P. Nav. Co. (D. C. 1904) 134 Fed. 316.

CITED WITHOUT DEFINITE APPLICATION

The Vandercook (D. C. 1897) 77 Fed. 865, 868; O'Flaherty v. Hamburg-American Packet Co. (D. C. 1909) 168 Fed. 411; In re Guilbert (D. C. 1909) 169 Fed. 149.

§ 1627. (Act July 20, 1892, c. 209, § 2.) Suing as poor person after demand for fees or security for costs; false swearing in affidavit of poverty, perjury.

After any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false

New York may be proved by parol. Woodward v. Hall (C. C. 1821) Fed. Cas. No. 18,005.

Memorandum of costs.—Under the rule of the circuit court for the Ninth circuit which requires a party in whose favor a judgment or decree is rendered, and who claims costs, to file and serve a memorandum of his costs and disbursements within five days after rendition of the verdict, or "after notice of the decision of the court," and which further provides that "notice of a decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party," the five days do not begin to run in an equity case until notice has been received in one of the three ways specified. It is not sufficient that the solicitor had actual knowledge of the decision, or that his clerk or representative was present at its announcement. Spoor v. Board of Sup'rs of Riverside County (C. C. 1902) 113 Fed. 26.

Cited without definite application, Sellers v. Bell (1899) 94 Fed. 801, 814, 36 C. C. A. 502; Wooster v. Handy (C. C. 1885) 23 Fed. 49, 52; U. S. v. Treadwell (D. C. 1883) 15 Fed. 532, 535.

§ 1626. (Act July 20, 1892, c. 209, § 1, as amended, Act June 25, 1910, c. 435.) Suits and writs of error or appeals, etc., by poor persons without prepayment of or security for fees or costs; affidavit of poverty.

Any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. (27 Stat. 252. 36 Stat. 866.)

This section and the four sections next following were an act entitled, "An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," first cited above, amended by Act June 25, 1910, c. 435, also cited above.

This section, as originally enacted, was as follows:

"That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action."

It was amended by Act June 25, 1910, c. 435, cited above, to read as set forth here.

Courts of the United States shall be open to seamen without giving bond, or prepaying costs, or making deposit to secure costs, for the prosecution of suits for wages or salvage, or to enforce laws made for their health or safety, by a provision in Act July 1, 1916, c. 209, § 1, post, § 1630a.

Notes of Decisions

I. Operation of statute in general
1. Exclusiveness.
2. Stay for nonpayment of costs.

II. Right to prosecute suit in forma pauperis
3. Parties entitled.
4. —— Infants and representatives.
5. —— Creditor.
6. Where attorney employed for contingent fee.
7. Admiralty proceedings.
8. Appellate proceedings.
9. Criminal prosecutions.
10. Enforcement of right.

III. Requisite preliminary showing
11. In general.
12. Affidavit of poverty.

I. OPERATION OF STATUTE IN GENERAL

1. Exclusiveness.—In view of this act, a state statute on the same subject is not applicable to the federal courts. Silvas v. Arizona Copper Co. (1914) 213 Fed. 504.

2. Stay for nonpayment of costs.—Plaintiff commenced an action in a state court for injuries. The cause was removed by defendant to the federal court, in which, after the court, on the trial, had instructed the jury to render a verdict for defendant, plaintiff submitted to a nonsuit. Plaintiff afterwards commenced another action against defendant, for the same cause, in the federal court in another district. Held, that proceedings in such second action should be stayed until the costs of the first action were paid, though the first was prosecuted in forma pauperis. Kimble v. Western Union Tel. Co. (C. C. 1895) 70 Fed. 888.

II. RIGHT TO PROSECUTE SUIT IN FORMA PAUPERIS

3. Parties entitled.—This section does not apply to one who is in receipt of a salary of $20 per week, and who pays a rent of $200 per year for the house he occupies. Wickelman v. A. B. Dick Co. (1898) 85 Fed. 851, 29 C. C. A. 436.

4. —— Infants and representatives.—Although it is the settled practice in Tennessee that infants can neither sue nor defend in forma pauperis, such is not the rule of the federal courts of equity, in which they may so sue or defend. Ferguson v. Dent (C. C. 1883) 15 Fed. 771.

Neither the pauper's oath of an infant plaintiff nor that of his next friend can entitle them to sue without security for costs. Roy v. Louisville, N. O. & T. R. Co. (C. C. 1888) 34 Fed. 276.

A guardian ad litem held not entitled to sue in forma pauperis. Brown v. The Henry Pratt (D. C. 1843) Fed. Cas. No. 2,010.

5. —— Creditor.—A creditor who objects to the discharge of a bankrupt may prosecute his objections in forma pauperis. In re Guilbert (D. C. 1907) 154 Fed. 676.

6. Where attorney employed for contingent fee.—A plaintiff in a federal court, who has made a contract with her attorney to prosecute her case for a contingent fee, in a state where the statute recognizes such contracts as valid, and gives the attorney a special lien for his fee on the judgment recovered, represents as plaintiff not only her own interest, but that of her attorney, as trustee, and cannot sue as a poor person, unless it is shown that all persons beneficially interested in the action come within the terms of the act. Feil v. Wabash R. Co. (C. C. 1902) 119 Fed. 490.

Where plaintiff's attorney was financially interested in the result of an action brought in the federal court, plaintiff could not obtain an order permitting him to sue in forma pauperis, without a showing that plaintiff's attorney was also unable because of poverty to give security. Phillips v. Louisville & N. R. Co. (C. C. 1907) 153 Fed. 795.

Where plaintiff had secured counsel under a contract for a contingent fee, who had commenced the suit, filed pleadings, and prosecuted the case through two mistrials, plaintiff was not thereafter entitled, on the making of an application for security for costs, to an order rescinding his contract with his attorney and permitting him to sue in forma pauperis and to the assignment of counsel by the court. Id.

Where libelant, in a proceeding in admiralty for collision resulting in the loss of libelant's sloop, tackle, apparel, and furniture, alleged that by reason of his poverty he was unable to defray the expense of litigation, and prayed that process might issue and be served in forma pauperis, and there was no proof that libelant's sworn statement as to his poverty was false, the fact that he purchased the sloop for $500 was insufficient to establish that he possessed property at the time the suit was instituted, or had acquired any since that time, justifying the court in requiring him to give security for costs. The Our Friend (D. C. 1904) 131 Fed. 395.

Plaintiff could not secure leave to sue in forma pauperis, where her attorneys were prosecuting the case on a contingent fee basis and were able to give security for costs. Esquibel v. Atchison, T. & S. F. Ry. Co. (D. C. 1913) 206 Fed. 863.

See, also, Whelan v. Manhattan Ry. Co. (C. C. 1898) 86 Fed. 219.

7. Admiralty proceedings.—This section does not take away from the clerk, in actions brought thereunder, the right to charge and collect the same fees as in other causes, but provides only that he shall not be entitled to demand their payment in advance or security therefor; and a libelant who brings a suit in admiralty thereunder, and recovers, but without costs, is not entitled to withdraw the money paid in satisfaction of the judgment from the registry of the court without paying the clerk's fees taxed against him. Davis v. Adams (D. C. 1901) 109 Fed. 271.

Where libelant, in consequence of poverty, is unable to find sureties, his juratory caution will be taken, instead of a stipulation with sureties. Polydore v. Prince (D. C. 1837) Fed. Cas. No. 11,257.

A person may sue in admiralty without giving security for costs on proof

of inability. Wheatley v. Hotchkiss (D. C. 1854) Fed. Cas. No. 17,483.

See note under § 1536, ante.

8. Appellate proceedings.—The fact of poverty does not, of itself, relieve an appellant of the necessity of giving an appeal bond, but there must be statutory authority for an appeal in forma pauperis. The Presto (1899) 93 Fed. 522, 35 C. C. A. 394.

The allowance of a writ of error in forma pauperis under Act July 20, 1892, rests in the discretion of the court in respect to the meritorious character of the cause notwithstanding the amendment of June 25, 1910. Kinney v. Plymouth Rock Squab Co. (1915) 35 Sup. Ct. 236, 236 U. S. 43, 59 L. Ed. 457.

Leave to prosecute a writ of error to a state court without giving security could not be granted under Act July 20, 1892, as it had no application to proceedings in the supreme court of the United States. Gallaway v. State Nat. Bank of Ft. Worth, Tex. (1902) 22 Sup. Ct. 811, 186 U. S. 177, 46 L. Ed. 1111. Nor was the right to prosecute a writ of error from a Circuit Court of Appeals without giving security for costs given, as such act does not apply to appellate proceedings. Bradford v. Southern Ry. Co. (1904) 25 Sup. Ct. 55, 56, 195 U. S. 243, 49 L. Ed. 178.

In several cases, it was held that this section as enacted July 20, 1892, did not apply to appellate proceedings. Taylor v. Adams Express Co. (1908) 164 Fed. 616, 90 C. C. A. 526; The Presto (1899) 93 Fed. 522, 35 C. C. A. 394; In re Bradford's Petition (1905) 139 Fed. 518, 71 C. C. A. 334; Bristol v. U. S. (1904) 129 Fed. 87, 63 C. C. A. 529; Herman Keck Mfg. Co. v. Lorsch (1910) 179 Fed. 485, 103 C. C. A. 65; The George Hill (1912) 192 Fed. 1022, 112 C. C. A. 665.

In other cases, such section was held applicable to proceedings on appeal or writ of error, which were within its equity, and not excluded by its letter. Reed v. Pennsylvania Co. (1901) 111 Fed. 714, 49 C. C. A. 572; Fuller v. Montague (C. C. 1892) 53 Fed. 206; Columb v. Webster Manuf'g Co. (C. C. 1896) 76 Fed. 198; Volk v. B. F. Sturtevant Co. (1900) 99 Fed. 532, 39 C. C. A. 646.

After the Circuit Court of Appeals has twice decided that the clerk of the District Court rightfully refused to enter a default judgment, a writ of error in forma pauperis will not be allowed to review a judgment denying the existence of the default. Kinney v. Plymouth Rock Squab Co. (1915) 35 S. Ct. 236, 236 U. S. 43, 59 L. Ed. 457.

9. Criminal prosecutions.—St. 11 Hen. VII, c. 12, providing that every poor person having a cause of action against another shall have writs, according to the nature of his cause, without payment of fees, and assignment of counsel by the court, who shall act for him without reward, had reference only to a plaintiff prosecuting a civil action, and did not apply to criminal appeals. Bristol v. U. S. (1904) 129 Fed. 87, 63 C. C. A. 529.

This statute does not cover the case of one petitioning for the removal of a criminal prosecution begun against him in a state court. Virginia v. Felts (C. C. 1904) 133 Fed. 85.

10. Enforcement of right.—The federal courts have authority upon petition and by summary proceedings to compel their clerks and other officers to comply with the provisions of the statute. Columb v. Webster Manuf'g Co. (C. C. 1896) 76 Fed. 198.

III. REQUISITE PRELIMINARY SHOWING

11. In general.—The payment of the ordinary costs of proceedings in error in the circuit court of appeals cannot be dispensed with on a showing merely that the plaintiff in error, who is suing in a representative capacity, has no funds in such capacity, but it must also appear that the beneficiaries in whose interest the suit is maintained are unable to pay the required costs. Clay v. Southern Ry. Co. (1898) 90 Fed. 472, 33 C. C. A. 616.

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Party allowed to prosecute suit without giving security for costs, where he makes oath to his poverty, and an attorney certifies to merits. Form of such oath. Bradford v. Bradford (C. C. 1878) Fed. Cas. No. 1,766.

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Before a federal court should permit an action to be prosecuted in forma pauperis, it should be reasonably satis-

fied that plaintiff is likely to recover something by his action; and where an action has been once tried, and a judgment for plaintiff reversed by the appellate court, which held that on the evidence adduced a verdict should have been directed for defendant, leave will not be granted the plaintiff to continue the action as a poor person, under such statute, unless a showing is made that some new evidence will be produced on another trial. Whittle v. St. Louis & S. F. Ry. Co. (C. C. 1900) 104 Fed. 286.

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A seaman may be required to give security for costs on appeal unless he prove by satisfactory affidavits that he is unable to do so. Wheatley v. Hotchkiss (D. C. 1874) Fed. Cas. No. 17,483.

12. Affidavit of poverty.—An affidavit of poverty made by a plaintiff who sues, as administratrix of her deceased husband, to recover damages for his wrongful death, under a state statute which gives the right of action in favor of the widow and children of the deceased, should show that neither the estate nor the beneficiaries of the action are able to prepay or secure the costs. Reed v. Pennsylvania Co. (1901) 111 Fed. 714, 49 C. C. A. 572.

The sworn statement must show that plaintiff is a citizen, and that there is no person interested who is able to pay or secure the costs. Boyle v. Great Northern Ry. Co. (C. C. 1894) 63 Fed. 539.

Though the affidavit is not filed until after the granting, upon notice to plaintiff, of an order for a cost bond, it is not too late, for the order itself is a "demand" which the plaintiff may thus "answer and avoid." McDuffee v. Boston & M. R. Co. (C. C. 1897) 82 Fed. 865.

Plaintiff may be permitted to sue in forma pauperis on filing a proper affidavit of poverty, and also an affidavit of facts sufficient to show that the cause of action is not frivolous. Whelan v. Manhattan Ry. Co. (C. C. 1898) 86 Fed. 219.

It is the filing of the affidavit, and not the truth of it, that constitutes an "answer" to the defendant's demand. McDuffee v. Boston & M. R. Co. (C. C. 1897) 82 Fed. 865; Woods v. Bailey (C. C. 1902) 113 Fed. 390.

An affidavit of poverty should be so certain in its statements that a charge of perjury could be based thereon if false; and such an affidavit, stating that demand has been made upon plaintiff by defendant to give security for costs in the sum of $1,000, and "that by reason of her poverty she is unable to give security for said costs," is not sufficient, since it might be fairly claimed that the inability had reference to the amount of security demanded, and was relative and not absolute. Woods v. Bailey (C. C. 1901) 111 Fed. 121.

Plaintiff may file a proper affidavit of poverty, though a former affidavit of poverty has been adjudged insufficient, and an order to give security for costs has been made. Woods v. Bailey (C. C. 1902) 113 Fed. 390.

Where, on a rule to give security for costs, a nonresident plaintiff has interposed an affidavit of poverty, the action will be subsequently dismissed, on a rule taken for that purpose, where it is shown by the proofs that the allegation of poverty is not true. Woods v. Bailey (C. C. 1903) 122 Fed. 967.

A showing to obtain leave to maintain a suit in admiralty in forma pauperis, although made in conformity to rules of the court long in force, must also conform to the requirements of this section; but when process has issued without such showing, and a motion has been made to require security for costs, libelant may be permitted to supply the omission, as contemplated by section 1627. Donovan v. Salem & P. Nav. Co. (D. C. 1904) 134 Fed. 316.

13. Supplying omission in showing.—See Whelan v. Manhattan Ry. Co. (C. C. 1898) 86 Fed. 219; note under § 1626, ante.

A showing to obtain leave to maintain a suit in admiralty in forma pauperis, although made in conformity to rules of the court long in force, must also conform to the requirements of Act July 20, 1892; but when process has issued without such showing, and a motion has been made to require security for costs, libelant may be permitted to supply the omission, as contemplated by this section. Donovan v. Salem & P. Nav. Co. (D. C. 1904) 134 Fed. 316.

CITED WITHOUT DEFINITE APPLICATION

The Vandercook (D. C. 1897) 77 Fed. 865, 868; O'Flaherty v. Hamburg-American Packet Co. (D. C. 1909) 168 Fed. 411; In re Guilbert (D. C. 1909) 169 Fed. 149.

§ 1627. (Act July 20, 1892, c. 209, § 2.) Suing as poor person after demand for fees or security for costs; false swearing in affidavit of poverty, perjury.

After any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false

swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases. (27 Stat. 252.)

See note to preceding section.

§ 1628. (Act July 20, 1892, c. 209, § 3.) Suits, etc., by poor persons; issue and service of process, etc., by officers; attendance of witnesses.

The officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases. (27 Stat. 252.)

See note to section 1 of this act, ante, § 1626.

§ 1629. (Act July 20, 1892, c. 209, § 4.) Suits, etc., by poor persons; assignment of attorney; dismissal of cause.

The court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious. (27 Stat. 252.)

See note to section 1 of this act, ante, § 1626.

Parties were permitted to plead and manage their own causes personally by R. S. § 747, incorporated in Jud. Code, § 272, ante, § 1249.

Notes of Decisions

See notes under § 1626, and see Whelan v. Manhattan Ry. Co. (C. C. 1898) 86 Fed. 219.

Dismissal.—Where a suit prosecuted in forma pauperis has been dismissed on demurrer to the bill, defendant cannot, pending an application for the allowance of an appeal, obtain a dismissal of the case because the oath for leave to prosecute in forma pauperis was defective. Fuller v. Montague (C. C. 1892) 53 Fed. 206.

Although an appeal may be prosecuted in forma pauperis, the circuit court has authority, under this section to refuse the privilege to a litigant if it deems the cause unworthy of a trial, or is satisfied that the alleged cause of action is frivolous or malicious. Brinkley v. Louisville & N. R. Co. (C. C. 1899) 95 Fed. 345.

The filing of the affidavit of poverty, and not the truth of it, constitutes the answer to defendant's demand for security for costs, and defendant can only contest this truth by a motion to dismiss under this section. Woods v. Bailey (C. C. 1902) 113 Fed. 390.

The provision that the court may dismiss a cause brought under the act if satisfied that the alleged cause of action is frivolous, construed, and applied to the circumstances of the case. O'Connell v. Mason (C. C. 1903) 127 Fed. 435, judgment affirmed (1904) 132 Fed. 245, 65 C. C. A. 541. It applies to cases where the affidavit of poverty is filed simultaneously with the filing of the writ. O'Connell v. Mason (1904) 132 Fed. 245, 65 C. C. A. 541, affirming judgment (C. C. 1903) 127 Fed. 435.

"Brought under."—An action is "brought under" this section, when the filing of the writ, declaration, and affidavit is simultaneous. O'Connell v. Mason (C. C. 1903) 127 Fed. 435, judgment affirmed (1904) 132 Fed. 245, 65 C. C. A. 541.

§ 1630. (Act July 20, 1892, c. 209, § 5.) Suits, etc., by poor persons; judgment for costs; United States not liable therefor.

Judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred. (27 Stat. 252.)

See note to section 1 of this act, ante, § 1626.

§ 1630a. (Act July 1, 1916, c. 209, § 1.) Suits by seamen without prepayment of or bond for costs.

Courts of the United States shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety. (39 Stat.)

This was a provision of the sundry civil appropriation act for the fiscal year 1917, cited above.

§ 1631. (R. S. § 985.) Executions to run in all the districts of a State.

All writs of execution upon judgments or decrees obtained in a circuit or district court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but shall be issued from, and made returnable to, the court wherein the judgment was obtained.

Act May 20, 1826, c. 124, 4 Stat. 184.

Notes of Decisions

Executions.—In regard to final process, there are only two cases in which writs of execution can be served in any other district than that in which the judgment was rendered, one in favor of private persons in another district of the same state, and the other in favor of the United States in any part of the United States. Toland v. Sprague (1838) 12 Pet. 300, 328, 9 L. Ed. 1093.

The writs of execution from United States courts, in states divided into more than one district, run all over the state. Prevost v. Gorrell (C. C. 1877) Fed. Cas. Nos. 11,400, 11,402.

Cited without definite application, Treadwell v. Seymour (C. C. 1890) 41 Fed. 579, 580; Miller v. Norfolk & W. R. Co. (C. C. 1891) 47 Fed. 264, 266; The L. B. X. (D. C. 1898) 88 Fed. 290, 296.

§ 1632. (R. S. § 986.) Executions in favor of United States to run in every State and Territory.

All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State, may run and be executed in any other State, or in any Territory, but shall be issued from and made returnable to, the court wherein the judgment was obtained.

Act March 3, 1797, c. 20, § 6, 1 Stat. 515.

Notes of Decisions

See note under § 1631, ante.

Executions issued in District of Columbia.—Semble that under this section a writ of execution upon a judgment obtained in favor of the United States, issued by a court of the United States in any state, "may run and be executed in" the District of Columbia. (1874) 14 Op. Atty. Gen. 384. Accordingly, where two such writs were directed to the marshal of said District from the United States circuit court for the western district of Tennessee: Advised that it was his duty to execute them. Id.

Cited without definite application, Treadwell v. Seymour (C. C. 1890) 41 Fed. 579, 580; The L. B. X. (D. C. 1898) 88 Fed. 290, 296.

§ 1633. (R. S. § 987.) Executions stayed on conditions.

When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void.

Act Sept. 24, 1789, c. 20, § 18, 1 Stat. 83. Act March 3, 1865, c. 86, § 4, 13 Stat. 501.

Notes of Decisions

Construction and operation of statute.—This section, treating of the authority of the court over its execution as actually existing, implies that the power to issue executions has been granted. Wayman v. Southard (1825) 10 Wheat. 1, 23, 6 L. Ed. 253. It relates to a method of securing a deliberate reconsideration of a judgment or decree by the court rendering it. Sanborn v. Bay (1911) 194 Fed. 37, 114 C. C. A. 57. It relates only to the method of staying execution pending new trial, and does not limit the time

in which motions for new trial may be otherwise filed. Felton v. Spiro (1897) 78 Fed. 576, 581, 24 C. C. A. 321.

It is not the policy of congress to suspend the operation of a judgment so as to allow an application for a new trial in any case beyond the period of 42 days from the time of its rendition. Soberanes de Cambuston v. U. S. (1877) 95 U. S. 285, 287, 24 L. Ed. 448.

This section and section 1666 construed with respect to the time within which a party may obtain a supersedeas on writ of error, where the trial court entertains a motion for new trial. Sanborn v. Bay (1911) 194 Fed. 37, 114 C. C. A. 57.

Exclusiveness.—This is not the only section under which a party can apply for a new trial. His right to apply is independent of this section. This section provides for a case where he desires to obtain from the court an extension of the usual time within which to make his application for a new trial; and in that case, where he gets such time merely to apply, he must show that he has presented his petition, and that it has been allowed in accordance with the provisions of the section; but if he makes his motion for a new trial without asking for the time, then he can make it independent of this section and is not bound by the provisions of such section. In other words, the court had a perfect right to entertain the motion for a new trial, and suspend execution until it should be determined. Rutherford v. Pennsylvania Mut. Life Ins. Co. (C. C. 1880) 1 Fed. 456, 457.

Stay of execution—Power to grant.—When a circuit court enters judgment in a civil action, execution may, on motion of either party at the discretion of the court, and on such conditions for the security of the adverse party as it may be judged proper, be stayed 42 days from the time of entering judgment to give time to file in the clerk's office a petition for a new trial; but it was not the policy of congress to suspend the operation of the judgment so as to allow an application for a new trial in any case beyond the period of 42 days from the time of its rendition. Soberanes de Cambuston v. U. S. (1877) 95 U. S. 285, 287, 24 L. Ed. 448.

The federal circuit court has power to grant a temporary stay of execution of its judgments. Eaton v. Cleveland, St. L. & K. C. Ry. Co. (C. C. 1890) 41 Fed. 421.

—— **Waiver.**—A motion for new trial is a waiver of a stay agreed upon by the parties. Brent v. Coyle (C. C. 1822) Fed. Cas. No. 1,838.

—— **Rule to show cause.**—A rule to show cause why execution should not be stayed on a ground that defendant is entitled to further credit will not be granted except upon affidavit stating the precise credits and their nature. U. S. v. Wells (C. C. 1814) Fed. Cas. No. 16,664.

—— **Effect of stay.**—On motion to stay entry of judgment pending application for new trial, a decision was rendered that on plaintiff's filing security for costs he should have six weeks to make and serve his bill of exceptions or case, all proceedings for entry of judgment, except taxation for costs, to be stayed; but the order entered provided "that the defendants be stayed from entering judgment for the space of six weeks," and a resettlement of the order to make the stay coterminous with the making and service of the bill of exceptions or case was refused. Held, that the stay which was operative on defendant was not that mentioned in the decision, but that prescribed by the order; and a subsequent order extending plaintiff's time to make and file his case, "in accordance with the decision herein, and without prejudice to the stay of proceedings therein ordered," did not extend the stay. Lillienthal v. Wallach (C. C. 1888) 36 Fed. 255.

A stay of execution does not disturb the lien thereof. Love v. Love (D. C. 1874) Fed. Cas. No. 8,549.

Petition for new trial.—A bill to restrain the collection of a judgment at law will not be treated as a petition for a new trial where the bill is not framed on that theory, and shows no ground for a new trial which complainant could not have presented as a defense to the action. Edmanson v. Best (1893) 57 Fed. 531, 6 C. C. A. 471.

A motion to set aside a judgment by default, made, after the term is over, by petition to the judge, is not within this section. Popino v. McAllister (C. C. 1823) Fed. Cas. No. 11,277.

The court has no power to grant a new trial after judgment on a reference, though it was stipulated that judgment should be entered the same as if the cause had been tried by the court. Neafie v. Cheesebrough (C. C. 1877) Fed. Cas. No. 10,064.

Where a motion for a new trial is made and duly filed with leave after judgment is entered, according to the practice of some districts, the judgment does not become final, so as to authorize the issuance of execution, until the motion is disposed of. Danielson v. Northwestern Fuel Co. (C. C. 1893) 55 Fed. 49.

Motion for new trial does not suspend entering of judgment after one verdict, but execution will be stayed on application. Arnold v. Jones (D. C. 1798) Fed. Cas. No. 559.

Order denying new trial.—Where an order denying a motion for a new trial is signed by the judge at chambers, in vacation, it does not become effective,

so as to render the judgment final, until the order is filed of record in the clerk's office. Danielson v. Northwestern Fuel Co. (C. C. 1893) 55 Fed. 49.

Cited without definite application, Kingman & Co. v. Western Mfg. Co. (1898) 18 Sup. Ct. 786, 787, 170 U. S. 675, 42 L. Ed. 1192; Manning v. German Ins. Co. (1901) 107 Fed. 52, 54, 46 C. C. A. 144; Brown v. Evans (C. C. 1883) 18 Fed. 56, 58; Hynes v. Chicago, M. & St. P. R. Co. (C. C. 1885) 23 Fed. 18; Garrahy v. Kansas City, St. J. & C. B. R. Co. (C. C. 1885) 25 Fed. 258; Henning v. Western Union Tel. Co. (C. C. 1890) 41 Fed. 864, 866; U. S. v. Rogers (D. C. 1908) 164 Fed. 520.

§ 1634. (R. S. § 988.) When judgment debtor entitled to a continuance of one term.

In any State where judgments are liens upon the property of the defendant, and where, by the laws of such State, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term.

Act May 19, 1828, c. 68, § 2, 4 Stat. 281.

Notes of Decisions

Right and grounds for stay of execution.—A judgment defendant is not entitled to a stay of execution on the ground that an unsatisfied judgment previously obtained by it against the plaintiff, but which it assigned to a third party, may in a certain contingency be reassigned so as to enable defendant to set it off against the present judgment. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (1904) 128 Fed. 332, 63 C. C. A. 62.

If execution issue before the end of the term in which the judgment was rendered, it may be quashed on motion, and the judgment rescinded. Sharpless v. Robinson (C. C. 1803) Fed. Cas. No. 12,713.

The federal circuit court has power to grant a temporary stay of execution of its judgments. Eaton v. Cleveland, St. L. & K. C. Ry. Co. (C. C. 1890) 41 Fed. 421.

Under Rev. St. Mo. 1879, § 3215, an execution sale under a judgment foreclosing a mechanics' or contractors' lien against a railroad is only for the benefit of such lien holders as have obtained judgment at the time of the sale. Judgment was obtained by 2 lien holders, while in 20 or more suits to enforce other liens against the same property judgment had not been reached. Held, that to prevent a sacrifice of the judgment debtors' interest, and to avoid the expense of numerous sales, and complications of title resulting from same, the court would temporarily stay execution on the first judgment until other claims were reduced to judgment. Id.

No restraint or embarrassment can lawfully be put on the enforcement of judgment or decrees of the federal courts by means of trustee process issued by a state court; and, as execution could have issued against the principal debtor upon the decree entered in pursuance of the mandate, the enforcement of such decree against his sureties could not be prevented by the trustee suit, for, while execution could not have gone against them, they were so intimately connected with him as to stand in the same position. Rosenstein v. Tarr (C. C. 1892) 51 Fed. 368.

So far as a stay of execution is concerned, defendants in the federal courts in Pennsylvania have the same privilege as those in the state courts, and upon the same conditions, except that the stay cannot last longer than one term, and either the Pennsylvania act of 1836 (P. L. 762, §§ 3, 4; 2 Purd. Dig. [Stewart's Ed.] 1517, pars. 9, 10) or that of 1873 (P. L. 60; 1 Purd. Dig. 1519, par. 16) fixes the time when the stay begins in the federal courts, as well as in the state courts. Petrified Bone Min. Co. v. Rogers (C. C. 1908) 159 Fed. 1019.

A stay of execution is not a right, but a privilege, which the lawmaking body may grant upon such easy or burdensome conditions as are deemed wise. Id.

Where the defendant in an action at law in a federal court by the receiver of a bank claims an equitable set-off, proceedings for collection of the judgment recovered may properly be stayed to give him an opportunity to establish his claim in equity. Fowler v. Peet (C. C. 1909) 170 Fed. 620.

This section gives right of stay in a federal court only when the defendant has property upon which the judgment, if in a state court, would be a lien, and who by reason of such lien would be entitled under the state law to a stay of such judgment. Under Act Pa. June 16, 1836 (P. L. 762), which makes judgments liens on real estate, but not on personal property, and gives a right of stay to a defendant owning sufficient real estate without other security, and also a right of stay to other defendants on their giving bail, a judgment defendant in a federal court who has no real estate cannot obtain a stay by giving bail. The Island Queen (D. C. 1907) 152 Fed. 470.

Where a judgment of one court is levied on under a garnishment writ

from another court, the granting of a stay against the issuance of an execution on the judgment at the instance of the judgment debtor rests in the discretion of the court. Menees v. Matthews (D. C. 1912) 197 Fed. 633.

Where the facts indicated collusion between plaintiff in actions at law and judgment debtors who were garnisheed, the court would not grant a stay against the issuance of an execution on the judgment at the instance of the judgment debtors. Id.

Security.—Where defendants moved, after verdict, for a stay of proceedings, security was required, though they were solvent and engaged in active business. Fisher v. Meyer (C. C. 1882) 10 Fed. 268.

Stay of execution sale.—Where a levy was legally made under an execution, and the sale was adjourned from time to time and stayed by order of court, the execution did not become dormant. In re Bruce (D. C. 1907) 158 Fed. 123.

§ 1635. (R. S. § 989.) Execution not to issue against officers of revenue in cases of probable cause, etc.

When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

Act March 3, 1863, c. 76, § 12, 12 Stat. 741.

Provisions relating to the withholding of executions and the payment of judgments against revenue or other officers of the United States were made applicable to actions against officers of either House of Congress for their official acts, by Act March 3, 1875, c. 130, § 8, ante, § 117.

Notes of Decisions

1. Construction and operation of statute in general.
2. Direction to collector.
3. "Officer of the revenue."
4. Final judgment.
5. —— Interest on judgment.
6. Certificate of probable cause—Necessity and alternative liability.
7. Right to certificate and grounds therefor.
8. —— "Probable cause."
9. Application for certificate—Time of making.
10. Effect of certificate.

1. Construction and operation of statute in general.—Where a collector of customs merely detains a vessel for nonpayment of duties, the case seems properly to fall within the provisions of this section, rather than section 1611, ante. The Conqueror (1897) 17 Sup. Ct. 510, 515, 166 U. S. 110, 41 L. Ed. 937.

Where a collector is sued for money exacted under the revenue laws, it is no defense by him that he may have deposited the money in the treasury, since by this section, if there was probable cause for the act done, no execution can issue against him, but the amount of the judgment is to be paid out of the treasury. De Lima v. Bidwell (1901) 21 Sup. Ct. 743, 746, 182 U. S. 1, 45 L. Ed. 1041.

This provision would have been wholly unnecessary, except that the order of the superior officer is no defense to an inferior for the unlawful performance of an official act. Hendricks v. Gonzalez (1895) 67 Fed. 351, 353, 14 C. C. A. 659.

This section and section 1611 are not inconsistent, nor does this section authorize a recovery against a revenue officer for a wrongful seizure, when made upon probable cause, and when the goods are returned intact; but their effect, when construed together, is to limit the claimant in such case to an action for loss or damage to his property while in the custody of the officer, and to convert the judgment recovered therefor into a claim against the government, where the court certifies that the officer acted either upon probable cause or under the directions of a superior officer. Agnew v. Haymes (1905) 141 Fed. 631, 72 C. C. A. 325.

Notwithstanding this section, a suit against a collecting officer does not become a suit against the United States. Kinney v. Conant (1909) 166 Fed. 720, 92 C. C. A. 410, affirming judgment Conant v. Kinney (C. C. 1908) 162 Fed. 581, and writ of certiorari denied (1909) 29 Sup. Ct. 703, 214 U. S. 526, 53 L. Ed. 1068.

This section clearly contemplates, and by implication authorizes, a recovery against a revenue officer for an official act, although done with probable cause or under orders from a superior, and hence neither of such facts consti-

tutes a defense to an action against such an officer for an unwarranted seizure of property; the effect of a finding of either fact by the court being merely to convert the judgment recovered into a claim against the government. Haymes v. Brown (C. C. 1904) 132 Fed. 525, judgment reversed Agnew v. Haymes (1905) 141 Fed. 631, 72 C. C. A. 325.

2. Direction to collector.—The plain intent of this statute is that the direction to the collector shall shield him only when given by some officer of the government who has the undoubted authority to direct, and unless the collector is under some obligation to heed the instructions he is not protected. Frerichs v. Coster (C. C. 1885) 22 Fed. 637, 638.

3. "Officer of the revenue."—This section covers cases arising either under the tariff or the internal revenue laws of the government, but the protection afforded by this section is confined to officers of the revenue. Agnew v. Haymes (1905) 141 Fed. 631, 72 C. C. A. 325.

A postmaster is not an "officer of the revenue." Campbell v. James (C. C. 1880) 3 Fed. 513.

4. Final judgment.—It is only from final judgments that a writ of error lies from the district to the circuit court, or from the latter court to the supreme court. The granting or refusing to grant a certificate of probable cause is not a final judgment, in the sense of the statute which allows writs of error. U. S. v. Frerichs (1882) 1 Sup. Ct. 169, 170, 106 U. S. 160, 27 L. Ed. 128.

Where a writ of error to review a judgment recovered against a collector of customs for moneys exacted by and paid to him on entries is brought by the collector, the supreme court will, if it affirms the judgment, allow interest on it, under rule 23. In such a case the final judgment intended by this section is the judgment as it stands after its affirmance by this court, and after the court below has rendered such judgment as the mandate of this court requires. Cochran v. Schell (1882) 2 Sup. Ct. 827, 830, 107 U. S. 625, 27 L. Ed. 543.

5. —— Interest on judgment.—The fact that provision is made for paying judgments recovered against a collector out of the treasury, does not make a suit against a collector to recover judgment for the amount of a legacy tax illegally exacted and paid under protest one against the United States, so as to preclude the recovery of interest, and interest is recoverable in such case from the date of the payment. Conant v. Kinney (C. C. 1908) 162 Fed. 581, judgment affirmed Kinney v. Conant (1909) 166 Fed. 720, 92 C. C. A. 410, writ of certiorari denied (1909) 29 Sup. Ct. 703, 214 U. S. 526, 53 L. Ed. 1068.

The United States are not liable for interest on a judgment against a collector of a port, unless such liability is created by statute. It is not liable for interest on judgments against the collector for duties paid under protest. White v. Arthur (C. C. 1882) 10 Fed. 80.

The allowance of interest as damages under section 1671, post, and Supreme Court Rule 23, and the form of a mandate in affirming with interest a judgment against a collector of customs for duties wrongfully exacted, cannot affect the question of the liability under this section, of the government or collector for interest on the judgment. Id.

6. Certificate of probable cause—Necessity and alternative liability.—If a customs officer seizes goods for a supposed violation of law, he is liable in damages if, on the final adjudication, it appears that there was no probable cause for the seizure. McLane v. U. S. (1832) 31 U. S. (6 Pet.) 404, 8 L. Ed. 443.

The collector of customs is not personally liable for excessive duties collected, and no certificate of probable cause provided for by this section is needed or appropriate. Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98.

A suit against a collector to recover back duties paid is a private suit, and no liability exists in the government until a certificate of probable cause has been obtained from the court. White v. Arthur (C. C. 1882) 10 Fed. 80.

After a decision that the property is not liable to forfeiture, the collector is liable to the owner, unless the court certify that there was reasonable cause of seizure, and also the property be forthwith returned. Hoit v. Hook (1817) 14 Mass. 210.

7. Right to certificate and grounds therefor.—A doubt respecting the law furnishes a proper ground for granting to the collector a certificate of probable cause of seizure. U. S. v. Riddle (1809) 9 U. S. (5 Cranch) 311, 3 L. Ed. 110; The Friendship (C. C. 1812) Fed. Cas. No. 5,125; U. S. v. The Recorder (C. C. 1849) Fed. Cas. No. 16,-130; Same v. Twenty-Six Diamond Rings (D. C. 1855) Fed. Cas. No. 16,-572.

Concealment and undervaluation of goods are good grounds for a decision of the court that probable cause of prosecution existed. Taylor v. U. S. (1845) 44 U. S. (3 How.) 197, 11 L. Ed. 559.

A certificate of probable cause will be given if the officer making the seizure acts in good faith, and has reasonable grounds to suppose that the law has been violated. U. S. v. The Reindeer (C. C. 1848) Fed. Cas. No. 16,145.

A certificate of reasonable cause for seizure will be granted where it appeared that the collector acted under the instruction of the former officer in making the seizure, upon a construction of the statute adopted by the secretary

of the treasury in conformity with an opinion of the attorney general. U. S. v. The Recorder (C. C. 1849) Fed. Cas. No. 16,130.

It makes no difference whether the collector acted under a mistake of facts or of the law. Id.

A stipulation that a seizure had been made held a sufficient foundation for an order of reasonable cause of seizure, though no seizure was in fact made. U. S. v. The Henry (C. C. 1859) Fed. Cas. No. 15,352.

Where the district court, in an action against a collector for illegal seizure in which the plaintiff has recovered damages, refuses to grant a certificate of reasonable cause, under Rev. St. N. Y. § 970, the circuit court cannot certify "that there was probable cause for the act done by the collector," under this section. Frerichs v. Coster (C. C. 1885) 22 Fed. 637.

The court is not justified in granting a certificate that a collector of internal revenue, who seized the property of the plaintiff upon the pretense that he was unlawfully carrying on the business of a distiller, "acted under the direction of the secretary of the treasury, or other proper officer of the government," when it appears that he acted pursuant to the request of a revenue agent who was instructed to make the request by the chief clerk of a supervisor. Id.

A certificate of probable cause of seizure will be granted where it appears that the seizure was made in good faith, and after consultation with the surveyor, naval officer, and district attorney. U. S. v. One Hempen Cable and One Hempen Hawser (D. C. 1831) Fed. Cas. No. 15,931a.

A certificate of probable cause of seizure is properly granted on the report of public and merchant appraisers that an importation and entry was fraudulently made with intent to evade payment of duties. U. S. v. Thirty-One Boxes & Packages of Imported Articles (D. C. 1833) Fed. Cas. No. 16,465a: Same v. Three Bales of Cloth (D. C. 1840) Fed. Cas. No. 16,495.

Where the seizure is under circumstances warranting suspicion, the collector is entitled to a certificate of probable cause. U. S. v. Three Bales of Cloth (D. C. 1840) Fed. Cas. No. 16,495.

A certificate of probable cause cannot be granted where there has been neither claim nor trial, nor decree, nor anything to which an appeal could lie. The Malaga (D. C. 1849) Fed. Cas. No. 8,985.

Certificate of probable cause of seizure denied for want of jurisdiction, where the seizure had been abandoned, a new seizure made, and judgment rendered for defendant on appeal to the circuit court. Ninety-Two Barrels of Spirits (D. C. 1871) Fed. Cas. No. 10,275.

8. —— **"Probable cause."**—A reasonable ground of suspicion is reasonable cause for a seizure. U. S. v. The Recorder (C. C. 1849) Fed. Cas. No. 16,130.

The fact that the claimant was selling the goods at a low price in an obscure town, declaring them to have been imported, and that duty had been paid upon only a small portion, was held sufficient to justify their seizure. In re Gala Plaid (D. C. 1859) Fed. Cas. No. 5,183.

In determining the question, the court cannot consider the fact that the officer acted in an oppressive manner, and without a warrant. Id.

9. **Application for certificate—Time of making.**—A lapse of two years held no bar to the application, but the laches were sufficient to cast the costs of the action against the collector upon him. U. S. v. The Recorder (C. C. 1849) Fed. Cas. No. 16,130.

The certificate must be applied for in proper season. Faber v. Barney (C. C. 1869) Fed. Cas. No. 4,601.

After two years and notice for execution on the judgment, held, that the application for a certificate should not be granted. Id.

A motion for a certificate of probable cause of seizure may be made subsequent to the decree, and upon the hearing the court is not limited to the evidence introduced upon the trial. In re Gala Plaid (D. C. 1859) Fed. Cas. No. 5,183.

A certificate of probable cause and a stay of execution will be granted, though application not made until after judgment for excess duties paid where such appears to have been the practice. Cox v. Barney (D. C. 1877) Fed. Cas. No. 3,300.

10. **Effect of certificate.**—Where probable cause for seizure has been certified by the court, the claimant of the goods ought to move the court for the necessary orders to cause the return of the property to the rightful owner, and it is not the duty of the officers to do so. Averill v. Smith (1872) 17 Wall. 82, 95, 21 L. Ed. 613.

The only defense admissible in trespass against a customs officer for seizing goods as imported in violation of the revenue laws, is a judgment of condemnation on proceedings in rem in the district court, or a certificate of reasonable cause. Hall v. Warren (C. C. 1840) Fed. Cas. No. 5,952.

A certificate of probable cause of seizure is no defense to an action by the claimant against the seizing officer, to recover the value of the property, where it has not been returned. Smith v. Averill (C. C. 1869) Fed. Cas. No. 13,007.

Personal liability on the part of the collector for interest ceases after the certificate of probable cause. White v. Arthur (C. C. 1882) 10 Fed. 80.

The effect of this section is, when a certificate is given, to practically convert the suit against the officer into a claim against the United States. Hed-

den v. Iselin (C. C. 1887) 31 Fed. 266, 269.

Where the government has had no notice, actual or constructive, and no opportunity to defend, it is not concluded by the certificate of probable cause. Dunnegan v. U. S. (1881) 17 Ct. Cl. 247.

The certificate of probable cause is in effect a judgment against the government. Id.

The purpose of the law allowing certificates of probable cause is to enable the government to relieve a public officer from liability for acts done in its service, and to accept the benefit and assume the responsibility of his acts. The responsibility of the government is commensurate with the liability of the officer. New York Cent. & H. R. R. Co. v. U. S. (1888) 24 Ct. Cl. 22.

A certificate of probable cause in favor of an internal revenue collector operates instantly upon the judgment, and practically destroys the debt as against the judgment debtor. Id.

Cited without definite application, Andreae v. Redfield (1878) 98 U. S. 225, 232, 25 L. Ed. 158; U. S. ex rel. McLeod v. Sherman (1878) 98 U. S. 565, 566, 25 L. Ed. 235; U. S. v. Real Estate Sav. Bank (1881) 104 U. S. 728, 732, 26 L. Ed. 908; Flanders v. Seelye (1881) 105 U. S. 718, 724, 26 L. Ed. 1217; U. S. v. North Carolina (1890) 10 Sup. Ct. 920, 922, 136 U. S. 211, 34 L. Ed. 336; Lowe v. Kansas (1896) 16 Sup. Ct. 1031, 1035, 163 U. S. 81, 41 L. Ed. 78; Cruickshank v. Bidwell (1900) 20 Sup. Ct. 280, 284, 176 U. S. 73, 44 L. Ed. 377; Commissioners of the Sinking Fund v. Buckner (C. C. 1891) 48 Fed. 533, 535; Armstrong v. Bidwell (C. C. 1903) 124 Fed. 690, 694; Hartwell Lumber Co. v. U. S. (C. C. 1904) 128 Fed. 306 (affirmed [1905] 142 Fed. 432, 73 C. C. A. 548); People's U. S. Bank v. Goodwin (C. C. 1908) 162 Fed. 937; Twin Falls Canal Co. v. Foote (C. C. 1911) 192 Fed. 583.

§ 1636. (R. S. § 990.) Imprisonment for debt.

No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any State, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such State.

Act Feb. 28, 1839, c. 35, 5 Stat. 321. Act Jan. 14, 1841, c. 2, 5 Stat. 410. Act March 2, 1867, c. 180, 14 Stat. 543.

Notes of Decisions

Construction and operation in general.—Act Feb. 28, 1839, applied to pending cases. Gray v. Munroe (C. C. 1839) Fed. Cas. No. 5,724. CONTRA, Wilber v. Ingersoll (C. C. 1840) Fed. Cas. No. 17,632. And prior judgments. Moan v. Wilmarth (C. C. 1847) Fed. Cas. No. 9,686.

This act and the rule made thereunder by the federal courts of the Eastern district of Pennsylvania did no more than confer upon the latter courts similar powers as to the discharge of insolvent debtors as is conferred upon the state courts by the act of 1836. Ex parte Thomas (Pa. 1873) 30 Leg. Int. 344.

The intent of this and the following section is that, in civil actions for debt, the defendant shall be subject to imprisonment, and be released therefrom, precisely as he would be under the law of the state. Low v. Durfee (C. C. 1880) 5 Fed. 256, 258.

This section applies only to civil cases, and a fine imposed for a violation of federal laws punishing crimes and misdemeanors is not such a debt as is within the scope of the provisions of the constitution of California abolishing imprisonment for debt. In re Sanborn (D. C. 1892) 52 Fed. 583.

This section is controlling in all cases coming within its provision, and not affected by any subsequent act of congress, but it is not superior to subsequent conflicting statutes. Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810, 816.

—— **"Modifications."**—Section 78, c. 118, of the General Statutes of Massachusetts, provides that a debtor who has received his certificate of discharge shall be forever thereafter discharged and exempt from arrest and imprisonment in any suit or upon any proceeding for or on account of any debt or demand which might have been proven against his estate. Held, that this express exemption of discharged insolvents from imprisonment upon provable debts was a "modification * * * upon imprisonment for debt," within this section. Low v. Durfee (C. C. 1880) 5 Fed. 256.

—— **"Debt" and "Imprisonment for debt."**—Imprisonment of an attorney for contempt in failing to obey an order to pay over money collected for a client is not "imprisonment for debt," within the meaning of constitutional provision abolishing imprisonment for debt. Lack of money is no excuse in

such cases. Jeffries v. Laurie (C. C. 1886) 27 Fed. 198.

A claim for damages for an injury to the person with force is not a claim for a debt, within the meaning of the statute and rules relating to imprisonment for debt. Hanson v. Fowle (D. C. 1871) Fed. Cas. No. 6,041.

Neither fines, forfeitures, nor costs in criminal cases are debts, within the meaning of the prohibition against imprisonment for debt. In re Sanborn (D. C. 1892) 52 Fed. 583.

—— Debtors of the United States.—An insolvent debtor, who has received a certificate of discharge from arrest and imprisonment under a state insolvent law, is not entitled to a discharge from execution at the suit of the United States. U. S. v. Wilson (1823) 8 Wheat. 253, 255, 5 L. Ed. 610.

This section has no application to imprisonment under a distress warrant issued by a department under authority of a specific act of Congress against the property and body of a defaulting officer of the government. U. S. v. Dillin (1909) 168 Fed. 813, 94 C. C. A. 337.

The United States, as plaintiffs in an action at common law, are not exempt from the provisions of Act March 2, 1867, adopting the modifications, conditions, and restrictions upon imprisonment for debt existing by state laws by virtue of their prerogative. U. S. v. Tetlow (D. C. 1872) Fed. Cas. No. 16,456. But see U. S. v. Hewes (D. C. 1840) Fed. Cas. No. 15,359, holding that the United States and their debtors are not included in the provisions of Act Feb. 28, 1839; the United States not being bound by general words in a statute, but only when included expressly or by necessary implication.

State restrictions on imprisonment for debt.—Act Jan. 14, 1841, did not adopt subsequent state laws imposing restrictions and conditions on imprisonment for debt. In re Freeman (C. C. 1855) Fed. Cas. No. 5,083; U. S. v. Walsh (D. C. 1867) Fed. Cas. No. 16,635. CONTRA, Moan v. Wilmarth (C. C. 1847) Fed. Cas. No. 9,686. But Act March 2, 1867, adopts the modifications, conditions, and restrictions upon imprisonment for debt then existing by the laws of the several states, and the course of proceedings which may thereafter be adopted therein. United States v. Tetlow (D. C. 1872) Fed. Cas. No. 16,456.

As to state's power to regulate and abolish imprisonment for debt, see Mason v. Haile (1827) 12 Wheat. 370, 378, 6 L. Ed. 660.

Where, in a suit in equity for an accounting under a contract, and for a receiver for the property embraced in the contract, a part of which is in a foreign country, a writ of ne exeat is attached to preserve the property and compel its delivery to the receiver to abide the final decree, such writ is not a violation of the provision of the constitution of Illinois prohibiting imprisonment for debt. Gooding v. Reid, Murdock & Co. (1910) 177 Fed. 684, 101 C. C. A. 310.

Act Mass. May 21, 1855, to abolish imprisonment for debt and to punish fraudulent debtors, does not abolish imprisonment for debt, and is not adopted by any act of congress so as to affect process out of that court. In re Freeman (C. C. 1855) Fed. Cas. No. 5,083.

Imprisonment for debt, having been abolished in the state (New York), it cannot be used to enforce a final decree in the federal court. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

The power of the federal courts to punish for contempt and imprison for nonpayment of money judgments is circumscribed and controlled by the state laws, and where an order made in the progress of the cause is of the character of the judgment or decree for payment of money, it cannot be enforced on the theory that disobedience is a contempt. Mallory Mfg. Co. v. Fox (C. C. 1884) 20 Fed. 409, 410.

Rev. St. Ill. 1895, c. 72, §§ 30, 31, which provide that creditors who have caused their debtors to be imprisoned upon writs of ca. resp. or ca. sa. must pay their board weekly in advance, or the debtors will be discharged, is a restriction on imprisonment for debt, within this section. Stroheim v. Deimel (C. C. 1896) 73 Fed. 430, order reversed (1897) 77 Fed. 802, 23 C. C. A. 467.

Imprisonment for debt being abolished in Louisiana, held, that the federal courts therein have no jurisdiction of a suit for the enforcement of a highly penal statute in regard to fraudulent debtors. Curtis v. Feste (D. C. 1853) Fed. Cas. No. 3,502.

Construction of Massachusetts and federal statutes relating to imprisonment for debt. Campbell v. Hadley (D. C. 1859) Fed. Cas. No. 2,358.

Whether, under a judgment for the value of goods illegally imported, the debtor is liable to arrest on execution, depends on the local law. U. S. v. Moller (D. C. 1878) Fed. Cas. No. 15,793.

Imprisonment for debt, except in certain cases, having been abolished in this state (Laws 1839, 96, 83; Rev. St. 1846, pp. 433, 504), the act of Congress operates to prohibit imprisonment for debt, except in the same cases on process from the United States court. Ward v. Cozzens (1854) 3 Mich. 252.

An order of a United States circuit court issuing a capias for arrest of a defendant over whom it has jurisdiction in a state where imprisonment for

debts of that class is abolished, though erroneous, is not void. Id.

Bankruptcy.—A person is not imprisoned for debt by an order of the bankruptcy court directing his imprisonment until he pays over to the trustee in bankruptcy money adjudged to be in his hands belonging to the bankrupt's estate. Mueller v. Nugent (1902) 22 Sup. Ct. 269, 274, 184 U. S. 1, 46 L. Ed. 405.

An order of the court of bankruptcy for the payment of money or delivery of property to a trustee in bankruptcy, which constitutes a part of the estate in bankruptcy, and which is in the control and possession of the party directed to pay or deliver it, at the time the order is made, is not an order for the payment of a debt; and a commitment of the party to jail until such order is complied with is not imprisonment for debt, within the meaning of a state law (Const. Mo. art. 2, § 16; Rev. St. Mo. § 8954), abolishing imprisonment for debt. In re Rosser (1900) 101 Fed. 562, 41 C. C. A. 497.

An order requiring a bankrupt to deliver to his trustee in bankruptcy a sum of money found to be in his possession is not a judgment or order for the payment of a debt, and commitment of the party to compel his obedience thereto is not imprisonment for debt. In re Schlesinger (1900) 102 Fed. 117, 42 C. C. A. 207.

A court of bankruptcy cannot lawfully order a bankrupt to deliver to his trustee money or property which is not in his possession or under his control, and imprison him if he fails to comply with such order, which would be in fact an imprisonment for debt, and not for contempt. Boyd v. Glucklich (1902) 116 Fed. 131, 53 C. C. A. 451.

It is doubtful whether the enforcement of a contempt proceeding in bankruptcy is equivalent to imprisonment for debt within the meaning of this section, and it is also doubtful whether this section is not by implication repealed so far as it conflicts with the express provisions to the contrary in the Bankruptcy Act; but this section has no application to a case in which imprisonment for failure to obey the lawful order of the court is permitted by the laws of the state. In re Lacov (1905) 142 Fed. 960, 962, 74 C. C. A. 130.

An order requiring a bankrupt to pay over money or surrender property forming part of his estate is not one for the payment of a debt, and his commitment for refusing to obey such an order is not an imprisonment for debt. Samel v. Dodd (1906) 142 Fed. 68, 73 C. C. A. 254, writ of certiorari denied Dodd v. Samel (1906) 26 Sup. Ct. 761, 201 U. S. 646, 50 L. Ed. 903.

A court of bankruptcy has power to compel a bankrupt to surrender to his trustee money or other property which is in his possession or control, and which belongs to his estate in bankruptcy, by committing him to jail until he complies with its order in that behalf, notwithstanding the provision of this section. If this section applies to proceedings in bankruptcy, it is in conflict with the bankruptcy act of July 1, 1898, and must give way. Ripon Knitting Works v. Schreiber (D. C. 1900) 101 Fed. 810.

An involuntary bankrupt who withholds property from his trustee in bankruptcy is liable to punishment as for contempt of court, notwithstanding this section; but the power of the court to punish in such cases should be cautiously exercised. In re Anderson (D. C. 1900) 103 Fed. 854, judgment reversed McGahan v. Anderson (1902) 118 Fed. 115, 51 C C A. 92.

Admiralty and maritime jurisdiction.—See, also, note under § 1536, ante.

A surety in a stipulation in admiralty is exempt from imprisonment on execution when he would be exempt under like process from the state courts. The Kentucky (C. C. 1860) Fed. Cas. No. 7,717.

Since the adoption by the supreme court, in 1850, of rule 48, there has been no imprisonment for debt upon an execution in admiralty in New York. Id.

A court of admiralty has no power to punish sureties on a stipulation for value for contempt in failing to comply with the provisions of the decree. The Blanche Page (C. C. 1879) Fed. Cas. No. 1,524.

Prior to the amendment of admiralty rule 47, whereby imprisonment for debt on process issuing out of the admiralty court was abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, upon similar, or analogous process, issuing from a state court, it was held that this section did not prohibit arrests upon process issued out of maritime courts. Gardner v. Isaacson (D. C. 1848) Fed. Cas. No. 5,230; Gaines v. Travis (D. C. 1849) Fed. Cas. No. 5,180; Hodge v. Bemis, Id. 6,557; Marshall v. Bazin, Id. 9,125; Hanson v. Fowle (D. C. 1871) Fed. Cas. No. 6,041.

Since said amendment it seems to be the rule that no process for arrest can issue in admiralty where, in a like case, such process could not issue from the state courts in the state in which such process is sought. The Kentucky (C. C. 1860) Fed. Cas. No. 7,717; Louisiana Ins. Co. v. Nickerson (D. C. 1874) Fed. Cas. No. 8,539; The Carolina (D. C. 1876) 14 Fed. 424; Chiesa v. Conover (D. C. 1888) 36 Fed. 334. And a person arrested subsequent to such amendment, but prior to its publication, has been held to be entitled to be discharged. Bell v. Nelson (D. C. 1851) Fed. Cas. No. 1,257. But it has been held that said amended rule and this section do not affect the power of the federal court, sitting in admiralty, to issue a warrant of arrest as process to

compel defendant to respond to a claim for damages for personal injury and cruelty inflicted on a seaman. Bolden v. Jensen (D. C. 1895) 69 Fed. 745, disapproving The Carolina (D. C. 1876) 14 Fed. 424, Chiesa v. Conover (D. C. 1888) 36 Fed. 334, and The Bremena (D. C. 1889) 38 Fed. 144.

The nonimprisonment act of New York (1 Rev. St. p. 807, § 1) does not embrace arrests upon process issued out of maritime courts. Gardner v. Isaacson (D. C. 1848) Fed. Cas. No. 5,230; Marshall v. Bazin (D. C. 1849) Fed. Cas. No. 9,125.

A respondent arrested must remain in custody until he gives bond or stipulation to satisfy the decree made against him. Rule 3. Gardner v. Isaacson (D. C. 1848) Fed. Cas. No. 5,230.

Act Aug. 23, 1842 (4 Stat. 518, § 6), conferring upon the supreme court power to regulate the practice of the circuit and district courts, taken in connection with the rules promulgated by the supreme court under that act, in 1845, operates as a suspension of the acts of congress of 1839 and 1841, abolishing imprisonment for debt on process issuing out of the United States courts in all cases where, by the local law, it would be abolished. Gaines v. Travis (D. C. 1849) Fed. Cas. No. 5,180; Hodge v. Bemis, Id. 6,557.

After the adoption of the rules of 1845 parties were liable to arrest and imprisonment on process issuing out of the United States courts, irrespective of subsequent legislation in the several states abolishing imprisonment on like process. Gaines v. Travis (D. C. 1849) Fed. Cas. No. 5,180.

Since the promulgation of the supreme court rules of 1850 abolishing arrests on admiralty process, where, by the state laws imprisonment for debt has been abolished, a warrant of arrest sued out without the special order of the judge is nugatory and void. Van Stratton v. Borbock (D. C. 1857) Fed. Cas. No. 16,876a.

Act March 2, 1867, applies to admiralty proceedings. Louisiana Ins. Co. v. Nickerson (D. C. 1874) Fed. Cas. No. 8,539. CONTRA, Hanson v. Fowle (D. C. 1871) Fed. Cas. No. 6,041.

The limitation in the statutes of the United States and the rules of the supreme court, allowing arrests in civil causes by virtue of a process from a court of the United States only in cases in which an arrest is authorized by the laws of the state in which such court was sitting, applies to admiralty as well as to common-law processes. The Carolina (D. C. 1876) 14 Fed. 424.

Rule 2 of the admiralty rules of practice, providing that the mesne process in a suit in personam may be a warrant of arrest of the person of defendant, and, if he cannot be found, for an attachment of his goods and chattels, does not authorize an attachment in Alabama, where imprisonment for debt has been abolished. Chiesa v. Conover (D. C. 1888) 36 Fed. 334.

On libel against the master and two mates of a vessel for an assault and battery on libelant by the two mates, who are not in the jurisdiction, where there is no evidence that the master knew of the mates' intention to assault libelant, or could have prevented it, an order of arrest will not be issued without the security usually required in such cases. Cole v. Tollison (D. C. 1889) 40 Fed. 303.

This section and the amended forty-seventh admiralty rule, which abolishes imprisonment for debt under admiralty process in like cases, do not affect the power of the federal court, sitting in admiralty, to issue a warrant of arrest as process to compel defendant to respond to a claim for damages for personal injury and cruelty inflicted on a seaman. Bolden v. Jensen (D. C. 1895) 69 Fed. 745, disapproving The Carolina (D. C. 1876) 14 Fed. 424, Chiesa v. Conover (D. C. 1888) 36 Fed. 334, and The Bremena (D. C. 1889) 38 Fed. 144.

Under admiralty rule 47 and Rev. St. §§ 990, 991, where the master and mate of a ship are arrested in the state of Oregon on a libel for damages for injuries inflicted on the high seas, they are entitled to discharge on giving bond conditioned at all times to "render themselves amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment," as provided by the laws of Oregon, and cannot be required to give a bond conditioned for the payment of the money awarded by the final decree. Stone v. Murphy (D. C. 1898) 86 Fed. 158.

Cited without definite application, Snead v. McCoull (1851) 12 How. 407, 410, 13 L. Ed. 1043; U. S. v. Arnold (1895) 69 Fed. 987, 992, 16 C. C. A. 575 (writ of certiorari denied [1896] 16 Sup. Ct. 1208, 163 U. S. 709, 41 L. Ed. 315); In re Purvine (1899) 96 Fed. 192, 195, 37 C. C. A. 446; Clay v. Waters (1910) 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897; Hayes v. Canada, A. & P. S. S. Co. (1911) 184 Fed. 821, 108 C. C. A. 175; U. S. v. Reid (C. C. 1883) 17 Fed. 497; Nelson Morris & Co. v. Hill (C. C. 1898) 89 Fed. 477.

§ 1637. (R. S. § 991.) Discharge from arrest or imprisonment on mesne or final process.

When any person is arrested or imprisoned in any State, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest

or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such State. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such State, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the circuit court for the district where the defendant is so held.

Act Jan. 6, 1800, c. 4, § 2, 2 Stat. 5. Act Jan. 7, 1824, c. 3, 4 Stat. 1. Act April 22, 1824, c. 39, §§ 1, 2, 4 Stat. 19, 20. Act March 2, 1867, c. 180, 14 Stat. 543.

The discharge of poor debtors, imprisoned on execution, by the Secretary of the Treasury or by the President, was provided for by R. S. §§ 3471, 3472, post, §§ 6377, 6378; and the Postmaster-General was authorized to discharge from imprisonment any person confined in jail on any judgment in a civil case, obtained in behalf of the Department, by R. S. § 410, ante, § 602.

Notes of Decisions

Construction and operation in general.—See Low v. Durfee (C. C. 1880) 5 Fed. 256; note under § 1636, ante.

The remedy given by the act of 1798, authorizing the secretary of the treasury to discharge imprisoned debtors, does not prevent a remedy under the act of 1867. United States v. Tetlow (D. C. 1872) Fed. Cas. No. 16,456.

Discharge of debtor.—Where the debtor arrested on a ca. sa. is set at liberty by plaintiff, though on express condition that plaintiff shall not be prejudiced thereby, it operates as a discharge, and equity will not interfere. Magniac v. Thomson (C. C. 1852) Fed. Cas. No. 8,957.

—— **Right to discharge.**—The act of 1800 provided for the mode of discharging insolvent debtors, committed under process from the United States courts, and the cases in which it might be done. It was obligatory on the sheriffs in every county of the states who acceded to the resolution of 1789 relating to use of state jails, and no discharge under any state law not adopted by Congress or rule of court would exonerate the officer. McNutt v. Bland (1844) 2 How. 9, 11 L. Ed. 159.

Under the resolution passed by Congress in 1789 relating to the use of state jails and the Mississippi law passed in 1822, the sheriff had no right to discharge a prisoner in custody by process from the circuit court, unless such discharge is sanctioned by an act of Congress, or the mode of it adopted as a rule by the circuit court. Id.

The court will not, on motion, discharge a prisoner for debt, who has the benefit of the bounds, because the creditor refuses to pay the daily allowance. Ex parte Wilson (C. C. 1810) Fed. Cas. No. 17,779.

A prisoner in execution for a debt due the United States is entitled to be released on prison-bounds bonds. U. S. v. Anderson (C. C. 1818) Fed. Cas. No. 14,450.

Persons confined for torts and trespasses are not within the provisions of the act of congress, or that of South Carolina, for the relief of insolvent debtors. Martins v. Ballard (D. C. 1808) Fed. Cas. No. 9,176.

Jurisdiction of proceedings.—A person in custody under a capias ad satisfaciendum issued under the authority of a Circuit Court cannot legally be discharged by a state officer acting under a state insolvent law. Duncan v. Darst (1843) 1 How. 301, 304, 11 L. Ed. 139.

A United States commissioner had jurisdiction, not only of proceedings for the discharge of a person arrested on mesne process issued out of a federal court, but also of proceedings to obtain the arrest of a judgment debtor on an execution issued by a federal court, and hence was bound to entertain and determine an application for such arrest. Hayes v. Canada, A. & P. S. S. Co. (1911) 184 Fed. 821, 108 C. C. A. 175.

The aldermen of Alexandria have no power to discharge, under the Virginia laws, a debtor committed on process from a United States court. Knox v. Summers (C. C. 1810) Fed. Cas. No. 7,914.

Selection of justice of peace by officer, at request of debtor, must be considered the act of the debtor. Buckley v. Page (C. C. 1860) Fed. Cas. No. 2,094.

After surrender to the custody of the jailer, the debtor cannot complete the disclosure theretofore begun, and further proceedings by the justices are without jurisdiction. Burnham v. Adams (C. C. 1866) Fed. Cas. No. 2,173.

Where a judgment debtor was arrested on a writ issued out of the federal court on the ground that he had property which he refused to apply to a judgment against him, all proceedings to secure his release after commitment other than by petition in bankruptcy must be taken before a United States commissioner. Johnson v. Crawford & Yothers (C. C. 1907) 154 Fed. 761.

A judge of a state court cannot discharge from arrest, under the insolvent laws of the state, one who is in cus-

tody upon process from the federal court. Ex parte Thomas (Pa. 1873) 10 Phila. 82, 30 Leg. Int. 344.

Even if Act Feb. 28, 1839, c. 39, expressly or impliedly gave to the court of common pleas jurisdiction to discharge an insolvent debtor held under process of the federal courts, the court of common pleas will decline to take jurisdiction because there is full power in the federal courts in that behalf, under same act and rule. Id.

Regularity of proceedings.—Where the justices have jurisdiction, their certificate is conclusive as to regularity of preliminary proceedings. Buckley v. Page (C. C. 1860) Fed. Cas. No. 2,094.

Bonds—Validity.—A statutory bond for the liberties of the prison, executed by the debtor under duress, is void both as against him and his sureties. Hawes v. Marchant (C. C. 1852) Fed. Cas. No. 6,240.

But if the debtor, with the knowledge and consent of one of his sureties, claims and exercises the right of being on the liberties by virtue of such a bond, they are estopped to allege its invalidity. Id.

—— Time to procure.—Forty-eight hours is ordinarily a reasonable time to give a debtor arrested on execution to procure bond before committing him to prison. U. S. v. Hudson (D. C. 1874) Fed. Cas. No. 15,412.

Poor debtor's oath.—Right of imprisoned debtor in Massachusetts to take the poor debtor's oath. See Case of Snow (C. C. 1847) Fed. Cas. No. 13,143.

Rearrest and reimprisonment.—After judgment rendered on a prison-bounds bond, defendant may be taken in custody on the original ca. sa., after the expiration of a year from the date of the bond. Owen v. Glover (C. C. 1824) Fed. Cas. No. 10,629.

After a prisoner has been released upon a limit bond, the sheriff can confine him again only on the bail's becoming insufficient. He cannot accept a surrender. U. S. v. Noah (C. C. 1825) Fed. Cas. No. 15,894.

A debtor of the United States, discharged, by order of the president, under Act March 3, 1817, cannot be arrested again on a new ca. sa. by the marshal for his fees, irrespective of an agreement to that effect. U. S. v. Smith (C. C. 1826) Fed. Cas. No. 16,327.

Cited without definite application, Snead v. McCoull (1851) 12 How. 407, 410, 13 L. Ed. 1043; Campbell v. Haverhill (1895) 15 Sup. Ct. 217, 220, 155 U. S. 610, 39 L. Ed. 280; Stroheim v. Deimel (1896) 77 Fed. 802, 806, 23 C. C. A. 467 (writ of certiorari denied [1897] 17 Sup. Ct. 993, 166 U. S. 721, 41 L. Ed. 1188); Hayes v. Canada, A. & P. S. Co. (1911) 184 Fed. 821, 108 C. C. A. 175; U. S. v. Reid (C. C. 1883) 17 Fed. 497; Hendryx v. Fitzpatrick (C. C. 1884) 19 Fed. 810, 811; In re Sanborn (D. C. 1892) 52 Fed. 583, 586.

§ 1638. (R. S. § 992.) Privileges of jail limits.

Persons imprisoned on process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective States are entitled to, and under the like regulations and restrictions.

Act Jan. 6, 1800, c. 4, § 1, 2 Stat. 4. Act May 19, 1828, c. 68, § 1, 4 Stat. 278. Act Aug. 1, 1842, c. 109, 5 Stat. 499.

Notes of Decisions

Bond for jail limits.—A prison-bounds bond may be assigned by a deputy marshal. Scott v. Wise (C. C. 1807) Fed. Cas. No. 12,548.

The escape of a prisoner while he is in a state of insanity, is no breach of the condition of a bond for jail limits. Hazard v. Hazard (C. C. 1820) Fed. Cas. No. 6,278.

The obligors on a bond for the jail limits are not discharged from liability for an escape by the subsequent assent of the plaintiff to the escape. Slocum v. Hathaway (C. C. 1820) Fed. Cas. No. 12,952.

It is no defense to a surety on a prison-bounds bond that the principal was insolvent when the bond was given. Smoot v. Lee (C. C. 1824) Fed. Cas. No. 13,133.

An assignment of a bond for jail limits to the United States, when they are plaintiffs, is valid, and its acceptance by the secretary of the treasury will be presumed to have been authorized. U. S. v. Noah (C. C. 1825) Fed. Cas. No. 15,894.

Right of action upon a prison-bounds bond, for an escape after the debtor had been ordered into close custody on being found guilty of fraud on an application for a discharge under the insolvent act. Keirll v. McIntire (C. C. 1826) Fed. Cas. No. 7,651.

Debtors of the United States are not entitled to the benefit of the prison bounds in the District of Columbia. U. S. v. Gorman (C. C. 1835) Fed. Cas. No. 15,236.

A valid promise not to arrest a debtor on the first execution does not, at law, avoid a bond given by the debtor

for the prison liberties, when arrested in violation of such promise, which is collateral merely. Hawes v. Marchant (C. C. 1852) Fed. Cas. No. 6,240.

State legislation.—Act May 19, 1828, gave debtors imprisoned under executions from federal courts at the suit of the United States the privilege of jail limits as they were fixed by state laws at the date of that act. U. S. v. Knight (1840) 14 Pet. 301, 313, 10 L. Ed. 465.

The Rhode Island statutes giving the liberty of the limits to prisoners, on giving bonds not to escape, etc., have not altered the common law. Steere v. Field (C. C. 1822) Fed. Cas. No. 13,-350.

Act 1828, c. 68, adopts the state laws, then existing, on the subject of jail liberties; and Act 1800, c. 4, is no longer in force. U. S. v. Knight (C. C. 1838) Fed. Cas. No. 15,539.

Habeas corpus.—The writ of habeas corpus ad subjiciendum does not lie to bring up a person confined in the prison bounds on a ca. sa. issued in a civil suit. Ex parte Wilson (1810) 6 Cranch, 52, 3 L. Ed. 149.

§ 1639. (R. S. § 993.) Goods taken on a fieri facias, how appraised.

When it is required by the laws of any State that goods taken in execution on a writ of fieri facias shall be appraised, before the sale thereof, the appraisers appointed under the authority of the State may appraise goods taken in execution on a fieri facias issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such State. And the marshal, in whose custody such goods may be, shall summon the appraisers, in the same manner as the sheriff is, by the laws of such State, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement. When such appraisers attend they shall be entitled to the like fees as in cases of appraisements under the laws of the State.

Act March 2, 1793, c. 22, § 8, 1 Stat. 335.

Notes of Decisions

Appraisement.—This act refers to the appraisement laws of the respective states which were in force at the time of its passage. Wayman v. Southard (1825) 10 Wheat. 1, 33, 6 L. Ed. 253.

Under the Nebraska statute, giving judgment debtors the right to have their property appraised, and providing that it shall not be sold for less than two-thirds its appraised value, an appraisement cannot be set aside, as too low, where fraud in the appraisement is not alleged. Northwestern Mut. Life Ins. Co. v. Seaman (C. C. 1897) 80 Fed. 357.

Cited without definite application, Bronson v. Kinzie (1843) 1 How. 311, 323, 11 L. Ed. 143.

§ 1640. (Act March 3, 1893, c. 225, § 1.) Sale of real property under order or decree.

All real estate or any interest in land sold under any order or decree of any United States Court shall be sold at public sale at the Court-house of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct. (27 Stat. 751.)

This section and the two sections next following were an act entitled "An act to regulate the manner in which property shall be sold under orders and decrees of any United States courts," cited above.

Notes of Decisions

1. Construction and operation in general.
2. Judicial sales of realty in general.
3. —— Validity of sale.
4. —— Place of sale.
5. —— Public auction.
6. —— Appraisement.
7. —— Order or decree of sale.
8. —— Deed.
9. Confirmation of sale.
10. Rights and liabilities of purchaser.
11. Setting aside of sale.
12. —— Power to set aside.
13. —— Procedure.
14. —— Grounds in general.
15. —— Inadequacy of price.
16. —— Waiver of right.
17. Sales in bankruptcy proceedings.
18. Disposition of proceeds of sale.
19. Claims against property sold.
20. Resale.

1. Construction and operation in general.—This section is mandatory, and divests federal courts of the discretion which theretofore existed of making sales otherwise than by public auction,

and a sale otherwise made does not bind the purchaser even after confirmation. Cumberland Lumber Co. v. Tunis Lumber Co. (1909) 171 Fed. 352, 96 C. C. A. 244, writ of certiorari denied Tunis Lumber Co. v. Cumberland Lumber Co. (1909) 30 Sup. Ct. 403, 215 U. S. 603, 54 L. Ed. 345.

This act is prospective in its operation. Central Trust Co. of New York v. Sheffield & Birmingham Coal, Iron & Ry. Co. (C. C. 1894) 60 Fed. 9.

2. Judicial sales of realty in general.—A standing master in chancery, who has taken and filed his oath as such, need not take an additional oath or file a bond before making a sale in a case where it is not required by the decree, nor the state statute under which he acts. Elgutter v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 500, 30 C. C. A. 218.

Where the bid of the proposing purchaser at the sale in equity is reported to the court, and the price to be paid and the purchaser are specified in the order empowering the officer to accept the bid and convey the property, the sale is final, when the officer has received the price and conveyed the property. Files v. Brown (1903) 124 Fed. 133, 59 C. C. A. 403.

A judicial sale is a sale authorized by a court which has jurisdiction to grant such authority. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. (1908) 165 Fed. 162, 91 C. C. A. 196.

A sale under a decree of court is judicial when such sale is not made exclusively under the powers of a trust deed. Chew v. Hyman (C. C. 1881) 7 Fed. 7.

While persons, who by virtue of liens or otherwise have an existing interest in property to be sold at judicial sale, may lawfully combine together for the protection of their interests and may even expressly agree not to bid against each other, in furtherance of a plan to conserve their rights, in so doing their activities must not operate to exclude any part of the general public from bidding. Investment Registry v. Chicago & M. Electric R. Co. (D. C. 1913) 206 Fed. 488, decree affirmed (C. C. A. 1913) 212 Fed. 594.

3. —— Validity of sale.—The fact that a sale had actually been made pursuant to a decree erroneous in adjudging the whole debt due should not prevent its reversal; the error being substantial, and the appellate court not being in a position to determine the bona fides of the sale. Grape Creek Coal Co. v. Farmers' Loan & Trust Co. (1894) 63 Fed. 891, 12 C. C. A. 350 (decree affirmed Farmers' Loan & Trust Co. v. Grape Creek Coal Co. [1895] 65 Fed. 717, 13 C. C. A. 87).

There is no statute or other authority requiring a standing master to give a bond, and, if an order under which he makes a sale of property does not require a bond, the validity of the sale is not affected by the lack of one. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 30 C. C. A. 212.

It is no objection to the validity of a sale by a master that a party had no notice of his appointment. His authority to make the sale is derived, not from his appointment as an officer of the court, but from the decree of sale, of which the parties had notice. Id.

The failure of a commissioner appointed to make a sale of property under a decree of court, through inadvertence, to offer separately one parcel of land, of small value, as required by the terms of the decree, before offering all as a totality, is a mere irregularity, which will not defeat confirmation where no loss or injury resulted. Godchaux v. Morris (1903) 121 Fed. 482, 57 C. C. A. 434.

The rule that courts have power over their judgments and decrees during the term at which they are rendered does not give them jurisdiction to avoid confirmed judicial sales without cause at the term at which they are confirmed; the rights of purchasers having vested under the confirmation. Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391.

Where a federal court has rendered a decree foreclosing a mortgage, in a suit wherein it had jurisdiction of the parties and the subject-matter, the fact that the provision of such decree directing the manner in which the property should be sold, and the order of sale subsequently issued thereon, inadvertently followed the state statute, and did not conform to the requirements of this section, as to the notice of sale, does not render the sale made thereon void, but merely voidable; and where the defendant, with knowledge of the facts, and due notice of the application for confirmation, makes no objection thereto, and does not appeal from either the original decree or the order of confirmation, he will be deemed to have waived the defect, and he cannot attack the validity of the title acquired by the purchaser collaterally, by an action to recover the property. National Nickel Co. v. Nevada Nickel Syndicate (C. C. 1901) 106 Fed. 110, judgment affirmed (1901) 112 Fed. 44, 50 C. C. A. 113, writ of certiorari denied (1902) 22 Sup. Ct. 939, 184 U. S. 700, 46 L. Ed. 765.

While it is the duty of a special master authorized by the court to make a sale of real estate to report the costs and expenses of executing the order of the court, his failure to do so does not affect the validity of the sale. Clark v. Iowa Fruit Co. (C. C. 1911) 185 Fed. 664.

4. —— Place of sale.—An execution sale by a marshal, on a judgment of a federal court, outside the county in which the land was situated, was void, unless it was at the place of holding

the federal court of the district, and the return showed that it was on the "written request" of defendant. Jones v. Rogers (1905) 38 So. 742, 85 Miss. 802.

Neither the return on an execution that the execution sale by a marshal, on a judgment of a federal court, outside the county where the land was situated, was "in J.," nor the bill in a suit to remove clouds from title alleging that it was at the "front door of the statehouse in J.," shows that the sale was at the place authorized by Act Feb. 16, 1839, c. 27, § 4, 5 Stat. 317, "the place where the United States court for the district is holden"; that is, the special house in which the federal court held its sittings. Id.

A sale of lands situated in Boone county by the United States marshal at the courthouse in St. Louis under a judgment of the United States District Court is valid. Keene v. Barnes (1860) 29 Mo. 377.

5. —— **Public auction.**—That a sale of real estate under decree of a federal court was not held at the place prescribed by statute does not render it void nor subject to collateral attack. Lansburgh v. McCormick (1915) 224 Fed. 874, 140 C. C. A. 296.

6. —— **Appraisement.**—Rev. St. Ohio, § 5389, which requires three "disinterested freeholders" to appraise lands before a judicial sale thereof, does not disqualify a distant relative of one of the creditors of a corporation, whose claim represents only a small portion of its aggregate indebtedness, from acting as an appraiser on a judicial sale of its property for the benefit of all its creditors. Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C. 1890) 44 Fed. 539, decree affirmed Leadville Coal Co. v. McCreery (1891) 12 Sup. Ct. 28, 141 U. S. 475, 35 L. Ed. 824.

7. —— **Order or decree of sale.**—Where a federal court had jurisdiction to order a sale of real estate, the fact that its decree directed that the sale be made at a place other than "the courthouse of the county, parish or city, in which the property, or the greater part thereof, is located, or upon the premises," as required by this act, does not render the sale void, nor is it a ground for refusing confirmation, since the decree, although erorneous, is binding unless reversed on appeal. Godchaux v. Morris (1903) 121 Fed. 482, 57 C. C. A. 434.

Where an order appointing a clerk of the Circuit Court of the United States special master to conduct a judicial sale of certain land under a decree of the Circuit Court did not specify special reasons therefor, the order was erroneous to that extent; but the error did not affect the balance of the sale decree, as it was amendable in that respect. Quinton v. Neville (1907) 154 Fed. 432, 83 C. C. A. 252.

Where a lien was imposed on the excess of the proceeds of a sale of land belonging to an administrator with the will annexed, over $60,000, the owners of the lien could not object to a provision in the sale decree requiring each bidder as evidence of good faith to deposit 20 per cent. of the amount of his accepted bid, to be forfeited and applied to the costs if the bid was not made good, the commissioner being authorized to accept the receipt of the administrator in lieu of cash in case he became the purchaser at the sale. Id.

8. —— **Deed.**—A master's deed, for property sold by him after he filed his report, is void. McBride v. Gwynn (D. C. 1887) 33 Fed. 402.

9. **Confirmation of sale.**—An order of confirmation of a judicial sale may cure all irregularities in the course of the proceeding but can add nothing to the authority of the officer to make it. Wills v. Chandler (C. C. 1880) 2 Fed. 273.

A sale of property as a whole instead of in parcels will be confirmed, where no objection was made to the decree directing that it be sold as a whole, and there is no offer to pay higher price in case the bidding be reopened. Id.

Confirmation of a sale will not be refused on the ground that the purchaser has not made the full cash payment required by the decree, where it appears that he has paid a substantial sum, and there is no reason to suppose that he will not pay the balance on confirmation. Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1897) 84 Fed. 752.

Where the law makes no provision for the service of notice on the defendant of an application for confirmation of a sale, a notice served upon the defendant's attorney of record constitutes due notice to the defendant. Nevada Nickel Syndicate v. National Nickel Co. (C. C. 1900) 103 Fed. 391.

The fact that a decree provided that a sale of property made thereunder should be reported for confirmation after the expiration of the six months allowed for redemption does not render invalid a confirmation entered before that time, after due notice to the defendant of the application therefor, and without objection on its part. Id.

When confirmation of a judicial sale is desired, the better practice is to serve on counsel notice that at a time and place stated decree nisi will be moved for. The motion, when made, should be accompanied by proof of service of such notice. Coltrane v. Baltimore Building & Loan Ass'n (C. C. 1903) 126 Fed. 839.

The purchaser at judicial sale is not the only one who may move for confirmation. Id.

10. **Rights and liabilities of purchaser.**—A bid for property at a special master's sale is only an offer to take it

at that price, and the acceptance or rejection of the offer is within the sound legal discretion of the court, to be exercised with due regard to the special circumstances of the case. The acceptance of the offer is only manifested by an order confirming the sale, and, until this is done, the purchaser does not stand in the position of an innocent purchaser. State of Tennessee v. Quintard (1897) 80 Fed. 829, 26 C. C. A. 165.

A purchaser at a master's sale becomes a quasi party to the suit, and is affected with notice of every step subsequently taken in the case relating to the purchase and the title acquired thereby. Id.

The rule that a pledgee who is a trustee cannot become the purchaser at his own sale of the pledge is inapplicable to a judicial sale conducted by an officer of the law. Anderson v. Messinger (1906) 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094.

A successful bidder under an order of court at a sale subject to confirmation by the court is a purchaser from the announcement of the sale to him by the officer, and may thereafter be compelled to complete his purchase. Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391.

A purchaser at a judicial sale should not be compelled to comply with his bid, where he was given reasonable time to investigate the title, where the prevailing practice recognized his right to show defects in the title, and where it appears that there were defects in some of the titles to the lands sold. Buell v. Kanawha Lumber Corporation (1911) 185 Fed. 109, 109 C. C. A. 194.

A purchaser at a judicial sale is a party to the proceedings, and within the court's jurisdiction for the enforcement of the terms of sale, both in his favor and against him. In re Two Rivers Woodenware Co. (1912) 199 Fed. 877, 118 C. C. A. 325.

At a judicial sale the successful bidder buys subject to the approval of the court, and until confirmation he has no vested right in the property, nor is it free from the court's control. Layton v. Rhode Island Hospital Trust Co. (1913) 205 Fed. 276, 125 C. C. A. 263.

The costs and expenses to be paid by the advance bidder cannot be fixed for all cases, but must depend in each case on its own circumstances. Blackburn v. Selma R. Co. (C. C. 1880) 3 Fed. 689.

A court of equity will relieve the purchaser from complying with his bid made at a judicial sale where the title is defective. Dunscomb v. Holst (C. C. 1882) 13 Fed. 11.

A title acquired under the following devise in a will, "I bequeath to my daughter [the land in question] for her and her children's sole and separate use, free from any claim or control of her husband," is not of such clear and indisputable character as the purchaser at a judicial sale has a right to demand. Id.

The purchaser at the sale made, who is also a bondholder and party, takes no full title to what the decree purports to sell. Coann v. Atlanta Cotton Factory Co. (C. C. 1882) 14 Fed. 4.

The protection extended to a bona fide purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity. Latham v. Barney (C. C. 1882) 14 Fed. 433, decree reversed Hoyt v. Latham (1892) 12 Sup. Ct. 568, 143 U. S. 553, 36 L. Ed. 259.

One claiming the right to avoid a purchase made by another at a judicial sale, or of treating the purchaser as a trustee, and availing himself of the purchaser's bid, cannot delay the assertion of this right to enable him to decide in the light of subsequent events whether he would or not be profited by its assertion. Credit Co. v. Arkansas Cent. R. Co. (C. C. 1882) 15 Fed. 46.

In chancery, a bidder at a sale by a master, under a decree of court, is not considered a purchaser until the report of sale is confirmed; and he cannot be compelled to complete his purchase until his bid has been in some form accepted by the court, which stands in the place of a vendor, using the master to receive and report the bids. Mayhew v. West Virginia Oil & Oil Land Co. (C. C. 1885) 24 Fed. 205, decree affirmed Camden v. Mayhew (1889) 9 Sup. Ct. 246, 129 U. S. 73, 32 L. Ed. 608.

A purchaser at a judicial sale is entitled to look to the judgment or decree for the measure of his rights, and need look no further. It is his contract with the court, and should not be changed. Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 30 Fed. 332.

Purchasers, and all others claiming under purchasers, at a judicial sale, are privies to the judgment authorizing the sale, and are concluded by it from questioning the validity of receiver's certificates of indebtedness, subject to the payment of which the sale was decreed to be made. Central Nat. Bank v. Hazard (C. C. 1887) 30 Fed. 484.

Where a claim is sold at judicial sale before the locator has paid the price and received his certificate, the purchaser at such sale acquires only the then interest of the locator, and the title afterwards acquired by him, by paying the price and receiving his certificate, does not pass by such sale. Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C. 1887) 33 Fed. 562.

A purchaser of property at judicial sale, who is made a party to an appeal from the order confirming the sale, and who pending the appeal, which is with-

out supersedeas, conveys the title to the property, and so deals with it as practically to destroy its identity, is not protected from a suit in personam for its value, upon reversal of the order, by Code Iowa 1873, § 3199, which provides that property acquired in good faith under a judgment subsequently reversed shall not be affected by such reversal. Central Trust Co. v. Hubinger (C. C. 1898) 87 Fed. 3.

A purchaser of property at a judicial sale, who fails to complete his bid, cannot be held for the difference between his bid and the price realized on a second sale, nor for the costs of such resale, unless he had notice that the second sale was to be made at his risk; and the fact that by his purchase he became a party to the record does not charge him with such notice, where there was no order that the sale should be so made. Bayne v. Brewer Pottery Co. (C. C. 1898) 90 Fed. 622, decree reversed Tower v. Eagle Pencil Co. (1899) 94 Fed. 361, 36 C. C. A. 294.

Where a claimant was purchaser, and objected to paying $25 auctioneer's fees, and claimed to draw his own deed, both of which the auctioneer refused to yield, and the property was again put up and sold at $450 less price, held that the first purchaser could not be held for the deficiency. The John E. Mulford (D. C. 1883) 18 Fed. 455.

Where, at a sale for cash, the purchaser gives a check for less amount than the price, offering to pay the balance next day, he cannot complain where his bid is rejected, and a sale made to the next lowest bidder. United States v. The Haytian Republic (D. C. 1894) 64 Fed. 214.

11. Setting aside of sale.—A party is not estopped from bringing an action to set aside a judicial sale, made without authority, by the fact that the court may have overruled the motion to set aside the order confirming such sale. Wills v. Chandler (C. C. 1880) 2 Fed. 273.

12. —— Power to set aside.—A court has power to vacate an order of confirmation of a judicial sale at the same term at which it was rendered. Indiana & Arkansas Lumber & Mfg. Co. v. Milburn (1908) 161 Fed. 531, 88 C. C. A. 473.

13. —— Procedure.—Courts can consider alleged causes for avoiding judicial sales during the term under which they were made on motions or orders to show cause on due notice, without the filing of formal bills for that purpose. Morrison v. Burnette (1907) 154 Fed. 617, 88 C. C. A. 391.

14. —— Grounds in general.—In a sale by a master or receiver under an order of confirmation, a bidder becomes a purchaser when the officer announces the sale to him; and the sale will not be opened for bidders, in the absence of fraud or misconduct. Files v. Brown (1903) 124 Fed. 133, 59 C. C. A. 403.

In the absence of fiduciary relations or extraordinary circumstances, courts and their officers are as firmly bound by their executed sales as private citizens, and ordinarily have no right to rescind them on any ground not available to a private party. Id.

After confirmation of a judicial sale, the rights of purchasers are vested, and neither inadequacy of price nor offers of higher prices, nor anything but fraud, mistake, or accident, for which equity would avoid a like sale between private parties, will warrant a court in avoiding the sale or opening it for other bids. Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391.

The fact that all the property of a defendant corporation, both personal and real, is sold under a decree in one parcel, as a whole, affords no ground for setting aside such sale on motion of the defendant, where the decree and order of sale expressly directed the sale to be made in that manner, and, although regularly served with copies thereof, the defendant made no objection on that ground, and especially where it is not shown that the price realized was inadequate, or that the defendant suffered any injury from the manner of sale. Nevada Nickel Syndicate v. National Nickel Co. (C. C. 1900) 103 Fed. 391.

Where a judicial sale has been conducted in good faith and in accordance with provisions made for notice, etc., and has brought a satisfactory price, it will not be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining parties before the sale. Bidwell v. Huff (C. C. 1909) 176 Fed. 174.

15. —— Inadequacy of price.—Under the settled rule that a judicial sale will not be set aside for inadequacy of price, unless so gross as to shock the conscience, or unless there are additional circumstances which make it inequitable to allow it to stand, opinions by affiants that a larger price might be obtained on a resale are not sufficient to authorize the setting aside of a sale where no other facts are shown which make it inequitable. Blanks v. Farmers' Loan & Trust Co. (1903) 122 Fed. 849, 59 C. C. A. 59.

In an application to set aside a judicial sale upon the ground of gross inadequacy of price, it is not essential that the amount of the advance bid should be actually paid into court if it is absolute and unconditional. Blackburn v. Selma R. Co. (C. C. 1880) 3 Fed. 689.

Where title to property worth many thousands of dollars was purchased at a judicial sale for $100, the purchaser will be restrained from taking any title by the purchase, where the facts show

that the sale was made under adverse circumstances, when creditors jointly interested were not parties, and that the decree was procured, and the sale made, in a court distant from that in which the land was situated. Hunt v. Fisher (C. C. 1887) 29 Fed. 801.

Expression of a well-founded opinion by a witness that property would, on resale, bring a much higher price, is not sufficient ground for setting aside a judicial sale. Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C. 1893) 54 Fed. 26.

A sale will not be set aside for inadequacy of price, unless it is such as to shock the conscience. Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1897) 84 Fed. 752; Fidelity Insurance & Safe-Deposit Co. v. Roanoke St. Ry. Co. (C. C. 1899) 98 Fed. 475. And additional circumstances exist, which render it inequitable to permit the sale to stand. Magann v. Segal (1899) 92 Fed. 252, 34 C. C. A. 323. But will be vacated for inadequacy, accompanied by slight circumstances of unfairness by the successful bidder. Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391, Layton v. Rhode Island Hospital Trust Co. (1913) 205 Fed. 276, 125 C. C. A. 263.

A transferee of $285,000 of the stock of a corporation worth at least $200,000 failed to record a certificate of the transfer, as required by the state statute, to render the transfer valid as against creditors of the transferror. Such a creditor, having a claim of $12,000, brought suit thereon, attached such stock, and obtained a judgment and an order for its sale. Under such order, which required the stock to be sold in solido or in blocks to suit the purchaser, he caused the entire amount of stock to be sold in bulk, and became the purchaser for $1,000, which he credited on his judgment. It was an admitted purpose of both creditor and debtor to devest the transferee of his stock. Held, that the action of the creditor in causing the sale in bulk of property so largely exceeding in value the amount of the judgment, and in purchasing it for a price so inadequate, operated as a constructive fraud upon the transferee, which vitiated the sale, and that the fact that the transferee had knowledge of the sale did not deprive him of the right to relief against it in equity. Fahrney v. Kelly (C. C. 1900) 102 Fed. 403.

Mere errors in a decree, in directing the manner of sale of property thereunder, or irregularities in such sale, afford no ground for setting aside such sale after confirmation had upon due notice to the defendant, and without objection. Nevada Nickel Syndicate v. National Nickel Co. (C. C. 1900) 103 Fed. 391.

It was no reason for vacating a judicial sale that two of the defendants had an undivided two-sevenths interest in the property, and that they were not entitled to have their interests adjusted. Bidwell v. Huff (C. C. 1909) 176 Fed. 174.

16. —— Waiver of right.—Where the minority stockholders of a railroad made no objection to a judicial sale of the property to the majority stockholder and no effort to protect themselves for 17 months, and until the purchaser had expended large sums in the payment of debts and improvement of the property, an action to avoid the sale was then too late. Rothchild v. Memphis & C. R. Co. (1902) 113 Fed. 476, 51 C. C. A. 310.

17. Sales in bankruptcy proceedings.—The provision requiring judicial sales of land to be made on the property or at the courthouse in the county where it lies, does not apply to sales by trustees in bankruptcy. Robertson v. Howard (1913) 33 Sup. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174 (reversing judgments [1910] 109 Pac. 696, 82 Kan. 588 [1910] 112 Pac. 162, 83 Kan. 453); In re Britannia Mining Co. (1913) 203 Fed. 450, 121 C. C. A. 395 (reversing order [D. C. 1912] 197 Fed. 459); In re Edes (D. C. 1905) 135 Fed. 595; In re National Mining Exploration Co. (D. C. 1911) 193 Fed. 232; In re La France Copper Co. (D. C. 1913) 205 Fed. 207.

18. Disposition of proceeds of sale.—Where a person not a party to a suit holds two distinct and separate claims against property sold therein, the fact that he presents them for allowance against the fund realized from such property at different times does not constitute a splitting of a single demand, which should debar him from the right to prove his second claim. Central Trust Co. of New York v. Richmond, N., I. & B. R. Co. (1900) 105 Fed. 803, 45 C. C. A. 60.

Where the proceeds of a sale of a debtor's property on judgment creditors' bill are insufficient to pay the judgment creditors, and there has previously been no application to the payment of judgment creditors of any of the debtor's property which should have been applied to the payment of open accounts, the holders of such accounts cannot participate in the proceeds of the sale. George v. St. Louis Cable & W. Ry. Co. (C. C. 1890) 44 Fed. 117.

19. Claims against property sold.—Persons who are not parties to a suit, but who have claims against property which must be sold therein, may properly be permitted to come in at any time before the proceeds of such property have been distributed; and such a person should not be charged with laches to defeat his claim because it is not filed until after an interlocutory decree for sale of the property has been en-

tered, where no prejudice has resulted to other parties by reason of the delay; nor should one be denied the right to establish his claim because such decree undertook to adjudge certain fixed amounts to be paid from the fund to parties then before the court, since such decree was not final in respect to the matter of distribution, but remained subject to such modifications as might be necessary to permit other legitimate claims to be asserted at any time before actual distribution. Central Trust Co. of New York v. Richmond, N., I. & B. R. Co. (1900) 105 Fed. 803, 45 C. C. A. 60.

Statutes relating to allowances for improvements and betterments to good-faith occupying claimants of property purchased at judicial sales have no application in an action in personam to recover the value of property purchased at judicial sale, and alleged to have been so changed pending appeal as to be practically destroyed. Central Trust Co. v. Hubinger (C. C. 1898) 87 Fed. 3.

20. Resale.—Where the title to the land was acquired by the defendant under the following devise in a will, "I bequeath to my daughter [the land in question] for her and her children's sole and separate use, free from any claim or control of her husband," and the purchaser at the sale declined to comply with the terms of his purchase, alleging a defect of title, the court, after an investigation of the title of the master, will order a resale of such interest in the land as the defendant to the suit may have. Dunscomb v. Holst (C. C. 1882) 13 Fed. 11.

A resale will be ordered only when the court finds the purchaser will not pay the balance due. Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co. (C. C. 1897) 84 Fed. 752.

Where there is a valid sale, under which the price had been paid, the mere nondelivery of a deed would not authorize a resale. In re King (D. C. 1880) 3 Fed. 839.

§ 1641. (Act March 3, 1893, c. 225, § 2.) Sale of personal property under order or decree.

All personal property sold under any order or decree of any Court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner. (27 Stat. 751.)

See note to preceding section.

Notes of Decisions

Amendment of decree.—Where a court has decreed the sale by a master of certain corporate stock on terms stated it will not, at a subsequent term, direct the insertion in the advertisement of a provision that the purchaser shall not have the right to vote the stock until it is fully paid for, which would be, in effect, an amendment of the decree; at least unless special considerations require it. Earle v. McCartney (C. C. 1901) 112 Fed. 372, decree affirmed McCartney v. Earle (1902) 115 Fed. 462, 53 C. C. A. 392.

Sales in admiralty.—A purchaser in good faith under a marshal's sale, upon a decree of a court of admiralty, will be protected in his title if the court had jurisdiction to decree the sale. Daily v. Doe (D. C. 1880) 3 Fed. 903.

To invalidate the sale of a vessel under a decree of a court of admiralty on the ground of fraud, it must appear that the proceedings were both collusive and fraudulent, and that the purchaser was cognizant of the fraud. Hence, where a vessel subject to a mortgage, and also to liens for loss of lives, was taken from Detroit to Canada at the instance of her owner for the purpose of freeing her of these liens, and there seized and sold upon a small but valid claim for necessaries, and was brought in for her appraised value by the mortgagee, who had no knowledge that the proceedings had been taken with the approval of the owner, it was held that the sale was valid, and the mortgagee took an unincumbered title. The Garland (D. C. 1883) 16 Fed. 283.

An auctioneer is not required by law to be employed by the marshal in sales under process or decree in admiralty; and if an auctioneer be employed by him he is but the agent of the marshal, and can make no charge which the marshal could not lawfully make. The John E. Mulford (D. C. 1883) 18 Fed. 455.

Cited without definite application, Robertson v. Howard (1913) 33 Sup. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174.

§ 1642. (Act March 3, 1893, c. 225, § 3.) Notice of sale of real property under order, judgment, or decree.

Hereafter no sale of real estate under any order, judgment, or decree of any United States Court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued, and having a general

circulation in the county and State where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper. (27 Stat. 751.)

See note to section 1 of this act, ante, § 1640.

Notes of Decisions

Operation of statute in general.—This section is intended for the benefit and protection of the judgment defendant, and creates a privilege or right which he may insist upon or waive. A failure to observe such requirement does not render a sale void, but only voidable, and the defect is cured by confirmation after due notice to the defendant, and without objection from him. Nevada Nickel Syndicate v. National Nickel Co. (C. C. 1900) 103 Fed. 391.

Where a federal court has rendered a decree foreclosing a mortgage, in a suit wherein it had jurisdiction of the parties and the subject-matter, the fact that the provision of such decree directing the manner in which the property should be sold, and the order of sale subsequently issued thereon, inadvertently followed the state statute, and did not conform to the requirements of this act, as to the notice of sale, does not render the sale made thereon void, but merely voidable; and where the defendant, with knowledge of the facts, and due notice of the application for confirmation, makes no objection thereto, and does not appeal from either the original decree or the order of confirmation, he will be deemed to have waived the defect, and he cannot attack the validity of the title acquired by the purchaser collaterally, by an action to recover the property. National Nickel Co. v. Nevada Nickel Syndicate (C. C. 1901) 106 Fed. 110, judgment affirmed (1901) 112 Fed. 44, 50 C. C. A. 113, writ of certiorari denied (1902) 22 Sup. Ct. 939, 184 U. S. 700, 46 L. Ed. 765.

Description in notice.—Where the notice of sale referred to papers on file in the office of the court for a more certain and full description of the interest advertised for sale, such interest passes, notwithstanding an otherwise erroneous description. In re King (D. C. 1880) 8 Fed. 839.

Publication.—The publication of a notice of sale once a week for only 27 days before the day of sale is not a "previous publication" of such a notice "once a week for at least four weeks prior to such sale." Wilson v. Northwestern Mut. Life Ins. Co. (1894) 65 Fed. 38, 12 C. C. A. 505.

Objections that a master's sale was not published the length of time required by law by but one day, and that, through his incompetency, part of the property was sold for less than it could have been sold for, when made two years after the sale, are too late. McBride v. Gwynn (D. C. 1887) 33 Fed. 402.

Cited without definite application, Robertson v. Howard (1913) 33 Sup. Ct. 854, 229 U. S. 254, 57 L. Ed. 1174.

§ 1643. (R. S. § 994.) Death of marshal after levy or after sale. When a marshal dies, or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements, or hereditaments, and before sale or other final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if such marshal had not died or been removed, or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements, or hereditaments, under process from a court of the United States, and before a deed for the same is executed by him to the purchaser, such court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser, upon his paying the purchase-money and costs remaining unpaid.

Act May 7, 1800, c. 45, § 3, 2 Stat. 61.

Notes of Decisions

Operation of statute.—This act did not abrogate Judiciary Act, c. 20, § 28, giving the marshal power after removal to execute all writs in his hands. Doo-

little v. Bryan (1852) 14 How. 563, 565, 14 L. Ed. 543.

Cited without definite application, Ex parte Worley (D. C. 1884) 19 Fed. 586; The Alert (D. C. 1912) 199 Fed. 542.

§ 1644. (R. S. § 995.) Moneys paid into court, where and how deposited.

All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court: Provided, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

Act March 24, 1871, c. 2, § 1, 17 Stat. 1.

Notes of Decisions

See note under § 1644, ante.

Construction and operation of statute in general.—The facts that the statutes of the United States require all money paid into any federal court or received by its officers in any cause to be at once paid into the registry of the court, to be drawn out only on an order of a judge, and that a clerk, in violation of such provisions, failed to deposit money so received by him, but appropriated it to his own use, constitute no defense to an action against the sureties on his official bond for its recovery. U. S. v. Howard (C. C. 1899) 93 Fed. 719.

Semble that there is no law making it the duty of the assistant treasurers, with whom moneys are deposited under the provisions of the act of 1871, to keep a detailed account in respect of the causes to which the deposited moneys appertain. (1874) 14 Op. Atty. Gen. 363.

Authority to receive money.—A clerk must be deemed to have authority to receive money paid into court by a private suitor in a pending cause, with the sanction of the court. Howard v. U. S. (1902) 22 Sup. Ct. 543, 547, 184 U. S. 676, 46 L. Ed. 754.

Duty to deposit money.—A party to a civil action in a circuit court has the right, on filing a pleading making a tender, to pay the money necessary to make such tender good into court, no order authorizing such payment being required, and it is the duty of the clerk to receive such money in his official capacity; and, being money received by him "in a cause pending in such court," he is required to forthwith deposit the same in the registry of the court. A failure on his part to so deposit the money, or to pay it over to the party entitled thereto by the order of the court, is a breach of the condition of his bond, for which his sureties are liable to the person suffering damage thereby. Howard v. U. S. (1900) 102 Fed. 77, 42 C. C. A. 169, affirming judgment U. S. v. Howard (C. C. 1899) 93 Fed. 719, and judgment affirmed (1902) 22 Sup. Ct. 543, 184 U. S. 676, 46 L. Ed. 754.

Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage ought to be deposited with a designated depositary of the United States. Thomas v. Chicago & C. S. Ry. Co. (C. C. 1889) 37 Fed. 548.

This section requires "moneys" only which are paid into court or received by the officers thereof to be deposited with a depositary so as to entitle the clerk to commissions thereon, and does not affect the power of the court to permit payment for property to be made in other forms as may be most appropriate or convenient to the parties; and where a bidder is permitted to make a deposit with the master in the form of a check or certificate of deposit, and to pay for the property by crediting the amount on the decree in his favor, neither the deposit nor the purchase money is required to be deposited in court. Curtice v. Crawford County Bank (C. C. 1903) 124 Fed. 919.

Where money, the proceeds of a judgment recovered in the federal court, was paid to the clerk, it was his duty forthwith to deposit the same with the United States Treasurer, an assistant treasurer or designated depository, notwithstanding it had been immediately levied on under a state writ. D. B. Martin Co. v. Shannonhouse (D. C. 1913) 203 Fed. 517.

Exemption from process.—Money in the registry of the federal courts is not by law in the hands of the clerk nor of the judge, nor is the fund subject to the control of the clerk, and is not subject to attachment either by foreign attachment or garnishment. Wilson v. Bell (1873) 20 Wall. 201, 224, 22 L. Ed. 259.

Where moneys have been paid into court, and, pending litigation in regard thereto, have been placed, by order of the court, in the custody of its designated depositary, or of some other depositary, such depositaries are in all respects as exempt from the process of the litigants as though the moneys had always remained in the personal custody of the court's immediate officials. Jones v. Merchants' Nat. Bank (1896) 76 Fed. 683, 22 C. C. A. 483, 35 L. R. A. 698.

A check drawn on a fund in the registry of a federal court, while in the hands of the clerk in process of transmission to the payee, under a decree of the court, is not held by the clerk as an individual, but is in the custody of the court, and is not subject to attachment on process of another court. In re Forsyth (D. C. 1897) 78 Fed. 296.

Bankruptcy proceedings.—Under rule 28 in bankruptcy, providing that all money received on account of any bankrupt's estate shall be deposited with one designated depositary, and requiring any check therefor to specify "the account for which it is drawn," the depositary is not bound to keep a separate account for each bankrupt's estate, but checks so drawn must be paid out of any funds then to the credit of the court. State Nat. Bank v. Dodge (1888) 8 Sup. Ct. 521, 527, 124 U. S. 333, 31 L. Ed. 458.

This act does not repeal the laws previously in force relating to moneys paid into the courts of the United States, or received by the officers thereof, which are of a special character and apply only to moneys thus paid or received in particular classes of cases, as proceedings in prize and bankruptcy proceedings; it repeals merely the general law on the subject, as embodied in the two statutes mentioned in the sixth section. (1874) 14 Op. Atty. Gen. 363.

Accordingly, the disposition of moneys paid into the United States courts or received by the officers of such courts, in bankruptcy proceedings, is governed since the act of 1871, as it was prior thereto, by the provisions of the bankruptcy acts and the rules prescribed in pursuance thereof. Id.

Attachment bond.—In attachment against several as partners, one of the defendants claimed sole ownership, and pleaded to the jurisdiction. Pending the proceedings the attached property was sold by order of court, and the proceeds deposited in the registry. The other defendants failing to defend, judgment was rendered against them. The attachment was sustained against all, and, as to the defendant who had filed the plea to the jurisdiction, the main action was continued. Without notice to him, the court ordered the money in the registry paid to the attaching plaintiff, which was done, and afterwards the plea to the jurisdiction was sustained. The attachment bond bound the sureties "to pay to the defendants all damages they or either of them may sustain by reason of the attachment if the order therefor is wrongfully obtained." Held, that the sureties were only liable for the value of the attached property, less the proceeds of the sale, and not for the sum erroneously paid to the attaching plaintiff. Files v. Davis (C. C. 1903) 119 Fed. 1002.

Fees on money deposited.—As to right of clerk to fees on money deposited, see Fagan v. Cullen (C. C. 1886) 28 Fed. 843; Thomas v. Chicago & C. S. Ry. Co. (C. C. 1889) 37 Fed. 548; Easton v. Houston & T. C. Ry. Co. (C. C. 1891) 44 Fed. 718 (distinguishing Ex parte Prescott [C. C. 1814] Fed. Cas. No. 11,388, 2 Gall. 146); Northwestern Mut. Life Ins. Co. v. Quinn (C. C. 1895) 69 Fed. 462; Edwards v. Bay State Gas Co. of Delaware (C. C. 1910) 177 Fed. 573. And see, also, note under § 1383, ante.

The United States has no claim to interest accrued or paid on a fund constituted from deposits made with the clerk of a federal court by litigants, pursuant to a rule of court, to be drawn against by the clerk for the payment of the fees of himself and other officers of the court as they accrue. Nor has the United States any claim to interest received by the clerk on a fund constituted from the fees and emoluments of his office collected and deposited by him pending his semi-annual return. U. S. v. MacMillan (D. C. 1913) 209 Fed. 266.

Cited without definite application, U. S. v. Mason (1910) 31 Sup. Ct. 28, 33, 218 U. S. 517, 54 L. Ed. 1133; In re Michigan Cent. R. Co. (1903) 124 Fed. 727, 59 C. C. A. 643; Michigan Cent. R. Co. v. Harsha (1904) 134 Fed. 217, 67 C. C. A. 145; U. S. v. Abeel (1909) 174 Fed. 12, 98 C. C. A. 50; Butte & Boston Consol. Min. Co. v. Montana Ore P. Co. (C. C. 1907) 158 Fed. 131; S. Morgan Smith Co. v. Rockingham Power Co. (C. C. 1909) 173 Fed. 923; In re Moneys in Registry of District Court (D. C. 1909) 170 Fed. 470.

§ 1645. (R. S. § 996, as amended, Act Feb. 19, 1897, c. 265, § 3, and Act March 3, 1911, c. 224.) Moneys paid into court, how withdrawn; disposition of moneys unclaimed.

No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or

its successor, to cause such money to be deposited in the Treasury of the United States, in the name and to the credit of the United States: Provided, That any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders, and this Act is applicable to all money deposited in the Treasury of the United States in accordance with section nine hundred and ninety-six, Revised Statutes of the United States, as amended February nineteenth, eighteen hundred and ninety-seven. (17 Stat. 1. 29 Stat. 578. 36 Stat. 1083.)

This section, as enacted in the Revised Statutes, contained only the first paragraph set forth here, ending with the clause, "and every such order shall state the cause in or on account of which it is drawn." It was amended by Act Feb. 19, 1897, c. 265, § 3, 29 Stat. 578, by adding thereto the further provision: "And it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid, which have remained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depository of the United States, to the credit of the United States."

And it was further amended, by Act March 3, 1911, c. 224, last cited above, by inserting, instead of said provision added by such previous amendment, the second paragraph of the section set forth here, beginning with the words, "In every case in which the right to withdraw money," etc., to the end of the section as so set forth.

Notes of Decisions

Validity of statute.—Rev. St. § 996, in so far as it required money deposited in a federal court unclaimed for 10 years to be turned over to the United States, was unconstitutional, as depriving the owners thereof of their property without due process of law. American Loan & Trust Co. v. Grand Rivers Co. (C. C. 1908) 159 Fed. 775.

Claim to fund.—After a fund has remained in its registry unclaimed for 10 years or more the court has no power to then award it to a claimant, but can only follow the statute, and any claim must be presented to the Treasury Department. In re Moneys in Registry of District Court (D. C. 1909) 170 Fed. 470.

Paying out and withdrawing funds deposited.—When money is deposited with a designated depositary of the United States to the credit and in the name of a federal court, checks drawn by the court, and specifying the cause in which they are drawn, must be paid out of the account generally; and naming the cause in the check is merely a memorandum for the benefit of the court, and not a direction to the bank to pay it out of any particular fund. State Nat. Bank v. Dodge (1888) 8 Sup. Ct. 521, 527, 124 U. S. 333, 31 L. Ed. 458.

Money paid into the district court, on the sale in condemnation proceedings of a distillery, cannot, while the proceedings are pending, be withdrawn, or their distribution directed, by the circuit court on an original bill. U. S. v. Mackoy (C. C. 1872) Fed. Cas. No. 15,696.

Moneys received by a marshal should, under these sections, either be immediately deposited by him or paid to the clerk and by him deposited, and in neither case it can be withdrawn only on the order of the judge entered of record by the clerk. Fagan v. Cullen (C. C. 1886) 28 Fed. 843, 844.

Where the judgment of a federal court in Texas in favor of a minor directed the money to be paid by the clerk to her legal guardian, and application is made for the same by a guardian appointed in another state where the minor resides, such guardian should obtain ancillary letters from the court in the county where the property is located, under Rev. St. Tex. 1895, art. 2753. Ex parte Huffman (C. C. 1909) 167 Fed. 422.

Interest on judgment.—Where a case is removed from a state to a federal court, interest on the judgment accruing during the stay of the judgment by motion for a new trial in the latter court may be included in the taxation of costs, since it is within the equity of this section. Gunther v. Liverpool, L. & G. Ins. Co. (C. C. 1882) 10 Fed. 830.

Liability of sureties.—See Files v. Davis (C. C. 1903) 119 Fed. 1002.

Cited without definite application, National Bank of Commonwealth v. Mechanics' Nat. Bank (1876) 94 U. S. 437, 439, 24 L. Ed. 176; Howard v. U. S. (1902) 22 Sup. Ct. 543, 547, 184 U. S. 676, 46 L. Ed. 754; U. S. v. Mason (1910) 31 Sup. Ct. 28, 33, 218

U. S. 517, 54 L. Ed. 1133; Howard v. U. S. 1900) 102 Fed. 77, 81, 42 C. C. A. 169 (affirmed [1902] 22 Sup. Ct. 543, 184 U. S. 676, 46 L. Ed. 754); U. S. v. Abeel (1909) 174 Fed. 12, 98 C. C. A. 50; Thomas v. Chicago & C. S. R. Co. (C. C. 1889) 37 Fed. 548, 549; Edwards v. Bay State Gas Co. of Delaware (C. C. 1910) 177 Fed. 573; Davis v. Adams (D. C. 1901) 109 Fed. 271, 272.

PROCEDURE ON ERROR AND APPEAL

§ 1646. (Act March 3, 1891, c. 517, § 4.) Appeals, writs of error, etc., from district courts to Supreme Court or to circuit courts of appeals.

No appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same. (26 Stat. 827.)

This section was part of the Circuit Courts of Appeals Act, cited above.

The provisions of this section relating to "the existing circuit courts" became inoperative by the abolition of the circuit courts, by Jud. Code, § 289, ante, § 1266, except in so far as they may have been made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts by Jud. Code, § 291, ante, § 1268.

The provisions of this act, mentioned in this section, relating to the appellate jurisdiction of the Supreme Court and of the circuit courts of appeals, contained in sections 5–7 of the act, were incorporated in the Judicial Code, in sections 128 and 129 thereof, ante, §§ 1120, 1121, defining the appellate jurisdiction of the circuit courts of appeals, and in sections 238–241 thereof, ante, §§ 1215–1218, defining the appellate jurisdiction of the Supreme Court, and were superseded thereby.

Other provisions of said Circuit Courts of Appeals Act, regulating the taking of and procedure on appeals to the circuit courts of appeals and to the Supreme Court, which remain in force, are set forth post, §§ 1647, 1648, 1651, 1670.

Notes of Decisions

1. Effect on other statutes.
2. Construction in general.
3. Basis of right of appeal.
4. Parties to appeals or writs of error—Persons entitled to appeal.
5. —— Right of vessel to appeal.
6. —— Necessity for all parties jointly affected by judgment or decree to join in appeal or writ of error.
7. —— Joint or several judgments or decrees.
8. —— Summons and severance or notice to join in appeal.
9. —— Joinder of parties.
10. —— Substitution of parties.
11. —— Intervention.
12. —— Objections and amendments.
13. Effect of transfer or proceedings therefor—Transfer of jurisdiction in general.
14. —— Vacating order or judgment.
15. —— Amendment of proceedings.
16. —— Custody or disposition of property in controversy.
17. —— Injunction.
18. —— Irregular or ineffectual proceedings.
19. —— Jurisdiction acquired by appellate court.

1. Effect on other statutes.—This section repealed sections 763, 764, and 765 of the Revised Statutes. Ex parte Lennon (1893) 14 Sup. Ct. 123, 126, 150 U. S. 393, 37 L. Ed. 1120.

But it did not affect the supervisory jurisdiction over bankruptcy proceedings which was conferred on the circuit courts by R. S. § 4986. In re Briggs (1894) 61 Fed. 498, 9 C. C. A. 585.

2. Construction in general.—This act does not govern an appeal in which the appeal bond was given and filed prior to its passage, although the citation was not signed or served until afterwards. Mattingly v. Northwestern Virginia R. Co. (1895) 15 Sup. Ct. 725, 726, 158 U. S. 53, 39 L. Ed. 894.

The terms "brought" and "sued out" as applied to writs of error, and meaning the issuance of the writ by proper authority and the filing of the same in the proper court, appear to be used synonymously in the statutes of the United States, in the decisions of the courts, and in the text-books. Waxahachie v. Coler (1899) 92 Fed. 284, 286, 34 C. C. A. 349.

3. Basis of right of appeal.—Congress alone has power to determine whether the judgment of a federal court shall be reviewed, and if it fails to provide for such review the judgment is final. Ex parte Pennsylvania (1883) 3 Sup. Ct. 84, 85, 109 U. S. 174, 27 L. Ed. 894.

4. Parties to appeals or writs of error—Persons entitled to appeal.—See Bronson v. La Crosse & M. R. Co. (1862) 2 Black, 524, 531, 17 L. Ed. 347; In re Cockcroft (1881) 104 U. S. 578, 26 L. Ed. 856; Andrews v. National Foundry & Pipe Works (1896) 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139 (reversing decree National Foundry & Pipe Works v. Oconto Water Co. [D. C. 1895] 68 Fed. 1006, and motion for rehearing denied [1897] 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 139); U. S. ex rel. State of Louisiana v. Boarman (1914) 217 Fed. 757, 133 C. C. A. 487; Grier v. Union Nat. Life Ins. Co. (D. C. 1914) 217 Fed. 293.

5. —— Right of vessel to appeal.—See The M. Burns v. Reynolds (1869) 9 Wall. 237, 238, 19 L. Ed. 620; The Spark v. Lee Choi Chum (C. C. 1872) Fed. Cas. No. 13,206.

6. —— Necessity for all parties jointly affected by judgment or decree to join in appeal or writ of error.—See Williams v. Bank of U. S. (1826) 11 Wheat. 414, 415, 6 L. Ed. 508; Masterson v. Howard (1870) 10 Wall. 416, 417, 19 L. Ed. 953; Germain v. Mason (1870) 12 Wall. 259, 261, 20 L. Ed. 392; Beardsley v. Arkansas & L. Ry. Co. (1895) 15 Sup. Ct. 786, 788, 158 U. S. 123, 39 L. Ed. 919; Humes v. Third Nat. Bank (1893) 54 Fed. 917, 4 C. C. A. 668; Grand Island & W. C. R. Co. v. Sweeney (1900) 103 Fed. 342, 43 C. C. A. 255 (appeal dismissed [1901] 21 Sup. Ct. 924, 181 U. S. 616, 45 L. Ed. 1029); Loveless v. Ransom (1901) 107 Fed. 626, 46 C. C. A. 515; Fitzpatrick v. Graham (1902) 119 Fed. 353, 56 C. C. A. 95 (denying motion to dismiss writ of error Graham v. Fitzpatrick [C. C. 1902] 116 Fed. 1021); Port v. Schloss Bros. & Co. (1907) 149 Fed. 731, 79 C. C. A. 437; Lewis v. Sittel (1908) 165 Fed. 157, 91 C. C. A. 191 (affirming judgment Lewis v. Sittell [Ind. T. 1907] 104 S. W. 850); City of Detroit v. Guaranty Trust Co. of New York (1909) 168 Fed. 608, 93 C. C. A. 604; Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co. (1910) 177 Fed. 854, 101 C. C. A. 68; Ibbs v. Archer (1911) 185 Fed. 37, 107 C. C. A. 141; Ireton v. Pennsylvania Co. (1911) 185 Fed. 84, 107 C. C. A. 304 (writ of certiorari denied [1912] 32 Sup. Ct. 526, 223 U. S. 728, 56 L. Ed. 633); Alsop v. Conway (1911) 188 Fed. 568, 110 C. C. A. 366 (writ of certiorari denied [1911] 32 S. Ct. 523, 223 U. S. 720, 56 L. Ed. 629); Lamon v. Speer Hardware Co. (1912) 198 Fed. 453, 119 C. C. A. 1; Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co. (1913) 205 Fed. 282, 123 C. C. A. 446.

7. —— Joint or several judgments or decrees.—See Gray v. Havemeyer (1892) 53 Fed. 174, 3 C. C. A. 497; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (1893) 58 Fed. 6, 7 C. C. A. 3 (distinguishing Hardee v. Wilson [1892] 13 S. Ct. 39, 146 U. S. 179, 36 L. Ed. 933); Louisville, N. A. & C. Ry. Co. v. Pope (1896) 74 Fed. 1, 20 C. C. A. 253; St. Louis United Elevator Co. v. Nichols (1899) 91 Fed. 832, 34 C. C. A. 90; Hall v. Gambrill (1899) 92 Fed. 32, 34 C. C. A. 190 (affirming decree [C. C. 1898] 88 Fed. 709); Hook v. Mercantile Trust Co. of New York (1899) 95 Fed. 41, 36 C. C. A. 645; Grand Island & W. C. R. Co. v. Sweeney (1899) 95 Fed. 396, 37 C. C. A. 127; Id. (1900) 103 Fed. 342, 43 C. C. A. 255 (appeal dismissed [1901] 21 S. Ct. 924, 181 U. S. 616, 45 L. Ed. 1029); Ayres v. Polsdorfer (1900) 105 Fed. 737, 45 C. C. A. 24 (writ of error dismissed [1903] 23 Sup. Ct. 196, 187 U. S. 585, 47 L. Ed. 314); Reid v. Pauly (1903) 121 Fed. 652, 58 C. C. A. 152; Bulte v. Igleheart Bros. (1905) 137 Fed. 492, 70 C. C. A. 76; Love v. Export Storage Co. (1906) 143 Fed. 1, 74 C. C. A. 155; Holbrook, Cabot & Daly Contracting Co. v. Menard (1906) 145 Fed. 498, 76 C. C. A. 258; Interurban St. Ry. Co. v. Same (1906) 145 Fed. 500, 76 C. C. A. 260; Lamon v. Speer Hardware Co. (1911) 190 Fed. 734, 111 C. C. A. 462; Id. (1912) 198 Fed. 453, 119 C. C. A. 1.

8. —— Summons and severance or notice to join in appeal.—See Beardsley v. Arkansas & L. Ry. Co. (1895) 15 Sup. Ct. 786, 788, 158 U. S. 123, 39 L. Ed. 919; Hedges v. Seibert Cylinder Oil Cup Co. (1892) 50 Fed. 643, 1 C. C. A. 594 (sustaining motion to dismiss appeal Seibert Cylinder Oil-Cup Co. v. Newark Lubricator Mfg. Co. [C. C. 1888] 35 Fed. 509); Humes v. Third Nat. Bank (1893) 54 Fed. 917, 4 C. C. A. 668; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (1893) 58 Fed. 6, 7 C. C. A. 3; Farmers' Loan & Trust Co. v. McClure (1897) 78 Fed. 211, 24 C. C. A. 66; Johnson v. Trust Co. of America (1900) 104 Fed. 174, 43 C. C. A. 458; Loveless v. Ransom (1901) 107 Fed. 626, 46 C. C. A. 515; Fitzpatrick v. Graham (1902) 119 Fed. 353, 56 C. C. A. 95; Port v. Schloss Bros. & Co. (1907) 149 Fed. 731, 79 C. C. A. 437; City of Detroit v. Guaranty Trust Co. of New York (1909) 168 Fed. 608, 93 C. C. A. 604; Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co. (1910) 177 Fed. 854, 101 C. C. A. 68; Ibbs v. Archer (1911) 185 Fed. 37, 107 C. C. A. 141; Ireton v. Pennsylvania Co. (1911) 185 Fed. 84, 107 C. C. A. 304 (writ of certiorari denied [1912] 32 Sup. Ct. 526, 223 U. S. 728, 56 L. Ed. 633); Alsop v. Conway (1911) 188

Fed. 568, 110 C. C. A. 366 (writ of certiorari denied [1911] 32 Sup. Ct. 523, 223 U. S. 720, 56 L. Ed. 629).

9. —— Joinder of parties. — See Farmers' Loan & Trust Co. v. Longworth (1897) 83 Fed. 336, 27 C. C. A. 541; Central Trust Co. v. Continental Trust Co. of City of New York (1898) 86 Fed. 517, 30 C. C. A. 235 (certiorari denied [1898] 18 Sup. Ct. 940, 171 U. S. 687); Fitzpatrick v. Graham (1902) 119 Fed. 353, 56 C. C. A. 95 (denying motion to dismiss writ of error Graham v. Fitzpatrick [C. C. 1902] 116 Fed. 1021).

10. —— Substitution of parties.—See Herndon v. Howard (1869) 9 Wall. 664, 665, 19 L. Ed. 809.

See, also, ante, § 1592, and notes.

11. —— Intervention. — A Circuit Court of Appeals will not permit an intervention in a patent cause which is ready for hearing on appeal for the purpose of having the case remanded for the taking of further proofs, on the ground of collusion between the parties, where the record does not support such charge, and where the petitioner had full opportunity to intervene in the court below. Thomson-Houston Electric Co. v. Western Electric Co. (1907) 158 Fed. 813, 86 C. C. A. 73.

12. —— Objections and amendments. —See Ayres v. Polsdorfer (1900) 105 Fed. 737, 45 C. C. A. 24 (writ of error dismissed [1903] 23 Sup. Ct. 196, 187 U. S. 585, 47 L. Ed. 314); Loveless v. Ransom (1901) 107 Fed. 626, 46 C. C. A. 515; Williams v. City Bank & Trust Co. (1911) 186 Fed. 419, 108 C. C. A. 341 (writ of certiorari denied City Bank & Trust Co. v. Williams [1911] 32 Sup. Ct. 526, 223 U. S. 727, 56 L. Ed. 632).

13. Effect of transfer or proceedings therefor—Transfer of jurisdiction in general.—See Interstate Commerce Commission v. Louisville & N. R. Co. (C. C. 1899) 101 Fed. 146; St. Louis & S. F. R. Co. v. Loughmiller (D. C. 1912) 193 Fed. 689.

14. —— Vacating order or judgment. —See Citizens' Bank v. Farwell (1893) 56 Fed. 539, 6 C. C. A. 30 (judgment affirmed [1894] 63 Fed. 117, 11 C. C. A. 108); New Liverpool Salt Co. v. Wellborn (1908) 160 Fed. 923, 88 C. C. A. 105.

15. —— Amendment of proceedings. —See Western Wheel-Scraper Co. v. Drinnen (C. C. 1897) 79 Fed. 820; Ommen v. Talcott (D. C. 1910) 180 Fed. 925; St. Louis & S. F. R. Co. v. Loughmiller (D. C. 1912) 193 Fed. 689.

16. —— Custody or disposition of property in controversy.—See U. S. v. Stone (1911) 187 Fed. 577, 109 C. C. A. 267.

17. —— Injunction.—Where a decree sustaining the validity of a patent and awarding an injunction against its infringement is subsequently set aside on a bill of review and the original bill dismissed, the court has no power to continue the injunction in force pending an appeal from the later decree. Kelley Bros. & Spielman v. Diamond Drill & Machine Co. (C. C. 1906) 142 Fed. 868, decree affirmed Birdsboro Steel Foundry & Machine Co. v. Kelly Bros. & Speilman (1906) 147 Fed. 713, 78 C. C. A. 101.

18. —— Irregular or ineffectual proceedings.—See Riddle v. Hudgins (1893) 58 Fed. 490, 7 C. C. A. 335; Burnham v. North Chicago St. Ry. Co. (C. C. A. 1898) 87 Fed. 168.

19. —— Jurisdiction acquired by appellate court.—See Anderson v. Comptois (1901) 109 Fed. 971, 48 C. C. A. 1 (judgment affirmed on rehearing [1901] 111 Fed. 998, 50 C. C. A. 76); Lockman v. Lang (1904) 132 Fed. 1, 65 C. C. A. 621; Martin v. Burford (1910) 176 Fed. 554, 100 C. C. A. 159; Union Trust Co. v. Rochester & P. R. Co. (C. C. 1886) 29 Fed. 609; Morgan's Louisiana & T. R. & S. S. Co. v. Texas Cent. Ry. Co. (C. C. 1887) 32 Fed. 525; Woodbridge & Turner Engineering Co. v. Ritter (C. C. 1895) 70 Fed. 677; Morrin v. Lawler (C. C. 1899) 91 Fed. 693.

Cited without definite application, Lau Ow Bew v. U. S. (1892) 12 Sup. Ct. 517, 519, 144 U. S. 47, 36 L. Ed. 340; Sparf v. U. S. (1895) 15 Sup. Ct. 273, 321, 156 U. S. 51, 39 L. Ed. 343; Whitney v. Dick (1906) 26 Sup. Ct. 584, 586, 202 U. S. 132, 50 L. Ed. 963; The Beeche Dene (1893) 55 Fed. 526, 527, 5 C. C. A. 208; The New York (1900) 104 Fed. 561, 565, 44 C. C. A. 38; The Nyack (1912) 199 Fed. 383, 118 C. C. A. 67.

§ 1647. (Act March 3, 1891, c. 517, § 11.) Appeals and writs of error from district courts to circuit courts of appeals; time for taking.

No appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: Provided however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits

of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. (26 Stat. 829.)

These provisions were part of section 11 of the Circuit Courts of Appeals Act of March 3, 1891, cited above.

Further provisions of this section, making provisions in force, regulating appeals or writs of error, applicable to appeals and writs of error provided for in the act in respect of the circuit courts of appeals, are set forth post, § 1651.

Before this act, the time for writs of error and appeals from district courts to circuit courts was limited by R. S. § 635, to one year, with the proviso "that where a person entitled to prosecute a writ of error or to take an appeal is an infant, or non compos mentis, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within one year after the entry of the judgment, decree, or order, exclusive of the term of such disability." This limitation was superseded by the limitations prescribed by this section; and with it the proviso quoted above, unless the proviso might be regarded as applicable to writs of error and appeals to the circuit courts of appeals under the further provision of this section, that "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals," etc.; post, § 1651. Said section 635 of the Revised Statutes was repealed by Jud. Code, § 297, ante, § 1274.

Appeals in proceedings for injunctions or receivers were required to be taken within 30 days, by Jud. Code, § 129, ante, § 1121.

Notes of Decisions

1. Decisions as to time for taking appeals from the district to the circuit courts prior to the creation of the circuit courts of appeals.
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9. —— Effect of motion for new trial or rehearing.
10. Extension of time.
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1. Decisions as to time for taking appeals from the district to the circuit courts prior to the creation of the circuit courts of appeals.—See Strode v. The Stafford Justices (C. C. 1810) Fed. Cas. No. 13,537; Norton v. Rich (C. C. 1824) Fed. Cas. No. 10,352; U. S. v. Haynes (C. C. 1840) Fed. Cas. No. 15,-335; Same v. Certain Hogsheads of Molasses (C. C. 1852) Fed. Cas. No. 14,766; Sedgwick v. Fridenberg (C. C. 1873) Fed. Cas. No. 12,611; Morris v. Brush (C. C. 1876) Fed. Cas. No. 9,-828; In re McEwen (C. C. 1880) 4 Fed. 13; Noe v. U. S. (D. C. 1857) Fed. Cas. No. 10,286.

2. Construction in general.—The terms "brought" and "sued out," as applied to writs of error, and meaning the issuance of the writ by proper authority and the filing of the same in the proper court, appear to be used synonymously in the statutes of the United States, in the decisions of the courts, and in the text-books. Waxahachie v. Coler (1899) 92 Fed. 284, 286, 34 C. C. A. 349.

Under this section and sections 1108, 1239, ante, the circuit courts of appeals cannot issue writs of certiorari as original process. They can review no cause except by an appeal taken or a writ of error sued out as prescribed. Travis County v. King Iron Bridge & Manufacturing Co. (1899) 92 Fed. 690, 34 C. C. A. 620.

3. Shorter periods fixed by law.—A rule of the District Court fixing the time for taking appeals in admiralty is not a "law" within the meaning of the provision authorizing an appeal within six months, except where a lesser time is limited by law. Robins Dry Dock & Repair Co. v. Chesbrough (C. C. A. 1914) 216 Fed. 121.

4. Proceedings to which limitation applies.—This section applies to an admiralty proceeding. The City of Naples (1895) 69 Fed. 794, 16 C. C. A. 421; The New York (1900) 104 Fed. 561, 44 C. C. A. 38. And to suits on claims against the United States brought under Act March 3, 1887, c. 359, ante, § 991(20). Butt v. U. S. (C. C. 1904) 126 Fed. 794.

The time prescribed by this section for taking out a writ of error or praying an appeal applies to writs of error or appeals from a judgment or decree of the district court in a controversy arising in bankruptcy, within Bankruptcy Act July 1, 1898, c. 541, § 24a, post, § 9608. In re Mueller (1905) 135 Fed. 711, 68 C. C. A. 349. And to a petition to revise an order entered in bankruptcy proceedings, denying the bankrupt's motion to quash the service of the subpœna. In re Thomlinson Co. (1907) 154 Fed. 834, 83 C. C. A. 550.

5. Time for bill of review.—A bill of review charging errors apparent on the record of a suit in equity should be filed within the time allowed for appeal. Huntington v. Little Rock & Ft. S. R. Co. (C. C. 1882) 16 Fed. 906; In re

Brown (D. C. 1913) 213 Fed. 701 (order affirmed In re O. A. Brown & Co. [1914] 213 Fed. 705, 130 C. C. A. 219).

6. Premature appeal or writ of error.—An appeal from a ruling denying a new trial is premature if taken before the day of the order overruling the motion. Brown v. Evans (C. C. 1883) 18 Fed. 56.

7. Computation of period.—When the last day of the six months falls on Sunday, the appeal cannot be taken, or writ sued out, on any subsequent day. Johnson v. Meyers (1893) 54 Fed. 417, 4 C. C. A. 399; Meyer v. Hot Springs Imp. Co. (1909) 169 Fed. 628, 95 C. C. A. 156.

In computing the six months the time of the pendency of proceedings for review in the Supreme Court, which were dismissed for want of jurisdiction, cannot be excluded. Darnell v. Illinois Cent. R. Co. (1913) 206 Fed. 445, 124 C. C. A. 327.

An appeal taken December 12, 1914, from a decree entered June 12, 1914, was too late. Baxter v. Bevil Phillips & Co. (D. C. 1914) 219 Fed. 309.

8. Commencement of period of limitation.—It does not affect the finality of a judgment, as to the time of suing out a writ of error thereon, that the cause of action on which it was rendered was united, in the same petition, with other causes of action, which have not yet been finally adjudicated. Klever v. Seawall (1894) 65 Fed. 373, 12 C. C. A. 653, judgment reversed (1895) 65 Fed. 393, 12 C. C. A. 661.

A bill of exceptions, after reciting the facts upon which the court directed a verdict, concluded: "Forasmuch as the facts aforesaid and the decision of the court thereon do not appear of record, plaintiffs pray that this, their bill of exceptions, may be allowed," etc. Held not to imply that judgment had been rendered, and a writ of error within the time limited after a formal judgment subsequently entered was taken in time. Marks v. Northern Pac. R. Co. (1896) 76 Fed. 941, 22 C. C. A. 630.

An order signed by the judge, and entered by the clerk, finally dismissing certain defendants from the case, and directing the costs to be taxed, is a final, appealable order, though the amount of the costs is not inserted therein; and a writ of error taken more than six months thereafter must be dismissed, although a more formal judgment was afterwards entered, less than six months before the allowance of the writ. Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co. (1897) 84 Fed. 213, 28 C. C. A. 481, dismissing appeal (C. C. 1896) 73 Fed. 438.

An order of court approving and confirming the clerk's accounts covering the disbursements of the proceeds of a foreclosure sale of a railroad becomes a final decree on the adjournment of the term, and can only be reviewed by an appeal taken within six months. Coe v. East & West R. R. of Alabama (1898) 85 Fed. 489, 29 C. C. A. 292.

Where an order overruling an application for rehearing of an order confirming a bankrupt's composition was entered on the journal for October 10, 1905, which contained an indorsement by the clerk "Filed Oct. 10th, 1905," and the direction, "Enter this order. John E. McCall, Judge. Oct. 16, 1905," it would be presumed that the date October 16th was a clerical mistake, since neither the approval of the form of the order by the judge nor the date of his approval has any proper place on the journal, and hence the time within which an appeal from such order could be taken began to run from October 10th. In re McCall (1906) 145 Fed. 898, 76 C. C. A. 430.

An interlocutory decree in favor of complainant, in a suit for infringement of a trade-mark, is reviewable on an appeal taken within the statutory time after final decree, though more than six months had elapsed since the entry of the interlocutory decree, and the appeal purported to be from that decree and steps therefor were taken prior to the entry of the final decree. Nashville Syrup Co. v. Coca Cola Co. (1914) 215 Fed. 527, 132 C. C. A. 39, Ann. Cas. 1915B, 358, affirming judgment Coca Cola Co. v. Nashville Syrup Co. (D. C. 1912) 200 Fed. 157.

Where the decree contained provision for further proceedings against the surety on an injunction bond, if plaintiff did not pay, an appeal by the surety within six months from final decree against it, subsequently entered, was in time. American Surety Co. of New York v. Jones (1915) 224 Fed. 673, 140 C. C. A. 183, reversing decree Woolfolk v. Same (D. C. 1914) 216 Fed. 807.

The clerk made the following entry in a cause on his minutes: "Bill dismissed as to A. and B. Decree." Held, that the inference was that the judge had announced his decision in the case, and that an appeal might be taken therefrom at once, although no opinion containing a full statement of the judge's reasons had then been filed. Fairbanks v. Amoskeag Nat. Bank (C. C. 1887) 32 Fed. 572.

The time begins to run on the day when the judgment or decree is filed and entered. Baxter v. Bevil Phillips & Co. (D. C. 1914) 219 Fed. 309.

9. —— Effect of motion for new trial or rehearing.—Where the trial court permits the filing of a petition for rehearing during the term at which the order or decree sought to be reviewed was entered, it retains jurisdiction, and the time for appeal does not begin to run until such action is taken. Andrews v. Thum (1894) 64 Fed. 149, 12 C. C. A. 77 (denying petition to dismiss appeal Thum v. Andrews [C. C. 1892] 53 Fed. 84, and decree reversed

Andrews v. Thum [1895] 67 Fed. 911, 15 C. C. A. 67); Andrews v. Thum (1896) 72 Fed. 290, 18 C. C. A. 566, certiorari denied (1896) 16 Sup. Ct. 1198, 163 U. S. 676, 41 L. Ed. 313; In re Worcester County (1900) 102 Fed. 808, 42 C. C. A. 637; In re McCall (1906) 145 Fed. 898, 76 C. C. A. 430.

But a petition for rehearing, not filed within the 15 days limited by rule of court, does not operate to extend the time within which defendants may appeal. Marden v. Campbell Printing-Press & Manufacturing Co. (1895) 67 Fed. 809, 15 C. C. A. 26, dismissing appeal (C. C. 1894) 64 Fed. 782.

Where a motion for new trial is made after judgment, the judgment does not become effective, for the purposes of a writ of error, until such motion is disposed of, and the time limited by statute for the allowance of a writ to review the judgment runs from that date. Alexander v. U. S. (1893) 57 Fed. 828, 6 C. C. A. 602; Louisville Trust Co. v. Stockton (1896) 72 Fed. 1, 18 C. C. A. 408; Andrews v. Thum (1896) 72 Fed. 290, 18 C. C. A. 566 (certiorari denied [1896] 16 Sup. Ct. 1198, 163 U. S. 676, 41 L. Ed. 313); Altenberg v. Grant (1897) 83 Fed. 980, 28 C. C. A. 244; Kentucky Coal, Timber, Oil & Land Co. v. Howes (1907) 153 Fed. 163, 82 C. C. A. 337; Brown v. Evans (C. C. 1883) 18 Fed. 56.

10. Extension of time.—The courts have no power to extend the statutory period for taking out a writ of error. Old Nick Williams Co. v. U. S. (1907) 152 Fed. 925, 82 C. C. A. 73 (judgment affirmed [1910] 30 Sup. Ct. 221, 215 U. S. 541, 54 L. Ed. 318); Camden Iron Works Co. v. Sater (1915) 223 Fed. 611, 139 C. C. A. 157.

Nor can the time be extended by agreement. Clark v. Doerr (1906) 143 Fed. 960, 75 C. C. A. 146. Nor by a motion in the trial court to vacate the judgment, filed after the time has expired, which brings nothing new into the record, but is in effect merely a motion to reargue the question whether the judgment was warranted by the record. U. S. v. Fidelity & Deposit Co. of Maryland (1907) 155 Fed. 117, 83 C. C. A. 577.

Although an appeal was allowed within the time limited, but no citation was issued to the persons who procured the order appealed from, and the record was not filed within the time required by rule 16 of the court (see notes under § 1114, ante), nor until nearly a year after the appeal was allowed, the court has no power to then award a citation, and, by a nunc pro tunc order, allow the appeal to stand as of the date when the record was filed. Hudson v. Limestone Natural Gas Co. (1906) 144 Fed. 952, 75 C. C. A. 678.

Time given for the allowance of a bill of exceptions does not prevent the judgment from becoming final, and cannot enlarge the time within which a writ of error must be brought. Kentucky Coal, Timber, Oil & Land Co. v. Howes (1907) 153 Fed. 163, 82 C. C. A. 337; Camden Iron Works Co. v. Sater (1915) 223 Fed. 611, 139 C. C. A. 157.

11. Proceedings required within time fixed.—A writ of error is not "brought," within the meaning of this section, until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed. Kentucky Coal, Timber, Oil & Land Co. v. Howes (1907) 153 Fed. 163, 82 C. C. A. 337; Baxter v. Bevil Phillips & Co. (D. C. 1914) 219 Fed. 309.

Filing the assignment of errors is not a jurisdictional requirement. Old Nick Williams Co. v. U. S. (1910) 30 Sup. Ct. 221, 222, 215 U. S. 541, 54 L. Ed. 318.

A delay of a month in filing bond on appeal from a decree granting an injunction held not so unreasonable as to require dismissal. Schenck v. Diamond Match Co. (1896) 73 Fed. 22, 19 C. C. A. 352.

On May 7th an intervener filed an assignment of errors, and prayed an appeal, and it was ordered that said appeal be allowed, on the filing of a bond "with security to be approved by the court." A bond was approved September 5th, and filed September 9th, and a citation issued. Held, that the appeal was perfected September 9th. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 19 C. C. A. 477, overruling motion to dismiss appeal (C. C. 1895) 68 Fed. 412, and appeal dismissed (1897) 84 Fed. 1017, 28 C. C. A. 681.

A writ of error is not filed in the trial court till it is indorsed as filed by the clerk. Gilbert, Circuit Judge, dissenting. Mutual Life Ins. Co. v. Phinney (1896) 76 Fed. 617, 22 C. C. A. 425.

The allowance of an appeal by the trial court within six months from the entry of the decree is sufficient to save the case from the bar of the statute, as neither the filing of the bond nor the issuance of citation within the time is jurisdictional. Wickelman v. A. B. Dick Co. (1898) 85 Fed. 851, 29 C. C. A. 436; Noonan v. Chester Park Athletic Club Co. (1899) 93 Fed. 576, 35 C. C. A. 457; Berliner Gramophone Co. v. Seaman (1901) 108 Fed. 714, 47 C. C. A. 630; Lockman v. Lang (1904) 132 Fed. 1, 65 C. C. A. 621. But see In re Goodman (1900) 101 Fed. 920, 42 C. C. A. 85, holding that an appeal is not taken until the order allowing the same and the bond are filed in the court in which the decree or order appealed from is entered, and this must be done within the time allowed by statute for taking the appeal.

The mere filing of the petition for appeal and the assignments of error in

the clerk's office within the statutory period is not a sufficient perfection of appeal. Green v. City of Lynn (1898) 87 Fed. 839, 31 C. C. A. 248.

The Circuit Court of Appeals, is without jurisdiction to review a judgment on a writ of error not issued until more than six months after the entry of the judgment, notwithstanding it may have been allowed within that time. City of Waxahachie v. Coler (1899) 92 Fed. 284, 34 C. C. A. 349; Rutan v. Johnson (1904) 130 Fed. 109, 64 C. C. A. 443, dismissing writ of error Johnson & Johnson v. Rutan (C. C. 1903) 122 Fed. 993.

An order allowing a writ of error conditioned on the giving of a bond by the plaintiff in error is ineffective until the condition is complied with. Kentucky Coal, Timber, Oil & Land Co. v. Howes (1907) 153 Fed. 163, 82 C. C. A. 337.

The writ of error must be actually sued out and filed in the court below within the six months from entry of judgment; it being insufficient that an intention to obtain a review was fully disclosed at the trial, or that the court was held open to the legal end of the term to allow time for preparing a bill of exceptions. Threadgill v. Platt (C. C. 1895) 71 Fed. 1.

12. Excuses for delay.—Delay in settling the bill of exceptions, due to judicial engagements of the trial judge, is no excuse for the failure to sue out a writ of error from a circuit court of appeals to a federal District Court within the six months, although an assignment of errors should accompany the petition for the writ of error. Old Nick Williams Co. v. U. S. (1910) 30 Sup. Ct. 221, 222, 215 U. S. 541, 54 L. Ed. 318.

It is not the duty of a clerk of a federal court to procure the allowance of writs of error, and the approval of bonds for appeals and writs of error, and if parties intrust such matters to him they cannot complain of delay. Warner v. Texas & P. Ry. Co. (1893) 54 Fed. 920, 4 C. C. A. 670.

Whether the failure to issue the writ of error in time is through the negligence of the plaintiff in error or the fault of the clerk appears to be immaterial. City of Waxahachie v. Coler (1899) 92 Fed. 284, 34 C. C. A. 349.

Where a writ of error was not sued out until more than six months after the expiration of an extended time allowed after judgment for preparation of a bill of exceptions, nor within that time after the bill of exceptions was actually signed and filed, it is too late to give the circuit court of appeals jurisdiction, and cannot be aided by a showing that the bill was not returned promptly to counsel after being signed by the judge. Brewster v. Evans (1899) 93 Fed. 628, 35 C. C. A. 500.

Delay in perfecting appeal beyond the time prescribed by statute by reason of the absence of judge from the district and without fault of appellant is not ground for dismissing the appeal. Toledo Metal Wheel Co. v. Foyer Bros. & Co. (1915) 223 Fed. 350, 138 C. C. A. 612.

Where a bill of review was not filed within the time specified for an appeal from the order, it could only be sustained on the theory that the case was out of the jurisdiction of the court so much of the time that there had not been six months during which the court could have entertained the bill. In re Brown (D. C. 1913) 213 Fed. 701, order affirmed In re O. A. Brown & Co. (1914) 213 Fed. 705, 130 C. C. A. 219.

13. Effect of delay.—An appeal or writ of error not taken within the time prescribed by law will be dismissed for want of jurisdiction. Whitsitt v. Union Depot & R. Co. (1887) 122 U. S. 363, 7 Sup. Ct. 1248, 30 L. Ed. 1150; Old Nick Williams Co. v. U. S. (1910) 30 Sup. Ct. 221, 222, 215 U. S. 541, 54 L. Ed. 318 (affirming judgment [1907] 152 Fed. 925, 82 C. C. A. 73); Coulliette v. Thomason (1892) 50 Fed. 787, 1 C. C. A. 675; Hamilton v. Brown (1893) 53 Fed. 753, 3 C. C. A. 639; Union Pac. Ry. Co. v. Colorado Eastern Ry. Co. (1893) 54 Fed. 22, 4 C. C. A. 161 (writ of error dismissed [1895] 16 Sup. Ct. 1207, 163 U. S. 708, 41 L. Ed. 310); Stevens v. Clark (1894) 62 Fed. 321, 10 C. C. A. 379; White v. Iowa Nat. Bank (1895) 71 Fed. 97, 17 C. C. A. 621; Condon v. Central Loan & Trust Co. (1896) 73 Fed. 907, 20 C. C. A. 110; City of Waxahachie v. Coler (1899) 92 Fed. 284, 34 C. C. A. 349; Blaffer v. New Orleans Water Supply Co. (1908) 160 Fed. 389, 87 C. C. A. 341.

On a bill of review to correct errors of law on the face of a decree, a final decree, from which no appeal is taken in time, can be reviewed by the circuit court of appeals only as to matters of law apparent on its face. Desvergers v. Parsons (1894) 60 Fed. 143, 8 C. C. A. 526.

The failure to sue out the writ within six months after the entry of the judgment makes the judgment final. Connecticut Fire Ins. Co. v. Oldendorff (1896) 73 Fed. 88, 90, 19 C. C. A. 379.

Where an appeal in habeas corpus is perfected after the time allowed, and after the prisoner has been transferred to another district for trial, so as to be beyond reach of the court's process, the questions for decision on the appeal become mere moot questions, which the court will not decide. U. S. v. Arnold (1897) 82 Fed. 769, 27 C. C. A. 342.

It is not error to refuse to join a judgment debtor to a writ of error more than three months after the ex-

piration of the time to sue out the writ. Lewis v. Sittel (1908) 165 Fed. 157, 91 C. C. A. 191, affirming judgment Lewis v. Sittle (Ind. T. 1907) 104 S. W. 850.

A circuit judge, in passing on an application for a writ of error to review a judgment at law in the circuit court of appeals, must exercise the powers of that court, and hence cannot issue the writ after the expiration of the time limited by law. Threadgill v. Platt (C. C. 1895) 71 Fed. 1.

The lower court has no power to allow an appeal after the expiration of six months from the entry of the decree. Butt v. U. S. (C. C. 1904) 126 Fed. 794; Born v. Schneider (C. C. 1904) 128 Fed. 179.

14. Waiver of objections.—Objection based on a misprision of the clerk of the appellate court in docketing the appeal as of a date prior to the time when the decree appealed from was in fact entered, was waived by moving to dismiss the appeal on other grounds. Elder v. McClaskey (1895) 17 C. C. A. 251, 70 Fed. 529, reversing decree McClaskey v. Barr (C. C. 1891) 47 Fed. 154, and certiorari denied (1896) 16 Sup. Ct. 1201, 163 U. S. 685.

Parties cannot confer jurisdiction on the circuit court of appeals to review a judgment six months after its entry by the voluntary appearance of necessary parties to the appeal. Dodson v. Fletcher (1897) 79 Fed. 129, 24 C. C. A. 466, denying motion to set aside dismissal (1897) 78 Fed. 214, 24 C. C. A. 69.

Where the attorneys for a party, having by stipulation retained the papers in error proceedings presented to them for examination and acceptance until after the expiration of the six months allowed for taking such proceedings, stipulated that they might be filed nunc pro tunc, argued the case in the appellate court, and after reversal retried it in the court below without objection, they will not be heard to urge the invalidity of the entire error proceedings, because the writ was not sued out within the statutory time. Jarowski v. Hamburg-American Packet Co. (1911) 186 Fed. 332, 108 C. C. A. 410, denying motion to vacate order (1910) 182 Fed. 320, 104 C. C. A. 548.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; U. S. v. Goodrich (1893) 54 Fed. 21, 4 C. C. A. 160; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Brady v. Bernard & Kittinger (1909) 170 Fed. 576, 95 C. C. A. 656 (dismissed and certiorari denied [1910] 30 Sup. Ct. 695, 217 U. S. 595, 54 L. Ed. 896); U. S. v. Train (C. C. 1882) 12 Fed. 852, 854.

§ 1648. (Act March 3, 1891, c. 517, § 6.) Appeals and writs of error from circuit courts of appeals to Supreme Court; time for taking.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed. (26 Stat. 828.)

These were the concluding provisions of section 6 of the Circuit Courts of Appeals Act, cited above.

The preceding provisions of the section, relating to the appellate jurisdiction of the circuit courts of appeals and of the Supreme Court, were incorporated in the Judicial Code, in sections 128, and 238–240 thereof, ante, §§ 1120, 1215–1217, and were superseded thereby.

The first sentence of the paragraph set forth here, authorizing appeals, etc., to the Supreme Court in cases in which the judgments or decrees of the circuit courts of appeals were not made final by the preceding provisions of the section, was also incorporated in and superseded by Jud. Code, § 241, ante, § 1218.

The last sentence of this paragraph, limiting the time for taking such appeals, etc., remains in force.

Before this act, the time for writs of error and appeals from circuit or district courts to the Supreme Court was limited to two years, by R. S. § 1008, post, § 1649.

Notes of Decisions

Proceedings to which limitation applies.—This section does not limit the time within which writs of error from the supreme court to state courts can be taken, as such writs are, under R. S. § 1003, post, § 1662, subject to the limitation governing judgments or decrees of "a court of the United States," and the act of 1891 did not repeal the two-years limitation as to circuit and district courts, previously established by R. S. § 1008, post, § 1649. Allen v. Southern Pac. R. Co. (1899) 19 Sup. Ct. 518, 520, 173 U. S. 479, 43 L. Ed. 775, dismissing writ of error (1896) 44 Pac. 796, 112 Cal. 455.

An appeal to the federal Supreme Court from a decree of a Circuit Court

of Appeals on a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt in fraud of creditors need not be taken within the 30 days prescribed by General Orders in Bankruptcy No. 36, for appeals under the bankrupt act, but the appellate jurisdiction being under, or the same as that under, this section, the appeal is in time if taken within a year. Thomas v. Sugarman (1910) 30 Sup. Ct. 650, 218 U. S. 129, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250, reversing decree Same v. Sugarman (1907) 157 Fed. 669, 85 C. C. A. 337, 15 L. R. A. (N. S.) 1267.

Proceedings required within the time limited.—When a writ of error from the circuit court of appeals is allowed within the six months, but is not actually issued by the clerk until after the expiration thereof, it will be dismissed, for a writ of error is not brought until it is filed in the court below. U. S. v. Baxter (1892) 51 Fed. 624, 2 C. C. A. 410.

Effect as to equity rule.—Equity rule 88 (ante, § 1536) does not authorize the filing of a petition for rehearing after the term at which decree was entered since the passage of this section. Byron Jackson Iron Works v. United Iron Works (C. C. 1911) 197 Fed. 44.

§ 1649. (R. S. § 1008.) Writs of error and appeals to Supreme Court, time for taking.

No judgment, decree, or order of a [circuit or] district court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: Provided, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability.

Act June 1, 1872, c. 255, § 2, 17 Stat. 196.

The words in the first sentence of this section inclosed in brackets, "circuit or," became inoperative on the abolition of the circuit courts by Jud. Code, § 289, ante, § 1266.

On the establishment of the circuit courts of appeal, the time for writs of error or appeals from the circuit courts of appeals to the Supreme Court was limited to one year, and from the circuit courts or district courts to the circuit courts of appeals, to six months, by provisions of the Circuit Courts of Appeals Act (Act March 3, 1891, c. 517, §§ 6, 11, ante, §§ 1647, 1648). But as that act contained no limitation of the time for taking appeals, etc., from circuit or district courts directly to the Supreme Court this section continued in force, and after the abolition of the circuit courts by the Judicial Code, remained applicable to such appeals, etc., from district courts.

Said provisions of the Circuit Courts of Appeals Act prescribing limitations of time for appeals, etc., contained no exceptions in favor of persons under disability, such as were made by the proviso annexed to this section, and also to R. S. § 635, since repealed by Jud. Code, § 297, ante, § 1274.

See notes to provision of Act March 3, 1891, c. 517, § 11, ante, § 1647.

See Act Oct. 22, 1913, c. 32, ante, § 1000, and notes thereunder.

Notes of Decisions

1. Construction in general.
2. Proceedings to which limitation applies.
3. Commencement of period of limitation.
4. Computation of period.
5. Proceedings required to be taken within the time limited.
6. —— Time for docketing in the supreme court.
7. Effect of petition for rehearing.
8. Effect of delay.
9. Waiver of objections.
10. Suspension of period during incapacity.
11. Effect of appeal or writ of error perfected in time.

1. Construction in general.—This section was not repealed by the Circuit Court of Appeals Act of 1891. Allen v. Southern Pac. R. Co. (1899) 19 Sup. Ct. 518, 520, 173 U. S. 479, 43 L. Ed. 775, dismissing writ of error (1896) 44 Pac. 796, 112 Cal. 455.

The terms "brought" and "sued out," as applied to writs of error, and meaning the issuance of the writ by proper authority and the filing of the same in the proper court, appear to be used synonymously in the statutes of the United States, in the decisions of the courts, and in the text-books. Waxahachie v. Coler (1899) 92 Fed. 284, 286, 34 C. C. A. 349.

2. Proceedings to which limitation applies.—The period of limitations for appeals in equity cases is applied to bills of review, though they are not strictly within the statute; but it is within the discretion of the court to grant leave to file a bill of review on matter discovered since the right to appeal is barred. Thomas v. Brockenbrough (1825) 10 Wheat. 146, 150, 6 L. Ed. 287.

Appeals from the district courts of California under Act March 3, 1851, which provides for ascertaining and settling private land claims without limiting the time for appeals, are subject to the general regulations as to appeals. Castro v. U. S. (1865) 3 Wall. 46, 49, 18 L. Ed. 163.

The time for writs of error from the supreme court to the state courts is limited by this section, not by section 1648, ante. Cummings v. Jones (1881) 104 U. S. 419, 26 L. Ed. 824; Scarborough v. Pargoud (1883) 2 Sup. Ct. 877, 878, 108 U. S. 567, 27 L. Ed. 824; Allen v. Southern Pac. R. Co. (1899) 19 Sup. Ct. 518, 520, 173 U. S. 479, 43 L. Ed. 775, dismissing writ of error (1896) 44 Pac. 796, 112 Cal. 455.

A bill of review must ordinarily be filed within the two years. Ensminger v. Powers (1883) 2 Sup. Ct. 643, 108 U. S. 292, 27 L. Ed. 732.

The time within which a writ of error to review a decision in bankruptcy of the District Court is two years, as regulated by these sections. Frederic L. Grant Shoe Co. v. W. M. Laird Co. (1909) 29 Sup. Ct. 332, 333, 212 U. S. 445, 53 L. Ed. 591.

A direct appeal in a case in which the lack of a certificate of jurisdiction is supplied by the decree, which shows dismissal for want of jurisdiction only, may be perfected after the term, if within two years from the entry of the decree. Herndon-Carter Co. v. James N. Norris, Son & Co. (1912) 32 Sup. Ct. 550, 551, 224 U. S. 496, 56 L. Ed. 857.

Appeals to the supreme court may be taken at any time within two years from the entry of decree in all cases except where the jurisdiction of the court is alone to be reviewed, in which case no appeal can be taken unless the certificate demanded is procured during the term at which the final decree is rendered. Reed v. Stanly (C. C. 1898) 89 Fed. 430, 434, affirmed (1899) 97 Fed. 521, 38 C. C. A. 331.

3. Commencement of period of limitation.—An order to enter a decree is not to be taken as the date of the decree subsequently entered now for then, but the date of the decree is the day of the actual and formal entry. U. S. v. Gomez (1863) 1 Wall. 690, 698, 17 L. Ed. 677.

Though an appeal be entered "as" of a prior date, the date of an order settling apparently the terms of a decree to be entered thereafter, the rights of the parties as to an appeal are determined by date of actual surety, or of signing and filing the final decree. Providence Rubber Co. v. Goodyear (1867) 6 Wall. 153, 155, 18 L. Ed. 762.

Where a final decree in an equity case adjudged that a certain sum was due an administratrix, and that if in 90 days from its date the court should be satisfied that a certain sum paid for the purchase of incumbrances, and notes had inured to the benefit of deceased or his estate, that sum should be credited on the amount decreed to be paid, the date of the decree was the date on which it was entered, and an appeal taken more than two years thereafter should be dismissed. Radford v. Folsom (1888) 9 Sup. Ct. 792, 131 U. S. 392, 33 L. Ed. 203.

A writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. Old Nick Williams Co. v. U. S. (1909) 30 Sup. Ct. 221, 222, 215 U. S. 541, 54 L. Ed. 318.

The time begins to run from the date of the entry of the judgment. Connecticut Fire Ins. Co. v. Oldendorff (1896) 73 Fed. 88, 89, 19 C. C. A. 379.

The time limit, for review of an order confirming a bankrupt's composition by appeal, begins to run from the entry of the confirmation order on the records of the court. In re McCall (1906) 145 Fed. 898, 76 C. C. A. 430.

4. Computation of period.—The time during which the control of the circuit court over the appeal was suspended by an appeal which was subsequently dismissed for failure of the appellants to file and docket the cause in the supreme court will not be computed as a part of the two years. Ensminger v. Powers (1883) 2 Sup. Ct. 643, 108 U. S. 292, 27 L. Ed. 732.

In computing the two years, the day of entry of the judgment, decree, or order sought to be reviewed should be excluded. Smith v. Gale (1890) 11 Sup. Ct. 185, 137 U. S. 577, 34 L. Ed. 792.

The time which elapsed between the tendering of a bill of review to the federal district court for Porto Rico for filing, and the permission given to file, should not be counted in applying the two-year limitation for filing such bill, fixed by analogy to the time allowed by law for an appeal to the federal Supreme Court. Fraenkl v. Cerecedo (1909) 30 Sup. Ct. 322, 324, 216 U. S. 295, 54 L. Ed. 486.

5. Proceedings required to be taken within the time limited.—An appeal is not "taken" until petition and order for appeal, and appeal bond, are filed in the trial court. Scarborough v. Pargoud (1883) 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824; Credit Co. v. Arkansas Cent. Ry. Co. (1888) 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448; Farrar v. Churchill (1890) 10 Sup. Ct. 771, 772, 135 U. S. 609, 34 L. Ed. 246; U. S. v. Baxter (1892) 51 Fed. 624, 2 C. C. A. 410; Kentucky Coal, Timber, Oil & Land Co. v. Howes (1907) 153 Fed. 163, 82 C. C. A. 337.

An appeal prayed for and allowed within the time limited is valid, though the security be not given until after that period. The Dos Hermanos (1825) 10 Wheat. 306, 311, 6 L. Ed. 328.

A final decree was entered in the circuit court January 22, 1883, and on the same day an appeal was allowed,

but it was never prosecuted. On January 22, 1885, a justice of the supreme court allowed an appeal in the case, and approved the appeal bond. The papers were presented to the circuit court January 27, 1885. Held, that the appeal was not taken within two years, and the defect was not aided by entering the order allowing the appeal, in the circuit court, on January 27th as of January 22d. Credit Co. v. Arkansas Cent. Ry. Co. (1888) 9 Sup. Ct. 107, 128 U. S. 258, 32 L. Ed. 448.

The filing of the transcript during the term next after the term at which an appeal is allowed gives the court jurisdiction, though citation is not obtained nor bond given until after the time allowed by law for the appeal has expired. Evans v. State Nat. Bank (1890) 10 Sup. Ct. 493, 134 U. S. 330, 33 L. Ed. 917.

6. —— Time for docketing in the Supreme Court.—The supreme court will not entertain a motion to dismiss an appeal not regularly docketed, and which appellant is not bound to docket until the next term. Stafford v. Union Bank (1853) 16 How. 135, 139, 14 L. Ed. 876.

An appeal from a circuit court taken in open court becomes inoperative when it is not docketed in the supreme court before the end of the term of the supreme court to which it is made returnable. Radford v. Folsom (1887) 8 Sup. Ct. 334, 335, 123 U. S. 725, 31 L. Ed. 292.

7. Effect of petition for rehearing.—Where a petition for rehearing is made at the same term, and entertained by the court, the time limited for an appeal or writ of error does not begin to run until the application is disposed of, though this is at a subsequent term. Aspen Mining & Smelting Co. v. Billings (1893) 150 U. S. 31, 14 Sup. Ct. 4, 37 L. Ed. 986.

8. Effect of delay.—An appeal not docketed in time will be dismissed. Brooks v. Norris (1850) 11 How. 204, 207, 13 L. Ed. 665; Good Intent Towboat Co. v. Atlantic Mut. Ins. Co. (1883) 3 Sup. Ct. 78, 83, 109 U. S. 110, 27 L. Ed. 874; Whitsitt v. Union Depot & R. Co. (1887) 7 Sup. Ct. 1248, 122 U. S. 363, 30 L. Ed. 1150; Green v. Elbert (1891) 11 Sup. Ct. 188, 137 U. S. 615, 34 L. Ed. 792; Fowler v. Hamill (1891) 11 Sup. Ct. 663, 139 U. S. 549, 35 L. Ed. 266.

The fact that the clerk of the circuit court, in preparing transcripts on appeal to the supreme court, labored under a mistake as to the time within which they were required to be filed, is not a valid excuse for a failure to file them within the time prescribed by the established rules. Richardson v. Green (1889) 9 Sup. Ct. 443, 445, 130 U. S. 104, 32 L. Ed. 872.

Where a bill against several defendants was dismissed as to all but one, and plaintiff denied relief on all but one item, to determine the amount of which the case was referred to a master and an appeal was taken from this decree, which was afterward dismissed for failure to file the transcript in time, and the master filed his report, which was confirmed, and plaintiff again appealed, it was held that on this second appeal the matters adjudicated by the first decree could not be considered; the time to appeal therefrom being past. Hill v. Chicago & E. R. Co. (1891) 11 Sup. Ct. 690, 140 U. S. 52, 35 L. Ed. 331.

9. Waiver of objections.—An objection that an appeal in bankruptcy was not claimed and notice given within the time prescribed by the rules is made too late in the supreme court of the United States after a lapse of 16 years, where it does not seem to have been called to the attention of the lower court, in which a motion was made to declare the appeal deserted. Bryar v. Campbell (1900) 20 Sup. Ct. 794, 795, 177 U. S. 649, 44 L. Ed. 926, affirming decree (1898) 90 Fed. 690, 33 C. C. A. 236.

10. Suspension of period during incapacity.—This limitation on the time of appeal did not run during the civil war against a party who could not for that reason bring his cause of action. Freeborn v. The Protector (1869) 9 Wall. 687, 689, 19 L. Ed. 812.

No disability arising after the statute of limitations has once begun to run will suspend its operation. A party appealing from a decree of a district or circuit court, after the lapse of two years, is not helped by the fact that he has been imprisoned during the entire period, except a few months directly following the decree. McDonald v. Hovey (1884) 4 Sup. Ct. 142, 110 U. S. 619, 28 L. Ed. 269.

Facts held to show that accused had been in prison, so as to come within the proviso of this section. Chapman v. Barney (1889) 9 Sup. Ct. 426, 427, 129 U. S. 677, 32 L. Ed. 800.

11. Effect of appeal or writ of error perfected in time.—Error of an absolute foreclosure of the right of redemption without allowing 15 months for that purpose by the decree is not waived by failure of defendant to tender the redemption money within that time, when the case is brought to the supreme court by an appeal taken within the two years allowed by the statute. Mason v. Northwestern Mut. Life Ins. Co. (1882) 1 Sup. Ct. 165, 166, 106 U. S. 163, 27 L. Ed. 129.

Proceedings in a court below, after an appeal from an order is taken, will not affect the case; the order being appealable, and the appeal having been perfected in time. Williams v. Morgan (1884) 4 Sup. Ct. 638, 645, 111 U. S. 684, 28 L. Ed. 559.

The allowance of an appeal, which afterwards becomes of no avail from failure to file the record and prosecute

it, is no bar to a second appeal within the time allowed by law. Evans v. State Nat. Bank (1890) 10 Sup. Ct. 493, 134 U. S. 330, 33 L. Ed. 917.

Cited without definite application, Memphis v. Brown (1876) 94 U. S. 715, 717, 24 L. Ed. 244; Young v. U. S. (1877) 95 U. S. 641, 642, 24 L. Ed. 467; The Osborne (1881) 105 U. S. 447, 448, 26 L. Ed. 1065; Small v. Northern Pac. R. Co. (1890) 10 Sup. Ct. 614, 615, 134 U. S. 514, 33 L. Ed. 1006; Holt v. Indiana Mfg. Co. (1900) 20 Sup. Ct. 272, 273, 176 U. S. 68, 44 L. Ed. 374; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Davie v. Heyward (C. C. 1887) 33 Fed. 93, 94; The Sydney (C. C. 1891) 47 Fed. 260, 263.

§ 1649a. (Act Sept. 6, 1916, c. 448, § 4.) Dismissal of writ of error or appeal because of use of wrong remedy prohibited.

No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed. (39 Stat.)

This was section 4 of an act entitled "An act to amend the Judicial Code, to fix the time when the annual term of the Supreme Court shall commence; and further to define the jurisdiction of that court," cited above.

Section 7 of said act provided that the act should take effect thirty days after its approval, that it should not apply to nor affect any writ of error, appeal or certiorari already applied for, and that the right of review under existing laws in respect of judgments and decrees entered before the act takes effect should remain unaffected for six months thereafter.

§ 1650. (R. S. § 1009.) Appeals in prize causes, within what time.

Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case: Provided, That the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein.

Act June 30, 1864, c. 174, § 13, 13 Stat. 310. Act March 3, 1873, c. 230, § 2, 17 Stat. 556.

Appeals from district courts direct to the Supreme Court, from final sentences and decrees in prize causes, were authorized by Jud. Code, § 238, ante, § 1215.

A provision similar to the proviso annexed to this section was made by R. S. § 4636, post, § 8413.

Cited without definite application, Clark v. U. S. (1878) 99 U. S. 493, 25 L. Ed. 481; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; The Sydney (C. C. 1891) 47 Fed. 260, 263.

§ 1651. (Act March 3, 1891, c. 517, § 11.) Provisions regulating appeals or writs of error made applicable to appeals and writs of error provided for in respect of circuit courts of appeals.

All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error. (26 Stat. 829.)

This provision was part of section 11 of the Circuit Courts of Appeals Act, cited above.

The preceding provisions of the section are set forth ante, § 1647.

A further provision of this section, that any judge of the circuit courts of appeals, in respect of cases brought to that court, should have the same powers and duties as to allowance of appeals, etc., as belonged to justices

or judges in respect of the existing courts of the United States, was incorporated in Jud. Code, § 132, ante, § 1124, and was superseded thereby.

Notes of Decisions

Effect of section in general.—The court has the power, and it is generally its duty, to admit to bail, after conviction of a crime not capital, pending a writ of error. Hudson v. Parker (1895) 15 Sup. Ct. 450, 453, 156 U. S. 277, 39 L. Ed. 424; McKnight v. U. S. (1902) 113 Fed. 451, 51 C. C. A. 285.

Under this section and Interstate Commerce Law, § 16, post, § 8584, appeals from decrees to the Circuit Court in proceedings to enforce orders of the Interstate Commerce Commission are to be taken to the Circuit Court of Appeals. Louisville & N. R. Co. v. Behlmer (1898) 18 Sup. Ct. 502, 503, 169 U. S. 644, 42 L. Ed. 889.

Writs of error from the circuit court of appeals to the circuit and district courts are sued out as in cases of writs from the supreme court. Cotter v. Alabama G. S. R. Co. (1894) 61 Fed. 747, 10 C. C. A. 35.

The rules which govern the Supreme Court in taking jurisdiction of an appeal or writ of error obtain in the Circuit Courts of Appeals. Muhlenberg County v. Dyer (1895) 65 Fed. 634, 635, 13 C. C. A. 64.

An appeal in an admiralty cause is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the circuit courts prior to the passage of this act; and, under the settled rule, such an appeal vacates entirely the decree of the district court, and brings the cause up for trial de novo upon every issue raised by the pleadings, those determined by the district court in favor of the appellant as well as those determined against him. Gilchrist v. Chicago Ins. Co. (1899) 104 Fed. 566, 44 C. C. A. 43.

Provisions made applicable to Circuit Court of Appeals by this section.—The general provisions of Rev. St. U. S. § 1007, post, § 1666, limiting the time within which a writ of error must be allowed and lodged in the clerk's office if a supersedeas is desired, would govern writs of error from the federal Supreme Court to the Circuit Courts of Appeals, even under the mistaken hypothesis that writs of error from the Circuit Courts of Appeals to inferior courts, and appeals from such courts to the Circuit Courts of Appeals, were all that were within the purview of this section. Title Guaranty & Surety Co. v. U. S., to Use to General Electric Co. (1912) 32 Sup. Ct. 168, 222 U. S. 401, 56 L. Ed. 248, granting motion to vacate supersedeas (1911) 187 Fed. 98, 109 C. C. A. 106, which affirms U. S. v. Schofield (C. C. 1910) 182 Fed. 240, writ of certiorari denied Title Guaranty & Surety Co. v. U. S., to Use of General Electric Co. (1911) 32 S. Ct. 523, 223 U. S. 720, 56 L. Ed. 629.

The provision of Act Feb. 16, 1875, ante, § 1585, limiting the supreme court on an appeal in admiralty from a decree entered on findings by a jury to questions of law only does not apply to the circuit court of appeals. The State of California (1892) 49 Fed. 172, 1 C. C. A. 224, reversing decree (D. C. 1889) 46 Fed. 877.

Rev. St. § 1011, post, § 1672, is applicable to the Circuit Court of Appeals. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

Construction of provisions made applicable to the circuit court of appeals by this section.—See notes under the several sections.

Cited without definite application, Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co. (1910) 185 Fed. 487, 107 C. C. A. 587.

§ 1652. (Act April 7, 1874, c. 80, § 2.) Writs of error and appeals from Territorial courts to Supreme Court; statement of facts, etc., on appeal.

The appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe: Provided, that on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree. (18 Stat. 27.)

These provisions were part of section 2 of an act entitled "An act concerning the practice in the Territorial courts and appeals therefrom," cited above.

Further provisions of this section, relating to appellate proceedings theretofore taken and to pending cases, are omitted here, as temporary merely.

Section 1 of the act, relating to practice in the Territorial courts under codes and rules of practice, is set forth post, § 3458.

The courts referred to in this section by the words "said Territorial courts," were described in section 1 of the act, post, § 3458, as "any of the courts of the several Territories of the United States."

On the establishment of the circuit courts of appeals by the Circuit Courts of Appeals Act of March 3, 1891, c. 517, all provisions then in force regulating appeals or writs of error were made applicable to the appeals and writs of error provided for in that act in respect of the circuit courts of appeals, by a provision of section 11 of the act, ante, § 1647, and jurisdiction was given to those courts of writs of error and appeals in certain cases from the supreme courts of the Territories by section 15 of said act, 26 Stat. 830.

But the application of this section to the Territories existing at the time of its enactment has been superseded by the admission, from time to time, of all said Territories to the Union as States. And the exercise of appellate jurisdiction over the courts of the Territories organized since this act is regulated to a great extent by provisions relating to particular Territories only.

Notes of Decisions

1. Construction in general.
2. Mode of review in general.
3. —— Writ of error.
4. —— Appeal.
5. Statement of facts.
6. Special verdicts.
7. Conclusiveness of findings.
8. Presumptions in absence of findings of fact.
9. Extent of review.
10. Decisions of territorial court as controlling.
11. Application to Alaska.
12. Issuance of writ of error under act 1838.
13. Decisions under Act March 3, 1891, c. 517, §§ 13, 15.

1. Construction in general.—This section applies absolutely to all territorial courts, without regard to whether the distinction between suits at law and equity had been abolished or not. Hecht v. Boughton (1881) 105 U. S. 235, 26 L. Ed. 1018; U. S. v. Union Pacific R. Co. (1881) 105 U. S. 263, 26 L. Ed. 1021.

2. Mode of review in general.—Proceedings to review in the federal Supreme Court judgment of Porto Rico Supreme Court under Act April 12, 1900, § 35, relating to appellate jurisdiction possessed by the former court to review territorial Supreme Court judgments, must be by appeal, unless there was a trial by jury under this section, in which case appellate jurisdiction must be exercised by writ of error. People of Porto Rico v. Emmanuel (1914) 35 S. Ct. 33, 235 U. S. 251, 59 L. Ed. 215.

3. —— Writ of error.—Cases at law, in the territorial courts, are to be carried up to the supreme court of the United States by writ of error, and not by appeal. Parish v. Ellis (1842) 41 U. S. (16 Pet.) 451, 10 L. Ed. 1028.

Writ of error, and not appeal, is the proper method of obtaining a review in the federal Supreme Court of a judgment of the Supreme Court of the territory of Oklahoma which affirmed a judgment of the court below sustaining a demurrer to, and dismissing with costs, the petition in an action to recover damages for false imprisonment. Comstock v. Eagleton (1905) 25 Sup. Ct. 210, 196 U. S. 99, 49 L. Ed. 402, dismissing appeal (1902) 69 P. 955, 11 Okl. 487.

Writ of error, and not appeal, is the proper method of obtaining a review in the Supreme Court of the United States of a judgment of the Oklahoma Supreme Court, affirming a judgment of the trial court, in an action on a contract, tried by the court without a jury. Guss v. Nelson (1906) 26 Sup. Ct. 260, 200 U. S. 298, 50 L. Ed. 489, affirming judgment (1904) 78 P. 170, 14 Okl. 296.

Writ of error is the proper method of reviewing a judgment of the supreme court of the territory of Oklahoma, affirming a judgment of the court below in an action of replevin tried by the court on waiver of a jury. National Live Stock Bank of Chicago v. First Nat. Bank (1906) 27 Sup. Ct. 79, 80, 203 U. S. 296, 51 L. Ed. 192.

4. —— Appeal.—Under this section, where the case was not tried in the territorial court by a jury, the judgment can only be brought up by appeal, and not by writ of error. Woolf v. Hamilton (1882) 1 Sup. Ct. 139, 108 U. S. 15, 27 L. Ed. 635; Kahn v. Same (1882) 1 S. Ct. 139, 154 U. S. 677, 27 L. Ed. 635; Bonnifield v. Price (1882) 14 Sup. Ct. 1194, 154 U. S. 672, 26 L. Ed. 1022; Murphy v. Ramsey (1885) 5 Sup. Ct. 747, 758, 114 U. S. 15, 29 L. Ed. 47; Story v. Black (1886) 119 U. S. 235, 7 Sup. Ct. 176, 30 L. Ed. 341.

Laws of a territory abolishing the distinction between cases at law and cases in equity, and requiring all cases to be removed from an inferior to a higher court by writ of error and not by appeal, cannot regulate the process of the supreme court, and a case in the nature of a bill in equity is properly brought up by appeal. Brewster v. Wakefield (1859) 22 How. 118, 128, 16 L. Ed. 301.

In view of this section it was held that an appeal to the Supreme Court

in a special proceeding heard by a probate judge was properly taken, and that a writ of error must be dismissed. Stringfellow v. Cain (1878) 99 U. S. 610. 611, 25 L. Ed. 421.

A mechanic's lien foreclosure can be reviewed only on appeal, though the court submitted issues to the jury. Idaho & O. Land Imp. Co. v. Bradbury (1889) 10 Sup. Ct. 177, 178, 132 U. S. 509, 33 L. Ed. 433.

Since under this section, a case tried without a jury can only be brought to the Supreme Court by appeal, that court has no jurisdiction of a writ of error in such case, and can only dismiss without damages, though it appears that the writ was taken merely for delay. Affirming Starr v. Gregory Consol. Min. Co. (1887) 13 Pac. 195, 198. Gregory Consol. Min. Co. v. Starr (1891) 11 Sup. Ct. 914, 141 U. S. 222, 35 L. Ed. 715.

The fact that an action of ejectment was tried by the court, upon waiver of a jury, does not make appeal the proper method of obtaining a review in the federal Supreme Court of the final judgment of the Oklahoma Supreme Court, under Act May 2, 1890, c. 182, § 9, 26 Stat. 81, 85, authorizing such review in the same manner and under the same regulations as though the judgment were that of a federal circuit court. Oklahoma City v. McMaster (1905) 25 Sup. Ct. 324, 196 U. S. 529, 49 L. Ed. 587, reversing judgment (1903) 73 Pac. 1012, 12 Okl. 570.

A decree of the Supreme Court of the Territory of Oklahoma, affirming a decree of the trial court, setting aside a sale made under attachment proceedings as a cloud on title, and directing the enforcement of a trust deed by sale, is reviewable in the Supreme Court of the United States only by appeal. Southern Pine Lumber Co. v. Ward (1908) 28 Sup. Ct. 239, 208 U. S. 126, 52 L. Ed. 420, affirming judgment (1906) 85 Pac. 459, 16 Okl. 131.

5. **Statement of facts.**—Where, on appeal from the district court in Utah, its findings are sustained and its judgment affirmed by the supreme court of the territory, or the judgment is reversed for the reason that the findings are insufficient to support the judgment, such findings are in effect adopted by the supreme court of the territory, and, for the purpose of an appeal to the United States supreme court, are a sufficient statement of facts, within the act of congress of April 7, 1874, concerning the practice in territorial courts and appeals therefrom. Stringfellow v. Cain (1878) 99 U. S. 610, 25 L. Ed. 421; Cannon v. Pratt (1878) 99 U. S. 619, 25 L. Ed. 446.

As by this section appeals lie to the federal supreme court only from the supreme court of a territory, it follows that the statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on admission or rejection of evidence, pursuant to the proviso in this section, both as to facts and rulings on which the federal supreme court are to act, must be made directly or indirectly by the supreme court of the territory. Davis v. Fredericks (1881) 104 U. S. 618, 619, 26 L. Ed. 849.

Where there is no "statement of the facts of the case in the nature of a special verdict," as required in the record on appeal from the judgment of the supreme court of a territory, reversing the district court on the ground that its findings of fact were contrary to the evidence, there is nothing which the court can re-examine, and the judgment will be affirmed. Gray v. Howe (1882) 1 Sup. Ct. 136, 108 U. S. 12, 27 L. Ed. 634.

Where the record on appeal from the supreme court of a territory presents no statement of the facts showing whether the facts found were sufficient to sustain the judgment rendered, and no exceptions were taken to rulings in the admission or rejection of evidence, there is no question for review. Salina Stock Co. v. Salina Creek Irrigation Co. (1896) 16 Sup. Ct. 1036, 1038, 163 U. S. 109, 41 L. Ed. 90.

There is a finding of facts upon which a review can be had in the Supreme Court of the United States by writ of error to the Oklahoma Supreme Court, where the latter court states in its opinion that on a prior appeal it had made "a full statement and findings of facts" and had enunciated the law as applied thereto, and that finding the record the same as stated in its former opinion, and being satisfied with the law as therein declared, no new question being raised, the judgment of the trial court is affirmed. National Live Stock Bank v. First Nat. Bank (1906) 27 Sup. Ct. 79, 203 U. S. 296, 51 L. Ed. 192, affirming judgment (1905) 79 Pac. 1134, 15 Okl. 194.

Hypothetical assumption by a territorial Supreme Court of the correctness of findings of the trial court, and thereupon reversing the decree for complainant and remanding the cause to enter a final decree against it, instead of making a statement of facts calls for reversal in the federal Supreme Court, where the action arose from misconception as to the extent of the court's powers, and where the final order which made clear the court's misconception was not entered until months after appeal to the federal Supreme Court. Nielsen v. Steinfeld (1912) 32 Sup. Ct. 609, 611, 224 U. S. 534, 56 L. Ed. 872, reversing decree Steinfeld v. Nielsen (1909) 100 Pac. 1094, 12 Ariz. 381.

The statement of facts contained in the opinion may be accepted in lieu of more formal findings on an appeal to the federal supreme court from the supreme court of Porto Rico, where the judgment record itself discloses that such opinion was made a part of the

judgment. Rosaly v. Grahamy v. Frazer (1913) 33 Sup. Ct. 333, 227 U. S. 584, 57 L. Ed. 655.

6. Special verdicts.—Territorial Supreme Court does not discharge its duty under this section, c. 80, to render a special verdict, where it hypothetically assumes the findings of the trial court to be correct, and on them bases a judgment reversing decree for complainant and remands, with direction to enter a final decree against him. Nielsen v. Steinfeld (1912) 32 Sup. Ct. 609, 611, 224 U. S. 534, 56 L. Ed. 872, reversing decree Steinfeld v. Nielsen (1909) 100 Pac. 1094, 12 Ariz. 381.

7. Conclusiveness of findings.—The supreme court must accept as true the findings of facts made by the supreme courts of the territories. Eilers v. Boatman (1884) 4 Sup. Ct. 432, 111 U. S. 356, 28 L. Ed. 454.

Since the jurisdiction of the court, on appeal from the judgment of a territorial supreme court, is limited to determining whether the facts found are sufficient to sustain the judgment, and to reviewing the rulings on testimony, the court cannot investigate the preponderance of proof, but must confine itself to the findings, and their sufficiency to support the conclusions. Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 40 L. Ed. 436.

8. Presumptions in absence of findings of fact.—In the absence of a finding of facts, the court will assume that a judgment rendered by a territorial court on a trial without a jury was justified by the evidence. Marshall v. Burtis (1899) 19 Sup. Ct. 290, 292, 172 U. S. 630, 43 L. Ed. 579.

9. Extent of review.—Under the federal statute, if on a trial by the court without a jury the findings attacked are general, only such rulings in accordance with the trial can be reversed as are presented by a bill of exceptions, and the bill cannot be used to bring up the whole testimony for review, any more than on a trial by jury. Grayson v. Lynch (1896) 16 Sup. Ct. 1064, 163 U. S. 468, 41 L. Ed. 230.

Contentions which the record does not show to have been presented, directly or indirectly, to the trial court, by way of pleading or otherwise, before final judgment, and which were not made the subject of complaint in the motion for a new trial, and which were evidently regarded by the Supreme Court of the territory, on writ of error, as an afterthought, and not open under the state of the record, cannot be considered by the federal Supreme Court on an appeal from the Supreme Court of the territory. Southern Pine Lumber Co. v. Ward (1908) 28 Sup. Ct. 239, 208 U. S. 126, 52 L. Ed. 420, affirming judgment (1906) 85 P. 259, 16 Okl. 131.

The jurisdiction of the Supreme Court of the United States on an appeal from a decree of the Supreme Court of the territory of Oklahoma in a case submitted to the trial court by stipulation, without a jury, is confined to determining whether there was evidence tending to support the findings, and whether such findings sustained the judgment; since the trial court, by virtue of Rev. St. Okl. 1903, § 279, was empowered to make findings of fact as the basis of its conclusions of law, and the Supreme Court of the territory was confined to determining whether the findings below sustained the judgment, if there was evidence supporting the findings, and was not at liberty to consider the mere weight of the evidence upon which the findings were made by the trial court. Id.

An objection that the verdict is against the weight of evidence, or that the damages allowed are excessive, cannot be considered in the federal supreme court on a writ of error sued out under this section, to review a judgment of a territorial supreme court, where there was some evidence to go to the jury. Phœnix Ry. Co. v. Landis (1913) 34 Sup. Ct. 179, 231 U. S. 578, 58 L. Ed. 377.

10. Decisions of territorial court as controlling.—The ruling of the territorial supreme court that a judicial sale was within the terms of Comp. Laws N. M. 1897, § 2716, governing the sale of attached property of a perishable nature when the interests of the parties will be promoted by the sale, will ordinarily be followed by the federal supreme court on appeal. Jones v. Springer (1912) 33 Sup. Ct. 64, 226 U. S. 148, 57 L. Ed. 161.

11. Application to Alaska.—The appellate jurisdiction of the Circuit Court of Appeals for the Ninth Circuit over appeals and writs of error from the District Courts of Alaska is not ruled by this section, relating to appeals from judgments and decrees of territorial courts, but by the Alaska Civil Code (31 Stat. 414, c. 51), authorizing such appeals. Shields v. Mongollon Exploration Co. (1905) 137 Fed. 539, 70 C. C. A. 123.

12. Issuance of writ of error under Act 1838.—The act of 1838, providing that writs of error and appeals from the final decision of the supreme court of the territory shall be allowed in the same manner and under the same regulations as from the circuit courts of the United States, gives to the clerk of the territorial court the power to issue the writ of error, and to a judge of that court the power to sign the citation and approve the bond. Sheppard v. Wilson (1847) 46 U. S. (5 How.) 210, 12 L. Ed. 120.

13. Decisions under Act March 3, 1891, c. 517, §§ 13, 15.—Appeal to the supreme court of the United States

from the United States court for the Central district of the Indian Territory, in a case in which the constitutionality of an act of congress is brought in question, but which is not affected by the Indian appropriation act of July 1, 1898, is not authorized by Act March 3, 1891, § 13, providing for appeals from the United States court in that territory to the supreme court of the United States, or to a circuit court of appeals in the Eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, but the appeal should be prosecuted to the court of appeals in the Indian Territory. Ansley v. Ainsworth (1901) 21 Sup. Ct. 364, 365, 180 U. S. 253, 45 L. Ed. 517.

By the order of the Supreme Court assigning the territory of Oklahoma to the eighth judicial circuit under the provisions of this section, the courts of the territory were thereby brought within the appellate jurisdiction of the Circuit Court of Appeals for that circuit. Plymouth Cordage Co. v. Smith (1904) 24 Sup. Ct. 725, 726, 194 U. S. 311, 48 L. Ed. 992.

Lack of statutory authority precludes a review in the federal Supreme Court of judgments of the supreme court of the territory of Oklahoma in capital cases. New v. Oklahoma (1904) 25 Sup. Ct. 68, 69, 195 U. S. 252, 49 L. Ed. 182.

No appeal lies from a territorial supreme court to the circuit court of appeals in an action of assumpsit between citizens of the territory for goods sold and delivered; for by the judiciary act of March 3, 1891, § 15, appeals from territorial supreme courts are limited to cases in which the judgments of the circuit courts of appeal are "made final by this act," and in section 6 its judgments are made "final" only in controversies in which the jurisdiction depends on diverse citizenship, in admiralty cases, and in cases arising under the patent laws, the revenue laws, and the criminal laws. Aztec Min. Co. v. Ripley (1892) 53 Fed. 7, 3 C. C. A. 388, judgment affirmed (1894) 14 Sup. Ct. 236, 151 U. S. 79, 38 L. Ed. 80.

Cases wherein the judgment of the circuit court of appeals is "final," within the meaning of Act March 3, 1891, § 15, giving the right of appeal to such court from territorial supreme courts in such cases, are only those enumerated in the first clause of section 6; and no appeal to the circuit court of appeals lies in a case not there enumerated, although an appeal to the supreme court is denied by section 6, the amount in controversy being less than $1,000. Badaracco v. Cerf (1892) 53 Fed. 169, 3 C. C. A. 491, applied in Aztec Min. Co. v. Ripley (1892) 53 Fed. 7, 3 C. C. A. 388.

The "same appellate jurisdiction" to review judgments of the supreme court of territories as have the circuit courts of appeals to review judgments of the district and circuit courts of the territories is power to review judgments under criminal laws as administered by the supreme courts of the territories, but the review is confined to cases where the judgments of the circuit courts of appeals are made final by this act, and the amendment of 1897. Storm v. Arizona (1909) 170 Fed. 423, 95 C. C. A. 593.

Cited without definite application, De La Rama v. De La Rama (1906) 26 Sup. Ct. 485, 486, 201 U. S. 303, 50 L. Ed. 765; Halsell v. Renfrow (1906) 26 Sup. Ct. 610, 611, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189; Harless v. U. S. (1898) 88 Fed. 97, 101, 31 C. C. A. 397; In re Blair (1901) 106 Fed. 662, 45 C. C. A. 530.

§ 1653. (R. S. § 997.) Removal of causes by writ of error.

There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.

Act Sept. 24, 1789, c. 20, § 22, 1 Stat. 84. Act Feb. 5, 1867, c. 28, § 2, 14 Stat. 386.

Notes of Decisions

1. Nature of writ of error.
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23. —— Number of assignments.
24. —— Title of assignments.
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33. —— Assignment of cross-errors.
34. —— Briefs accompanying assignments.
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36. Scope and extent of review as dependent on record—In general.
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43. —— Consideration of documents or papers not included in record.
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45. Prayer for reversal.
46. Citation—Necessity of citation.
47. —— Time of awarding.
48. —— Excuse for failure to file citation.
49. —— Waiver of citation.
50. —— Form and sufficiency.
51. —— Service.
52. —— Alias citations.

See, also, notes under § 1673, post.

1. Nature of writ of error.—A writ of error operates only upon the record, and brings it into the appellate court. Suydam v. Williamson (1857) 20 How. 427, 437, 15 L. Ed. 978.

Upon removal of a cause from the district court to the circuit court by a writ of error, the record, the fund, the stipulations, and the res remain in the district court, and the circuit court acts upon an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. Ten Cases v. U. S. (C. C. 1887) 34 Fed. 100, 101.

2. Removal of cause by writ.—Where the suit is at law, and the trial by a jury, the only proper way of bringing the case under the review of the supreme court is by writ of error. U. S. v. Hailey (1886) 6 Sup. Ct. 1049, 118 U. S. 233, 30 L. Ed. 173.

A writ of error is not brought, and does not remove the record until it is filed in the court or with the clerk of the court which rendered the judgment, or which has succeeded to the jurisdiction of that court, and, until so filed, it presents no ruling for the appellate court to review. U. S. v. Alamogordo Lumber Co. (1912) 202 Fed. 700, 121 C. C. A. 162.

3. Time of return of writ and filing.—A writ of error on appeal must be docketed at the term to which it is returnable; otherwise it will be non pros'd. Hamilton v. Moore (1797) 3 Dall. 371, 1 L. Ed. 642.

A writ of error, not returned at the term to which it was returnable, is a nullity. Blair v. Miller (1800) 4 Dall. 21, 1 L. Ed. 724.

If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. Wood v. Lide (1807) 4 Cranch, 180, 2 L. Ed. 588.

It is the filing of the writ of error which removes the record from the inferior to the appellate court. Brooks v. Norris (1850) 11 How. 204, 207, 13 L. Ed. 665.

Where a writ was allowed in the circuit court in open court, but had no seal and was not returned to the supreme court with a transcript of the record, and two terms afterwards a paper was filed in the clerk's office in the form of a writ, but without seal and having no authenticated transcript annexed, the case was dismissed on motion. Overton v. Cheek (1859) 22 How. 46, 47, 16 L. Ed. 285.

Appeals from the district courts of California under Act March 3, 1851, for ascertaining and settling private land claims, which makes no provision as to returns or citations, held to be subject to general regulations of this section. Castro v. U. S (1865) 3 Wall. 46, 49, 18 L. Ed. 163.

Where a writ was regularly sued out on Aug. 14, 1863, returnable at the next term of court thereafter, and duly served, and citation issued and served, returnable at the same term, and the writ, citation, and record returned to the supreme court and filed, and the cause docketed before a motion to dismiss, under supreme court rule 9, a ground for dismissal that the record was not filed in time is untenable. Sparrow v. Strong (1865) 3 Wall. 97, 103, 18 L. Ed. 49.

A writ of error, not sealed until 11 days after the judgment sought to be reversed was rendered, cannot operate as a supersedeas; nor where service of citation before return day of the writ was omitted. Washington v. Dennison (1867) 6 Wall. 495, 496, 18 L. Ed. 863.

Where the record does not show that the original writ of error sued out in the circuit court of appeals has been formally filed in the trial court, even though it was in fact delivered to and lodged with the clerk, the appellate court is without jurisdiction. Mutual Life Ins. Co. v. Phinney (1896) 76 Fed. 617, 22 C. C. A. 425.

A Circuit Court of Appeals does not acquire jurisdiction of a cause by writ of error unless such writ, together with the record, is returned to the next ensuing term of the court to which it is made returnable, or sufficient cause is then shown why it is not so returned. Pender v. Brown (1903) 120 Fed. 496, 56 C. C. A. 646.

Erroneous proceedings may be reversed on a writ of error, if presented within the time required by law, but if the time has expired the judgment cannot be reversed however erroneous. Thompson v. Phillips (C. C. 1830) Fed. Cas. No. 13,974.

4. Sufficiency of writ.—Where a writ of error does not set out the names of all the parties to the judgment of the

trial court, the case will be dismissed. Smyth v. Strader (1851) 12 How. 327, 13 L. Ed. 1008.

A writ of error, which does not properly describe the judgment, will be dismissed on motion. Davenport v. Fletcher (1853) 16 How. 142, 144, 14 L. Ed. 879.

A defect in a writ of error, such as not naming a return day, held fatal. Carroll v. Dorsey (1857) 20 How. 204, 207, 15 L. Ed. 803.

A mistake in the date of a writ of error is not important, when it is clear that such mistake is a clerical one merely, and when, from the judgment described and the number given to it, the party cannot be misled. Davidson v. Lanier (1866) 4 Wall. 447, 453, 18 L. Ed. 377.

5. Return of original writ.—The original writ of error awarded and the original citation subscribed by the judge allowing the writ must be returned to the supreme court. Wilson v. Daniel (1798) 3 U. S. (3 Dall.) 401, 1 L. Ed. 655.

The writ of error by which a case is transferred from a Circuit Court is the writ of the Supreme Court, and the original writ should always be sent to the Supreme Court with the transcript. Mussina v. Cavazos (1867) 6 Wall. 355, 357, 18 L. Ed. 810.

The writ is served by depositing it with the clerk of the Circuit Court, and if he makes return by sending to the Supreme Court a transcript in due time, the Supreme Court has jurisdiction to decide the case, though the original writ may be lost or destroyed before it reaches the Supreme Court. Id.

6. Second or subsequent writs of error.—A second writ of error brings up for revision nothing but proceedings subsequent to the mandate issued to the court below. Roberts v. Cooper (1857) 20 How. 467, 481, 15 L. Ed. 969.

Proceedings in accordance with the mandate sent to the lower court on affirmance will not be reviewed on a second writ of error. Cook v. Porter (1870) 11 Wall. 672, 677, 20 L. Ed. 84.

7. Transcript of record.—Construction and application of rules of Circuit Court of Appeals, see notes to § 1114, ante.

8. —— Duty to furnish.—It is the duty of counsel for a plaintiff in error to furnish the Circuit Court of Appeals with a full and complete transcript of the record as described in the certificate to the bill of exceptions, including exhibits, or with the stipulation of opposing counsel waiving any part which is omitted. Dalton v. Moore (1905) 141 Fed. 311, 72 C. C. A. 459, writ of certiorari denied Moore v. Dalton (1906) 26 Sup. Ct. 757, 200 U. S. 619, 50 L. Ed. 623.

It is the duty of a party appealing to see that there is sufficient in the transcript of the record brought to the appellate court to intelligibly present the questions sought to be reviewed. Rodgers v. U. S. (1907) 152 Fed. 426, 81 C. C. A. 568.

9. —— Time of docketing or return.—The court refused to quash a writ of error on the ground that the record was not filed with the clerk until June, 1833, the writ having been returnable to January term, 1832, in view of a rule giving the defendant in error the right to docket and dismiss the cause. Pickett v. Legerwood (1833) 7 Pet. 144, 147, 8 L. Ed. 638.

The transcript must be filed and the case docketed at the next term, but a dismissal of the appeal for want of timely filing does not bar a second appeal. The Virginia v. West (1856) 19 How. 182, 183, 15 L. Ed. 594.

An omission to file a transcript of the record at the term next succeeding issue of the writ of error or taking the appeal held fatal. Carroll v. Dorsey (1857) 20 How. 204, 207, 15 L. Ed. 803.

Delay in filing transcript held fatal to appeal. The Lucy v. U. S. (1868) 8 Wall. 307, 309, 19 L. Ed. 394.

Under this section and section 1673, post, if a transcript is not filed and the cause docketed during the term to which it was made returnable, or sufficient excuse given for the delay, the writ of error or appeal becomes inoperative, and the cause may on that account be dismissed. Grigsby v. Purcell (1878) 99 U. S. 505, 506, 25 L. Ed. 354.

An order extending the time for filing the record on appeal, made after the time has expired, is ineffective. West v. Irwin (1893) 54 Fed. 419, 4 C. C. A. 401, dismissing appeal Irwin v. West (C. C. 1892) 50 Fed. 362.

Where the transcript was filed within 30 days after the appeal was perfected, but not until the next day after the return day of the citation, held, that the appeal would not be dismissed; it appearing that the transcript was carried at 5 o'clock on the previous day to the door of the clerk's office, to be filed, but that the office had then been closed for the day. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 19 C. C. A. 477, overruling motion to dismiss appeal (C. C. 1895) 68 Fed. 412, and appeal dismissed (1897) 84 Fed. 1017, 28 C. C. A. 681.

Facts held to justify the Court of Appeals, in the exercise of its discretion, to vacate an order of dismissal for failure to file a transcript within the time required, and to grant leave to redocket the appeal on terms. Rector v. Alcorn (1913) 204 Fed. 748, 123 C. C. A. 125.

The appellee may continue the cause where the record is filed only a short time before the term. Backus v. The Marengo (C. C. 1855) Fed. Cas. No. 713.

Time for filing transcript on appeal in

the circuit court may be extended by consent of parties beyond statutory time. Baldwin v. Raplee (C. C. 1871) Fed. Cas. No. 802.

An appeal was claimed by the plaintiff from a decree of the district court, and due notice given to the clerk and the defendant's solicitor. On the same day as that on which such notice was given, a citation was signed by the district judge and served. Held, that the transcript of the record from such district court was filed in time, if filed at any time during the term at which the citation was made returnable. Platt v. Preston (C. C. 1881) 8 Fed. 182.

An appeal having been properly entered in the district court, the time for filing the transcript from the district court may be extended during the term at which the citation is returnable. Id.

10. —— Authentication.—The value in controversy may be shown by affidavit to sustain the writ of error, if it does not appear on the record. Williamson v. Kincaid (1800) 4 Dall. 20, 21, 1 L. Ed. 723; Course v. Stead (1800) 4 Dall. 22, 25, 1 L. Ed. 724.

A return to a writ of error, authenticated by the seal of the court and the certificate of the clerk, is sufficient, without the signature of the judge. Worcester v. Georgia (1832) 6 Pet. 515, 536, 8 L. Ed. 483.

A certificate that a transcript of a record was a full, true, and correct copy of all the proceedings, entries, and files in the district court, except the transcript sent up from the board of land commissioners was held so far good that the party alleging it to be bad was referred, if dissatisfied, to his remedy of a suggestion of diminution and motion for certiorari. U. S. v. Gomez (1863) 1 Wall. 690, 701, 17 L. Ed. 677.

A transcript containing only a blank form of a certificate of authentication, without the seal of the court below or the signature of its clerk, is not a proper transcript, and the writ of error will be dismissed, unless plaintiff in error perfects the record. Blitz v. Brown (1868) 7 Wall. 693, 19 L. Ed. 280.

Since Act June 8, 1872 (17 Stat. 330), a transcript of the record is sufficiently authenticated for an appeal or writ of error to the supreme court, if it is signed by the deputy in the name of the clerk of the court from which the appeal comes, or to which the writ of error is directed, and sealed with the seal of that court. Garneau v. Dozier (1879) 100 U. S. 7, 25 L. Ed. 536.

Authentication of record is necessary; but, where the clerk's signature is lacking, it is within the discretion of the court to allow the defect to be supplied. Idaho & O. Land Imp. Co. v. Bradbury (1889) 10 Sup. Ct. 177, 132 U. S. 509, 33 L. Ed. 433.

11. —— Scope and contents of record.—Under this section it is not necessary that the transcript of the record should contain the names of the jurors. Owens v. Hanney (1815) 9 Cranch, 180, 3 L. Ed. 697.

In appeals from circuit courts in chancery cases, the parol testimony heard ought to appear in the record. New Orleans v. U. S. (1831) 5 Pet. 449, 450, 8 L. Ed. 187.

The practice of bringing up with the record the charge of the court at large disapproved. Conard v. Pacific Ins. Co. (1832) 6 Pet. 262, 280, 8 L. Ed. 392.

On a writ of error, the whole record, including the determination on a plea in abatement, is brought up. Scott v. Sandford (1856) 19 How. 393, 403, 15 L. Ed. 691.

A demurrer to evidence makes the evidence a part of the record. Suydam v. Williamson (1857) 20 How. 427, 436, 15 L. Ed. 978.

In the absence of bill of exceptions, agreed statement, or special verdict, the judgment will be affirmed. Pomeroy v. State Bank of Indiana (1863) 1 Wall. 592, 604, 17 L. Ed. 638.

A transcript of the record on appeal which contains all the parts of a deposition called for by either party is sufficient. Blanks v. Klein (1891) 49 Fed. 1, 1 C. C. A. 254.

On an appeal the circuit court of appeals will not grant appellants' petition for a mandamus to the clerk of the lower court to certify and transmit a transcript of the record, merely to determine in advance whether a certain deposition is part of the record, where the ordinary procedure is adequate for the purpose. Starcke v. Klein (1893) 62 Fed. 502, 10 C. C. A. 445.

On an appeal in equity, in the absence of joint stipulation for simplifying the transcript, the clerk should send up the whole of the record, made as directed by R. S. § 750, ante, § 1604, except that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted; and, if any parts thereof are omitted, even by joint stipulation, their nature should be indicated. Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp. (1894) 61 Fed. 237, 9 C. C. A. 468, modifying decree (C. C. 1892) 49 Fed. 774.

The transcript of the record for use on cross-appeals from a decree by which a cross-bill was dismissed should include the cross-bill and proceedings thereon, although the party filing the cross-bill was dismissed as a defendant in the original bill, and is not named as appellee in the appeal of the original complainant. Gregory v. Pike (1894) 64 Fed. 415, 12 C. C. A. 202.

The fact that papers not in the judgment roll are in the transcript, and certified by the clerk, does not make them any part of the record on appeal, when they are not brought into the record by any bill of exceptions or agreed statement of facts, or in some

other way recognized by the rules or practice of the federal courts. Duncan v. Atchison, T. & S. F. R. Co. (1896) 72 Fed. 808, 19 C. C. A. 202, following Suydam v. Williamson (1857) 20 How. 427, 15 L. Ed. 978.

A special finding of facts, like a general finding or verdict, is in itself a part of the record, and need not be embodied in a bill of exceptions; and it should not be accompanied by a general finding. Wesson v. Saline County (1896) 73 Fed. 917, 20 C. C. A. 227.

Whether a verdict be general or special, a bill of exceptions is not necessary to make it a part of the record. Its proper place is in the docket entry showing its return. Daube v. Philadelphia & R. Coal & Iron Co. (1897) 77 Fed. 713, 23 C. C. A. 420.

Irrelevant papers or proceedings need not be included in the transcript, and it is proper for the clerk to require of counsel for appellant or plaintiff in error a præcipe stating what the transcript shall contain, to attach a copy of such præcipe to the transcript, and certify that the transcript is full and correct according to the præcipe. Burnham v. North Chicago St. Ry. Co. (1898) 87 Fed. 168, 30 C. C. A. 594.

Where several different proceedings are pending below, arising in the same original suit, and an appeal is taken from a decree rendered in one of them, matters embodied in the record which relate only to the other proceedings will be stricken out on motion. Tuttle v. Claflin (1898) 88 Fed. 122, 31 C. C. A. 419, modifying decree (C. C. 1898) 86 Fed. 964.

Affidavits used on the hearing of a motion to vacate a judgment form no part of the record, and cannot be considered by an appellate court unless brought into the record by a statement or bill of exceptions. Travelers' Protective Ass'n v. Gilbert (1900) 101 Fed. 46, 41 C. C. A. 180.

Evidence is not a part of the record, unless made so by the bill of exceptions. Id.

Neither counsel for an appellant nor the clerk can determine conclusively what parts of the record are necessary to the hearing on appeal in the circuit court of appeals, and, where the certificate does not show that the record is a full and complete transcript of the entire proceedings, it should appear by stipulation or otherwise that it does include all that is necessary to a determination of the matters involved in the appeal; but it is desirable that it should contain no immaterial matter, and a failure to incorporate the entire record will not be held ground for dismissing the appeal, but the appellee should, if not satisfied with the transcript as filed, seasonably move the court to require the incorporation of such other papers and evidence as he deems necessary and points out. Cunningham v. German Ins. Bank (1900) 103 Fed. 932, 43 C. C. A. 377.

Where, in a suit against a circuit court clerk for misconduct in refusing to file plaintiff's papers, etc., in a certain suit, plaintiff made profert of his statement of claim in his intended suit, and annexed a copy thereof as an exhibit to his assignments of error filed in the trial court, such exhibit was a part of the record on error. U. S. v. Bell (1905) 135 Fed. 336, 68 C. C. A. 144, affirming judgment (C. C. 1904) 127 Fed. 1002.

The opinion of the trial court in an action tried by the court without a jury is not available on a writ of error as a special finding of facts and declarations of law predicated thereon. Hayden v. Ogden Sav. Bank (1907) 158 Fed. 90, 85 C. C. A. 558.

Notice of the settlement of a bill of exceptions being necessarily given by one counsel to the other would not ordinarily appear in the records of the court. Kentucky Distilleries & Warehouse Co. v. Lillard (1908) 160 Fed. 34, 87 C. C. A. 190.

In the absence of a finding of facts, a special verdict, or a request for a ruling on the facts and bill of exceptions, the evidence taken in a Circuit Court is no part of the record, and therefore cannot be considered by the appellate court on a writ of error. Continental Gin Co. v. Murray Co. (1908) 162 Fed. 873, 89 C. C. A. 563.

Under Code Civ. Proc. Alaska, § 223, providing that the statement of the bill of exceptions when settled and allowed shall be signed by the judge and filed with the clerk, and thereafter deemed a part of the record, a bill of exceptions allowed and signed by the judge, and filed with the clerk, is a part of the record. Sutherland v. Pearce (1911) 186 Fed. 783, 108 C. C. A. 653, vacating order of dismissal (1911) 183 Fed. 1023, 105 C. C. A. 664.

A special finding where a jury is waived, becomes a part of the record, like a special verdict, and the question of its sufficiency arises, without objection or exception, and no bill of exceptions is necessary to present it. St. Joseph Stockyards Co. v. U. S. (1911) 187 Fed. 104, 110 C. C. A. 432, reversing judgment U. S. v. St. Joseph Stockyards Co. (D. C. 1909) 181 Fed. 625; Chicago, R. I. & P. Ry. Co. v. Barrett (1911) 190 Fed. 118, 111 C. C. A. 158.

Where a seizure case is, by agreement of the parties, tried by the district court without a jury, the record should be made up as in the case of a writ of error, with the proper exceptions to the admission or rejection of testimony, etc. U. S. v. Fifteen Hogsheads of Brandy (C. C. 1862) Fed. Cas. No. 15,090.

A statement in the clerk's minutes that a bill of exceptions was sealed and placed on file is not available unless

the exception was seasonaby reduced to writing, and embodied in a regular bill of exceptions. Locke v. U. S. (C. C. 1866) Fed. Cas. No. 8,442.

A statement by counsel of the evidence, not made a part of the bill of exceptions, though formally certified by the clerk, is no part of the record. Strain v. Gourdin (C. C. 1874) Fed. Cas. No. 13,521.

Where an opinion had been rendered, on final hearing, sustaining a patent, and afterwards, on motion for a rehearing, a second opinion was filed denying the motion, and a final decree had been entered, referring to the proceedings upon the motion for rehearing as well as to the former proceedings, from which decree an appeal was prayed, held, that the opinion on the rehearing comes within the requirements of rule 8 of the supreme court, which requires a copy of the opinion or opinions filed in the case to be annexed to and transmitted with the record. Hoe v. Kahler (C. C. 1886) 27 Fed. 145.

Where the papers on a motion for rehearing, taken in connection with the record, illustrated the opinion rendered on such motion, and the disposition of the motion was referred to in the decree appealed from, held, that the whole was proper to be transcribed into the record under this section and United States supreme court rule 8, requiring a copy of the opinion or opinions filed in the case to be included. Id.

In an equity suit testimony that is ruled out on objection will not be excluded from the record on appeal. Adee v. J. L. Mott Iron Works (C. C. 1891) 46 Fed. 39.

The ruling of a federal court refusing to permit a party to a suit in equity to introduce further evidence after the time for taking testimony had expired, being discretionary, and not reviewable, the motion papers on which such ruling was made are not properly a part of the record of the case on appeal. Baglin v. Cusenier Co. (C. C. 1907) 156 Fed. 1019, decree modified (1908) 164 Fed. 25, 90 C. C. A. 499.

12. —— Consent of parties and stipulations as to contents.—Parties will not be permitted to make up a record to suit themselves, without regard to the wishes of their opponents or the rules of practice of the court. Florida C. R. Co. v. Schutte (1879) 100 U. S. 644, 657, 25 L. Ed. 605.

The duty of the circuit court of appeals on an appeal is confined to a review of the rulings and decree of the trial court, and a stipulation of facts made by the parties after the decree below is no part of the record which the court is required to consider. Stelk v. McNulta (1900) 99 Fed. 138, 40 C. C. A. 357.

Where, in a doubtful case, the clerk is requested by one party to an appeal to insert in the transcript what he is requested by the other party to leave out, a direction by the court is proper. Hoe v. Kahler (C. C. 1886) 27 Fed. 145.

13. —— Statement of facts.—If a decree in equity find a fact, it is such a statement of it as is required by the Judiciary Act. Wiscart v. Dauchy (1796) 3 Dall. 321, 327, 1 L. Ed. 619.

A statement of facts, placed upon the record by the circuit court, is conclusive, even if the evidence be sent up with it. Id.

A case cannot be brought by writ of error from a circuit court on an agreed statement of facts. Keene v. Whittaker (1839) 13 Pet. 459, 10 L. Ed. 246.

Where the judge files the statement of facts after the trial nunc pro tunc, the presumption is that he had been requested to do so at the trial. McGavock v. Woodlief (1857) 20 How. 221, 225, 15 L. Ed. 884.

A statement of facts, filed without the consent of the parties by the trial judge after the removal of the case to the Supreme Court by service of writ of error, must be treated as a nullity. Generes v. Bonnemer (1868) 7 Wall. 564, 565, 19 L. Ed. 227.

A statement of facts made and filed by the judge several days after the issue and service of the writ of error is a nullity. Avendano Bros. v. Gay (1869) 8 Wall. 376, 377, 19 L. Ed. 422.

Where the record certified by the judges consists of a statement of facts in the nature of evidence, the appeal will be dismissed. Smith v. Craft (1887) 8 Sup. Ct. 196, 123 U. S. 436, 31 L. Ed. 267.

14. —— Defective or insufficient transcripts or records.—The filing of a defective transcript on appeal does not necessarily deprive the supreme court of jurisdiction. Berry v. Green (1884) 4 Sup. Ct. 696, 28 L. Ed. 604.

Where no return has been made to a writ of error by filing a transcript of the record in the Supreme Court, either before or during the term of court next succeeding the filing of the writ in the Circuit Court, the Supreme Court has acquired no jurisdiction of the case, and, the writ having expired, can acquire none, under that writ, and it will be dismissed. Caillot v. Deetken (1885) 5 Sup. Ct. 432, 113 U. S. 215, 28 L. Ed. 983.

A case was brought by writ of error to the United States supreme court. There was no assignment of errors in the transcript returned with the writ, as required by this section. The brief, in violation of rule 21 of the United States supreme court, contained no specification of errors, no statement of the case presenting the questions involved with reference to the pages of the record in support thereof, and failed to quote the evidence whose rejection or admission was complained of. Held that, in accordance with the dis-

cretionary power vested in the court by section 5 of the above rule, the appeal would be dismissed on motion. Benites v. Hampton (1887) 8 Sup. Ct. 254, 123 U. S. 519, 31 L. Ed. 260.

A writ of error from the federal supreme court to the highest court of a state must be dismissed, where the record does not contain the final judgment to which the writ of error is directed. Illinois ex rel. Gersch v. Chicago (1913) 33 Sup. Ct. 178, 226 U. S. 451, 57 L. Ed. 295.

An appeal will not be dismissed for insufficiency of the transcript where the records were burned while the case was pending below, and the transcript contains all the subsequent proceedings, and so much of the prior record as has been re-established, and appellants were to blame for not fully re-establishing it. Cutting v. Tavares, O. & A. R. Co. (1894) 61 Fed. 150, 9 C. C. A. 401, decree affirmed Florida Cent. & P. R. Co. v. Cutting (1895) 68 Fed. 586, 15 C. C. A. 597.

A certificate merely stating that the papers contained in the transcript are correct copies, without showing that the transcript is a complete one, or that the parties by stipulation designated the papers to be included, or that the clerk was guided by appellant's solicitor, is insufficient, and the appeal will be dismissed on motion. Meyer v. Mansur & Tebbetts Implement Co. (1898) 85 Fed. 874, 29 C. C. A. 465.

Where a writ of error was duly issued and filed by the clerk of the circuit court, but no notation of its filing made, and by mistake a copy was attached to the transcript instead of the original, on production of the original, with the citation, and acknowledgment of service thereon, both certified by the clerk, they may be made or recognized as part of the record, or the want of a seal upon the copy may be supplied by an impression of the seal of the appellate court. Burnham v. North Chicago St. Ry. Co. (1898) 87 Fed. 168, 30 C. C. A. 594.

While, on appeal from an order refusing to dissolve a restraining order, the court has power to finally dispose of the case, it will not do so where the record is not sufficiently complete for that purpose. Clark v. McGhee (1898) 87 Fed. 789, 31 C. C. A. 321.

A certificate to a transcript is insufficient where it is limited to the correctness of the pleadings, and omits all reference to the decrees or orders of the court, and the proceedings to bring up the case on appeal, and only certifies the evidence as furnished by counsel for appellants, "which is said by him to have been agreed upon by counsel for both parties." Ruby v. Atkinson (1899) 93 Fed. 577, 35 C. C. A. 458.

The circuit court of appeals will not dismiss an appeal on motion on the ground that the record filed is insufficient; that being a matter to be determined at the hearing on the merits, or to be corrected by certiorari for a diminution of the record. Merriman v. Chicago, D. & V. R. Co. (1903) 120 Fed. 240, 56 C. C. A. 536.

Where a copy of the judgment was contained in the transcript, the beginning of which recited, "On the 8th day of March, 1892, the court rendered judgment herein, which is in words and figures as follows, to wit," and the petition for a writ of error referred to the judgment as "heretofore rendered," and the writ referred to the "rendition of judgment," and the clerk certified that the transcript which contained the judgment entry was a "full, true, and correct copy of the records and proceedings," as the same remains of record on file in the office of the clerk, the appeal was not subject to dismissal on the ground that it did not appear from the transcript that the judgment was entered of record. Mackay v. Fox (1903) 121 Fed. 487, 57 C. C. A. 439.

A record on appeal is defective where it fails to give the filing date of several orders contained in it. In re Friedman (1908) 161 Fed. 260, 88 C. C. A. 306, affirming order (D. C. 1907) 153 Fed. 939.

Where, on appeal from an order adjudging petitioner guilty of contempt, the transcript showed that the petitioner appeared and waived citation, it was not material that it should also show that no citation was issued, and that petitioner demanded a copy of the alleged citation. Curtis v. Wilfley (1908) 165 Fed. 893, 91 C. C. A. 571.

A recital of the words "excepted to, admitted, exception noted," in the record following the answer to a question objected to, does not show a proper and timely exception. Atlantic Coast Line R. Co. v. Linstedt (1910) 184 Fed. 36, 106 C. C. A. 238.

Where, on plaintiff's appeal from a judgment dismissing his bill, it appeared that his only rights against defendant were under a contract, the provisions of which did not appear in the record, the judgment must be affirmed. Griffin v. Allen (1913) 207 Fed. 61, 124 C. C. A. 621.

The Circuit Court of Appeals cannot remodel a bill of exceptions which is defective, but can only affirm or reverse the judgment. Murphy v. Milford, A. & W. St. Ry. Co. (1913) 210 Fed. 135, 126 C. C. A. 649.

Where the transcript of record is incomplete, the appeal will be dismissed, unless appellants take certiorari to bring up the former record within a time limited. Sowles v. U. S. (C. C. 1884) 21 Fed. 223.

Where appellant abstracted the testimony on the only point sought to be raised on the appeal, held, that the appeal would not be dismissed for non-

compliance with rule 9. St. Louis, I. M. & S. R. Co. v. Craft (1914) 171 S. W. 1185, 115 Ark. 483, L. R. A. 1916C, 817, judgment affirmed (1915) 35 S. Ct. 704, 237 U. S. 648, 59 L. Ed. 1160.

15. —— Amendment or correction.— The fact that the transcript shows that certain portions of the record were omitted by directions of appellant's attorney is not necessarily a ground for dismissing the appeal, for the appellee may suggest a diminution of the record, and ask for a certiorari. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1892) 51 Fed. 929, 2 C. C. A. 542, denying motion to dismiss appeal (C. C. 1892) 49 Fed. 774.

It is within the authority of the trial court, during the term, to allow an amendment to the record showing that a paper excluded from evidence was afterwards offered again and admitted; and at the hearing above, on writ of error, the bill of exceptions may be amended to show that such action was taken. Whiting v. Equitable Life Assur. Soc. (1893) 60 Fed. 197, 8 C. C. A. 558.

Presumptively the transcript filed in the appellate court is correct, and that court has no power, by certiorari, upon ex parte affidavits, to cause the record to be amended by inserting a paper which appellant claims was introduced before the master, but of which neither the master nor counsel for appellee has any recollection. Randolph v. Allen (1896) 73 Fed. 23, 19 C. C. A. 353.

Where a necessary part of the record has been omitted from the transcript, and is subsequently presented, duly certified, to the court of appeals, it may be made a part of the record by direct order, without writ of certiorari. Burnham v. North Chicago St. Ry. Co. (1898) 87 Fed. 168, 30 C. C. A. 594.

When a bill of exceptions is presented for signature after the term at which the judgment was rendered, it should contain an explicit statement of any order extending the time for its settlement, so as to show that the signing and filing of the same were within the time allowed, or, if waiver of time is relied on, a distinct statement of consent by the adverse party or counsel, or a written agreement showing such consent; and under no ordinary circumstances, if at all, will affidavits be received by the appellate court to establish such facts, if omitted, and in no case to establish consent when disputed. Reliable Incubator & Brooder Co. v. Stahl (1900) 102 Fed. 590, 42 C. C. A. 522.

Where an appeal is allowed in open court, the presumption is that it was allowed by a judge duly authorized to hold such court, and the record cannot be changed or corrected on motion to dismiss appeal to show otherwise by affidavits filed in the appellate court. Columbus Chain Co. v. Standard Chain Co. (1906) 145 Fed. 186, 76 C. C. A. 164.

By the allowance of a writ of error and the approval of a supersedeas, the trial court lost jurisdiction to correct an error in the judgment apparent on the face of the record. McKay v. Neussler (1906) 148 Fed. 86, 78 C. C. A. 154.

Under a writ of certiorari from an appellate court made on a suggestion of a diminution of the record, directing the court below to correct and complete the record, that court has authority by a nunc pro tunc entry to make any changes in the record necessary to make it conform to the facts and recite accurately what was done. Hays v. Wagner (1907) 150 Fed. 533, 80 C. C. A. 275.

Permission will not be granted to a plaintiff in error to obtain and file a new or amended bill of exceptions after the case has been argued in the appellate court, and especially where no good reason is shown why the original bill was not made complete. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. (1907) 151 Fed. 466, 81 C. C. A. 76.

A writ issued out of the federal court described plaintiff's citizenship, but omitted to state the citizenship of either of the three defendants. Defendants moved to dismiss for want of jurisdiction because of this omission, whereupon plaintiff asked leave to amend the writ by inserting after the description of the "plaintiffs" the words "citizens and residents of." This motion was allowed, all parties treating the word "plaintiffs" as intended for "defendants," after which defendants, who were represented by the same counsel, filed a special plea denying that one of them was a citizen of Massachusetts, which plea was heard and overruled. Held, that the error in the motion to amend was unsubstantial, and that plaintiff, as defendant in error, was entitled to correct the record by substituting the word "defendants" for "plaintiffs." Brock v. Fuller Lumber Co. (1907) 153 Fed. 272, 82 C. C. A. 402.

Where, on the death of one or more coplaintiffs in an action which survived and could be continued to termination by the surviving plaintiffs, the personal representatives of certain of the deceased plaintiffs were erroneously joined, and, though no formal order of revivor was made, defendants permitted the suit to proceed to judgment in its favor, the defect not being jurisdictional, the Court of Appeals could order the making of the proper suggestion and the striking out of the names of such personal representatives to correct the record on remand. Thomas v. Green County (1908) 159 Fed. 339, 89 C. C. A. 405, judgment affirmed Green County, Ky., v. Thomas' Ex'r (1909)

29 Sup. Ct. 168, 211 U. S. 598, 53 L. Ed. 343.

A transcript is sufficient if its contents show jurisdiction and so much of the record as is necessary for the consideration of the questions presented for determination; and the practice is for the appellate court to allow such defects to be cured and omissions to be supplied as are not fatal to its own jurisdiction. Kaw Valley Drainage Dist. of Wyandotte County v. Union Pac. R. Co. (1908) 163 Fed. 836, 90 C. C. A. 320.

Where, on apeal from an order adjudging petitioner guilty of contempt in appearing as attorney for E., petitioner did not allege that he had ever demanded permission to inspect the testimony of E. or to cross-examine him as to his statements, or that the record of the trial court indicated any such request, petitioner was not entitled to have the appeal record show that E. made his statement in the private rooms of the judge, and that the statement was thereafter sworn to by E. in open court, and without being read, and without any opportunity afforded petitioner to know its contents, or to examine said E. on the same. Curtis v. Wilfley (1908) 165 Fed. 893, 91 C. C. A. 571.

The record on a writ of error to a federal court cannot be amended there so as to show federal jurisdiction. Yeandle v. Pennsylvania R. Co. (1909) 169 Fed. 938, 95 C. C. A. 282.

A plaintiff in error is not entitled to a writ of certiorari with reference to perfecting a bill of exceptions which occurred through his own fault or neglect, where application for the writ was not made until the trial court had lost jurisdiction to amend the bill under rule 17 of the Circuit Court. Kerrch v. U. S. (1909) 171 Fed. 365, 96 C. C. A. 257, applying New York & N. E. R. R. Co. v. Hyde (1893) 56 Fed. 188, 5 C. C. A. 461.

What shall constitute the transcript upon which a case may be carried to the circuit court of appeals is a matter regulated by the acts of congress and the rules and regulations of that court, which the court below has no power to change, and it cannot overhaul the record, after final determination, and, without consent of both parties, remodel it, for the convenience of the plaintiff in error, or to save him expense. Smith v. McIntyre (C. C. 1897) 84 Fed. 721.

16. —— Withdrawal of transcript and refiling on subsequent appeal.—Where a writ of error to a decree in chancery in a circuit court, instead of an appeal from such decree, was sued out, and plaintiff in error consented to a dismissal of the writ of error, the supreme court will permit him, on reasonably taking and prosecuting an appeal from the decree, to file as part of the return the transcript of the record on the writ of error. Williams v. Passumpsic Sav. Bank (1891) 11 Sup. Ct. 1005, 141 U. S. 249, 35 L. Ed. 628.

A circuit court of appeals cannot make its own record for the hearing of a case on appeal by authorizing the withdrawal from its files of the record on a previous appeal, and permitting the same to be refiled as a part of the record on a subsequent appeal in the same case. It can act only upon a record which comes from the court below, properly certified. Merriman v. Chicago, D. & V. R. Co. (1903) 120 Fed. 240, 56 C. C. A. 536.

17. —— Striking out record.—That the transcript filed on an appeal does not contain all of the evidence upon which the order appealed from was made is not ground for striking it from the files; the proper procedure for the appellee being to suggest a diminution of the record. Flickinger v. First Nat. Bank (1906) 145 Fed. 162, 76 C. C. A. 132, writ of certiorari denied First Nat. Bank v. Flickinger (1906) 27 S. Ct. 783, 203 U. S. 595, 51 L. Ed. 332.

Where, on a writ of error to review a judgment entered on a referee's report, the record was voluminous and had already been printed, a motion to strike out parts of it would not be granted prior to the hearing on the merits. Edenborn v. Sim (1913) 204 Fed. 781, 123 C. C. A. 144.

18. —— Transmission to appellate court.—Where the clerk of the lower court transmits the transcript to the circuit court of appeals under the proper caption, the fact that he certifies on the writ of error that he "therewith transmits to the supreme court of the United States" a duly certified transcript, etc., is an immaterial mistake. McClellan v. Pyeatt (1892) 49 Fed. 259, 1 C. C. A. 241.

The transcript of a record on appeal is understood to be transmitted to the supreme court from the circuit court, as such, under its seal, so that the clerk in making and certifying the transcript acts as an officer of, and under the general direction and control of, the lower court, in the first instance, subject to the further order of the supreme court on proceedings on suggestion of diminution of the record. Hoe v. Kahler (C. C. 1886) 27 Fed. 145.

19. —— Conclusiveness of record.—The statement of facts in a bill of exceptions is conclusive, unless excepted to and exceptions are recorded when the bill is settled. Purple v. Union Pac. R. Co. (1902) 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700.

On a writ of error or appeal the transcript of the records of the trial court imports absolute verity, and cannot be contradicted or explained by

outside evidence. In re McCall (1906) 145 Fed. 898, 76 C. C. A. 430.

A case-made in an appellate court imports absolute verity as to what occurred below. St. Louis & S. F. R. Co. v. Loughmiller (D. C. 1912) 193 Fed. 689.

20. Assignment of errors.—Construction and application of circuit court of appeals rules, see § 1114, ante, and notes. Supreme Court rules, see notes following § 1232, ante.

Where the assignment of error is based on an allegation of fact which the record shows to be without foundation, the decree will be affirmed. Cheney v. Bacon (1892) 49 Fed. 305, 1 C. C. A. 244.

An assignment of error cannot be accepted as proof of facts alleged therein, and cannot, therefore, be considered, in the absence of anything else in the record to show that the court did or did not rule as asserted in such assignment. Woodbury v. City of Shawneetown (1896) 74 Fed. 205, 20 C. C. A. 400.

An assignment of error is not jurisdictional. World's Columbian Exposition Co. v. Republic of France (1898) 91 Fed. 64, 69, 33 C. C. A. 333.

21. —— Time of filing.—A writ of error will not be dismissed because the assignment of errors bears the file mark of the clerk of the trial court of a date later than that on which the petition for the writ was filed and allowed, where from its date and from reference thereto in the petition it appears that the assignment of errors was in fact presented to the court and lodged with the clerk on the same date as the petition. Tyee Consol. Min. Co. v. Langstedt (1903) 121 Fed. 709, 58 C. C. A. 129, judgment reversed (1905) 136 Fed. 124, 69 C. C. A. 548.

The filing of an assignment of error before the allowance of an appeal is indispensable. Webber v. Mihills (1903) 124 Fed. 64, 59 C. C. A. 578.

This section, and section 1673, post, do not require the filing of an assignment of error before the allowance of a writ of error, or of an appeal, but that requirement rests on a rule of court. Simpson v. First Nat. Bank (1904) 129 Fed. 257, 63 C. C. A. 371.

This section does not necessitate the settlement of a bill of exceptions prior to the filing of the writ and the assignment of errors. Old Nick Williams Co. v. U. S. (1907) 152 Fed. 925, 82 C. C. A. 73, judgment affirmed (1910) 30 Sup. Ct. 221, 215 U. S. 541, 54 L. Ed. 318.

22. —— Necessity of assignment.—An error which has not been assigned will not be reviewed. Camden v. Stuart (1892) 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; City of Findlay v. Pertz (1896) 74 Fed. 681, 20 C. C. A. 662 (affirming judgment [1895] 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188); Russel v. Huntington Nat. Bank (1908) 162 Fed. 868, 89 C. C. A. 558.

Where there is no assignment of errors, and no appearance for plaintiff after his appearance had been withdrawn, the judgment will be affirmed. Boston Hydraulic Gold Min. Co. v. Eagle Copper & Silver Min. Co. (1885) 6 Sup. Ct. 33, 115 U. S. 221, 29 L. Ed. 392.

Rulings not set out in the assignment of error will not be reviewed by the federal Supreme Court. Matheson v. U. S. (1913) 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

An appellate court cannot be required to consider irregularities not objected to below, not covered by the assignments of error, and not shown to work substantial injustice. Garner v. Second Nat. Bank (1895) 67 Fed. 833, 16 C. C. A. 86, certiorari denied (1896) 16 Sup. Ct. 1201, 163 U. S. 688, 41 L. Ed. 319.

Assignments of error are necessary in appeals in equity as well as on writs of error. Randolph v. Allen (1896) 73 Fed. 23, 19 C. C. A. 353.

To obtain the benefit of any error in respect to the action of the trial court in failing to give effect to a particular statute, there should be some specific assignment definitely pointing out the action against which complaint is made. City of Findlay v. Pertz (1896) 74 Fed. 681, 20 C. C. A. 662, affirming judgment (1895) 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188.

Upon a writ of error the objection that the circuit court made neither general nor special findings of fact cannot be considered, unless raised by the assignment of errors. National Masonic Acc. Ass'n v. Sparks (1897) 83 Fed. 225, 28 C. C. A. 399.

Where, in an action on a claim against a decedent's estate, objections that the claim before the administrator was not duly verified, that it differed from the claim presented to the court, and that the heirs were not made parties to the proceedings, were not included in the assignments of error on appeal, which merely alleged error in the court's ruling, on the administrator's motion to strike out the petition, and in overruling defendant's demurrer thereto, and his motion for judgment on the pleadings, without any specifications of the grounds of the motions or the demurrer being made, the objections, being technical, would not be reviewed. Esterly v. Rua (1903) 122 Fed. 609, 58 C. C. A. 548.

The overruling of motions to quash an alternative writ of mandamus, and compel relator to amend the petition, cannot be reviewed, not having been challenged in the assignments of error.

Jones v. U. S. (1905) 135 Fed. 518, 68 C. C. A. 68.

A defect of jurisdiction of the trial court which cannot be waived, and which shows the total absence of power to take any affirmative action in a suit, will be noticed by the appellate court without specification of error, and objections to the jurisdiction of the trial court, such as want of proper service of lawful summons, must be presented by an assignment of errors, giving the opposing party an opportunity to prepare a proper record. Rogers v. Penobscot Min. Co. (1907) 154 Fed. 606, 83 C. C. A. 380.

On appeal from the Circuit Court it appeared that the appellee had been entitled to relief different from that decreed by that court. Held that, as the point had not been raised, the judgment of the Circuit Court must be affirmed, though incorrect. U. S. v. Dieckerhoff, Raffloer & Co. (1908) 160 Fed. 449, 87 C. C. A. 410, affirming judgment Dieckerhoff, Raffloer & Co. v. U. S. (C. C. 1907) 151 Fed. 957.

Nothing is presented for review by a record, in the absence of an assignment of error, where there is no bill of exceptions, and nothing but the record showing that there was a trial, verdict, and judgment. Ireton v. Pennsylvania Co. (1911) 185 Fed. 84, 107 C. C. A. 304, writ of certiorari denied (1912) 32 Sup. Ct. 526, 223 U. S. 728, 56 L. Ed. 633.

Where plaintiff's claim against defendant bank was allowed as an offset in accordance with the prayer of complainant's bill, and no error was assigned with reference thereto, the court would not review an objection that it should have been allowed as an offset against complainant's claim as a general creditor. Brennan v. Tillinghast (1913) 201 Fed. 609, 120 C. C. A. 37.

23. —— **Number of assignments.**—Practice of filing large number of assignments of error will not be approved. Central Vermont R. Co. v. White (1915) 35 S. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment White v. Central Vermont R. Co. (1914) 89 A. 618, 87 Vt. 330.

The record on appeal should not be incumbered with numerous assignments of error when a few would suffice to present in an intelligible manner all of the material questions involved in the case. The assignment of a large number of errors raises no presumption that the judgment is erroneous. Farnsworth v. Nevada Co. (1900) 102 Fed. 578, 42 C. C. A. 509.

24. —— **Title of assignments.**—An assignment of errors filed in a District Court should bear the title of that court and not of the Circuit Court of Appeals, but such informality will not invalidate the appeal. Church Cooperage Co. v. Pinkney (1909) 170 Fed. 266, 95 C. C. A. 462, reversing decree (D. C. 1908) 163 Fed. 653.

25. —— **Effect of failure to annex assignments.**—A judgment affirmed because of the failure of plaintiff in error to file assignment of error or brief. Ryan v. Koch (1872) 17 Wall. 19, 21 L. Ed. 611.

Failure to annex or return with a writ an assignment of errors as required by this section considered in deciding that a writ was taken for delay only. Micas v. Williams (1881) 104 U. S. 556, 557, 26 L. Ed. 842.

A failure to annex to or return with a writ of error an assignment of errors, as required by this section, is no ground for dismissal for want of jurisdiction. Independent School Dist. of Ackley, Hardin County, Iowa, v. Hall (1882) 1 Sup. Ct. 417, 106 U. S. 428, 27 L. Ed. 237; Gumbel v. Pitkin (1885) 5 Sup. Ct. 616, 113 U. S. 545, 28 L. Ed. 1128.

In the absence of an assignment of errors annexed to or returned with the writ of error, as required where counsel for plaintiff in error has been permitted to withdraw, and no appearance has been made in his place, the judgment will be affirmed, without examination of the record. Boston Hydraulic Gold Min. Co. v. Eagle Copper & Silver Min. Co. (1885) 6 Sup. Ct. 33, 115 U. S. 221, 29 L. Ed. 392, affirming judgment Lancaster v. Collins (C. C. 1881) 7 Fed. 338.

Where, on writ of error from the United States supreme court, no assignments of error are returned with the writ as required, no counsel appears for plaintiff in error, and the case is submitted by defendant in error on briefs, without any specification of errors by plaintiff, as required by S. Ct. Rule 21, § 2, the judgment will be affirmed, under section 4 of the same rule, for want of prosecution. Dugger v. Tavloe (1887) 7 Sup. Ct. 895, 121 U. S. 286, 30 L. Ed. 946.

Where no assignment of error accompanies the transcript of the record, and there is no specification of error relied on in the brief of plaintiff in error, and the record presents no question of law calling for review, the judgment will be affirmed. Stevenson v. Barbour (1891) 11 Sup. Ct. 690, 140 U. S. 48, 35 L. Ed. 338.

26. —— **Assignments predicated on opinion.**—Specifications of error aimed at the opinion of the court, and not at the decree rendered, need not be considered. McFarlane v. Golling (1896) 76 Fed. 23, 22 C. C. A. 23.

Assignments of error which are predicated upon the opinion of the court, or on reasons given by the court for its ruling or decree, are not available. Evans v. Suess Ornamental Glass Co. (1897) 83 Fed. 706, 28 C. C. A. 24,

affirming judgment (C. C. 1897) 81 Fed. 198, certiorari denied (1898) 18 Sup. Ct. 942, 171 U. S. 687, and petition for rehearing denied (1898) 86 Fed. 779, 30 C. C. A. 367.

Error cannot be predicated of an opinion or reason given by the court for a ruling, but must be of the ruling itself. Columbus Safe Deposit Co. v. Burke (1898) 88 Fed. 630, 32 C. C. A. 67; Patting v. Spring Valley Coal Co. (1900) 98 Fed. 811, 39 C. C. A. 308.

Assignments of error cannot be predicated on alleged holdings, findings, and judgments of the trial judge as reflected in its opinion. Gibson v. Luther (1912) 196 Fed. 203, 116 C. C. A. 35.

Alleged errors of law in the opinion of the court below, which was engaged with a discussion of evidence and the inferences which might properly be drawn from it, will not be considered by the Supreme Court of the United States on a writ of error if they are not contained in the assignment of errors filed with the petition for the writ, where, on the whole, it is clear that the facts found justify the judgment rendered. Behn, Meyer & Co. v. Campbell & Go Tauco (1907) 27 Sup. Ct. 502, 504, 205 U. S. 403, 51 L. Ed. 857.

27. —— **Errors considered without assignment.**—Where there is a bill of exceptions, the writ of error does not operate only upon that part of the record. Wherever error is apparent on the record, it is open to revision. Suydam v. Williamson (1857) 20 How. 427, 433, 15 L. Ed. 978.

The Supreme Court will reverse and remand a case defective as to parties, although this deficiency was not urged below. Hooey v. Wilson (1869) 9 Wall. 501, 504, 19 L. Ed. 762.

The option reserved, under supreme court rules 21 and 35, of examining the transcript of record on writ of error or appeal, in order that the court may be advised as to whether there has occurred any plain error which obviously demands correction, will be exercised where the defendants in error have made no objection to the failure to assign error, under this section and section 1012, R. S., section 1673, post, but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. Columbia Heights Realty Co. v. Rudolph (1910) 30 Sup. Ct. 581, 583, 217 U. S. 547, 54 L. Ed. 877, 19 Ann. Cas. 854.

Objections not assigned as error cannot be reviewed. Wood v. A. Wilbert's Sons Shingle & Lumber Co. (1912) 33 S. Ct. 125, 226 U. S. 384, 57 L. Ed. 264.

Where one vessel and cargo were totally lost by a collision resulting from mutual fault, and the other vessel, after paying full damages for the lost cargo, was permitted to recoup one-half thereof from the half damages awarded to the owners, officers, and crew of the lost vessel, but the decree was open to the construction that the recoupment was to be pro rata on the sums apportioned to owners, master, and crew, held that, in the absence of an assignment of error in respect to the recoupment against the seamen, the appellate court would, of its own motion (seamen being wards of the admiralty), direct that the decree be modified so that the several sums awarded to the mate and crew, who were in no way responsible for the fault of navigation, should be exonerated by, and have priority over, the amounts awarded the owners and master. The Chattahoochee (1896) 74 Fed. 899, 21 C. C. A. 162, decree affirmed (1899) 19 Sup. Ct. 491, 173 U. S. 540, 43 L. Ed. 801.

A question which, though not presented by an explicit specification of error, so underlies other questions that a complete and final disposition of the case would be impossible without deciding it, is sufficiently presented by the record to permit its decision by an appellate court. Andrews v. National Foundry & Pipe Works (1897) 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153, denying motion for rehearing (1896) 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139.

Primarily, at least, the assignment of errors determines the scope of an appeal to the circuit court of appeals, and if, in any case, errors other than the lack of jurisdiction in the lower court are asserted, the whole case is before the court, including the question of jurisdiction, if there be such question, notwithstanding it may be found on examination that for the lack ot a proper bill of exceptions, or for failure to comply with the rules of practice, other questions are not presented, or are so imperfectly presented that the court might refuse to consider them. Reliable Incubator & Brooder Co. v. Stahl (1901) 105 Fed. 663, 44 C. C. A. 657.

The defense of laches may be considered by an appellate court, although not made the subject of an assignment of error. Shea v. Nilima (1904) 133 Fed. 209, 66 C. C. A. 263.

An appellate court will notice without assignment lack of jurisdiction of an inferior court. Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391.

Legal issues other than the one specifically presented for determination may properly be considered and determined by an appellate court, where they naturally arise and are pertinent to the question at issue and to further proceedings in the trial court. Collin County Nat. Bank of McKinney, Tex., v. Hughes (1907) 155 Fed. 389, 83 C. C. A. 661, denying rehearing (1907) 152 Fed. 414, 81 C. C. A. 556.

The insufficiency of an assignment of errors may be disregarded where the question not raised lies at the very threshold of a case, and is necessarily involved in the assignment of errors as filed; or, even if a plain error has

been committed, it should be noticed, though not assigned. U. S. v. Bernays (1908) 158 Fed. 792, 86 C. C. A. 52.

While errors not assigned in conformity with the rule on that subject will not ordinarily be considered, a plain error may be noticed when justice requires, though it is not assigned. New York Life Ins. Co. v. Rankin (1908) 162 Fed. 103, 89 C. C. A. 103.

A Circuit Court of Appeals may take notice of a plain palpable error appearing in the record, the correction of which is necessary to the administration of justice between the parties, even though it is not the subject of an assignment of error. Baltimore & O. R. Co. v. McCune (1909) 174 Fed. 991, 98 C. C. A. 561.

A federal appellate court may consider a case in which the personal liberty of defendant is involved, notwithstanding the insufficiency of the assignment of errors. Humes v. U. S. (1910) 182 Fed. 485, 105 C. C. A. 158.

A plain error may be noticed on appeal without assignment. White v. U. S. (1913) 202 Fed. 501, 121 C. C. A. 33.

Where, in an action against a fraternal insurance order, defended on the ground that the member was not in good standing at his death, the court over the objection of the order admitted evidence of a custom between an officer of a local council of the order and the member, for payment of dues and assessments after maturity, and defendant excepted before the jury retired to a charge that there had been testimony as to the custom, and that such testimony was withdrawn except as to the question of payment, on the ground that it failed to specify with sufficient particularity the evidence intended to be withdrawn, and the portion of the charge was assigned as error, the ruling on the evidence was reviewable, though not assigned as error. Order of United Commercial Travelers of America v. Young (1914) 212 Fed. 132, 128 C. C. A. 648.

Supposed errors in a decree of the court cannot be reviewed on exceptions to the report of a commissioner appointed to ascertain damages. Sun Mut. Ins. Co. v. Mississippi Transp. Co. (D. C. 1883) 16 Fed. 800.

28. —— **Rulings on motions.**—The refusal of a continuance and change of venue is not reviewable. McFaul v. Ramsey (1857) 20 How. 523, 527, 15 L. Ed. 1010.

The action of the trial court in denying a motion for a new trial cannot be assigned as error. Van Stone v. Stillwell & Bierce Mfg. Co. (1891) 12 Sup. Ct. 181, 183, 142 U. S. 128, 35 L. Ed. 961.

Since a motion for a new trial is, under the federal practice, addressed to the discretion of the trial court, and no error can be assigned to the ruling thereon, such motion will not be considered in aid of an insufficient assignment of errors. McClellan v. Pyeatt (1892) 50 Fed. 686, 1 C. C. A. 613, motion to dismiss writ of error and vacate supersedeas (1892) 49 Fed. 259, 1 C. C. A. 241.

The overruling of a motion for a new trial cannot be assigned for error, and does not bring before the appellate court any of the grounds assigned for a new trial not otherwise properly saved and assigned as errors. Condran v. Chicago, M. & St. P. Ry. Co. (1895) 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749.

Where the record on writ of error showed that accused's counsel stated the grounds of his motion for new trial, presented his argument in support thereof, and that the court, having heard and considered such argument, overruled it, an assignment that the court, when a motion for new trial was made, summarily refused to allow a motion to be set for argument, but overruled it without consideration, was not sustained. Keller v. U. S. (1909) 168 Fed. 697, 94 C. C. A. 368.

A general assignment of error that the court erred in overruling a motion for a directed verdict, made at the close of all the evidence, is sufficient, where the motion was on the ground that there was no substantial evidence to sustain the cause of action alleged. Metropolitan Life Ins. Co. v. Hartman (1909) 174 Fed. 801, 98 C. C. A. 509.

29. —— **Rulings on evidence.**—An assignment of error that the court erred in overruling a demurrer to the evidence is too general for review, where there is no specification wherein evidence was improper or irrelevant. Van Stone v. Stillwell & Bierce Mfg. Co. (1891) 12 Sup. Ct. 181, 183, 142 U. S. 128, 35 L. Ed. 961.

An assignment of error on behalf of defendant that the court erred in admitting any evidence is too general for review. Id.

A demurrer to the evidence being addressed more to the discretion of the court than to the merits, the ruling of the trial court thereon cannot be assigned as error. Id.

Under an assignment that the court erred in excluding evidence to show that a certain feature of an infringing scene in defendant's play was not a material part of "plaintiff's play," it cannot be held that the court erred in excluding evidence that this feature was not a material part of defendant's play, and that his play continued to be successful after this feature was eliminated. Brady v. Daly (1897) 83 Fed. 1007, 28 C. C. A. 253, judgment affirmed (1899) 20 Sup. Ct. 62, 175 U. S. 148, 44 L. Ed. 109.

An objection to the introduction of a lease in evidence, in an action by the landlord for possession, that the lease had not been pleaded as an estoppel, was a technical objection, which could

not be reviewed where it was not specified in the assignments of error. Piper v. Cashell (1903) 122 Fed. 614, 58 C. C. A. 396.

Rulings on evidence are not reviewable, where they are not made the subject of an assignment of error. Bell v. Union Pac. R. Co. (1912) 194 Fed. 366, 114 C. C. A. 326.

30. —— **Rulings on instructions.**—An assignment of error for defendant that the court erred in submitting the cause to the jury and entering judgment on the verdict is too indefinite for review, where there was evidence in support of the contention of plaintiff, and the only exception to the charge was too general for consideration, and the verdict was responsive to the issues. Van Stone v. Stillwell & Bierce Mfg. Co. (1891) 12 Sup. Ct. 181, 183, 142 U. S. 128, 35 L. Ed. 961.

Denial of a requested charge cannot be reviewed, unless error is assigned thereon. City of Detroit v. Grummond (1914) 216 Fed. 273, 132 C. C. A. 417.

31. —— **Sufficiency of assignments.**—After counsel had argued a general assignment of error they could not insist, on petition for rehearing, that the assignment was not sufficiently specific. Michigan Cent. R. Co. v. Consolidated Car Heating Co. (1895) 69 Fed. 1, 16 C. C. A. 106, overruling petition for rehearing (1895) 67 Fed. 121, 14 C. C. A. 232.

Assignments of error are necessary in appeals, as well as on writs of error; but they should be directed to the rulings of the court, and, where the decree appealed from is one confirming a master's report, the assignments should not be in the form of elaborate arguments in support of the contention that the court erred in sustaining the master's findings. Randolph v. Allen (1896) 73 Fed. 23, 19 C. C. A. 353.

It is unnecessary and cumbersome to give, in a specification of error, the reasons why the ruling complained of is claimed to be erroneous, or to state the fact that the party duly objected and excepted to such ruling, and to further give the grounds of objection. Atchison, T. & S. F. R. Co. v. Meyers (1896) 76 Fed. 443, 22 C. C. A. 268.

An assignment of error that the trial court erred in entering judgment for one party or against another presents no question for review. Deering Harvester Co. v. Kelly (1900) 103 Fed. 261, 43 C. C. A. 225.

Assignments that the court erred in entering the order adjudging petitioner guilty of contempt and alleging error in the refusal of the court to deny the order, while not sufficiently specific to conform to the best practice, were sufficient to justify the inspection of the record by the appellate court for apparent error. In re Grove (1910) 180 Fed. 62, 103 C. C. A. 416, reversing order International Curtis Marine Turbine Co. v. William Cramp & Sons Ship and Engine Bldg. Co. (C. C. 1910) 176 Fed. 925.

An assignment that the court should have rendered a judgment for plaintiff on the pleadings presents a question of law for review on a writ of error. Jackson v. Mutual Life Ins. Co. of New York (1911) 186 Fed. 447, 108 C. C. A. 369.

The Court of Appeals will disregard technical questions with reference to the form and sufficiency of the assignment of errors, but there can be no reversal unless the record discloses proceedings at the trial which can be made the basis of an assignment of errors in support of a common-law writ of error. McBride v. Neal (1914) 214 Fed. 966, 131 C. C. A. 262.

32. —— **Striking out assignments.**—A motion to strike out an assignment of error on the ground that it was not well taken is not proper practice, as the question whether the assignment is well taken is the ultimate question in every contested appeal. Petersburg Sav. & Ins. Co. v. Dellatorre (1895) 70 Fed. 643, 17 C. C. A. 310.

33. —— **Assignment of cross errors.**—Cross appeals must be prosecuted like other appeals, and an assignment of error by an appellee cannot be considered unless an appeal has been regularly taken by him. Building & Loan Ass'n of Dakota v. Logan (1895) 66 Fed. 827, 14 C. C. A. 133.

A defendant in error or appellee, who does not sue out a writ of error or take an appeal cannot, by assigning cross-errors, confer jurisdiction on the Circuit Court of Appeals to determine questions not otherwise presented. Guarantee Co. of North America v. Phenix Ins. Co. (1903) 124 Fed. 170, 59 C. C. A. 376.

Cross-errors are not assignable in a federal court. Rogers v. Penobscot Min. Co. (1907) 154 Fed. 606, 83 C. C. A. 380; Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391; Midland Valley R. Co. v. Fulgham (1910) 181 Fed. 91, 104 C. C. A. 151 (reversing judgment Fulgham v. Midland Valley R. Co. [C. C. 1909] 167 Fed. 660).

Appellee who takes no appeal cannot, by assigning cross-errors or brief or argument, confer on the appellate court jurisdiction to review rulings against him in the court below. O'Neil v. Wolcott Mining Co. (1909) 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200.

34. —— **Briefs accompanying assignments.**—Construction of Supreme Court rules, see notes following § 1232, ante.

An omission to file an assignment of error to the refusal of leave to file an amended petition was not supplied by a statement in plaintiff in error's brief, under the heading "Specifications of Error," that "the court erred in refusing to allow the filing of an amended petition after the expiration of the statutory

period for bringing the action, which simply added new specifications of error on the part of the defendant, but did not create a new cause of action." Stillwagon v. Baltimore & O. R. Co. (1908) 159 Fed. 97, 86 C. C. A. 287.

Under the practice in Pennsylvania the brief must contain a concise abstract presenting the questions involved in the order in which they are raised. City of Camden v. Armstrong Cork Co. (1913) 210 Fed. 818, 127 C. C. A. 368.

Where counsel do not consider errors assigned of sufficient importance to point out in their brief the pages in the bill of exceptions in the printed transcript of the record where the rulings of the court challenged with the objections and exceptions to them may be found, the court will not ordinarily deem them of sufficient materiality to search through the record to find and discuss them. Illinois Cent. R. Co. v. Nelson (1914) 212 Fed. 69, 128 C. C. A. 525.

35. —— **Assignments as to rulings not shown by record.**—The circuit court of appeals will not review an assignment of error based on any portion of the charge, when the record fails to show that exceptions were taken thereto "while the jury was at the bar." Stone v. U. S. (1894) 64 Fed. 667, 12 C. C. A. 451, judgment affirmed (1897) 17 Sup. Ct. 778, 167 U. S. 178, 42 L. Ed. 127.

An assignment of error based on refusal of an instruction will be considered, though neither the reasons for the refusal nor any part of the general charge appear in the record, where counsel have argued the requested instruction on its merits, and impliedly given the court to understand that it raised a substantial issue. Chapman v. Reynolds (1896) 77 Fed. 274, 23 C. C. A. 166.

A memorandum of opinion filed by the trial judge is no part of the record, and assignments of error based thereon, and not supported by exceptions properly taken and preserved in the record, will not be considered on appeal. North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co. (1897) 83 Fed. 796, 28 C. C. A. 88, modifying judgment (C. C. 1896) 76 Fed. 623; Mutual Reserve Fund Life Ass'n v. Du Bois (C. C. A. 1898) 85 Fed. 586, certiorari denied (1898) 19 Sup. Ct. 886, 171 U. S. 688, 43 L. Ed. 1178.

An assignment of error, based on the refusal of the trial court to give a peremptory instruction for defendant, presents no question for consideration by the appellate court, where the record fails to show that any instruction was requested by defendant, and does not contain the charge given by the court. Eastman, Gardner & Co. v. Newman (1901) 112 Fed. 122, 50 C. C. A. 155.

Defendant railroad company pleaded a release in defense to an action for a personal injury, and plaintiff in his replication admitted the signing of the same, but denied its validity. It did not appear from the record that the release was introduced in evidence, that any evidence was taken with reference to it, or that it was in any manner brought to the attention of the court. Held, that in such state of the record the appellate court would not consider an assignment of error based on the failure of the trial court to make such release the basis of a special instruction directing a verdict for defendant. Mexican Cent. Ry. Co. v. Wilder (1902) 114 Fed. 708, 52 C. C. A. 410.

An assignment of error on the ground that defendant was estopped by his previous conduct from setting up a certain defense in support of which he introduced testimony in the court below cannot be considered by the appellate court, unless based on some objection and exception to the evidence taken in the trial court, and shown by the record. Parker v. Moore (1902) 115 Fed. 799, 53 C. C. A. 369, reversing judgment (C. C. 1901) 111 Fed. 470, and writ of certiorari denied Moore v. Parker (1902) 23 Sup. Ct. 844, 187 U. S. 644, 47 L. Ed. 347.

Where neither the bill of exceptions nor the transcript of the testimony attached thereto showed that certain assignments of error were founded on any exceptions asked for during the progress of the trial, such assignments could not be considered on a writ of error. H. S. Kerbaugh v. Caldwell (1907) 151 Fed. 194, 80 C. C. A. 470, 10 Ann. Cas. 453.

Assignments of error cannot be considered by an appellate court where based on exhibits and excerpts from the evidence embodied in the bill of exceptions, but which bill contains nothing to show their relation to the issues involved. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co. (1907) 151 Fed. 466, 81 C. C. A. 76.

Assignments of error relating to instructions cannot be considered where the record contains only a portion of the charge. Johnson v. Willapa Lumber Co. (1909) 173 Fed. 488, 97 C. C. A. 494.

An assignment of error, in that the trial court acquired no jurisdiction over appellant's person by the issuance and service of an order to show cause, could not be reviewed, where there was nothing in the record to show that the jurisdiction of the Circuit Court over appellant's person was challenged on that account at the trial, or that appellant had not voluntarily appeared. or that the service, if made, was not made within the court's territorial jurisdiction. Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509.

Assignments of error cannot be reviewed where they call in question certain alleged erroneous rulings not shown by the record. Bell v. Union Pac. R.

Co. (1912) 194 Fed. 366, 114 C. C. A. 326.

Where, in an action on a note, plaintiff's case consisted entirely of the note and his own testimony, and the bill of exceptions contained but a few meager extracts from plaintiff's testimony, the court on appeal could not review assignments of error with reference to the exclusion of defendants' evidence or the instructions. Robinson v. Stearns (1913) 204 Fed. 772, 123 C. C. A. 222.

36. Scope and extent of review as dependent on record—In general.—Specifications of error to the effect that the court erred in holding as stated cannot be considered, where there is nothing in the record outside of the opinion of the court to show that the court so held and adjudged. Albany Perforated Wrapping-Paper Co. v. John Hoberg Co. (1901) 109 Fed. 589, 48 C. C. A. 559.

Where, in a suit to restrain infringement of a trade-mark, the appeal record did not show either the ground on which an application for an amendment to the bill was made nor the amendment which was proposed, the exercise of the court's discretion in refusing such amendment could not be reviewed. Bulte v. Igleheart Bros. (1905) 137 Fed. 492, 70 C. C. A. 76.

Where a stipulation of facts in an action tried by the court was not filed in nor considered by the trial court, it could not be considered on a writ of error, the only office of which is to review the action of the trial court on questions of law presented by the bill of exceptions. Hayden v. Ogden Sav. Bank (1907) 158 Fed. 90, 85 C. C. A. 558.

The inquiry of the Circuit Court of Appeals on writ of error must be confined to the pleadings and proof as embodied in a bill of exceptions, and, where the record so made up is free from error, the judgment must be affirmed. Reader v. Haggin (1908) 160 Fed. 909, 88 C. C. A. 91.

The court may take notice of facts appearing outside the record, which disclose the moot character of a question presented and decline for that reason to consider it. Keely v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 601, 95 C. C. A. 99.

In the absence of proof by the record that a question of law arose and was ruled on by the court below, no error is shown. Mexico International Land Co. v. Larkin (1912) 195 Fed. 495, 115 C. C. A. 405.

The Circuit Court of Appeals held limited by the stipulation of the parties, and by the omission of matters from the record as sent up, to the consideration of a single question. Lydiard-Peterson Co. v. Woodman (1913) 205 Fed. 900, 126 C. C. A. 434, denying rehearing (1913) 204 Fed. 921, 123 C. C. A. 243.

The jurisdiction of the circuit court on writ of error from the district court, in cases at law, extended no further than to pass upon such error as might appear by the record, and, when none was shown on inspection of the record, the writ of error should be dismissed, and the judgment of the district court affirmed. Macheca v. U. S. (C. C. 1886) 26 Fed. 845.

37. —— Rulings on evidence.—Assignments of error to the admission and exclusion of evidence "against defendant's objections" cannot be considered when the record fails to show that any exceptions were taken to such rulings. U. S. v. Breitling (1857) 20 How. 252, 15 L. Ed. 900; Newport News & Mississippi Val. Co. v. Pace (1895) 15 Sup. Ct. 743, 158 U. S. 36, 39 L. Ed. 887; Marion Phosphate Co. v. Cummer (1893) 60 Fed. 873, 9 C. C. A. 279.

An alleged error in the admission of evidence will not be considered by an appellate court when the record merely recites that the complaining party "objected" and "excepted." Ward v. Blake Mfg. Co. (1893) 56 Fed. 437, 5 C. C. A. 538, following U. S. v. Shapleigh (1893) 54 Fed. 126, 4 C. C. A. 237.

On questions of admissibility of evidence, not involving any substantial error contrary to the law and justice of the case, the court will not look outside the bill of exceptions, although the bill assumes to make all the evidence and proceedings in the court below a part of it. Central Vermont R. Co. v. Soper (1894) 59 Fed. 879, 8 C. C. A. 341.

A ruling that a certain document is admissible in evidence is not assignable as error where the record does not show that the document was actually read to the jury. Masonic Ben. Ass'n of Central Illinois v. Lyman (1894) 60 Fed. 498, 9 C. C. A. 104.

If the record on appeal does not show how a question permitted by the court, against objection, was answered, or that it was answered at all, the ruling of the court will not be disturbed. Turner v. U. S. (1895) 66 Fed. 280, 13 C. C. A. 436.

Overruling an objection to a question will not be held prejudicial error if the record fails to show what answer was made by the witness. Id.

The exclusion of a question is not prejudicial error when the record fails to show what was proposed to be proved by the answer. Turner v. U. S. (1895) 66 Fed. 289, 13 C. C. A. 445.

An exception to the evidence of a witness on the ground that he testified from a memorandum made long after the fact cannot be sustained when the record does not contain the memorandum, or disclose whether it was prejudicial or not, or whether it was in fact used by the witness. Missouri, K. & T. Ry. Co. v. Fuller (1895) 72 Fed. 467, 18 C. C. A. 641, judgment affirmed

(1898) 18 Sup. Ct. 944, 168 U. S. 707, 42 L. Ed. 1215.

An objection, made for the first time on appeal, to the admissibility of an exhibit found in the record, held unavailing, because forbidden at that stage of the case by rule 12 of the circuit court of appeals for the Third circuit, and because the exhibit had been made part of the record by stipulation of counsel. Franklin Sugar-Refining Co. v. Funch (1896) 73 Fed. 844, 20 C. C. A. 61, affirming order (D. C. 1895) 66 Fed. 342.

To enable the circuit court of appeals to review the admission or exclusion of evidence, the evidence to which the exception is directed must be in the bill of exceptions. National Masonic Acc. Ass'n v. Sparks (1897) 83 Fed. 225, 28 C. C. A. 399.

The rule, in force when this case was tried, that the substance of excluded answers must appear in the record, did not apply where the witness testified in person; and the exclusion of an answer will be deemed error or not, according as the question upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose favor it is propounded. Hoffmann v. Mayaud (1899) 93 Fed. 171, 35 C. C. A. 256.

The correctness of rulings admitting answers to a certain line of questions on cross-examination cannot be reviewed where no ground was given for the objections made, and the record does not show the examination of the witness in chief. New Orleans & N. E. R. Co. v. Clements (1900) 100 Fed. 415, 40 C. C. A. 465.

An alleged error in refusing to admit in evidence a certain document cannot be reviewed where the record fails to show the contents of the paper. Myers v. Brown (1900) 102 Fed. 250, 42 C. C. A. 320.

A ruling by the trial court upon objections to evidence in equity must be obtained or refused, an exception taken, and these proceedings must appear in the record, to warrant a consideration of the questions they suggest in an appellate court. Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co. (1900) 104 Fed. 243, 43 C. C. A. 511 (affirming decree [C. C. 1899] 92 Fed. 774); Fidelity & Casualty Co. of New York v. Freeman (1901) 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680.

Under the rules of practice of the supreme court and the circuit court of appeals, a ruling on admission of evidence is not reviewable, unless the record discloses the ruling made and the taking of the exception thereto, and there is a specific assignment of error on that ground. Kalamazoo Ry. Supply Co. v. Duff Mfg. Co. (1902) 113 Fed. 264, 51 C. C. A. 221.

When the evidence is not brought into the record, no question on the admission of evidence is presented for review. Dubois v. Decker (1902) 114 Fed. 267, 52 C. C. A. 153.

Where the evidence excluded by the trial court does not appear in the record, the question as to its admissibility is not presented. Dresser v Canadian Pac. Ry. Co. (1902) 116 Fed. 281, 53 C. C. A. 559.

On appeal in suits in equity in the federal courts, unless an exception appears in the record, based on an objection to the admission of evidence, such evidence is considered as having been admitted by consent, and it cannot be excluded from consideration by the appellate court. White v. Wansey (1902) 116 Fed. 345, 53 C. C. A. 634.

Complaint that the court erred in refusing to allow witnesses to answer questions set forth cannot be considered, where it does not appear what answers were expected. Briggs v. Chicago & N. W. Ry. Co. (1903) 125 Fed. 745, 60 C. C. A. 513.

Where a ruling excluding evidence appears only from the opinion of the trial court, it not being shown by the record that the evidence was offered and rejected, and an exception reserved, such ruling is not reviewable on appeal. Board of Com'rs of Kearney County, Kan., v. Irvine (1903) 126 Fed. 689, 61 C. C. A. 607, modifying decree Coffin v. Board of Com'rs of Kearney County (C. C. 1902) 114 Fed. 518, and writ of certiorari denied (1904) 24 Sup. Ct. 851, 192 U. S. 607, 48 L. Ed. 585.

Where, in an action for the price of goods sold, a question asked of a witness, on redirect examination, as to the time when defendants first began to send out stems made from castings furnished by the plaintiffs, was properly excluded as repetition, error could not be predicated on such exclusion on the ground that it was expected to be proved by the question that the stems which had been so referred to were not defendants' stems, which was not supported by the record. Fredrick Mfg. Co. v. Devlin (1904) 127 Fed. 71, 62 C. C. A. 53.

Exclusion of evidence cannot be reviewed, the record not showing that any statement was made as to what was proposed to be proved by the witness. Gardiner Campbell Co. v. Iroquois Iron Co. (1904) 127 Fed. 648, 62 C. C. A. 374.

Assignments of error relating to the admission of evidence cannot be considered, where the record contains only a portion of the evidence. Johnson v. Willapa Lumber Co. (1909) 173 Fed. 488, 97 C. C. A. 494.

A refusal to admit a deposition in evidence cannot be reviewed, where the deposition, while printed in the transcript, was not included in the bill of exceptions or made a part of the record. Arizona & N. M. Ry. Co. v Clark (1913) 207 Fed. 817, 125 C. C. A. 305.

Where the rulings of the court on documentary evidence are made the subject of exceptions, the documents must be inserted in the bill of exceptions. U. S. v. Dunham (C. C. 1857) Fed. Cas. No. 15,006; Stockwell v. U. S. (C. C. 1870) Fed. Cas. No. 13,466.

The ground of objection to the admissibility of evidence must appear, to render the exception available. Locke v. U. S. (C. C. 1866) Fed. Cas. No. 8,442.

Error in excluding depositions cannot be considered when the bill of exceptions does not identify them, but they are inserted in the copy of the record by the clerk, more than two months after the bill is signed. U. S. v. Three Hundred and Thirty-Seven Cases of Wine (C. C. 1870) Fed. Cas. No. 16,506.

38. —— **Review of instructions.**—In an action to recover for personal injuries, plaintiff asked six instructions, of which the court gave two, declined to give one, and declined to give the other three, except as covered by the general charge. The whole charge was incorporated into the bill of exceptions, which concluded: "To which refusal and charge * * * plaintiff excepted, and tendered this bill of exceptions," etc. Held, that this exception was insufficient under rule 4 of the supreme court rules (3 Sup. Ct. v). Jones v. East Tennessee, V. & G. R. Co. (1895) 15 Sup. Ct. 719, 157 U. S. 682, 39 L. Ed. 856.

Where the bill of exceptions shows that the plaintiff tendered three separate propositions to be given by the court to the jury, which the court refused to give, and that the court then charged the jury, the charge being set forth in full, but the bill does not show that any exception was taken to the refusal of the court to charge as requested, or to the charge as given, or to any part thereof, the supreme court are unable to consider these assignments of error, because the exceptions were not fully saved in the circuit court. Little Rock Granite Co. v. Dallas County (1894) 66 Fed. 522, 13 C. C. A. 620.

Alleged error in giving instructions cannot be considered, where no exceptions appear on the record. American Cent. Ins. Co. v. Heiserman (1895) 67 Fed. 947, 15 C. C. A. 95.

The correctness of a special instruction cannot be considered by an appellate court, where the court gave it as qualified or explained by the general charge, and such charge is not in the record. Scaife v. Western North Carolina Land Co. (1898) 90 Fed. 238, 33 C. C. A. 47.

The charge of a trial court is no part of the record, and cannot be noticed on appeal, unless brought into the record by the bill of exceptions, and without such charge before the court the refusal to give instructions requested cannot be reviewed. Case v. Hall (1899) 94 Fed. 300, 36 C. C. A. 259, affirming judgment (Ind. T. 1898) 46 S. W. 180.

Exceptions to the charge of the court cannot be considered by the appellate court where only a portion of the charge is contained in the record. Myers v. Sternheim (1899) 97 Fed. 625, 38 C. C. A. 345.

Instructions printed in a transcript on appeal as having been given, or asked and refused, on the trial, but which are not contained in any bill of exceptions, or in any manner authenticated by the trial judge, do not constitute a part of the record in the case. Sternenberg v. Mailhos (1900) 99 Fed. 43, 39 C. C. A. 408.

It will be presumed on appeal that special instructions asked were properly refused on the ground that they were covered by the general charge, where the record does not contain all of the general charge, nor show that it contains all that related to the subject-matter of the special instructions. Union Mut. Life Ins. Co. of Portland, Me., v. Payne (1900) 105 Fed. 172, 45 C. C. A. 193.

A party cannot assign error on the failure of the court to give a particular charge, where the record shows no request therefor, and no exception to the charge given upon the same subject. Fidelity & Casualty Co. of New York v. Freeman (1901) 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680.

The refusal of requested instructions will not be considered, where the record does not contain the evidence on which such instructions were based. South Penn Oil Co. v. Latshaw (1901) 111 Fed. 598, 49 C. C. A. 478.

The failure of the trial court to give instructions requested cannot be assigned for error or considered by the appellate court unless it appears from the bill of exceptions that such instructions were requested and refused, and exceptions to such refusal were duly taken. Jack v. Mutual Reserve Fund Life Ass'n (1902) 113 Fed. 49, 51 C. C. A. 36.

Where the instructions are not contained in the record, their correctness cannot be reviewed. Dubois v. Decker (1902) 114 Fed. 267, 52 C. C. A. 153.

Where all of the instructions are not in the record, the refusal to give requested instructions will not be reviewed on appeal. Northern Pac. Ry. Co. v. Tynan (1902) 119 Fed. 288, 56 C. C. A. 192.

When the record does not show that the instructions contained therein were all the instructions given by the court, the presumption will be indulged that the court gave other instructions fully covering the substance of those re-

fused. Columbia Mfg. Co. v. Hastings (1902) 121 Fed. 328, 57 C. C. A. 504.

The presumption on appeal is that the charge of the court was correct and was applicable to the facts, in the absence of proof to the contrary by the record. Southern Pac. Co. v. Arnett (1903) 126 Fed. 75, 61 C. C. A. 131.

Objections to instructions will not be regarded if the record does not show that the instructions were excepted to. Southern Ry. Co. v. Blevins (1904) 130 Fed. 688, 66 C. C. A. 40.

Unless the evidence is before the appellate court, it cannot pass on instructions given or refused. Newport News & Old Point Ry. & Electric Co. v. Yount (1905) 136 Fed. 589, 66 C. C. A. 363.

Reversible error cannot be predicated upon an extract from the charge of the court, although standing alone it would be erroneous where the other parts of the charge by which it was presumptively qualified are not contained in the record. Southern Ry. Co. v. Hardin (1907) 157 Fed. 645, 85 C. C. A. 329.

Under the established rule of the federal courts assignments of error to the giving or refusal of instructions cannot be considered on a writ of error by an appellate court, unless it appears by the transcript that exceptions were reserved while the jury were at the bar. Star Co. v. Madden (1911) 188 Fed. 910, 110 C. C. A. 652.

Where the bill of exceptions in a cause showed requests to charge made by defendant, but they were not marked to show what action was taken thereon, although a comparison with the charge showed that certain of them were not given, nor covered thereby, a statement reciting that after the jury retired the judge stated that he understood that defendants' counsel were entitled to "every exception which belongs to them by reason of requests handed up to the court in advance and either refused or modified" was not sufficient to make it appear that exceptions were taken by defendant before the jury retired to the failure to charge such requests. Id.

It will be presumed that a case was submitted to the jury on proper instructions, where the charge was not excepted to and it does not appear in the record. St. Louis & S. F. R. Co. v. Underwood (1912) 194 Fed. 363, 114 C. C. A. 323.

Giving and refusal of instructions cannot be reviewed on a writ of error, without a properly settled bill of exceptions in the record containing the evidence. Duluth St. Ry. Co. v. Speaks (1913) 204 Fed. 573, 123 C. C. A. 99.

Judgment will not be reversed because the court refuses to give a charge abstractly correct, but which the bill of exceptions does not show was pertinent to the case. U. S. v. Three Hundred and Thirty-Seven Cases of Wine (C. C. 1870) Fed. Cas. No. 16,506.

39. —— **Rulings on motions and orders.**—Where motions are heard in the trial court, presenting issues of fact and submitted on evidence in any form, the ruling thereon cannot be reviewed, unless a proper bill of exceptions is duly taken and filed. A reference to the evidence in the journal entry does not make such evidence a part of the record. F. C. Austin Mfg. Co. v. Johnson (1898) 89 Fed. 677, 32 C. C. A. 309.

The judgment of a circuit court rendered on a motion in an action at law cannot be reviewed when the record fails to show any objection or exception thereto, and contains no bill of exceptions to bring before the appellate court either the motion or the evidence upon which the judgment was based. J. B. McFarlan Carriage Co. v. Solanas (1901) 106 Fed. 145, 45 C. C. A. 253.

Alaska Code Civ. Proc. § 378, provides that where it is determined that plaintiff is entitled to no part of the relief demanded, on account of a failure of proof, the dismissal of his action may be without prejudice. Held, that where an action was so dismissed without prejudice for a failure of proof, and on appeal none of the evidence was contained in the record, the circuit court of appeals could not say that the dismissal without prejudice was an abuse of the court's discretion. Ebner v. Zimmerly (1902) 118 Fed. 818, 55 C. C. A. 430.

Where, in an action to recover a penalty for charging usury, the court made an order requiring defendant to permit plaintiff to inspect his books of account containing evidence of matters relating to the action, but there was nothing in the record on error to show that the order was ever complied with, or that defendant was, in fact, ever compelled to furnish any evidence against him, or submit his books to plaintiff's inspection, no error was disclosed. Hemple v. Raymond (1906) 144 Fed. 796, 75 C. C. A. 526.

Where, on appeal from an order adjudging petitioner guilty of contempt for appearing in the United States Court for China, wherein he had not been admitted to practice, the transcript showed that he appeared and testified that he had been admitted to practice before the United States Supreme Court, before the courts of record of the state of New York, and before the United States Consular Court at Shanghai, and that the judgment was based solely on the fact that he had not complied with the rule of the United States Court for China relating to the admission of attorneys, it was not material that the record should

also contain copies of petitioner's certificate of admission before the various courts. Curtis v. Wilfley (1908) 165 Fed. 893, 91 C. C. A. 571.

A motion to strike part of the answer and the ruling thereon are not a part of the record on writ of error unless made so by bill of exceptions. Ghost v. U. S. (1909) 168 Fed. 841, 94 C. C. A. 253.

Where, on a petition to review an order disallowing an attorney's claim for compensation for successfully resisting the allowance of claims against a bankrupt's estate, there was no finding of facts by the referee or judge, but the record attached to the petition for review was limited to the orders of the referee and District Court, and the opinion of the District Judge, which was based on the absence of authority to allow the claim under circumstances such as are here presented, it could not be considered on review that petitioner's employment was had only after the trustee had refused to resist the claims. In re Roadarmour (1910) 177 Fed. 379, 100 C. C. A. 611.

Where an appeal was taken from an order with reference to costs in a suit in equity, entered at the foot of the decree after hearing, but the transcript did not contain the proceedings on the hearing, either in a certificate of evidence or any other form, and the decree was not included, but only memorandum opinions filed by the trial judge at various stages of the hearing, it was insufficient to authorize a reversal, unless reversible error was manifest in the terms or subject-matter of the order. Corn Products Refining Co. v. Chicago Real Estate Loan & Trust Co. (1911) 185 Fed. 63, 107 C. C. A. 283.

An order fining a party for contempt for disobedience of an injunction is not reviewable on a record which does not contain the evidence on which it was based. Frank v. Bernard (1911) 185 Fed. 810, 108 C. C. A. 42.

An order granting a nonsuit was presumptively made for good cause shown, and cannot be reviewed by an appellate court, where the record does not show the facts on which the court acted. Southern Pac. Co. v. Kelley (1911) 187 Fed. 937, 109 C. C. A. 659.

The Circuit Court of Appeals cannot determine a writ of error on the theory that the trial court compelled plaintiff to submit to a modification of the judgment as a condition to the denial of a new trial, where such fact was not based on anything contained in the record. Ferkel v. Columbia Clay Works (1911) 192 Fed. 119, 112 C. C. A. 406.

40. —— Questions relating to jury and proceedings at trial.—Under Code Civ. Proc. Or. § 187, providing that an opinion already formed by a juror is not alone sufficient to sustain a challenge, but that the court must be satisfied from all the circumstances that the juror cannot try the case impartially, the ruling of the court on the juror's qualifications will not be reviewed unless all of the evidence taken at the examination be presented in the record although the testimony produced shows the juror to have a fixed opinion on the merits of the cause. Southern Pac. Co. v. Rauh (1892) 49 Fed. 696, 1 C. C. A. 416, following State v. Tom (1879) 8 Or. 179.

There can be no reversal for error in admitting remarks of counsel to the jury when the record does not disclose the substance or character of the remarks. Rhodes v. U. S. (1897) 79 Fed. 740, 25 C. C. A. 186.

Error cannot be assigned on the alleged failure to comply with the provision of a statute requiring that it should be read to the officers sent out in charge of a jury, where the record does not show that the statute was not followed, or that any objection was made on that ground by the plaintiff in error. In such case it must be presumed that the statute was read to the bailiff, and, if not, the error was waived. Walton v. Wild Goose Mining & Trading Co. (1903) 123 Fed. 209, 60 C. C. A. 155, writ of certiorari denied (1904) 24 Sup. Ct. 856, 194 U. S. 631, 48 L. Ed. 1158.

An alleged admission of counsel in the trial court contradicting their pleading is unavailing in an appellate court, unless spread on the record of the trial court and embodied in the transcript or evidenced by written stipulation. Wilhite v. Skelton (1906) 149 Fed. 67, 78 C. C. A. 635, reversing judgment (Ind. T. 1904) 82 S. W. 932.

41. —— Review of questions of fact and findings.—A decision cannot be reversed as not sustained by the evidence where the record does not purport to contain all the evidence. U. S. v. Copper Queen Consol. Min. Co. (1902) 22 Sup. Ct. 761, 185 U. S. 495, 46 L. Ed. 1008; Metropolitan Nat. Bank v. Jansen (1901) 108 Fed. 572, 47 C. C. A. 497; Saling v. Bolander (1903) 125 Fed. 701, 60 C. C. A. 469; Franklin County v. Furry (1906) 144 Fed. 663, 75 C. C. A. 465.

The Supreme Court, which exercises an appellate jurisdiction, cannot look into any evidence not before the circuit court, and the evidence certified with the record must be considered as the only evidence before the court below, and if part of the evidence in the case below has been omitted it may be certified in obedience to a certiorari. Holmes v. Trout (1833) 7 Pet. 171, 210, 8 L. Ed. 647.

In a suit to recover an assessment on the stock of a corporation, the court allowed interest thereon only from the date of the suit. On appeal the record did not contain the charter and bylaws of the corporation, and did not

purport to contain all the evidence. Held, that while, in the absence of special provisions, interest would run from the date of the call, the court could not say but that the charter and by-laws were before the trial court, and contained matter to justify its decision, and must therefore affirm the same. Liggett v. Glenn (1892) 51 Fed. 381, 2 C. C. A. 286, reversing judgment (C. C. 1891) 47 Fed. 472.

In a railroad foreclosure suit a decree was entered January 31st, declaring that certain classes of claims therein specified were entitled to a lien prior to that of the bondholders, and directing the receiver to first pay the same out of the proceeds of the sale. A sale having been made, a judgment creditor intervened, asking that his judgment might be paid before any payments on the bonds, and the court decreed that his judgment came within the classes of claims enumerated in the decree of January 31st, and directed payment accordingly. From this decree an appeal was taken, but the decree of January 31st was not incorporated in the record. Held, that in view of this omission the appellate court could not review the finding that the claim in question was entitled to priority as belonging to the classes enumerated in the decree of January 31st. St. Louis S. W. Ry. Co. v. Stark (1893) 55 Fed. 758, 5 C. C. A. 264.

The circuit court, in a suit for the foreclosure of a railroad mortgage, allowed an intervening claim based on a judgment recovered in a state court, and directed its payment out of the proceeds of sale. The decree recited that it was one of those claims theretofore adjudged to be of a preferential character. This latter adjudication was not appealed from, and, on appeal from the decree allowing such intervening claim, the nature of the demand on which the judgment was recovered was not disclosed by the record. Held, that it must be presumed that the finding of the lower court as to its character was correct, and its decree will be affirmed. St. Louis S. W. Ry. Co. v. Graham (1893) 56 Fed. 258, 5 C. C. A. 501, following Same v. Stark (1893) 55 Fed. 758, 5 C. C. A. 264.

The appointment by a chancery court of an administrator ad litem, authorized only when there is no executor or administrator (Act Tenn. 1889) although it recites that fact, cannot be sustained on appeal, where no allegation or evidence of the fact appears in the record. Newman v. Schwerin (1894) 61 Fed. 865, 10 C. C. A. 129.

The circuit court of appeals will not consider an assignment of error that the court below refused to direct a verdict for defendant upon the ground that the evidence did not warrant any other verdict, unless it affirmatively appears that the record before the court contains all of the evidence. People's Sav. Inst. of Erie County, Pa., v. Miles (1896) 76 Fed. 252, 22 C. C. A. 152.

In the absence of any showing that the record contains all the evidence, the direction of a verdict will not be reviewed. Honey v. Chicago, B. & Q. R. Co. (1897) 82 Fed. 773, 27 C. C. A. 262.

The evidence taken in an equity cause in a federal court must be made a part of the record and certified on appeal, otherwise it will be disregarded; and, unless the record contains some evidence to sustain the finding, the decree will be reversed. Mears v. Lockhart (1899) 94 Fed. 274, 36 C. C. A. 239.

An exception to a peremptory instruction, directing a verdict for plaintiff and an assignment of error thereon, presents no question for review, where the record does not contain all the evidence. Board of Com'rs of Lake County, Colo., v. Sutliff (1899) 97 Fed. 270, 38 C. C. A. 167.

The correctness of the ruling of the trial court in refusing to direct a verdict or of instructions given or refused cannot be reviewed where all the evidence contained in the record is given in narrative form, and the certificate thereto is limited to the statement that "the foregoing is substantially all the evidence." Chicago G. W. Ry. Co. v. Price (1899) 97 Fed. 423, 38 C. C. A. 239.

Where the record on appeal fails to show that it contains all the evidence, the presumption is that there was evidence which justified the court in refusing to direct a verdict. Sternenberg v. Mailhos (1900) 99 Fed. 43, 39 C. C. A. 408.

Where the record on a writ of error from the circuit court does not purport to contain all the evidence, or all the material evidence, the questions whether the court erred in refusing a request to direct a verdict for defendant, or in directing a verdict for plaintiff, cannot be considered. Nashua Savings Bank v. Anglo-American Land-Mortgage & Agency Co. (1901) 108 Fed. 764, 48 C. C. A. 15, judgment affirmed (1903) 23 Sup. Ct. 517, 189 U. S. 221, 47 L. Ed. 782.

The circuit court of appeals cannot review a judgment on the ground that the jury was not impartial unless the record affirmatively shows that it was improperly influenced, or was governed by passion or prejudice; and that the verdict may have been for too large an amount does not show either of such facts. Kansas City S. Ry. Co. v. Billingslea (1902) 116 Fed. 335, 54 C. C. A. 109.

Where the evidence is not in the record, its sufficiency cannot be considered on appeal. Seaboard Air Line Ry. v. Richard (1905) 136 Fed. 409, 69 C. C. A. 253.

On appeal in an equity case, recourse cannot be had to an opinion filed by

the court below to ascertain the facts, where there is no evidence in the record; and, where the case was decided on issues of fact, it cannot be reviewed. Townsend v. Beatrice Cemetery Ass'n (1905) 138 Fed. 381, 70 C. C. A. 521.

Where the record on a writ of error does not clearly show that the jury's finding was contrary to the instructions of the court when taken as a whole, it will be presumed that the jury followed the instructions, and that the verdict is right. Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. (1907) 154 Fed. 545, 83 C. C. A. 431, writ of certiorari denied (1907) 28 Sup. Ct. 256, 207 U. S. 589, 52 L. Ed. 354.

Where, in an action tried by the court, there was neither stipulation nor request for a special finding of facts and no such finding was made, the inquiry on a writ of error is limited to the sufficiency of the petition, and the rulings on questions of law arising during the trial, if any, are preserved. Hayden v. Ogden Sav. Bank (1907) 158 Fed. 90, 85 C. C. A. 558.

To authorize the reversal of a judgment error must clearly appear, and, where, on the trial of an action by a servant against the master to recover for a personal injury, the plaintiff as a witness was permitted to "indicate" his position at the time of the injury by signs and gestures which do not appear in the record, but which may have been important or even vital upon the issue of contributory negligence, the action of the trial court in directing a verdict for the defendant cannot be reviewed. Christy v. Schwartzchild & Sulzberger Co. (1908) 160 Fed. 657, 88 C. C. A. 125.

A record showing that defendants requested a directed verdict, and the motion for new trial alleging its refusal as error, and the statement of the case in defendant's brief on writ of error, reciting that the case presents three phases, namely, negligence of a workman, negligence of the servants of defendant railroad company and the contributory negligence of the decedent, show that the failure of proof of nonadministration of the decedent's estate, so as to give the heirs the right to sue, was not called to the attention of the court. Choctaw, O. & G. R. Co. v. Jackson (1910) 182 Fed. 342, judgment affirmed (1912) 192 Fed. 792, 114 C. C. A. 12.

In an action by the United States against a railroad company for violation of the safety appliance laws, in which the statement of claim contained a large number of counts relating to different cars, and the trial court granted a compulsory nonsuit on the ground that there was not sufficient evidence to sustain a verdict on any count, its action will not be reversed by the appellate court, where the record is in such condition that it is unable to determine what evidence applies to any particular car or count. U. S. v. Baltimore & O. R. Co. (1911) 185 Fed. 486, 107 C. C. A. 586, affirming judgment (D. C. 1910) 176 Fed. 114.

The sufficiency of the evidence to sustain the trial court's conclusion will not be reviewed where the record does not contain all the evidence. Meyer v. Everett Pulp & Paper Co. (1912) 193 Fed. 857, 113 C. C. A. 643, reversing judgment Meyer. Wilson & Co. v. Same (C. C. 1911) 184 Fed. 945.

Where, though appellant excepted to appellee's proposed findings of fact, the record showed no ruling thereon, and the court made findings of its own, the appellate court would not search the record and ascertain for itself whether or not the objections were overruled. Eastern Oil Co. v. Holcomb (1914) 212 Fed. 126, 128 C. C. A. 642.

On review by writ of error, facts not stated in the bill of exceptions will not be noticed. Pendleton v. U. S. (C. C. 1822) Fed. Cas. No. 10,924.

The proceedings and judgments of the district court in actions at law cannot be reviewed where the facts are controverted and no case is stated for the opinion of the court. Blair v. Allen (C. C. 1874) Fed. Cas. No. 1,483.

When one tribunal reviews the judgment of another, or the action of its own subordinate bodies or officers, it should never reverse without having before it all the facts and conditions upon which the decision to be reviewed was based. In re Weber Furniture Co. (C. C. 1876) Fed. Cas. No. 17,331.

42. —— **Questions affecting jurisdiction.**—Time may be allowed to prove the jurisdictional amount, where the record on appeal fails to show it. Lockwood v. The Grace Girdler (1867) 6 Wall. 441, 18 L. Ed. 790.

If it does not appear from the record, or from the proof submitted when issue is joined on that point, that the amount in controversy is sufficient to give jurisdiction to the appellate court, the appeal must be dismissed. Parker v. Morrill (1882) 1 Sup. Ct. 14, 106 U. S. 1, 27 L. Ed. 72; Bowman v. Chicago & N. W. Ry. Co. (1885) 6 Sup. Ct. 192, 115 U. S. 611, 29 L. Ed. 502; Goldstucker v. Wilkins (1885) 6 Sup. Ct. 601, 116 U. S. 394, 29 L. Ed. 671; Wells v. Same (1886) 6 Sup. Ct. 600, 116 U. S. 393, 29 L. Ed. 671; Hunt v. Blackburn (1888) 8 Sup. Ct. 1395, 127 U. S. 774, 32 L. Ed. 323.

A federal appellate court will take notice that the record does not show jurisdiction in the court below. Grand Trunk Ry. Co. v. Twitchell (1894) 59 Fed. 727, 8 C. C. A. 237, following Mansfield, C. & L. M. Ry. Co. v. Swan (1884) 4 Sup. Ct. 510, 111 U. S. 379, 28 L. Ed. 462.

43. —— **Consideration of documents or papers not included in record.**—The supreme court will not look beyond the bill of exceptions, and depositions, exhibits, or certificates not in the bill can-

not be considered. Reed v. Gardner (1873) 17 Wall. 409, 411, 21 L. Ed. 665.

In ejectment, a reviewing court cannot consider a map which is merely introduced by counsel in argument, but is not made a part of the record. Colorado Cent. Consolidated Min. Co. v. Turck (1893) 54 Fed. 262, 4 C. C. A. 313, denying rehearing (1892) 50 Fed. 888, 2 C. C. A. 67, and writ of error dismissed (1893) 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030.

Matter not incorporated in the bill of exceptions, nor certified to by the clerk, but which is attached to the record, on appeal, by counsel without official sanction, cannot be considered by the appellate court. Board of Com'rs of Grand County v. King (1895) 67 Fed. 945, 15 C. C. A. 93 denying rehearing (1895) 67 Fed. 202, 14 C. C. A. 421.

In determining the sufficiency of a complaint on an insurance policy to sustain a judgment rendered thereon, the policy itself cannot be considered as a part of the complaint, where it was not filed therewith, but was only used as evidence on the trial, and such evidence was not brought into the record by bill of exceptions. Travelers' Protective Ass'n v. Gilbert (1900) 101 Fed. 46, 41 C. C. A. 180.

Where, at the argument and submission of a case in the appellate court, exhibits used in the trial court are referred to and treated by both parties as properly before the court, any informality in the manner in which they were brought into court is waived, and is not ground for dismissal of the writ of error. Wilson v. Chicago Lumber & Timber Co. (1906) 143 Fed. 705, 74 C. C. A. 529, reversing judgment (C. C. 1904) 129 Fed. 636.

Where, on the hearing of a petition for injunction against infringement, affidavits used on a prior hearing are referred to and used, they should, under the circumstances of this case, be incorporated in the record on an appeal. Staples & Hanford Co. v. Lord (1906) 148 Fed. 15, 78 C. C. A. 106.

The practice of bringing into the record, by bill of exceptions, pleadings or papers which the court has refused to allow a party to file, is not known to the federal courts in equity cases; but, inasmuch as a consideration of such documents may be necessary to enable the appellate court to determine whether or not they were properly rejected, it would seem that, in the absence of any statute or rule regulating the practice in that regard, the trial court may properly, by an order, direct the clerk to certify the pleading or other document rejected to the appellate court for that purpose. Southern Building & Loan Ass'n v. Carey (C. C. 1902) 117 Fed. 325.

44. —— Review of findings on reference.—An oral consent in open court to an order of reference, made pursuant to Code Civ. Proc. Neb. § 298, will not enable the circuit court of appeals (Eighth circuit) to review the action of the circuit court on exceptions to the referee's report, where there was no bill of exceptions making that report, or the evidence on which it was founded, a part of the record. Dietz v. Lymer (1894) 63 Fed. 758, 11 C. C. A. 410, affirming (1894) 61 Fed. 792, 10 C. C. A. 71.

Where the record does not contain all the evidence before a referee or master, the Supreme Court cannot review his findings of fact. St. Louis Merchants' Bridge Terminal Ry. Co. v. Continental Trust Co. (1901) 111 Fed. 669, 49 C. C. A. 529.

A statement of account between parties, made by a master by direction of the court, and approved by it, cannot be reviewed by an appellate court, where the master was not required to report all of the evidence taken before him, and it affirmatively appears that he did not. McCourt v. Singers-Bigger (1906) 145 Fed. 103, 76 C. C. A. 73, 7 Ann. Cas. 287.

Where the testimony taken before a referee is not in the record as sent to an appellate court, his findings of fact, or upon mixed questions of law and fact, cannot be reviewed. W. M. Ritter Lumber Co. v. Lestershire Lumber & Box Co. (1907) 153 Fed. 575, 82 C. C. A. 529, affirming judgment Lestershire Lumber & Box Co. v. W. M. Ritter Lumber Co. (C. C. 1906) 144 Fed. 568.

45. Prayer for reversal.—Under this act an appeal may be prayed in court when the decree is pronounced, but if the appeal be prayed after the court has risen the party must proceed in the same manner as has been previously directed in writs of error. Yeaton v. Lenox (1833) 7 Pet. 220, 8 L. Ed. 664.

A prayer in a petition for a writ of error that the writ may issue "for the correction of errors so complained of" is, in substance, a prayer for reversal, within the requirements of this section. Springfield Safe-Deposit & Trust Co. v. City of Attica (1898) 85 Fed. 387, 29 C. C. A. 214, certiorari denied City of Attica v. Springfield Safe-Deposit & Trust Co. (1898) 19 Sup. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179.

46. Citation—Necessity of citation.—A citation must accompany the writ of error. Lloyd v. Alexander (1803) 1 Cranch, 365, 366, 2 L. Ed. 137.

Where an appeal was not made in open court, and at the term at which the final decree was passed, a citation is necessary. Villabolos v. U. S. (1848) 6 How. 81, 89, 12 L. Ed. 352.

Where the adverse party is in Court represented by counsel, the appeal will not be dismissed for want of citation. Pierce v. Cox (1869) 9 Wall. 786, 787, 19 L. Ed. 786.

Appeals in open court do not require citations. Miltenberger v. Logansport,

C. & S. W. R. Co. (1882) 1 Sup. Ct. 140, 157, 106 U. S. 286, 27 L. Ed. 117.

A citation to the appellate court is not jurisdictional of the cause on appeal, but is jurisdictional of appellee, and its purpose is merely to give notice to appellee that an appeal will be prosecuted, so that he may appear and be heard. Sutherland v. Pearce (1911) 186 Fed. 783, 108 C. C. A. 653, vacating order of dismissal (1911) 183 Fed. 1023, 105 C. C. A. 664.

47. —— **Time of awarding.**—Under section 11 of Act March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. 829, c. 517), providing that no appeal shall be taken to such court except within six months after the entry of the decree or order sought to be reviewed, where, although an appeal was allowed within that time, no citation was issued to the persons who procured the order appealed from, and the record was not filed within the time required by rule 16 of the court (see notes under § 1114), nor until nearly a year after the appeal was allowed, the court has no power to then award a citation, and, by a nunc pro tunc order, allow the appeal to stand as of the date when the record was filed. Hudson v. Limestone Natural Gas Co. (1906) 144 Fed. 952, 75 C. C. A. 678.

Where the time within which to return the record into the Circuit Court of Appeals as provided by the original citation had expired, the trial court could, on appellee having notice, grant a new citation as against the objection to an extension of the time for the return of the citation on the ground that the appeal was then pending in the Court of Appeals. Sutherland v. Pearce (1911) 186 Fed. 783, 108 C. C. A. 653, vacating order of dismissal (1911) 183 Fed. 1023, 105 C. C. A. 664.

48. —— **Excuse for failure to file citation.**—An appeal from California, dismissed at the last term for apparent want of a citation, reinstated; it appearing that a citation had in fact been signed, served, and filed in the clerk's office, and that the building in which his office was kept had been afterwards partially destroyed by fire, and a great confusion and some loss of records occasioned in consequence. Alviso v. U. S. (1867) 6 Wall. 457, 18 L. Ed. 721.

49. —— **Waiver of citation.**—A party named in a citation on appeal, who joins in a motion to dismiss because the decree is not final, waives service of the citation. Andrews v. National Foundry & Pipe Works (1897) 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153, denying motion for rehearing (1896) 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139.

50. —— **Form and sufficiency.**—A citation on appeal to the circuit court of appeals must be signed by the judge or justice. Freeman v. Clay (1891) 48 Fed. 849, 1 C. C. A. 115, decree affirmed (1892) 52 Fed. 1, 2 C. C. A. 587.

An irregularity in a citation in being addressed to a firm instead of to the individual partners thereof is cured by the partners appearing generally, without making any objection. U. S. v. Hopewell (1892) 51 Fed. 798, 2 C. C. A. 510.

51. —— **Service.**—A certiorari will be awarded upon a suggestion that the citation has been served, but not sent up with the transcript of the record. Field v. Milton (1806) 3 Cranch, 514, 2 L. Ed. 516.

An attorney cannot withdraw his name after it has been entered upon the record without leave of court, and the service of a citation upon him, in case of appeal, is as valid as if served on the party himself. U. S. v. Curry (1848) 6 How. 106, 111, 12 L. Ed. 363.

A state officer, prosecuting a suit for the state, is the adverse party, and citation must be served on him. Poydras de la Lande v. Louisiana (1854) 17 How. 1, 2, 15 L. Ed. 93.

A service of citation on the attorney of defendant in error is sufficient, but where the attorney of record is dead, service on his personal representative is insufficient, nor can service be legally made on the partner of the deceased attorney. Bacon v. Hart (1861) 1 Black, 38, 39, 17 L. Ed. 52.

Where a writ of error is taken to the district court, but no citation is served on defendant in error agreeably to the act of 1789, the writ will on motion be dismissed for want of jurisdiction. Id.

The omission to serve a citation actually issued held not to avoid an appeal. Dayton v. Lash (1876) 94 U. S. 112, 113, 24 L. Ed. 33.

52. —— **Alias citations.**—Where an appeal to which necessary parties are omitted is seasonably docketed, but no application for the issuance of an alias citation to them is made before the expiration of the first term at which the case can be heard, the appeal becomes inoperative, in so far as it challenges rights of the omitted parties. Gray v. Grand Forks Mercantile Co. (1905) 138 Fed. 344, 70 C. C. A. 634.

Cited without definite application, Insurance Co. of Valley of Virginia v. Mordecai (1858) 21 How. 195, 197, 16 L. Ed. 94; Washington v. Dennison (1867) 6 Wall. 495, 18 L. Ed. 863; Armstrong's Foundry v. U. S. (1867) 6 Wall. 766, 769, 18 L. Ed. 882; Bigler v. Waller (1870) 12 Wall. 142, 148, 20 L. Ed. 260; Bartemeyer v. Iowa (1871) 14 Wall. 26, 27, 20 L. Ed. 792; Aurrecoechea v. Bangs (1884) 3 Sup. Ct. 639, 110 U. S. 217, 28 L. Ed. 125; Farrar v. Churchill (1890) 10 Sup. Ct. 771, 772, 135 U. S. 609, 34 L. Ed. 246; Gregory Consol. Min. Co. v. Starr (1891) 11 Sup. Ct. 914, 141 U. S. 222, 35 L. Ed. 715; O'Neil v. Vermont

(1892) 12 Sup. Ct. 693, 707, 144 U. S. 823, 36 L. Ed. 450 (dissenting opinion); Ballew v. U. S. (1895) 16 Sup. Ct. 263, 268, 160 U. S. 187, 40 L. Ed. 388; Old Nick Williams Co. v. Same (1909) 30 Sup. Ct. 221, 222, 215 U. S. 541, 54 L. Ed. 318; Dufour v. Lang (1892) 54 Fed. 913, 917, 4 C. C. A. 663; Lloyd v. Chapman (1899) 93 Fed. 599, 600, 35 C. C. A. 474; Frame v. Portland Gold Min. Co. (1901) 108 Fed. 750, 47 C. C. A. 664; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Lockman v. Lang (1903) 128 Fed. 279, 62 C. C. A. 550; Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C. A. 360, certiorari denied (1909) 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068; Bernard v. Lea (1913) 210 Fed. 583, 127 C. C. A. 219; Miller v. Tobin (C. C. 1883) 18 Fed. 609, 612; Providence Washington Ins. Co. v. Wager (C. C. 1888) 37 Fed. 59, 60.

§ 1654. (R. S. § 698.) Transcripts on appeals [in equity and admiralty].

Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court: Provided, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the Supreme Court, except in admiralty and prize causes.

Act March 3, 1803, c. 40, § 2, 2 Stat. 244. Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 163. Act June 30, 1864, c. 174, § 13, 13 Stat. 310.

The provisions of this section may be regarded as made applicable to appeals in equity and in admiralty to the circuit courts of appeals, under section 6 of the Circuit Courts of Appeals Act of March 3, 1891, c. 517, § 6, 26 Stat. 828, incorporated in Jud. Code, § 128, ante, § 1120, by the provision of section 11 of that act, ante, § 1651, that "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals."

The contents of the final record in equity and admiralty causes were prescribed by R. S. § 750, ante, § 1604.

Notes of Decisions

1. Application to circuit court of appeals.
2. Time of filing transcript.
3. Effect of failure to file transcript.
4. Contents of record or transcript.
5. Consent of parties to contents.
6. Form and sufficiency.
7. Statement of facts.
8. Setting out collision rules violated.
9. Agreed statement of facts.
10. Transmission of record.
11. Transmission of original papers.
12. Conclusiveness of record.
13. Correction of deficiencies and amendment.
14. Examination of evidence by court.
15. Return of record to lower court.
16. Further proof on appeal.
17. —— Orders for further proof.
18. —— Examination of witnesses.
19. —— Admissibility of particular evidence.
20. —— Method of taking new proof.
21. —— New proof as dependent on failure to produce below.

See notes under § 1536, subd. II, § 634 et seq.

1. Application to circuit court of appeals.—This section applies to appeals to the circuit court of appeals. The Philadelphian (1894) 60 Fed. 423, 427, 9 C. C. A. 54.

2. Time of filing transcript.—Where an appeal is taken to the Supreme Court, the transcript must be filed and the case docketed at the term next succeeding the appeal, and though the case must be dismissed if the transcript is not filed in time, yet appellant can prosecute another appeal. The Virginia v. West (1856) 19 How. 182, 183, 15 L. Ed. 594.

An appeal must be prosecuted by filing the record in the term next after the appeal is taken, and, if brought up and filed after the first term is gone by, the appeal will be dismissed. Mesa v. U. S. (1862) 2 Black, 721, 722, 17 L. Ed. 350.

The general rule is that the transcript of the record must be filed and the case docketed at the term next succeeding the appeal, but it does not apply when appellant without fault is prevented from seasonably obtaining the transcript by fraud of the other party, or by the ill-founded order of the court below, or by contumacy of its clerk. U. S v. Gomez (1865) 3 Wall. 752, 763, 18 L. Ed. 212.

An appeal will be dismissed where the record was not brought and filed within 60 days of the next term of court. German v. U. S. (1866) 5 Wall. 825, 18 L. Ed. 502.

Though a prayer for an appeal and its allowance below constitute an ap-

peal, though no bond be given, yet if no transcript be filed in the Supreme Court at the term next succeeding allowance of the appeal, it loses its vitality. Edmonson v. Bloomshire (1868) 7 Wall. 306, 311, 19 L. Ed. 91.

Where a transcript of the record is filed in the Circuit Court of Appeals after the time prescribed by the rules has expired, but before a motion is made to dismiss the appeal on that ground, such motion will not be granted. The Kawailan (1904) 128 Fed. 679, 63 C. C. A. 347.

Where a transcript of the record is filed in the Circuit Court of Appeals within 60 days from the signing of the citation and within the time specified therein, but after the return day of the writ of error, and the failure to file it before that return day has not continued the hearing of the case over any term of court, and no motion to dismiss the writ is made until the expense of printing the transcript has been incurred, the writ will not be dismissed. Incorporated Town of Gilman v. Fernald (1905) 141 Fed. 940, 72 C. C. A. 666.

Where under the express provisions of rule 9 of the Supreme Court (notes under § 1232) and rule 14 of the Circuit Court of Appeals (notes under § 1114, ante), the transcript or return to the writ of error is filed in the appellate court after the return day named in the writ but before the expiration of the next term after the writ issues, the writ is in force, unless before the filing of the transcript or return the defendant in error moves to dismiss the case. Gould v. U. S. (1913) 205 Fed. 883, 126 C. C. A. 1.

Where the transcript or return is not filed in the Circuit Court of Appeals during the next term after the writ is allowed, the writ expires, and the plaintiff in error may have a second writ within the time limited for an appeal. Id.

3. Effect of failure to file transcript. —Under this section and rule 14 of the Circuit Court of Appeals (notes under § 1114, ante), it devolves on appellant to bring a record showing such proceedings as are necessary for presentation of the errors assigned, and for want thereof the court has power to dismiss the appeal. But the power to dismiss ought not to be exercised unless the omission arose from negligence or indifference, and where good faith is shown the appellee will be directed to designate such additional papers, documents, and proof as he deems necessary for a proper presentation of the case, and appellant will be ordered to file the same as a part of the record under penalty of a dismissal of the appeal. State of Kansas v. Meriwether (1909) 171 Fed. 39, 96 C. C. A. 281.

4. Contents of record or transcript. —It is not ground for reversing a decree in admiralty that the facts do not appear of record. Hills v. Ross (1796) 3 Dall. 184, 187, 1 L. Ed. 562.

As appeals are subject to the same rules as writs of error brought under Judiciary Act, § 22, which bring up the whole record, an appeal cannot be dismissed on the ground that the record does not show any question of law for review. Wheeler v. Harris (1870) 12 Wall. 136, 141, 20 L. Ed. 278.

Though this section provides that on appeals in admiralty a transcript of the record shall be transmitted, and copies of the proofs and of such papers on file as may be necessary on the hearing of the appeal, the oral testimony should not be brought up, as Act Feb. 16, 1875, c. 77, § 1 (this compilation, § 1585), limits reviews of the judgments on the instance side of admiralty courts to questions of law arising on record, and to such rulings of the court below excepted to at the time as may be presented by bill of exceptions. The Adriatic (1880) 103 U. S. 730, 26 L. Ed. 605. This section was held to give the Supreme Court power to prescribe by rule what should be done in cases where Act Feb. 16, 1875, c. 77, § 1, 18 Stat. 315, applied, and a rule was promulgated as to what the record should contain in cases of admiralty and maritime jurisdiction, where the facts are found below, and the power of review is limited to determining questions of law arising on the record. The Adriatic (1880) 103 U. S. 730, 731, 26 L. Ed. 605.

On a libel for the condemnation of a vessel for taking fur seal, contrary to law, within waters of Alaska belonging to the United States, the vessel owner asked no finding as to the exact locality of the seizure, but, after the findings and conclusion of law were filed, moved in arrest of judgment, on the ground that "from the evidence produced on the part of the United States it appears that this court has no jurisdiction over the subject-matter of this cause." Held, that this motion was not equivalent to a plea in abatement, nor to a declinatory allegation in the nature of a plea to the jurisdiction, and therefore could not make the evidence referred to a part of the technical record. Ex parte Cooper (1892) 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

Section 1585, ante, requiring the circuit courts, in admiralty cases, to make separate findings of fact and conclusions of law, and limiting the supreme court, on appeal, to a review of the questions of law arising on the record, etc., is not applicable to the trial of admiralty cases in the district courts, and the review thereof on appeal by the circuit courts of appeal; but in the latter courts an admiralty appeal is, to

all intents and purposes, a trial de novo, so that the appeal cannot be heard upon the merits, where the transcript of the record does not contain the testimony taken below, as required by general admiralty rule 52 and by the rules of the circuit court of appeals. Nelson v. White (1897) 83 Fed. 215, 32 C. C. A. 166.

A transcript of appeal in admiralty should contain all the evidence adduced on both sides. When such evidence is not reduced to writing in the lower court, and there is no rule of that court requiring it to be reduced to writing, it would seem that an appeal can only be heard on the merits, where the evidence adduced appears by an agreed statement of facts, or where a statement is made by the court of the evidence adduced, or of the facts proved. The Edward H. Blake (1899) 92 Fed. 202, 34 C. C. A. 297.

Where a case removed from a state court is taken to a circuit court of appeals for review, either on a writ of error or by appeal, the petition for removal is an essential part of the record to enable the court to determine its own jurisdiction, without which it will not proceed to a final adjudication. Larned v. Jenkins (1901) 109 Fed. 100, 48 C. C. A. 252.

On an appeal to the Circuit Court of Appeals, where there is no question raised as to the credibility of any witness, or as to the weight of his testimony, and it is not important that the court should know just how the testimony was given, the testimony should not be printed in question and answer in the appeal record, but should be presented in narrative form. Radford v. U. S. (1904) 129 Fed. 49, 63 C. C. A. 491.

On an appeal in admiralty, evidence not made a part of the bill of exceptions will not be considered. The Wyandotte (1906) 145 Fed. 321, 75 C. C. A. 117, affirming decree (D. C. 1905) 136 Fed. 470.

Where the evidence was not in the record, the trial court had not passed on the referee's findings or the exceptions thereto or to his conclusions of law, and it was impossible to tell upon what the trial court based its judgment, the merits of the case cannot be reviewed. Tiernan v. Chicago Life Ins. Co. (1914) 214 Fed. 238.

Only the process, pleadings, orders, judgment, and matters properly preserved in the bill of exceptions constitute a part of the record on a writ of error, motions based on matters dehors the record being only available if preserved by bill of exceptions or by agreement of parties or orders of court. Eldorado Coal & Mining Co. v. Mariotti (1914) 215 Fed. 51, 131 C. C. A. 359.

On a question of fact an appellate court cannot have the entire record before it, where the trial court and jury made an inspection of the premises where an accident occurred. Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co. (1914) 216 Fed. 503, 133 C. C. A. 9, L. R. A. 1915B, 953.

A discretionary order cannot be reviewed, unless the record contains the evidence on which it was based. Walker v. Giles (1914) 218 Fed. 637, 134 C. C. A. 395, affirming decree (D. C. 1913) 207 Fed. 825.

Where the papers on a motion for rehearing, taken in connection with the record, illustrated the opinion rendered on such motion, and the disposition of the motion was referred to in the decree appealed from, held, that the whole was proper to be transcribed into the record; United States supreme court rule 8, requiring a copy of the opinion or opinions filed in the case to be included. Hoe v. Kahler (C. C. 1886) 27 Fed. 145.

Where, in a doubtful case, the clerk is requested by one party to an appeal to insert in the transcript what he is requested by the other party to leave out, a direction by the court is proper. Id.

5. Consent of parties to contents.—Parties will not be permitted to make up a record to suit themselves without regard to the wishes of their opponents or the rules of practice of the court. Florida C. R. Co. v. Schutte (1879) 100 U. S. 644, 657, 25 L. Ed. 605.

6. Form and sufficiency.—A certificate that a transcript of a record was a "full, true and correct copy of all the proceedings, entries, and files in the district court for the Southern district of California, except the transcript sent up from the board of land commissioners" was held so far good that the party alleging it to be bad was referred to his remedy of a suggestion of diminution and motion for certiorari. U. S. v. Gomez (1863) 1 Wall. 690, 701, 17 L. Ed. 677.

The filing of a transcript containing only blank forms of a certificate of authentication without the seal of the court below, or the signature of its clerk, is not the filing of the transcript at the next term after the issuing of the writ of error, without which the Supreme Court can have no jurisdiction. Blitz v. Brown (1868) 7 Wall. 693, 694, 19 L. Ed. 280.

The circuit court of appeals cannot be required to review the testimony in an admiralty appeal when the record is not made up as required by admiralty rule 52, but contains only the judge's notes of the testimony, and there is no stipulation that anything may be omitted. The Alijandro v. Wallace (1893) 56 Fed. 621, 6 C. C. A. 54.

On appeals in admiralty the record should be so prepared as to show

which witnesses were examined in the presence of the district judge and which were not. The Gypsum Prince (1895) 67 Fed. 612, 14 C. C. A. 573, reversing decree (D. C. 1893) 57 Fed. 859.

An appeal will not be dismissed on account of the transcript not having been properly made up or certified, when the fault thereof is not attributable solely to the appellant. The Ethel (C. C. 1887) 31 Fed. 576.

7. Statement of facts.—In chancery cases, a statement of facts must accompany the transcript. U. S. v. Hooe (1803) 1 Cranch, 318 319, 2 L. Ed. 121.

8. Setting out collision rules violated.—The holding of the trial court that a vessel was in fault in violating a rule of the supervising inspectors cannot be reviewed on appeal where such rule is not set out in the record or the briefs, for the appellate court cannot take judicial notice of such rules. McCaffrey v. The Clara and The Reliance (1893) 55 Fed. 1021, 5 C. C. A. 390, affirming decree as to The Reliance and reversing as to The Clara (D. C. 1892) 49 Fed. 765.

9. Agreed statement of facts.—A case cannot be brought by writ of error from a circuit court on an agreed statement of facts. Keene v. Whittaker (1839) 13 Pet. 459, 10 L. Ed. 246.

10. Transmission of record.—The transcript of a record on appeal is understood to be transmitted to the supreme court from the circuit court, as such, under its seal, so that the clerk, in making and certifying the transcript acts as an officer of, and under the general direction and control of, the lower court, in the first instance, subject to the further order of the supreme court on proceedings on suggestion of diminution of the record. Hoe v. Kahler (C. C. 1886) 27 Fed. 145, 146.

11. Transmission of original papers.—Where, in a prize cause, there was a material point arising from the comparison of handwriting, the supreme court of the United States ordered the clerk of the circuit court to transmit to the supreme court the original two writings, and, in the same order, required the claimant to make further proof of certain facts, and a detailed account of certain voyages. The Elsineur (1816) 14 U. S. (1 Wheat.) 439, 4 L. Ed. 130.

Power over the transmission of original papers is confined to such as require actual inspection as originals to give them full effect in determination of the case. Craig v. Smith (1879) 100 U. S. 226, 232, 25 L. Ed. 577.

In admiralty suits which are heard de novo on appeal, it is important that charts referred to by witnesses, and on which locations pointed out or marked, should be preserved in the record. The Catawissa (1914) 213 Fed. 14, 129 C. C. A. 352.

12. Conclusiveness of record.—The statement of facts sent up with the record on appeal in admiralty is conclusive, and the court cannot look into the evidence. Jennings v. The Perseverance (1797) 3 U. S. (3 Dall.) 336.

The Supreme Court can look only to the record to ascertain what was decided in the court below. Davis v. Packard (1833) 7 Pet. 276, 282, 8 L. Ed. 684.

13. Correction of deficiencies and amendment.—If an order for further proof is denied by the court below, when it ought to be granted, and vice versa, the appellate court will give relief, if the objection appears of record to have been duly taken below; aliter, if evidence in the nature of further proof be introduced, and no formal objection or order appears of record. The Pizarro (1817) 15 U. S. (2 Wheat.) 227, 4 L. Ed. 226.

Certiorari issued to supply omission in record. Morgan v. Curtenius (1856) 19 How. 8, 15 L. Ed. 576.

Certiorari is not the proper remedy for relief to plaintiff in error, where the only defect in a transcript sent to the Supreme Court is that the clerk has not appended to it his certificate that it contains the full record, but he should ask leave to withdraw the transcript, to enable him to apply to the clerk to append the necessary certificate. Hodges v. Vaughan (1873) 19 Wall. 12, 13, 22 L. Ed. 46.

On an allegation of deficiency in the record, the deficiency may be supplied by certiorari, and a motion to dismiss the appeal on such allegation will be denied. The Rio Grande (1873) 19 Wall. 178, 188, 22 L. Ed. 60.

Parties in admiralty cases have a right to make any amendments in an appellate court that are required to bring forward the merits of the case, but libelants cannot introduce a new subject of controversy; such amendment not being justified by admiralty practice, though the most liberal principles prevail in admiralty courts as to amendments. Houseman v. The North Carolina (1841) 15 Pet. 40, 50, 10 L. Ed. 653.

A party to an appeal in admiralty is entitled to a writ of certiorari to require the clerk of the district court to include in the record, and properly certify, documents which were used in evidence, but have been omitted from the record. The Margaret B. Roper (1901) 106 Fed. 740, 45 C. C. A. 577.

The Circuit Court of Appeals is without jurisdiction to allow an amendment of the record as sent up by the trial court. Jackson Co. v. Gardiner Inv.

Co. (1912) 200 Fed. 120, 118 C. C. A. 294.

14. Examination of evidence by court.—Where the appeal involves a question of fact, the burden is on the appellant to show that the decree below was erroneous; but the supreme court may re-examine the whole testimony therein, since it is as much its duty to reverse the decree for error of fact as for error of law. The City of Hartford (1877) 97 U. S. 323, 328, 24 L. Ed. 930.

15. Return of record to lower court.—Should the court below request a return of the record, in order that it might proceed further with the cause, the Supreme Court, in a proper case and under proper restrictions, might make the necessary order, but it cannot do so on application of the parties. Roemer v. Simon (1875) 91 U. S. 149, 150, 23 L. Ed. 267.

16. Further proof on appeal.—The supreme court is, under this act and under the established chancery practice, prohibited from receiving newly discovered evidence on the hearing of an appeal from a circuit court, except in admiralty and prize causes. Russell v. Southard (1851) 12 How. 139, 159, 13 L. Ed. 927.

In admiralty and prize cases the facts as well as the law of the case were open to revision on appeal. The Baltimore v. Rowland (1869) 8 Wall. 377, 382, 19 L. Ed. 463. And new evidence may be received. The Lady Pike (1874) 21 Wall. 1, 8, 22 L. Ed. 499.

After an appeal in equity, the supreme court cannot, on motion, set aside a decree of the court below and grant a rehearing, but can only affirm, reverse, or modify the decree appealed from, and on the hearing of the cause no new evidence can be received in the supreme court. Roemer v. Simon (1875) 91 U. S. 149, 150, 23 L. Ed. 267.

Where very important facts are discovered after trial, and there is either no dispute about them, or substantially little dispute, it is better that the trial court should reconsider the case, the same as where there has been an important misapprehension or mistake as to the testimony or facts proved; but where the opening of the cause would renew the same controversy upon a new field of evidence, evidently with contradictory witnesses, all of which must be weighed in connection with the evidence previously considered, the remedy is by appeal, where the new evidence may be heard under this section. The Havilah (D. C. 1889) 39 Fed. 333, 334.

17. —— Orders for further proof.—Where affidavits produced on an order for further proof are positive, but their credibility impaired by the nonproduction of letters mentioned in them, a second order for further proof will be allowed in the appellate court. The Frances (1814) 12 U. S. (8 Cranch) 348, 3 L. Ed. 585.

Where, on a seizure, the evidence is so ambiguous or so contradictory that the supreme court finds a decision difficult, it will order the cause to further proof. The Samuel (1816) 14 U. S. (1 Wheat.) 9, 4 L. Ed. 23.

Where there was a material point arising from the comparison of handwriting, the supreme court of the United States ordered the clerk of the circuit court to transmit to the supreme court the original two writings, and, in the same order, required the claimant to make further proof of certain facts, and a detailed account of certain voyages. The Elsineur (1816) 14 U. S. (1 Wheat.) 439.

The Supreme Court, in appeals in admiralty and prize causes, may allow additional evidence to be furnished by either party and where further evidence is taken after appeal, the issuing of the commission by the clerk of the Circuit Court and the uniting by both parties in its execution furnish a presumption that the proper order was given, or, if not, that the parties waived all objection. Rich v. Lambert (1851) 12 How. 347, 353, 13 L. Ed. 1017.

Cases of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examinations taken in preparatorio; and it is in the discretion of the court thereupon to make sua sponte, or not to make, an order for further proof. But the claimant may move for the order, and show the grounds of the application by affidavit or otherwise, at any time before the final decree is rendered; and such an order may also be made in the appellate court. The making of it anywhere is controlled by the circumstances of each case. It is made with caution, because of the temptation it holds out to fraud and perjury; and made only when the interests of justice clearly require it. The Sally Magee (1865) 70 U. S. (3 Wall.) 451, 18 L. Ed. 197.

Where on appeal in a prize case it appears that the parties have taken further proofs bearing on the legality of the capture, without objection, it will be inferred that there was an order granted in the trial court to take further proofs. The Georgia (1868) 74 U. S. (7 Wall.) 32, 19 L. Ed. 122.

Rule 7 of the admiralty rules promulgated by the circuit court of appeals for the Second circuit, to take effect July 2, 1892, authorized the taking of new proofs only on sufficient cause shown to the court or a judge thereof pursuant to an application made within 15 days after the filing of the apostles, and upon 4 days' notice to the adverse party. Held, that this rule will not be enforced as against a party

whose case was tried in the district court prior thereto, in reliance upon the right to introduce such new testimony on an appeal as was permissible under the then existing rules and practice of the circuit; and in such a case the court will, as under the old practice, receive new material evidence which was not intentionally withheld in the district court. Insurance Co. of North America v. The Venezuela (1892) 52 Fed. 873, 3 C. C. A. 319.

18. —— Examination of witnesses.—An affidavit on which a motion to examine witnesses in the supreme court was founded, simply stating their testimony is material as advised by counsel, does not accord with the practice of the court. The R. S. Mabey v. Atkins (1870) 10 Wall. 419, 19 L. Ed. 963.

Where it appeared by affidavits filed by the appellant, who was claimant below, in a collision case, that it was probable that two witnesses for the libelant received, before testifying, a promise from him for the payment of a sum of money in the event that the case should be decided in his favor, and that the appellant ascertained the fact after the appeal, the court ordered a commission to take the testimony of such witnesses relative to the alleged agreement. The Western Metropolis (1870) 79 U. S. (12 Wall.) 389, 20 L. Ed. 394.

On appeals in admiralty the record should be so prepared as to show which witnesses were examined in the presence of the district judge and which were not. The Gypsum Prince (1895) 67 Fed. 612, 14 C. C. A. 573, 35 U. S. App. 165.

19. —— Admissibility of particular evidence.—On an appeal in an admiralty cause, it is allowable, under certain restrictions, to allege and prove what was not alleged nor proved below. The Marianna Flora (1826) 24 U. S. (11 Wheat.) 1, 6 L. Ed. 405.

Where, in a collision case involving the conduct of a French vessel, there were offered in evidence as new proofs, on appeal, the records of the French consulate, containing statements made by the master and certain members of the crew in the course of an examination before a consular officer, a copy of which record had been served upon the opposite party as the master's protest, such record was admissible, in so far as the master's statements were concerned. But, in so far as the record contained statements of others than the master, it was only admissible in contradiction of testimony given by them at the trial, and to which their attention had been called when under examination. The Lisbonense (1892) 53 Fed. 293, 3 C. C. A. 539, following Bedell v. The Potomac (1869) 75 U. S. (8 Wall.) 590, 19 L. Ed. 511.

An appellate court should not receive as new evidence in an admiralty case a deposition by a witness who testified in the trial below concerning the very matters referred to in the deposition, when no ground for introducing additional proof is shown. Oliver v. The Sirius (1893) 54 Fed. 188, 4 C. C. A. 273.

20. —— Method of taking new proof.—The supreme court will hear new evidence, and award commissions, if necessary, to take such evidence. The James Wells v. U. S. (1812) 11 U. S. (7 Cranch) 22, 3 L. Ed. 256; The Clarissa Claiborne v. Same (1812) 11 U. S. (7 Cranch) 107, 3 L. Ed. 284.

Affidavits to be used as further proof must be taken by a commission. The London Packet (1817) 15 U. S. (2 Wheat.) 371, 4 L. Ed. 264.

Under Rule 8 of the circuit court of appeals for the Fifth circuit, the practice in admiralty appeals is not like that formerly existing in the circuit courts under Adm. Rule 49, but like the supreme court practice; and new evidence cannot be taken by deposition de bene esse, but only by a commission under Sup. Ct. Rule 12 (3 Sup. Ct. ix), which should not issue of course, but only when it appears that the testimony is material, and a good excuse for not offering it in the trial court is given. The Beeche Dene (1893) 55 Fed. 526, 5 C. C. A. 208.

After an appeal, the court may allow evidence, not received in season, to be put upon the record de bene esse, with a memorandum of the fact. The London Packet (C. C. 1815) Fed. Cas. No. 8,474.

21. —— New proof as dependent on failure to produce below.—On appeal to the supreme court from a judgment of condemnation in a prize case, where there is a defect of proof, plaintiffs will not be granted time for further proof, where they have pertinaciously withheld from the court documentary evidence which must be supposed to have been in their possession, and which they do not deny was received by them. The St. Lawrence (1814) 12 U. S. (8 Cranch) 434, 3 L. Ed. 615.

Where, in proceedings to condemn a vessel as a prize, certain persons interpose a claim for the cargo, and there is a lack of proof as to the interest of the claimants, on appeal from a condemnation, where the parties are fully apprised of the nature of the proof which their act requires, and withhold from the court documentary evidence which must be supposed to have been in their possession, the appellate court will deny the application for time to make further proof. The St. Lawrence (1815) 13 U. S. (9 Cranch) 120, 3 L. Ed. 676.

In an appeal in admiralty, a commission to take further evidence will not be allowed unless the appellant shows some excuse satisfactory to the court for the failure to examine the witnesses

in the courts below. The Mabey (1869) 77 U. S. (10 Wall.) 419, 19 L. Ed. 963.

Some excuse, satisfactory to the supreme court, should be shown for failure to examine witnesses below, such as that the evidence was discovered too late, or the witnesses were subpœnaed and failed to appear, and could not be reached by attachment and the like. The R. S. Mabey v. Atkins (1870) 10 Wall. 419, 420, 19 L. Ed. 963.

Depositions taken under a commission from a circuit court in admiralty will not be made a part of the record on appeal, unless a sufficient excuse be shown for not taking the evidence in the usual way before the court below. The Juniata (1875) 91 U. S. 366, 23 L. Ed. 208.

Though, on an appeal in admiralty from the district to the circuit court of appeals, it is not a matter of course to allow parties who have withheld evidence available to them in the district court to present such evidence on appeal, it has been the practice in the Second circuit to take such testimony, without excusing its nonproduction below, where neither side has objected; and in view of such practice, where no objection was interposed by an appellee to the taking of new proof until such taking was completed, a motion thereafter made, to suppress such depositions, will be denied. Singlehurst v. La Compagnie Générale Transatlantique (1892) 50 Fed. 104, 1 C. C. A. 487, 1 U. S. App. 126.

In an admiralty case the circuit court of appeals will, on motion, strike from the files depositions taken on appeal by a party who might easily have produced them in the trial court, and who was as well informed then as now as to its materiality and necessity. The Lurline (1892) 57 Fed. 398, 5 C. C. A. 165.

New testimony will be admitted on appeal in admiralty when the court is of opinion that, under all the circumstances, substantial justice requires it, though a satisfactory excuse is not given for failing to produce the testimony below. Red River Line v. Cheatham (1894) 60 Fed. 517, 9 C. C. A. 124, 23 U. S. App. 19.

The parties to a suit in admiralty should make reasonable effort to obtain all testimony material to the issues in the trial court, and the practice of taking further testimony after an adverse decision, to be used in the appellate court, is one not to be encouraged. Pacific Steam Whaling Co. v. Grismore (1902) 117 Fed. 68, 54 C. C. A. 454, affirming decree The Valencia (D. C. 1901) 110 Fed. 221.

Cited without definite application, Conn v. Penn (1820) 5 Wheat. 424. 5 L. Ed. 125; Sampeyreac v. U. S. (1833) 7 Pet. 222, 240, 8 L. Ed. 665; Germania Ins. Co. v. The Lady Rike (1874) 21 Wall. 1, 22 L. Ed. 499; Blease v. Garlington (1875) 92 U. S. 1, 4, 23 L. Ed. 521; Parks v. Booth (1880) 102 U. S. 96, 97, 26 L. Ed. 54; U. S. v. Coe (1894) 15 Sup. Ct. 16, 18, 155 U. S. 76, 39 L. Ed. 76; Teller v. U. S. (1901) 111 Fed. 119, 49 C. C. A. 263; Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C. A. 360 (certiorari denied [1909] 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068); Miller v. Tobin (C. C. 1883) 18 Fed. 609, 612; Ferguson v. Dent (C. C. 1891) 46 Fed. 88, 94; Southern Building & Loan Ass'n v. Carey (C. C. 1902) 117 Fed. 325 (affirmed [1904] 128 Fed. 1022, 62 C. C. A. 684); Dowagiac Mfg. Co. v. Brennan & Co. (C. C. 1907) 156 Fed. 213, 216.

§ 1655. (R. S. § 1013.) Where both parties appeal to the Supreme Court, one record sufficient.

Where appeal is duly taken by both parties from the judgment or decree of a [circuit or] district court to the Supreme Court, a transcript of the record filed in the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases.

Act Aug. 6, 1861, c. 61, § 1, 12 Stat. 319.

The words of the first sentence of this section inclosed in brackets, "circuit or," became inoperative on the abolition of the circuit courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

See note to preceding section.

Notes of Decisions

Parties to several appeals using one record.—Four appeals were taken by different parties from the same decree. All parties to the suit, by a single instrument, waived citations on "all the appeals." The record was made up as on one appeal. Held, that all parties to the suit appeared as parties to all the appeals, though the appeal bond on one appeal ran to one party only. United States Trust Co. v. Western Contract Co. (1897) 81 Fed. 454, 26 C. C. A. 472.

Assignment of errors by party not appealing.—While both parties in a civil action may sue out a writ of error to the final judgment, yet, where only one exercises that right, the other cannot

assign error in the appellate court, and the same rule prevails in cases of appeals in equity, admiralty, and prize cases. Martin v. Northern Transp. Co. (1870) 12 Wall. 31, 40, 20 L. Ed. 251.

Cited without definite application, Gregory v. Pike (1894) 64 Fed. 415, 416, 12 C. C. A. 202; L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. (1899) 93 Fed. 765, 766, 35 C. C. A. 590 (writ of certiorari denied [1899] 20 Sup. Ct. 1021, 175 U. S. 724, 44 L. Ed. 337); Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 21.

§ 1656. (Act Feb. 13, 1911, c. 47, § 1.) Printed transcript of record on appeal to or writ of error from circuit court of appeals; original documents or other evidence; written transcript not required.

In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: Provided, That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required. (36 Stat. 901.)

This section and the section next following were an act entitled "An act to diminish the expense of proceedings on appeal and writ of error or of certiorari," cited above.

Notes of Decisions

Indexes of records.—This section makes no provision for an index; and in view of the importance of having the indexes of all records comprehensive and uniform, they should be prepared by the clerk of the Circuit Court of Appeals, and since his fee for preparing and indexing the record under the fee bill in force is fixed at a stated sum per page of the whole, and is indivisible, until such fee bill is changed or further legislation enacted, parties will be required to pay the full fee thereby prescribed, to be held by the clerk until its return is authorized. Colt's Patent Firearms Mfg. Co. v. New York Sporting Goods Co. (1911) 186 Fed. 625, 108 C. C. A. 489.

Clerk's fees.—See Rule 24 Supreme Court printed in notes following § 1232, ante.

The clerk of a federal circuit court of appeals can make no charge for preparing for the printer, the record on an appeal from a final decree of a district court, or for indexing the same, or for supervising the printing and distributing the copies, by virtue of the fee bill prescribed for such services by the federal Supreme Court under the authority of section 1377, ante, where, conformably to this section, the appellant has caused the transcript of record to be printed and indexed, under a rule of the district court, and has caused to be filed with the clerk of the circuit court of appeals 25 printed copies thereof, since this later statute by implication sets aside the fee bill authorized by the former statute, so far as it fixes the fee which the clerk of the circuit court of appeals may charge for such services. Rainey v. W. R. Grace & Co. (1914) 34 Sup. Ct. 242, 231 U. S. 703, 58 L. Ed. 445.

This section does not apply to an appeal from an order granting a preliminary injunction, and in such case the clerk's supervision fee is not abolished. Smith v. Farbenfabriken of Elberfeld Co. (1912) 197 Fed. 894, 117 C. C. A. 133.

This act abolishes the clerk's supervision fee where it is sought to review a final order or decree on writ of error or appeal, held to apply to a petition to revise in bankruptcy proceedings. In re Burr Mfg. Co. (1914) 215 Fed. 898, 132 C. C. A. 238.

An order in a so-called omnibus proceeding in bankruptcy, directing the distribution of the proceeds of sale of

certain securities, is a final order, and so is a final decree, within this act, which abolishes the clerk's supervision fee where a final order or decree is sought to be reviewed by the Circuit Court of Appeals. Id.

For certification of a transcript for the Circuit Court of Appeals, the clerk of a District Court is entitled to tax a fee of 15 cents per folio for the entire transcript, including such portion as has been printed by the appellant or plaintiff in error, as fixed for making a record by § 1383, ante. Sarfert Co. v. Chipman (D. C. 1912) 205 Fed. 937.

§ 1657. (Act Feb. 13, 1911, c. 47, § 2.) Printed record in court below as part of transcript on appeal to or writ of error or certiorari from Supreme Court; transmission and use of uncertified copies; fees; written transcript of part of record printed not required.

In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ of error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required. (36 Stat. 901.)

See note to preceding section.

For table of fees, see Rule 24 of Supreme Court in notes following § 1232, ante.

§ 1658. (R. S. § 998.) Citation.

When the writ is issued by a circuit court to a district court, the citation shall be signed by the judge of such district court, or by the circuit judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least twenty days' notice.

Act Sept. 24, 1789, c. 20, § 22, 1 Stat. 84. Act Feb. 5, 1867, c. 28, § 2, 14 Stat. 386.

The writ mentioned in this section was the writ of error mentioned in the preceding section of the Revised Statutes, R. S. § 997, ante, § 1653.

Writs of error for review by circuit courts of decisions of district courts were abolished by the Circuit Courts of Appeals Act, of March 3, 1891, c. 517, § 4, ante, § 1646; but by section 11 of that act, ante, § 1647, any judge of the circuit courts of appeals has the same powers and duties, as to allowance of writs of error, as the other justices or judges.

Notes of Decisions

Citation on appeal or writ of error —Necessity.—Where the appeal is prayed at the same time when the decree or sentence is pronounced, the citation is not necessary. The San Pedro (1817) 2 Wheat. 132, 137, 4 L. Ed. 202.

Except in cases of appeals allowed in

open court during the term at which the decree appealed from was rendered, a citation returnable at the same term with the appeal or writ of error is necessary to perfect jurisdiction of the appeal or the writ, unless it has been waived. Brockett v. Brockett (1844) 2 How. 239, 241, 11 L. Ed. 251; Hudgins v. Kemp (1855) 18 How. 530, 537, 15 L. Ed. 511; Vansant v. Electro-Magnetic Gaslight Co. (1878) 99 U. S. 213, 25 L. Ed. 265; Chicago & P. R. Co. v. Blair (1879) 100 U. S. 661, 662, 25 L. Ed. 587; Miltenberger v. Logansport, C. & S. W. R. Co. (1882) 1 Sup. Ct. 140, 157, 106 U. S. 286, 27 L. Ed. 117; Hewitt v. Filbert (1885) 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581; Jacobs v. George (1893) 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; West v. Irwin (1893) 54 Fed. 419, 4 C. C. A. 401; Peace River Phosphate Co. v. Edwards (1895) 70 Fed. 728, 17 C. C. A. 358.

Where an appeal is allowed after expiration of the term at which the decree appealed from is rendered, a failure to have a citation issued, returnable at the same term as the appeal, causes the appellate court to lose jurisdiction. West v. Irwin (1893) 54 Fed. 419, 4 C. C. A. 401, dismissing appeal (C. C. 1892) 50 Fed. 362.

When an appeal is taken and perfected during the term at which the decree is rendered, no citation is necessary. Central Trust Co. v. Continental Trust Co. of City of New York (1898) 86 Fed. 517, 30 C. C. A. 235, certiorari denied (1898) 18 Sup. Ct. 940, 171 U. S. 687.

Where an appeal is taken from the circuit court at a term subsequent to that of the decree, a citation is necessary to bring in the parties; but, if the appeal is docketed at the next ensuing term of the circuit court of appeals, a citation may be issued and served at any time before the close of that term, though the time for taking the appeal has expired. Railroad Equipment Co. v. Southern Ry. Co. (1899) 92 Fed. 541.

Where an appeal is allowed in open court, but is not perfected during the term, a citation to the other party is necessary, and should be issued and served within the return day for the appeal. Ruby v. Atkinson (1899) 93 Fed. 577, 35 C. C. A. 458.

When an appeal is allowed in open court at the term when the decree was rendered, no citation is necessary, and an appeal so taken brings into the appellate court all of the parties whose presence is necessary to a determination of the rights of the appellant. McNulta v. West Chicago Park Com'rs (1900) 99 Fed. 328, 39 C. C. A. 545.

When an appeal is allowed in open court at the term when the decree was rendered, and duly perfected, no citation is necessary, and an appeal so taken brings into the appellate court all of the parties whose presence is necessary to a determination of the rights of the appellant. In re Fiechtl (1901) 107 Fed. 618, 46 C. C. A. 497; King v. Thompson (1901) 110 Fed. 319, 49 C. C. A. 59; Swift & Co. v. Kortrecht (1901) 110 Fed. 328, 49 C. C. A. 68; James H. Rice Co. v. Libbey (1901) 105 Fed. 825, 45 C. C. A. 78.

When an appeal is allowed in open court neither the issuance of a citation nor the giving of an appeal bond is jurisdictional. Columbus Chain Co. v. Standard Chain Co. (1906) 145 Fed. 186, 76 C. C. A. 164.

Where an appeal is taken in open court, it is taken against all adverse interests; all parties present in fact or in law being regarded as having notice without citation. Williams v. City Bank & Trust Co. (1911) 186 Fed. 419, 108 C. C. A. 341, writ of certiorari denied City Bank & Trust Co. v. Williams (1911) 32 Sup. Ct. 526, 223 U. S. 727, 56 L. Ed. 632.

Jurisdiction of the court on appeal in an equity case is acquired on the allowance of the appeal, and service of citation is needful only to docket the appeal for hearing, when allowed without his presence, actual or constructive. Pooler v. Hyne (1912) 202 Fed. 194, 120 C. C. A. 408.

Failure to issue a citation at the time of the taking of an appeal is not fatal to the appeal, as the citation may be issued thereafter by proper authority, if the appeal had been taken within the time prescribed. Rector v. Alcorn (1913) 204 Fed. 748, 123 C. C. A. 125.

—— **Service and return.**—Where, on error to the circuit court of appeals, there is nothing in the record to show that the person served with the citation was a person upon whom a lawful service could be made, the return may be amended to show that he was in fact attorney for defendant in error. McClellan v. Pyeatt (1892) 49 Fed. 259, 1 C. C. A. 241.

Though a writ of error is allowed and citation issued, if the citation is not served and no writ is actually issued the appellate court is without jurisdiction and the case should be dismissed. Smith v. Ferst (1895) 66 Fed. 798, 14 C. C. A. 96.

The appeal will be dismissed if no citation has been served on the appellee or his proctors, or either of them. Peace River Phosphate Co. v. Edwards (1895) 70 Fed. 728, 17 C. C. A. 358.

There is no rule in the Seventh circuit requiring the citation to be returnable to or before the next ensuing term of the circuit court of appeals. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 19 C. C. A. 477, overruling motion to dismiss appeal (C. C. 1895) 68 Fed.

412, and appeal dismissed (1897) 84 Fed. 1017, 28 C. C. A. 681.

A general acceptance of service of a citation upon appeal by an attorney is good for all the parties whom he represents of record, though he signs the admission as solicitor for only some of such parties, without naming others. Andrews v. National Foundry & Pipe Works (1897) 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153, denying motion for rehearing (1896) 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139.

A citation in error should be served personally on the attorneys of record, or upon all of the parties in whose favor judgment was entered, and service by mail is insufficient; but where service was so made, but the court has acquired jurisdiction of the case, a new citation may be issued and properly served. Martin v. Burford (1910) 176 Fed. 554, 100 C. C. A. 159.

Since the citation on writ of error is not jurisdictional, but is intended only for a notice that may be waived or substituted by proof of other equivalent notice, it was not a fatal defect that it was made returnable in 60, instead of 30, days. Nome & Sinook Co. v. Ames Mercantile Co. (1911) 187 Fed. 928, 109 C. C. A. 650.

—— **Parties to be cited.**—Appellants or plaintiffs in error, see notes under § 1646, ante.

On an appeal by the United States from the judgment of the circuit court, on an appeal from the board of general appraisers, it is an irregularity to address the citation to the importing firm instead of to the individual partners, but such irregularity is cured by the general appearance of the partners in the appellate court without making any objection. U. S. v. Hopewell (1892) 51 Fed. 798, 2 C. C. A. 510.

The appealing lienor being a subcontractor, and seeking by his appeal to have his lien adjudged prior to the mortgages, as well as to the other mechanics' liens, the owner of the land was also a necessary party to the appeal, since he would be personally liable for a balance due on the mortgage notes, but not on the amount of the subcontractors' lien; and the court could assume the possible failure of the land to sell for enough to meet both lien and mortgages, and the consequent injury to the owner, since the decree appealed from could be injurious to the subcontractor only by assuming the same possibility. Gray v. Havemeyer (1892) 53 Fed. 174, 3 C. C. A. 497.

In a foreclosure suit to which a subsequent mortgagee and certain mechanics' lienors were made parties, the court directed a sale of the property and an application of the proceeds to the payment first of costs, next of the mortgages in their order, and next of the mechanics' liens; and decreed the amount due each lienor, and the equality of all the mechanics' liens in point of time. Held, that where one of the mechanics' lienors appealed, seeking to have his lien given priority, the others were necessary parties, since the court could not subordinate their liens to his in their absence. Id.

The objection of defect of parties is not available on appeal, where the omitted parties are concerned only with questions not disposed of by the decree appealed from. McLeod v. City of New Albany (1895) 66 Fed. 378, 13 C. C. A. 525.

An insolvent railroad company in the hands of a receiver appointed in foreclosure proceedings is a necessary party to an appeal from an order giving to certain judgments against it priority over the mortgages, and directing the receiver to pay such judgments. Farmers' Loan & Trust Co. v. Longworth (1896) 76 Fed. 609, 22 C. C. A. 420, following Davis v. Trust Co. (1894) 14 Sup. Ct. 693, 152 U. S. 590, 38 L. Ed. 563.

Where a decree gives priority to a claim against an insolvent corporation, the receiver and all creditors whose claims are subordinated, and who were parties, are necessary parties to an appeal. Illinois Trust & Savings Bank v. Kilbourne (1896) 76 Fed. 883, 22 C. C. A. 599.

All the parties to a suit or proceeding who appear from the record to have an interest in an order, judgment, or decree challenged in an appellate court must be given an opportunity to be heard there, before such court will proceed to a decision upon the merits of the case; and an appeal taken by one party only, without citation to or appearance by another party interested in the decree, will be dismissed. Dodson v. Fletcher (1897) 78 Fed. 214, 24 C. C. A. 69, motion to set aside dismissal denied (1897) 79 Fed. 129, 24 C. C. A. 466.

An appeal may be prosecuted by one party to the record, as against another, without joining other parties who are in no way interested in or affected by the controversy between the appellant and appellee. Postal Tel. Cable Co. v. Vane (1897) 80 Fed. 961, 26 C. C. A. 342.

An appeal presenting a question whether a judgment creditor of a railroad company or the trustee of its mortgage bondholders is entitled to priority of lien must be dismissed on motion of the trustee, when no citation has been addressed to or served upon it. Boyd v. Stuttgart & A. R. R. R. (1897) 84 Fed. 9, 28 C. C. A. 262.

All parties to a suit or proceeding who appear from the record to have an interest in the order, judgment, or decree challenged in the appellate court must be given an opportunity to be heard there before that court will pro-

ceed to a decision upon the merits of the case, even though they were made parties in the court below, and defaulted in appearance. American Loan & Trust Co. v. Clark (1899) 83 Fed. 230, 27 C. C. A. 522.

Where the basis of one of the contentions of an appellant on the appeal is that a corporation joined in the court below is a necessary party to the suit, the appellate court is without jurisdiction to consider the appeal on the merits, unless such corporation is brought in as a party to the appeal. Railroad Equipment Co. v. Southern Ry. Co. (1899) 92 Fed. 541, 34 C. C. A. 519.

Receivers in a suit to foreclose a railroad mortgage, who had been finally discharged prior to the filing of an intervening petition to establish a judgment recovered against them as a claim against a fund reserved by the court after sale of the road to cover such claims, and who were not made parties to the petition, are not necessary parties on an appeal from the decree entered thereon. St. Louis S. W. Ry. Co. v. Jackson (1899) 95 Fed. 560, 37 C. C. A. 165.

The fund affected by a decree for payment of persons employed by authority of the court, in a suit in which a receiver was appointed, being in the registry of the court, and the payment being ordered by a check drawn by the clerk of the court, and signed by the judge, the receiver is not affected by the decree, and hence is not a necessary party to an appeal therefrom. Edgell v. Felder (1900) 99 Fed. 324, 39 C. C. A. 540.

Defendants below, not interested in the appeal, are not necessary parties thereto. Mills v. Provident Life & Trust Co. of Philadelphia (1900) 100 Fed. 344, 40 C. C. A. 394.

Holders of receiver's certificates, among whom the proceeds of a railroad sold under foreclosure have been distributed, are sufficiently represented by the receiver on an appeal by another creditor from the decree making such distribution, and compliance by the appellant with an order requiring citation on the appeal to be served on all the distributees who had counsel of record, or to whom the receiver was indebted in any considerable sum, is sufficient to sustain the appeal. Galveston, H. & N. Ry. Co. v. House (1900) 102 Fed. 112, 42 C. C. A. 205.

A railroad company which is hopelessly insolvent, and practically defunct, and all of whose property, rights, and franchises have been transferred to a purchaser at foreclosure sale, is not a necessary party to an appeal by such purchaser from a decree distributing the proceeds of the sale. Id.

A decree in a suit to enforce a mechanic's lien that a complainant shall take nothing by its action, and that it is entitled to no lien against a certain defendant named, is a final decision reviewable by the sole appeal of the complainant, although another necessary party, who was never served with process, and never appeared in the action, was named in the petition and summons as a defendant. Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (1901) 111 Fed. 81, 49 C. C. A. 229, reversing decree Hooven, Owens & Rentschler Co. v. Featherstone (C. C. 1900) 99 Fed. 180.

On an appeal to the circuit court of appeals, citation need be served only on those parties whose interests are affected by the decree or order appealed from. Coler v. Alen (1902) 114 Fed. 609, 52 C. C. A. 389.

Creditors of an insolvent partnership, whose claims have been allowed in proceedings to wind up its business, are necessary parties to an appeal from an order of distribution made therein; and where, because of the failure of the appellant to have citation issued for them within the required time, the appeal, as to them, has become inoperative, and their dividends have been paid, they cannot thereafter be brought in, and the appeal will be dismissed. Bloomingdale v. Watson (1904) 128 Fed. 268, 62 C. C. A. 600.

An appeal will not be dismissed because of the failure to bring in by citation parties who have no interest in the decree appealed from. Tull v. Nash (1905) 141 Fed. 557, 73 C. C. A. 29.

Where certain trustees of a bankrupt as individuals became mere stakeholders of a fund in controversy after the institution of their suit in a state court, which was removed to the federal courts, and obtained and held the stake subject thereto, they were not necessary parties in their individual capacity to an appeal from a portion of a decree determining that appellee was entitled to the fund as against appellant, as to which such stakeholders had no individual concern. Love v. Export Storage Co. (1906) 143 Fed. 1, 74 C. C. A. 155.

One made a party defendant merely because he was a conduit through which title to lands in controversy passed to the real defendants, and who as shown by the record had no interest in the suit, need not be joined in an appeal. U. S. v. Exploration Co. (1913) 203 Fed. 387, 121 C. C. A. 491, reversing decree (C. C. 1911) 190 Fed. 405; Same v. American Smelting & Refining Co. (1913) 203 Fed. 393, 121 C. C. A. 497.

Where two railroad corporations were joined as defendants in an action for wrongful death of an employé and both answered and an instructed verdict was returned for them, both were necessary parties to a writ of error. Teel v.

Chesapeake & O. Ry. Co. of Virginia (1913) 204 Fed. 914, 123 C. C. A. 210.

In a suit to administer the assets of an insolvent corporation and to determine the existence and priorities of an alleged lien, the general rule that all parties directly interested must be cited as parties to an appeal to the Circuit Court of Appeals extends to general creditors. Browning v. Boswell (1913) 209 Fed. 788, 126 C. C. A. 512.

—— **Addition of new parties.**—After motion to dismiss an appeal for want of certain parties, the court of appeals has discretionary power to grant appellant's motion to award an additional citation against such additional parties. Browning v. Boswell (1913) 209 Fed. 788, 126 C. C. A. 512.

Where certain necessary parties to an appeal were not omitted from a lack of diligence, but because of a misapprehension of counsel as to a question of practice, and they could be joined without prejudice to appellees, the court will grant appellant's motion for an additional citation to them as a proper exercise of discretion. Id.

—— **Time of issuance.**—That a citation on a writ of error is not issued until after the time limited for taking an appeal has expired does not affect the jurisdiction of the appellate court. Nome & Sinook Co. v. Ames Mercantile Co. (1911) 187 Fed. 928, 109 C. C. A. 650.

—— **By whom signed or allowed.**—Where there is an appeal from the supreme court of the district of Columbia, a justice of that court may sign the citation under this section and sections 1659, 1673, post. Richards v. Mackall (1885) 5 Sup. Ct. 535, 536, 113 U. S. 539, 28 L. Ed. 1132.

—— **Alias or new citation.**—Where a writ of error is seasonably returned and docketed in the circuit court of appeals in vacation, before the term next ensuing after its allowance, the court may at such term order an alias citation to bring in parties not served with a former citation, though the time for taking the writ has then expired. Altenberg v. Grant (1897) 83 Fed. 980, 28 C. C. A. 244.

Where a citation issued on a writ of error is defective, a new citation may be issued if necessary. Nome & Sinook Co. v. Ames Mercantile Co. (1911) 187 Fed. 928, 109 C. C. A. 650.

—— **Requisites of citation.**—The citation issued on a writ of error should give the proper names of all of the persons applying for the writ. Kerrch v. U. S. (1909) 171 Fed. 366, 96 C. C. A. 258, writ of certiorari denied (1909) 30 Sup. Ct. 402, 215 U. S. 602, 54 L. Ed. 344.

Notice to adverse parties.—The 20 days' notice referred to is 20 days before the return day of the writ. Yeaton v. Lenox (1833) 7 Pet. 220, 8 L. Ed. 664.

Where an appeal from a decree in equity fails for lack of notice to all parties interested, no notice which the court might order after the time for appeal had gone by could be effective to bring the absent parties within its jurisdiction. Kidder v. Fidelity Ins., Trust & Safe-Deposit Co. (1901) 105 Fed. 821, 44 C. C. A. 593.

Where one of several interveners appeals from a decree in equity after the term in which the decree was rendered, and cites only the complainant and the receiver of one of several defendants, the appeal will be dismissed, as it was necessary to include in the appeal and serve with notice all parties of record whose interests are directly involved in the appeal. Id.

That it would be an intolerable burden in some instances to give notice of appeal to all parties of record interested does not affect the rule, since the burden may be avoided by an appeal taken in open court at the term when the decree was rendered which is effective without such notice. Kidder v. Fidelity Ins., Trust & Safe-Deposit Co. (1901) 105 Fed. 821, 44 C. C. A. 593.

All parties to a suit who appear to have an interest in the order or judgment challenged must be made parties or given notice and severance before a United States court on appeal will decide the case on the merits, and, where this is not done, the writ will be dismissed. Lewis v. Sittel (1908) 165 Fed. 157, 91 C. C. A. 191, affirming judgment Same v. Sittle (1907) 104 S. W. 850.

In proceedings in error in the federal courts, the citation signed by the judge of the court to which the writ is addressed or any judge or justice of the appellate court is the notice required by this section. Exploration Mercantile Co. v. Pacific Hardware & Steel Co. (1910) 177 Fed. 825, 101 C. C. A. 39.

A separate appeal by a single party from a joint decree against him and others cannot be maintained without notice to the other defendants. Faulkner v. Hutchins (1903) 126 Fed. 362, 61 C. C. A. 425.

Circuit court obtains jurisdiction on appeal by filing and serving notice of appeal, and not by filing of transcript. Baldwin v. Raplee (C. C. 1871) Fed. Cas. No. 802.

Cited without definite application, Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211.

§ 1659. (R. S. § 999.) Citation; Supreme Court.

When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court, or by

a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice; and when it is issued by the Supreme Court to a State court, the citation shall be signed by the Chief Justice, or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice.

Act Sept. 24, 1789, c. 20, § 22, 1 Stat. 84. Act Feb. 5, 1867, c. 28, § 2, 14 Stat. 386.

On the establishment of the circuit courts of appeals, the provisions of law in force regulating appeals and writs of error were made applicable to appeals and writs of error provided for in the act in respect of the circuit courts of appeals, by a provision of the Circuit Courts of Appeals Act of March 3, 1891, c. 517, §, 11, ante, § 1651.

The circuit courts were abolished, and their powers and duties were transferred to the district courts, by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

1. Citation to federal courts—Necessity.
2. —— Service and return.
3. —— Parties to be cited.
4. —— Form and sufficiency.
4½. —— Security.
5. —— By whom signed or allowed.
6. —— Effect of recitals.
7. —— Citation on second writ of error.
8. —— Waiver of citation.
9. —— Effect of errors or irregularities.
10. Notice to adverse party.
11. Citation to state court—Construction of provision.
12. —— Service and return.
13. —— By whom signed or allowed.
14. —— Effect of recitals in certificate.

1. Citation to federal courts—Necessity.—A citation must accompany the writ of error. Bailiff v. Tipping (1805) 2 Cranch, 406, 2 L. Ed. 320.

An appeal was taken by complainants in the Alabama circuit court to the supreme court, and the citation required by the act of Congress was not served on appeal and he had no notice of the appeal. In printing the copy of the record the marshal's return stating that the citation had not been served, was accidentally omitted. The supreme court on motion declared the decree in a case made at a former term null and void, revoked the mandate issued to the circuit court, and dismissed the appeal. Ex parte Crenshaw (1841) 15 Pet. 119, 123, 10 L. Ed. 682.

When an appeal is not made in open court and at the term at which the final decree is passed, a citation, signed by the judge, is necessary. Villabolos v. U. S. (1848) 6 How. 81, 90, 12 L. Ed. 352.

Where decree was rendered in 1861, but no appeal was prayed for or allowed until 1865, it will be dismissed, there having been no citation to the appellee and the record not having been brought up on time. Garrison v. Cass County (1866) 5 Wall. 823, 18 L. Ed. 491.

A citation to the adverse party with due return or waiver by general appearance or otherwise is indispensable to jurisdiction on appeal. Alviso v. U. S. (1866) 5 Wall. 824, 18 L. Ed. 492.

Where the adverse party is in court represented by counsel, the appeal will not be dismissed for want of citation. Pierce v. Cox (1869) 9 Wall. 786, 19 L. Ed. 786.

If the security is given and accepted in open court during the term at which the decree appealed from is rendered, no citation is necessary; but if security is taken out of court, and after the term, a citation should be issued, unless the parties voluntarily appear. Sage v. Central R. Co. (1877) 96 U. S. 712, 714, 24 L. Ed. 641.

Even though an appeal is asked in open court, if security is not taken until after the term, a citation should be issued to bring in the parties, unless they voluntarily appear. Sage v. Central R. Co. (1877) 96 U. S. 712, 715, 24 L. Ed. 641; First Nat. Bank v. Omaha (1877) 96 U. S. 737, 738, 24 L. Ed. 881.

The citation, if security is taken out of court or after the term, is only necessary to show that the appeal which was allowed in term has not been abandoned by the failure to furnish the security before the adjournment. It is not jurisdictional. Its only purpose is notice. Dodge v. Knowles (1885) 5 Sup. Ct. 1108, 114 U. S. 436, 29 L. Ed. 144; Richardson v. Green (1889) 9 Sup. Ct. 443, 446, 130 U. S. 104, 32 L. Ed. 872.

On writ of error to a United States circuit court, where no citation has been issued as required by this section, and defendants do not appear in the supreme court, the case will be dismissed, as notice of a writ of error, given in open court at the same term the judgment is rendered, is not equivalent to such citation as in the case of an appeal in open court. U. S. v. Phillips (1887) 7 Sup. Ct. 874, 121 U. S. 254, 30 L. Ed. 914.

2. —— Service and return.—The original citation to the defendant in error signed by the judge must be returned; otherwise, the case is not properly before the court. Wilson v. Daniel (1798) 3 Dall. 401, 402, 1 L. Ed. 655.

The court will not compel a cause to be heard, unless the citation be served 30 days before the first day of the term.

Welsh v. Mandeville (1809) 5 Cranch, 321, 3 L. Ed. 113.

Appellant must prosecute his appeal to the next succeeding term of the supreme court, and the adverse party must be cited to appear at that time, whenever the appeal is taken by entering it in the clerk's office. A citation issued on August 27th would not bring up an appeal returnable to the December term. U. S. v. Curry (1848) 6 How. 106, 112, 12 L. Ed. 363.

Where there has been no service of citation in a case brought up by writ of error, it will be dismissed on motion. Brown v. Union Bank (1846) 4 How. 465, 466, 11 L. Ed. 1058; Hogan v. Ross (1850) 9 How. 602, 603, 13 L. Ed. 276.

A writ of error need not be allowed by a judge, but it is sufficient if it is issued and served by copy lodged with the clerk of the court to which it is directed. Davidson v. Lanier (1866) 4 Wall. 447, 453, 18 L. Ed. 377.

Where some attempt has been made to serve a citation which appellants may have supposed was actually completed, the appeal will not be dismissed; but the court will order an appeal dismissed unless a new citation be issued and served before a specified date. Dayton v. Lash (1876) 94 U. S. 112, 113, 24 L. Ed. 33.

Under R. S. §§ 763, 764, allowing an appeal to the United States supreme court in certain cases, and supreme court rule 8, subd. 5, providing that the appeal and citation, when issued more than 30 days before the first day of the next term of the supreme court, must be made returnable on that day, the judge of the circuit court, who is required to sign such citation, cannot fix any earlier return day. Ex parte Jugiro (C. C. 1891) 44 Fed. 754, judgment affirmed Jugiro v. Brush (1891) 11 Sup. Ct. 770, 140 U. S. 291, 35 L. Ed. 510.

Under this section the citation must be served on the party or his attorney personally, if not in some manner personally waived by one of them; and the mailing of it to them is not sufficient, though under the laws of the state that would be a proper service. Tripp v. Santa Rosa St. R. Co. (1892) 12 Sup. Ct. 655, 656, 144 U. S. 126, 36 L. Ed. 371.

3. —— **Parties to be cited.**—Where the citation is issued to a person who is not a party, the writ of error will be dismissed on motion. Davenport v. Fletcher (1853) 16 How. 142, 144, 14 L. Ed. 879.

Citation should be addressed to the actual parties to the suit at the time the appeal was allowed and prosecued, and thus, where the appellees have died pending appeal and administration has been taken out, the citation should be directed to the administrators upon the suggestion of death. Bigler v. Waller (1870) 12 Wall. 142, 147, 20 L. Ed. 260.

4. —— **Form and sufficiency.**—An order on appellee to appear and argue the cause if he saw fit is of itself the legal equivalent of a citation for all the purposes of such an appeal. Dodge v. Knowles (1885) 5 Sup. Ct. 1108, 114 U. S. 436, 29 L. Ed. 144.

A writ of error was dismissed, where the names in the citations differed from those in the writ. Kail v. Whitmore (1867) 6 Wall. 451, 18 L. Ed. 862.

Though this section provides that the adverse party shall have at least 30 days' notice, a writ of error will not be dismissed on the ground that the citation was issued and made returnable less than 30 days after the writ was granted. Seagrist v. Crabtree (1888) 8 Sup. Ct. 1394, 1395, 127 U. S. 773, 32 L. Ed. 323.

4½. —— **Security.**—A citation on appeal to the United States supreme court is sufficient, without any taking of security, to constitute the allowance of an appeal such as will give that court jurisdiction; and, if security be not taken in accordance with § 1660, post, the irregularity may be subsequently cured. Stewart v. Masterson (1888) 8 Sup. Ct. 561, 562, 124 U. S. 493, 31 L. Ed. 507; Brown v. McConnell (1888) 8 Sup. Ct. 559, 560, 124 U. S. 489, 31 L. Ed. 495.

5. —— **By whom signed or allowed.**—If the citation in error be signed by the clerk, and not by a judge of the circuit court or justice of the supreme court, the writ of error will be dismissed on motion. U. S. v. Hodge (1845) 3 How. 534, 11 L. Ed. 714.

Where a writ of error was allowed and citation signed by the chief justice of the territorial court of Iowa, it was sufficient. Sheppard v. Wilson (1847) 5 How. 210, 211, 12 L. Ed. 120.

This act gives to the clerk of the territorial court the power to issue the writ of error, and to a judge of that court the power to sign the citation and approve the bond. Id.

Where an appeal was not made in open court, and at the term at which the final decree was passed, a citation, signed by the judge and not by the clerk, is necessary. Villabolos v. U. S. (1848) 6 How. 81, 89, 12 L. Ed. 352.

A district judge sitting as the circuit court may allow an appeal from his own decree. Rodd v. Heartt (1872) 17 Wall. 354, 357, 21 L. Ed. 627.

The power to sign a citation is not confined to the particular justice of the supreme court assigned to the particular circuit in which the court that rendered the decree is held. Sage v. Central R. Co. (1877) 96 U. S. 712, 715, 24 L. Ed. 641.

When there is an appeal from the supreme court of the District of Columbia, a justice of that court may sign the citation, under this section

and section 1673, post. Richards v. Mackall (1885) 5 Sup. Ct. 535, 536, 113 U. S. 539, 28 L. Ed. 1132.

A citation on appeal from a circuit court or a territorial court must be signed by the judge thereof or by a justice of the supreme court, and, if signed by the clerk, the appeal will be dismissed. Brown v. McConnell (1888) 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495; Freeman v. Clay (1891) 48 Fed. 849, 1 C. C. A. 115, decree affirmed (1892) 52 Fed. 1, 2 C. C. A. 587.

An appeal may be allowed by an associate justice of the court of private land claims, and under this section any judge of such court has the power to act. U. S. v. Pena (1899) 20 Sup. Ct. 165, 166, 175 U. S. 500, 44 L. Ed. 251.

A district judge was a judge of the circuit court, and as such had authority to allow the appeal and sign the citation, even if the decree was rendered by the circuit judge. Huntington v. Laidley (1900) 20 Sup. Ct. 528, 529, 176 U. S. 668, 44 L. Ed. 630.

When one of the judges of the circuit court has approved an appeal bond, it is competent, under this section, for another judge of that court, who might have granted the appeal and approved the bond, to sign the citation. His signing thereof without requiring security is equivalent to an express approval of the existing bond. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 19 C. C. A. 477, overruling motion to dismiss appeal (C. C. 1895) 68 Fed. 412, and appeal dismissed (1897) 84 Fed. 1017, 28 C. C. A. 681.

6. —— **Effect of recitals.**—Such vitality cannot be restored by an order of the circuit court made afterwards, accepting a bond made to perfect the appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the appeal or constitute a new one. Edmonson v. Bloomshire (1868) 7 Wall. 306, 312, 19 L. Ed. 91.

7. —— **Citation on second writ of error.**—After a writ of error has been dismissed by the supreme court upon the ground that the preponderance of the evidence in the record shows that the property recovered was not of sufficient value to give that court jurisdiction, a second writ of error is not a writ of right, which, when issued by the clerk, makes it obligatory upon a judge to sign the citation and approve the bond, even though additional evidence as to the value of the property has been presented to the trial court. Red River Cattle Co. v. Needham (C. C. 1891) 47 Fed. 358.

8. —— **Waiver of citation.**—A general appearance by an appellee is a waiver of a citation. Farrar v. U. S. (1830) 3 Pet. 459, 460, 7 L. Ed. 741; Buckingham v. McLean (1851) 13 How. 150, 14 L. Ed. 90; Sage v. Central R. Co. (1877) 96 U. S. 712, 715, 24 L. Ed. 641; Richardson v. Green (1889) 9 Sup. Ct. 443, 446, 130 U. S. 104, 32 L. Ed. 872.

Leave granted to an attorney to withdraw his appearance will not authorize a motion to dismiss for want of citation, as the citation is merely notice to the party, and his appearance in person or by attorney is an admission of notice on the record, and it cannot afterwards be withdrawn. But the appearance does not preclude the party from moving to dismiss on any sufficient ground, except want of citation. U. S. v. Yates (1848) 6 How. 605, 608, 12 L. Ed. 575.

A defendant who has waived the irregularity by an appearance cannot object to jurisdiction, because the citation is not signed by the judge allowing the writ of error. Aldrich v. Ætna Ins. Co. (1869) 8 Wall. 491, 496, 19 L. Ed. 473.

9. —— **Effect of errors or irregularities.**—An irregularity in the citation may be cured by an appearance. Peale v. Phipps (1850) 8 How. 256, 257, 12 L. Ed. 1070; Carroll v. Dorsey (1857) 20 How. 204, 207, 15 L. Ed. 803; Chaffee v. Hayward (1857) 20 How. 208, 209, 15 L. Ed. 804.

10. **Notice to adverse party.**—The same effect will be given by the Supreme Court to the allowance of a writ of error or an appeal, when one of the parties has been notified or requested in writing to join in the writ of error or appeal, and refuses to do so. Masterson v. Howard (1870) 10 Wall. 416, 418, 19 L. Ed. 953.

The allowance of an appeal by the court while in session and acting judicially at the term in which the decree was rendered constituted a valid appeal of which the appellee is bound in law to take notice. The docketing of the cause in time perfected the jurisdiction of the supreme court. The giving of the bond is not essential to the taking, though it is to the prosecution of the appeal. Dodge v. Knowles (1885) 5 Sup. Ct. 1108, 114 U. S. 436, 29 L. Ed. 144.

11. **Citation to state court—Construction of provision.**—The practice herein provided for applies to writs of error sought to be taken from the state court to the supreme court. Gleason v. Florida ex rel. Attorney General (1869) 9 Wall. 779, 784, 19 L. Ed. 730.

12. —— **Service and return.**—Making the writ of error to a state court and the citation thereon returnable within 30 days from the date thereof, without inserting a day certain as the return day, held a substantial compliance with United States Supreme Court Rule 8, cl. 5, requiring such writs and citation to be returnable within 30 days

from the date of the citation. Seaboard Air Line Ry. v. Horton (1914) 34 Sup. Ct. 635, 233 U. S. 492, 58 L. Ed. 1062, reversing judgment Horton v. Seaboard Air L. R. Co. (1913) 78 S. E. 494, 162 N. C. 424.

13. —— By whom signed or allowed.—A district judge has no authority to sign a citation on a writ of error to a state court, and when the citation has been so signed, the writ will be dismissed on motion, and the citation must be signed by the chief justice or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States. Palmer v. Dooner (1868) 7 Wall. 541, 542, 19 L. Ed. 99.

Since Const. Colo. art. 6, § 8, provides that the supreme court judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and in case of his absence the judge having in like manner the next shortest term shall preside in his stead, the allowance of a writ of error by one of the associate justices, wherein he recites the absence of the chief justice, and styles himself the presiding judge, sufficiently complies with this section. Butler v. Gage (1891) 11 Sup. Ct. 235, 236, 138 U. S. 52, 34 L. Ed. 869.

Under this section, the allowance of a writ of error and signing of a citation by an associate judge of the court of appeals of New York, it not appearing that he was at that time acting as chief judge pro tem., does not give the federal supreme court jurisdiction to review a judgment of that court. Havnor v. People of New York (1898) 18 Sup. Ct. 631, 170 U. S. 408, 42 L. Ed. 1087.

A writ of error from the federal Supreme Court to the Supreme Court of the state of Nebraska sufficiently conforms to this section where it is signed "John B. Barnes, Presiding Judge of Supreme Court of Nebraska, in absence of Sedgwick, C. J., from this state," and the truth of this recital is not challenged. Missouri Valley Land Co. v. Wiese (1908) 28 Sup. Ct. 294, 208 U. S. 234, 52 L. Ed. 466, affirming judgment Wiese v. Union Pac. Ry. Co. (1906) 108 N. W. 175; Missouri Valley Land Co. v. Wrich (1908) 28 Sup. Ct. 299, 208 U. S. 250, 52 L. Ed. 473, affirming judgment Wrich v. Union Pac. Ry. Co. (1906) 108 N. W. 178.

Under this section one's remedy to review a state court judgment in the United States Supreme Court is not exhausted by a refusal of his application to a justice of the state court for a writ of error from the United States Supreme Court; but, on such refusal, application must be made to a justice of the latter court before the remedy is exhausted. Ex parte Chadwick (C. C. 1908) 159 Fed. 576.

14. —— Effect of recitals in certificate.—A certificate of the chief justice of the highest court of a state, under this section, allowing a writ of error to such court from the supreme court, certifying that a federal question arose and was determined adversely to plaintiff in error, cannot supply the want of all evidence of such question in the record. Felix v. Scharnweber (1888) 8 Sup. Ct. 759, 125 U. S. 54, 31 L. Ed. 687.

Cited without definite application, Insurance Co. of Valley of Virginia v. Mordecai (1858) 21 How. 195, 197, 16 L. Ed. 94; Bartemeyer v. Iowa (1871) 14 Wall. 26, 27, 20 L. Ed. 792; National Bank of Commerce v. National Bank of Commerce (1878) 99 U. S. 608, 609, 25 L. Ed. 362; In re Claasen (1891) 11 Sup. Ct. 735, 737, 140 U. S. 200, 35 L. Ed. 409; Miller v. Texas (1894) 14 Sup. Ct. 874, 875, 153 U. S. 535, 38 L. Ed. 812; Hudson v. Parker (1895) 15 Sup. Ct. 450, 452, 156 U. S. 277, 39 L. Ed. 424; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Gay v. Hudson River Electric Power Co. (C. C. 1911) 190 Fed. 812.

§ 1660. (R. S. § 1000.) Bond in error and on appeal.

Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid.

Act Sept. 24, 1789, c. 20, § 22, 1 Stat. 84. Act Dec. 12, 1794, c. 3, 1 Stat. 404. Act Feb. 21, 1863, c. 50, 12 Stat. 657. Act July 27, 1868, c. 255, § 1, 15 Stat. 226.

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Supersedeas, see notes under § 1666, post.

See, also, notes under § 1673, post.

1. Construction of provision in general.—It need not appear that the judge who granted the writ of error upon issuing the citation took a bond, as this section is merely directory to the judge. Martin v. Hunter's Lessee (1816) 1 Wheat. 304, 361, 4 L. Ed. 97.

To make an appeal operate as a supersedeas, appellant must give good and sufficient security for its prosecution, and for all costs and damages that may be adjudicated against him. This security is usually given by bond with one or more sureties, and this section requires that it be taken by the judge who signs the citation on appeal, and it is not required that it be in any fixed proportion to the decree. What is necessary is that it be sufficient, and, where it is desired to make the appeal a supersedeas, that it be given within 10 days from rendition of the decree. Its sufficiency must be determined first by the judge signing the citation, but after the appeal this question is cognizable in the Supreme Court, which may in its discretion increase or diminish the bond. Providence Rubber Co. v. Goodyear (1867) 6 Wall. 153, 156, 18 L. Ed. 762.

The object and purpose of this section and the bond given in pursuance thereof is to indemnify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse the holding of the trial court. A party who, on appeal from a decree for the recovery of possession of real property unless the balance of the purchase price should be paid before January 1, 1899, secures an extension of the time for such payment until November 1, 1899, has so prosecuted his appeal to effect, within the meaning of a supersedeas bond to secure the adverse party from loss in the use and possession of the premises, as to preclude any recovery on such bond for the use and occupation of the property between those dates. Crane v. Buckley (1906) 27 Sup. Ct. 56, 203 U. S. 441, 51 L. Ed. 260.

The purpose of the statute and paragraph 1 of C. C. A. Rule 13 (11 C. C. A. ciii, 47 Fed. vi), in the event of an appeal or writ of error, was that the appellee by reason of the stay of proceedings demanded by his opponent should be fully indemnified for all damages and costs sustained thereby if the appeal or writ of error shall prove ineffectual; that is, that he should sustain no loss in consequence of any ineffectual effort to reverse the decree or judgment by reason of his hand being stayed pending such effort. It was not designed to give one a better security than he had by the decree or judgment. Louisville, N. A. & C. Ry. Co. v. Pope (1896) 74 Fed. 1, 7, 20 C. C. A. 253.

The phrase "all costs," in the two clauses of this section, includes identically the same costs, so that, if the costs of the lower court are covered by a bond which acts as a supersedeas, they are also covered by a bond which does not act as a supersedeas, and the costs of the lower court are secured when a supersedeas bond is given, and a bond for "damages and costs" is for such damages and costs as the appellate court may award for the delay, and for the amount of the original judgment, if it be a money judgment, with all the costs in the court below. Fidelity & Deposit Co. of Maryland v. Expanded Metal Co. (1910) 183 Fed. 568, 106 C. C. A. 114.

The general rule is that signing the citation and taking the security are simultaneous acts. The statute seems to impose as a duty on the judge when he signs the citation that he shall then take good and sufficient security. Tiernan v. Booth (C. C. 1880) 4 Fed. 620, 621.

2. Authority to take or accept bond and delegation thereof.—The bond must be taken and approved by any judge or justice authorized to allow the appeal or writ. Anson v. Blue Ridge R. Co. (1859) 23 How. 1, 2, 16 L. Ed. 517.

The judge who signs the citation on writ of error must take the bond required. Western U. Teleg. Co. v. Eyser (1873) 19 Wall. 419, 426, 22 L. Ed. 43.

If the appeal is allowed in open court, the security may be taken by the court, and no citation is necessary; but if the security is not given until after the term, a citation must be issued and served. Haskins v. St. Louis & S. E. R. Co. (1883) 3 Sup. Ct. 72, 109 U. S. 106, 27 L. Ed. 873.

Refusal of the circuit court to accept a supersedeas bond, when offered during the term, does not necessarily take from that court, or a justice of the supreme court, power to take one thereafter. Sage v. Central R. Co. (1877) 96 U. S. 712, 715, 24 L. Ed. 641.

The power of the justice or judge to take security cannot be delegated to the clerk or to a commissioner. O'Reilly v. Edrington (1877) 96 U. S. 726, 24 L. Ed. 659; First Nat. Bank v. Omaha (1877) 96 U. S. 737, 738, 24 L. Ed. 881; Haskins v. St. Louis & S. E. R. Co. (1883) 3 Sup. Ct. 72, 109 U. S. 106, 27 L. Ed. 873.

Under this section, and section 1666, post, providing the manner in which a supersedeas may be obtained on a writ of error, a justice of the supreme court

may issue a supersedeas, on allowing a writ of error, under Act March 3, 1891, to a circuit court, in case of conviction for an infamous crime. In re Claasen (1891) 11 Sup. Ct. 735, 738, 140 U. S. 200, 35 L. Ed. 409.

A single judge may grant a writ of supersedeas. Tornanses v. Melsing (1901) 106 Fed. 775, 45 C. C. A. 615.

3. Discretion of court or judge.—A supersedeas is a matter of right, and its allowance does not rest in the discretion of the court or judge, but the only function of the judge is to determine whether the security proffered for damages and costs is good and sufficient. U. S. Comp. St. 1901, pp. 712, 714, 716. McCourt v. Singers-Bigger (1906) 150 Fed. 102, 80 C. C. A. 56.

The mode of taking security on appeal and the time of perfecting it are within the discretion of the trial court, and the supreme court will not interfere therewith. The Dos Hermanos (1825) 10 Wheat. 306, 310, 6 L. Ed. 328.

Where it lies within the discretion of a judge to accept a bond as security, in which the sureties are not jointly or severally bound for the full amount of the obligation, but each of them severally for a specified part only, and he does accept such bond, his action is final and not reviewable. New Orleans Ins. Co. v. E. D. Albro Co. (1884) 5 Sup. Ct. 289, 112 U. S. 506, 28 L. Ed. 809.

4. Necessity of bond to perfect appeal or error.—An appeal in chancery must be perfected by giving security in order to operate as a supersedeas. Adams v. Law (1853) 16 How. 144, 147, 14 L. Ed. 880; Stafford v. Union Bank (1854) 17 How. 275, 279, 15 L. Ed. 101; Stafford v. New Orleans Canal & Banking Co. (1854) 17 How. 283, 284, 15 L. Ed. 102.

There can be no appeal without the taking of security, which must be done by the court, or a judge or justice, and the acceptance of the security, if followed, when necessary, by the signing of the citation, is, in legal effect, the allowance of the appeal. Sage v. Central R. Co. (1877) 96 U. S. 712, 714, 24 L. Ed. 641.

A mandamus to compel a circuit judge to allow a writ of error to a state court will not be granted, where the petitioner does not show that an application has been made to have the security approved or the citation signed as required by law. Ex parte Commissioners of the Sinking Fund of Virginia (1884) 5 Sup. Ct. 421, 112 U. S. 177, 28 L. Ed. 691.

The docketing of a cause by defendant in error in advance of the return day of the writ of error would not prevent the plaintiff in error from doing what was necessary, while the writ was in life, to give it full effect. Davies v. U. S. (1885) 5 Sup. Ct. 696, 113 U. S. 687, 28 L. Ed. 1149.

An appeal is not perfected until bond is given as required by this section and section 1673, post; and while the omission of the bond does not necessarily avoid an appeal, and the appellate court may, in proper cases, permit the bond to be supplied, yet this permission could not properly be accorded after a lapse of nearly four years from the date of the decree, and, under such circumstances, where such permission is not even applied for, the appeal may properly be dismissed. Beardsley v. Arkansas & L. Ry. Co. (1895) 15 Sup. Ct. 786, 787, 158 U. S. 123, 39 L. Ed. 919.

Leave to prosecute a writ of error to a state court without giving security as required by this section cannot be granted under Act July 20, 1892, c. 209, 27 Stat. 252, as that act has no application to proceedings in the supreme court of the United States. Gallaway v. State Nat. Bank of Ft. Worth, Tex. (1902) 22 Sup. Ct. 811, 186 U. S. 177, 46 L. Ed. 1111.

An appeal does not operate as a supersedeas staying execution, unless appellant gives security binding him to answer for all damages and costs if his appeal prove unsuccessful. American Surety Co. v. North Packing & Provision Co. (1910) 178 Fed. 810, 102 C. C. A. 258.

Where the writ of error operates as a supersedeas, the security is to be for costs, and such damages as the supreme court may award for the delay. Renner v. Bank of Columbia (C. C. 1822) Fed. Cas. No. 11,699.

Appeal from the order confirming foreclosure sale granted, but supersedeas denied, under the facts of the particular case. Farmers' Loan & Trust Co. v. Central R. R. of Iowa (C. C. 1877) Fed. Cas. No. 4,664.

Under this section and section 1661, post, an appeal to the circuit court must be on security given. Providence Washington Ins. Co. v. Wager (C. C. 1888) 37 Fed. 59, 60.

A party seeking a writ of error must first enter into bond with surety to prosecute his writ to effect. Threadgill v. Platt (C. C. 1895) 71 Fed. 1, 2.

The circuit court has no authority to grant an appeal to the supreme court of the United States without requiring bond for costs. In re Newman (C. C. 1897) 79 Fed. 615.

Under rule 91, prescribing that no appeal shall operate as a stay of execution where the judgment is for a specific sum of money, etc., and in all other cases, except where the United States are appellants, any justice of the court may determine the amount and character of the security to be given which shall at least be sufficient to cover all costs on appeal, an undertaking need not be filed by appellant unless the appeal is to operate as supersedeas. Bryan v. Sanderson (D. C. 1879) 3 MacArthur, 404.

5. Approval or acceptance.—The action of the justice in approving the amount

of a supersedeas bond and the sureties thereon is conclusive. Jerome v. McCarter (1874) 21 Wall. 17, 28, 22 L. Ed. 515; Martin v. Hazard Powder Co. (1876) 93 U. S. 302, 23 L. Ed. 885.

Where a writ of error was allowed and the bond approved by the territorial court of Iowa, it was sufficient. Sheppard v. Wilson (1847) 5 How. 210, 211, 12 L. Ed. 120.

An appeal bond may be approved by the judge out of court. Hudgins v. Kemp (1855) 18 How. 530, 538, 5 L. Ed. 511.

Approval of a bond by a judge may be inferred from the facts of the transaction. Silver v. Ladd (1867) 6 Wall. 440, 441, 18 L. Ed. 828.

Where an appeal to the supreme court became inoperative for failure to give the necessary bond and to have the case docketed during the term of the supreme court following the allowance of the appeal, the acceptance of a bond does not have the effect of an allowance of a new appeal, where more than two years after the entry of the decree elapsed. Killian v. Clark (1884) 4 Sup. Ct. 700, 111 U. S. 784, 28 L. Ed. 599.

The acceptance of a bond by the district judge cannot be considered as an allowance of an appeal at that date, where the acceptance was after the term at which tthe decree appealed from was rendered, and no citation was ever issued or served. Radford v. Folsom (1887) 8 Sup. Ct. 334, 335, 123 U. S. 725, 31 L. Ed. 292.

Where a surety on a bond for costs upon appeal has been approved for about one month, it is too late for appellee to move for the withdrawal of the approval. National Harrow Co. v. Hench (C. C. 1897) 81 Fed. 926.

Under this section, where the presiding judge of a Circuit Court of Appeals allowed an appeal from a Circuit Court, signed the citation, and fixed the amount of the security to be given to operate as a supersedeas, the bond to be approved by "this court," in order to become effective as a supersedeas the bond must be approved by such judge, and neither the judge nor clerk of the court from which the appeal was taken has power to give such approval. Gay v. Hudson River Electric Power Co. (C. C. 1911) 190 Fed. 812.

The appeal bond on appeal to the circuit court of appeals must be approved by the judge or justice. An approval by the clerk alone is not sufficient, and is ground of dismissal. Freeman v. Clay (1891) 48 Fed. 849, 1 C. C. A. 115, decree affirmed (1892) 52 Fed. 1, 2 C. C. A. 587.

Where the court directed the bond on appeal to be approved by the clerk, instead of by the judge, the appeal should not be dismissed for the irregularity in the bond, but an opportunity should be given to file a proper bond. Chicago Dollar Directory Co. v. Chicago Directory Co. (1895) 65 Fed. 463. 13 C. C. A. 8, appeal overruled (1895) 66 Fed. 977, 14 C. C. A. 213.

Although this section requires that the supreme court justice signing a citation on appeal shall take good and sufficient security, yet this is unnecessary if another of the justices has already taken it, for the signing of the citation acts as an approval of such security. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 19 C. C. A. 477, appeal dismissed (1897) 84 Fed. 1017, 28 C. C. A. 681.

The fact that the judge of the trial court approved the bond on a writ of error does not operate as a writ of error, since neither the judge nor the court below could issue such writ. Loveless v. Ransom (1901) 109 Fed. 391, 48 C. C. A. 434.

An appeal bond taken under this section may be approved by any judge or justice authorized to sign the citation and to allow the writ of error or appeal; and it is not essential that it be approved by the judge who allows the writ of error or signs the citation. Brown v. Northwestern Mut. Life Ins. Co. (1902) 119 Fed. 148, 55 C. C. A. 654.

6. Parties to bond—Obligors.—It is not necessary that all the appellants shall join on the appeal bond, though all must join in the appeal. Brockett v. Brockett (1844) 2 How. 238, 240, 11 L. Ed. 251.

Defendants against whom separate judgments are rendered, and who join in a writ of error, may separate when they ask for a stay. Ex parte French (1879) 100 U. S. 1, 5, 25 L. Ed. 529.

On error to the circuit court of appeals, when the security of the supersedeas bond is sufficient, it is immaterial that it is signed by only one of the plaintiffs in error. McClellan v. Pyeatt (1892) 49 Fed. 259, 1 C. C. A. 241.

An appeal bond is sufficient, although signed by one only of two or more appellants, where good and sufficient security is taken, and approved by the judge of the trial court. King v. Thompson (1901) 110 Fed. 319, 49 C. C. A. 59.

Receivers appealing in good faith from the judgments of the state courts should not be required to give supersedeas bonds. Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C. 1890) 41 Fed. 551.

7. —— Obligees.—A bond on a writ of error given to the people of the state or the relator is good, and if forfeited may be sued on by either at the option of the government. Spalding v. New York ex rel. Backus (1844) 2 How. 66, 11 L. Ed. 181.

Where the bond is given to a person who is not a party, the writ of error will be dismissed on motion. Davenport

v. Fletcher (1853) 16 How. 142, 144, 14 L. Ed. 879.

It is no objection that the appellees are not individually named in the order allowing an appeal, where the names of all are given in the appeal bond. Richardson v. Green (1889) 9 Sup. Ct. 443, 447, 130 U. S. 104, 32 L. Ed. 872.

The omission of one of the adverse parties from the supersedeas bond does not justify the Court of Appeals of the District of Columbia in dismissing on motion an appeal to that court, where such motion was not made within the time prescribed by a court rule for moving to dismiss for want of a bond, and then was not based upon the defect in the bond, but upon a defect of parties to the appeal, which the bond is supposed to disclose, but which could not in fact exist, because the appeal was taken in open court. Taylor v. Leesnitzer (1911) 31 Sup. Ct. 371, 220 U. S. 90, 55 L. Ed. 382, reversing decree (1908) 31 App. D. C. 92.

If the appeal bond is defective, in that it runs to only one of the several parties whom the citation makes respondent to the appeal, this defect may be cured after the cause is in the appellate court. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 19 C. C. A. 477, appeal dismissed (1897) 84 Fed. 1017, 28 C. C. A. 681.

While, for greater certainty, all obligees in an appeal bond should be named therein, an appeal duly allowed will not be dismissed by the circuit court of appeals because they are not so named, but opportunity will be given to file a new bond. Swift & Co. v. Kortrecht (1901) 110 Fed. 328, 49 C. C. A. 68.

Where a supersedeas bond ran to two or more obligees jointly, and it did not appear that the interest of each was several, all must be joined as plaintiffs in an action thereon; but if the bond, while joint in form, expresses distinct obligations to the different obligees, separate actions may be maintained. Dashley v. Daniel (1913) 202 Fed. 426, 120 C. C. A. 532.

Where the motion and order for appeal were not taken against any of the numerous libelants by name, and where no bond was given in favor of any other than one of the libelants, the appeal can only hold as to him, and must be dismissed as to the others. Mason v. Ervine (C. C. 1885) 27 Fed. 240.

8. Amount or penalty of bond.—Under this section, the security to be taken from the plaintiff in error by the judge signing a citation on a writ of error must be sufficient to cover the whole amount of the judgment, and is not to be confined to such damages as the appellate court may adjudge for the delay. Catlett v. Brodie (1824) 9 Wheat. 553, 6 L. Ed. 158.

Where an appeal in chancery is intended to operate as a supersedeas, the security must be equal to the amount of the decree, notwithstanding that a receiver appointed by the court below had given the bond in a large amount, and that the persons to whom the property had been hired had given security for its safe-keeping and delivery. Stafford v. Union Bank (1853) 16 How. 135, 139, 14 L. Ed. 876.

Where a judgment or decree is for the recovery of money, the indemnity bond must be for the whole amount of the judgment, including just damages for delay and costs in interest on the appeal; but where there is nothing on the record to show that the indemnity is insufficient it will be presumed sufficient. French v. Shoemaker (1870) 12 Wall. 86, 99, 20 L. Ed. 270.

The rules of practice are satisfied if the indemnity is commensurate with the damages that may follow from the stay which is effected. Ex parte French (1879) 100 U. S. 1, 5, 25 L. Ed. 529.

A supersedeas bond on appeal from a decree foreclosing a mortgage will not operate as security for the amount of the decree, or interest pending appeal, or the balance after applying the proceeds of the mortgage sale, or damages for the detention of the property pending appeal, but only for costs, and against waste, and nonpayment of taxes, and loss by fire, if not properly insured. The addition to the statutory condition of a provision that the appellant shall "pay for the use and detention of the property covered by the mortgage, during the pendency of the appeal," will not vary or extend its legal effect. Omaha Hotel Co. v. Kountze (1883) 2 Sup. Ct. 911, 107 U. S. 378, 27 L. Ed. 609.

A decree which declares a lien in favor of a party on specific property, and requires the payment of a sum of money, is not a decree for the recovery of money not otherwise secured, within the meaning of rule 13 of the circuit court of appeals, as to supersedeas bonds, and the amount of such a bond need not be the full amount to be paid, but is in the discretion of the court. Louisville, N. A. & C. Ry. Co. v. Pope (1896) 74 Fed. 1, 20 C. C. A. 253.

Sup. Ct. Rule 29 (ante, § 1232) requires supersedeas bonds, conditioned that the writ of error or appeal shall be prosecuted to effect, to be, where the judgment or decree is "for the recovery of money not otherwise secured," for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal. Held, that a judgment rendered against a county for the amount of certain drain warrants, with a provision for mandamus to compel the levy of assessments according to law upon the lands benefited by the drains, was one "for the recovery of money not otherwise secured." Fuller v. Aylesworth (1896) 75 Fed. 694, 21 C. C. A. 505.

A judgment is "not otherwise secur-

ed" within the meaning of the rule, when the court has not, by reason of a lien on property secured to plaintiff otherwise than by the judgment, or by reason of actual custody of property liable to satisfy the claim asserted, the means of making the claim of the plaintiff by subjecting specific property. Id.

A "judgment for the recovery of money" is one which adjudges a defendant, either as an individual or in a representative capacity, absolutely liable to pay a sum certain to the plaintiff, and awards execution therefor, and which may be fully satisfied by the defendant by paying into court the amount adjudged, with interest and costs; and the fact that the judgment does not involve the personal liability of the defendant is immaterial. Id.

An appeal bond, operating as a supersedeas, given on appeal from a decree in equity which directs the payment of money from the appellant to the appellee, conditioned as required by this section and in accordance with rule 29 of the Supreme Court (ante, § 1232) and rule 13 of the Circuit Court of Appeals (ante, § 1114), to "answer all damages and costs" if appellant fails to make its appeal good, covers the amount of the decree appealed from, as well as damages for delay and costs. American Surety Co. of New York v. North Packing & Provision Co. (1910) 178 Fed. 810, 102 C. C. A. 258.

It was error to make the allowance of an appeal from an order dismissing a writ of review conditional on complainants' filing a bond, with sufficient sureties, in the sum of $1,100,000. Lewis v. Holmes (1912) 194 Fed. 842, 116 C. C. A. 408.

The plaintiff in error is bound only to indemnify the defendant in error for whatever losses he may have sustained by the judgment not being satisfied and paid after affirmance, which must be specially alleged in an action on the appeal bond. Tucker v. Lee (C. C. 1829) Fed. Cas. No. 14,221.

The appellant is not absolutely bound by the condition of a bond on appeal to the supreme court to pay the amount of the original judgment. Bank of the Metropolis v. Swann (C. C. 1831) Fed. Cas. No. 902.

Where an appeal ties up a fund in court, the bond should provide for payment of interest during the pendency of the appeal. Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1879) Fed. Cas. No. 14,260.

Where the judgment is for a large amount, the court may approve an appeal bond whose penalty is not double such amount. Hatch v. Coddington (C. C. 1867) Fed. Cas. No. 6,205.

The practice of requiring a bond in double the amount of the decree and costs will not be departed from except under special circumstances rendering it unnecessary. American Nicholson Pavement Co. v. Elizabeth (C. C. 1874) Fed. Cas. No. 310.

A judgment in mandamus against a city, compelling the levy of a tax to pay a certain sum, is not a judgment for the recovery of money within supreme court rule 29, and hence a supersedeas bond, on appeal by defendant, need only cover costs and the 10 per cent. of the amount involved, which the appellate court may, under rule 23, assess for frivolous appeal. U. S. v. City of New Orleans (C. C. 1881) 8 Fed. 112.

The amount of the bond to be required by a United States circuit court granting a supersedeas is to be determined by it in its sound discretion, under the laws and rules of the supreme court. Id.

On a creditors' bill in the United States circuit court to subject property fraudulently conveyed to the satisfaction of the judgment, a decree that the grantee pay the amount of the judgment, or that the property be sold to satisfy the same, is not "otherwise secured," within the meaning of United States supreme court rule 29, and the supersedeas bond to be given "must be for the whole amount of the judgment." In re Holladay (C. C. 1886) 28 Fed. 117.

On appeal from a decree for the specific delivery of bonds issued by defendant township in aid of a railroad, the amount of the supersedeas bond, under supreme court rule No. 29, will be fixed to cover the coupons already due and to mature in four years, with 7 per cent. interest, 10 per cent. damage on the aggregate of interest, and the costs. Massachusetts & S. Const. Co. v. Cherokee Tp. (C. C. 1890) 42 Fed. 750.

Where a decree in foreclosure directs defendant to account for three-fourths of the rents of the property for several years, and for waste committed during that time, and the judgment for which this accounting is ordered amounts to $13,000, with interest for two years or more, the supersedeas bond will be fixed at $14,000, as the case is not within rule 29 of the supreme court, directing that, in suits on mortgages, the supersedeas bond shall be fixed at a sum to cover the damages arising from the detention of the money secured by the mortgage, measured by the interest on the money. National Bank of Rondout v. McGahan (C. C. 1891) 45 Fed. 280.

9. Sureties on bonds.—The usual affidavit of the ability of the sureties accompanying the bond when approved, held sufficient justification. Hatch v. Coddington (C. C. 1867) Fed. Cas. No. 6,205.

A corporation will not be accepted as surety on a writ of error to the United States supreme court when there is fair ground to question whether power

to bind itself by such a contract is conferred by the acts under which it is incorporated. Black v. Black (C. C. 1893) 53 Fed. 985, writ of error dismissed (1896) 16 Sup. Ct. 1199, 163 U. S. 678, 41 L. Ed. 318.

10. Contents or conditions of bond.—Bonds on a writ of error held sufficient. Ex parte French (1879) 100 U. S. 1, 5, 25 L. Ed. 529.

The condition of a bond that the appellant "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said supreme court," covers all the requirements of the statute. Gay v. Parpart (1879) 101 U. S. 391, 25 L. Ed. 841.

Where a bond, instead of following the words of the statute, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fails to make his plea good shall answer all damages and costs, superadds that he shall also pay for the use and detention of the property covered by the mortgage in controversy during the pendency of the appeal, these words will be rejected, and the bond will be construed as having its ordinary and proper legal effect; the judge taking the bond having no right to require such an addition to the condition of an appeal and supersedeas. Omaha Hotel Co. v. Kountze (1883) 2 Sup. Ct. 911, 914, 107 U. S. 378, 27 L. Ed. 609.

Failure of an appeal bond to mention the term at which the decree was rendered is not a fatal defect; it not appearing that a decree had been rendered in any other cause between the same parties in the court from which the appeal was taken. Davis v. Wakelee (1895) 15 Sup. Ct. 555, 556, 156 U. S. 680, 39 L. Ed. 578.

An appeal and supersedeas bond is insufficient if conditioned to prosecute the appeal to effect, and answer all costs and damages "in the event the decree is affirmed" instead of "if it fails to make its plea good." Peace River Phosphate Co. v. Edwards (1895) 70 Fed. 728, 17 C. C. A. 358.

Where a bond did not show the names of the individuals composing the firm, nor that it was a party or privy, nor that it was approved during the term, nor any particular decree appealed from, nor any citation, it did not operate as a supersedeas. In re Woerishoffer (1896) 74 Fed. 915, 21 C. C. A. 175.

When a condition in an appeal bond is in the disjunctive, defendant in an action thereon must, by his plea, show which part he has performed. Tucker v. Lee (C. C. 1829) Fed. Cas. No. 14,-221.

The condition of an appeal bond is broken, unless the judgment be reversed in toto. Butt v. Stinger (C. C. 1832) Fed. Cas. No. 2246.

In a suit against the sureties on the bond, held, that the condition had been complied with, and that the sureties were released from all liability. Seymour v. Gregory (C. C. 1876) Fed. Cas. No. 12,686.

A supersedeas bond, conditioned that plaintiff in error "shall prosecute its writ of error to effect and answer all damages and costs, if it shall fail to make the plea good," is in the language of the statute, and sufficient. Chateaugay Ore & Iron Co. v. Blake (C. C. 1888) 35 Fed. 804.

11. Execution.—Where a clerk prepares a writ of error, bond, and citation, and sends them to the judge, who signs them without inserting the date of his signature, the clerk has no authority, on the return of the papers, to erase the dates originally written therein, and insert the date of the actual signing; nor has he any authority to change the file marks on papers filed by him; but it would not be improper to add a memorandum, signed by him officially, of any facts which, as to him, might be or become material. Warner v. Texas & P. Ry. Co. (1893) 54 Fed. 920, 4 C. C. A. 670.

An undertaking on appeal given to stay proceedings pending the appeal is not delivered, so as to become effective, until filed, and hence, though signed in another state, is "executed" in the state where filed. Howard Ins. Co. of New York v. Silverberg (1899) 94 Fed. 921, 36 C. C. A. 549, affirming judgment (C. C. 1898) 89 Fed. 168.

12. Time of delivery or filing.—On motion to dismiss an appeal for want of a bond, time may be allowed to file the bond, and the appeal be allowed to stand if the bond is filed pursuant to the order therefor. Anson v. Blue Ridge R. Co. (1859) 23 How. 1, 2, 16 L. Ed. 517.

Where the court supposes it probable that appellant's solicitors had been misled by the state of the record and mode of bringing up the questions from the court below, appellant would be allowed to enter an appeal bond nunc pro tunc. Brobst v. Brobst (1864) 2 Wall. 96, 97, 17 L. Ed. 905.

Where an appeal was allowed in May, 1878, and no bond for the appeal was given until October, 1881, the day on which the cause was for the first time docketed in the supreme court, the appeal became inoperative for failure to give the necessary bond and docket the case during the October term, 1878. Killian v. Clark (1884) 4 Sup. Ct. 700, 111 U. S. 784, 28 L. Ed. 599.

A citation on an appeal to the supreme court is sufficient, without any taking of security, to constitute the allowance of an appeal such as will give the court jurisdiction; and if security be not taken by the judge signing the

citation, the irregularity may be subsequently cured. Brown v. McConell (1888) 8 S. Ct. 559, 560, 124 U. S. 489, 31 L. Ed. 495; Stewart v. Masterson (1888) 8 Sup. Ct. 561, 562, 124 U. S. 493. 31 L. Ed. 507.

The failure to give a bond for costs at the time of taking an appeal is not ground for dismissing the appeal, provided the bond is filed within a reasonable time and the appellee is not prejudiced by the delay. Corcoran v. Kostrometinoff (1908) 164 Fed. 685, 91 C. C. A. 619, 21 L. R. A. (N. S.) 399.

Where a writ of error was not sued out and lodged in the trial court within 60 days of the date of the judgment, plaintiff in error was not entitled to a supersedeas. Roberts v. Kendrick (1914) 211 Fed. 970, 128 C. C. A. 468.

A supersedeas bond executed before judgment entered, but not delivered until after entry, is valid; but. that it may not be open to question, leave will be given to execute a new bond nunc pro tunc. Chateaugay Ore & Iron Co. v. Blake (C. C. 1888) 35 Fed. 804.

13. Additional security or new bond.—The supreme court cannot require an enlargement of the security given on a writ of error sued out in an ejectment suit in which only nominal damages were awarded. Roberts v. Cooper (1856) 19 How. 373, 374, 15 L. Ed. 687.

An application to file a new bond in place of a bond obtained by fraud and perjury is addressed to the discretion of the supreme court, and the application will be denied when agents of the company appealing knew of the wrong that was done, though its president, who presented the bond for approval, may have been ignorant thereof. Florida Cent. R. Co. v. Schulte (1879) 100 U. S. 644, 646, 25 L. Ed. 605.

The omission of the lower court judge to take security at the time of signing the citation on appeal is a mere irregularity, which may be cured by the supreme court allowing appellant to file the proper bond under penalty of dismissing the appeal. Stewart v. Masterson (1888) 8 Sup. Ct. 561, 124 U. S. 493, 31 L. Ed. 507; Brown v. McConnell (1888) 8 S. Ct. 559, 561, 124 U. S. 489, 31 L. Ed. 495.

An appeal will not be dismissed because the bond is not payable to all the adverse parties, where, on the hearing of a motion to dismiss, appellant tenders a new bond conditioned to meet the objections. Blaffer v. New Orleans Water Supply Co. (1908) 160 Fed. 389, 87 C. C. A. 341.

Where a petition in error was duly allowed by the trial court, and the proceedings were in all respects regular, except that no cost bond was given, and such a bond, approved by the court below, is tendered in the appellate court, the case will not be dismissed, but the bond will be allowed to be filed to take effect as though given at the beginning of the proceedings. Herr v. St. Louis & S. F. R. Co. (1909) 174 Fed. 938, 98 C. C. A. 550.

On writ of error from the supreme court, a justice refused to order an increase in the bond given, though, by reason of the supersedeas, the fees and emoluments coming to plaintiff from defendant would greatly exceed the amount of the bond given. Butchers' Ass'n v. Slaughter House Co. (C. C. 1870) Fed. Cas. No. 2,234.

The appellee having objected to the surety tendered on a bond for security for costs upon an appeal from an order dismissing exceptions to the taxation of costs, and the appellant having stated that it was ready to furnish a bond satisfactory to the court, the court required another bond, with a different surety, to be submitted to it for approval; 48 hours' notice to be given appellee's counsel. National Harrow Co. v. Hench (C. C. 1897) 81 Fed. 926.

Where, on appeal from the Supreme Court of the District of Columbia to the federal Supreme Court, a supersedeas bond has been accepted either in court or by a justice in chambers, the jurisdiction of the Supreme Court of the district is at an end, and an application for additional supersedeas bond must be made to the federal Supreme Court. Bradley v. Galt (D. C. 1886) 5 Mackey, 317.

14. Appeal by government or department.—A writ of error to review a judgment recovered against a collector of customs for moneys exacted by and paid to him on entries, being brought by a direction of a department of the government, operates as a supersedeas under this section, without any bond to answer in damages being given. Cochran v. Schell (1883) 2 Sup. Ct. 827, 830, 107 U. S. 625, 27 L. Ed. 543.

15. Effect of bond given without appealing.—Defendant in an action in the circuit court filed a supersedeas bond, which alleged that defendant had "prosecuted an appeal or writ of error to the supreme court." No bill of exceptions had been filed in the case, and no writ of error or appeal allowed. Plaintiff's motion to revoke the supersedeas created by the bond was denied. Held, that the cause would be docketed in the supreme court, and dismissed on plaintiff's motion. Tuskaloosa N. R. Co. v. Gude (1891) 11 Sup. Ct. 1004, 141 U. S. 244, 35 L. Ed. 742.

The mere fact that a supersedeas bond which is sufficient in all other respects was taken and approved before a writ of error was sued out is an immaterial irregularity, as the court will presume that it was reapproved upon the issuance of the citation and the allowance of the writ. McClellan v. Pyeatt (1892) 49 Fed. 259, 1 C. C. A. 241.

An appeal bond which is given in a cause in which no appeal lies, and which does not operate to stay execution, cre-

ates no liability. Steele v. Crider (C. C. 1894) 61 Fed. 484.

Where an appeal bond was presented and approved, but no formal appeal prayed, held, that the court might afterwards allow the appeal nunc pro tunc. Nicholson v. Chicago (C. C. 1869) Fed. Cas. No. 10,248.

16. Bonds void or defective.—Where through mistake or accident no bond, or a defective bond, has been filed, the supreme court will not dismiss an appeal in other respects regular, except on the appellant's failure to comply with an order to give the proper security within a reasonable time. Seymour v. Freer (1866) 5 Wall. 822, 18 L. Ed. 564.

Writs of error were dismissed in two cases, in one of which there were but three plaintiffs in error, while the citation presented four, and in the other where the names in the citation differed from them in the writ, bonds in both cases reciting but one person as plaintiff in error, when there were in fact three. Kail v. Whitmore (1867) 6 Wall. 451, 18 L. Ed. 862.

An appeal will not be dismissed because of a defective bond, but the appellant should be granted additional time to provide good and sufficient sureties. Bigler v. Waller (1870) 12 Wall. 142, 149, 20 L. Ed. 260.

The possession of a receiver will not be disturbed by reason of the giving of a defective bond. Ferguson v. Dent (C. C. 1886) 29 Fed. 1, 5.

Where an appeal from a judgment of the federal court awarding a writ of mandamus is prayed for and inadvertently allowed, a bond given thereon is a nullity, and does not operate as a supersedeas, nor is it based on any consideration which could bind the parties thereto, either as a statutory or a common-law obligation. Jabine v. Oates (C. C. 1902) 115 Fed. 861.

An appeal bond, given on an appeal from a judgment at law in a federal court, which was a nullity and ineffective to stay execution or for any purpose, is without consideration, and will not support an action. U. S. v. Morris' Heirs (C. C. 1907) 153 Fed. 240.

An objection to an appeal bond on the ground that it does not conform to the rules of court, and that its terms are such that it only binds appellant for the judgment of the Court of Appeals, is not ground for a dismissal of the appeal. La Conner Trading & Transportation Co. v. Widmer (1905) 136 Fed. 177, 69 C. C. A. 193.

Where a writ of error is allowed, and citation duly issued and served, an informality in the bond, or in its approval, will not affect the appellate jurisdiction. Smythe v. New Orleans Land Co. (1911) 184 Fed. 892, 107 C. C. A. 214.

17. Effect of failure to give bond.—Appeal dismissed for failure to give bond. Boyce v. Grundy (1832) 6 Pet. 777, 8 L. Ed. 579.

The supreme court will allow a plaintiff in error time to give the clerk the fee bond, but on a failure to give the same within the time prescribed the writ of error will be dismissed. Owings v. Tiernan (1836) 10 Pet. 447, 448, 9 L. Ed. 489.

The supreme court will issue mandamus to compel the execution of the decree on appellant's failure to give security. Stafford v. Union Bank (1854) 17 How. 275, 279, 15 L. Ed. 101; Same v. New Orleans Canal & Banking Co. (1854) 17 How. 283, 284, 15 L. Ed. 102.

Where a plaintiff in error has failed to comply with an order of the circuit court requiring him to file a bond on writ of error in a specified amount, but the writ of error has been issued and served, and the cause transferred to the circuit court of appeals, that court has power, although the time for suing out a writ of error has expired, to retain the cause, and to permit the filing of a bond in such amount as it may prescribe, but not to operate as a supersedeas. Walker v. Houghteling (1900) 104 Fed. 513, 44 C. C. A. 18.

18. Extent of liability on bond.—In a suit on a bond given by one ousted from office on quo warranto, the measure of damages for failure to prosecute a writ of error held to be the salary received by him pending the writ. U. S. ex rel. Crawford v. Addison (1867) 6 Wall. 291, 297, 18 L. Ed. 919.

The liability of sureties on a supersedeas bond given on the removal of a cause from the district court to the circuit court becomes fixed on affirmance by the circuit court, and such liability was not affected by the giving of a supersedeas bond on removal of the judgment of the circuit court to the supreme court, and the affirmance by the supreme court. Babbitt v. Shields (1879) 101 U. S. 7, 11, 25 L. Ed. 820.

Sureties on a bond given in the district court on appeal to the circuit court are not liable for costs on a subsequent removal of the cause from the circuit court to the supreme court. Id.

By taking an appeal from a decree subjecting lands to the payment of a debt, the damages which appellant and sureties must answer for are only such as result from delay in the sale of the property, and that does not imply an obligation to pay the balance of the debt after the proceeds of the land are applied to satisfy it. Wayne County v. Kennicott (1880) 103 U. S. 554, 557, 26 L. Ed. 486.

The damages to be answered for are only such as are incident to the plea that fails; that is to say, the appeal that is taken. Id.

Pending proceedings to review a judgment against a railroad company, it paid to the plaintiff a sum in cash,

and delivered certain bonds in escrow, on an agreement that, if the bonds should advance in market value to par within a year they should be accepted by the plaintiff in full satisfaction of the judgment. They failed to reach the stipulated value, and were tendered back. The proceedings in error resulted, after the expiration of the year, in an affirmance. Held, that such transaction did not discharge the sureties on defendant's supersedeas bond. Jacksonville M. & P. Ry. & Nav. Co. v. Hooper (1898) 85 Fed. 620, 29 C. C. A. 382, certiorari denied (1898) 18 Sup. Ct. 943, 170 U. S. 704, 42 L. Ed. 1217.

The measure of damages for the breach of the condition of a bond to "answer all damages and costs," which is made to work a supersedeas in an appeal from an order directing the issue of an execution under a decree in chancery for the payment of money, is the same as for the breach of the condition of such a bond in an appeal from the decree. It is the amount due to the obligee under the decree, just damages for delay, and costs. Wood v. Brown (1900) 104 Fed. 203, 43 C. C. A. 474.

The obligee in a bond which supersedes an order affirming a sale of real estate, and directing the execution of a deed and delivery of possession to the purchaser, is entitled, after affirmance on appeal, to recover as damages the value of the use and possession; that is to say, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use by the supersedeas bond. Brown v. Northwestern Mut. Life Ins. Co. (1902) 119 Fed. 148, 55 C. C. A. 654.

An appeal bond in the usual form given on appeal from a decree awarding to one of the parties a fund which has been paid into the registry of the court in interpleader proceedings and deposited at interest, does not bind the appellant, on an affirmance, to pay interest on such fund not awarded by the appellate court, in the absence of proof of misconduct on his part, like unreasonable or vexatious delay in prosecuting the appeal, where the appellee has received the fund, with its accumulations. Pike v. Gregory (1902) 118 Fed. 128, 55 C. C. A. 78.

A decree foreclosing a contract for the sale of real estate gave the defendant until January 1, 1899, to make the deferred payments under the contract, and provided that in default a writ of possession should issue. Defendant appealed, and gave a supersedeas bond, conditioned, inter alia, for the payment of the value of the use and occupation of the premises from the time of the appeal until the delivery of possession to complainant. The appellate court directed the modification of the decree by extending the time for performance under the contract to November 1st, and it was so modified. Held, that the effect of such modification was to keep the contract in force, including defendant's right of possession thereunder, until November 1st, and that he was not liable on his supersedeas bond for the value of the use and occupation prior to such time. Buckley v. Crane (1903) 123 Fed. 29, 59 C. C. A. 109.

After the rendition of a decree foreclosing a mortgage certain property was seized thereunder for sale. No application was made to the court for the release of the property as not embraced in the mortgage and decree, but a defendant obtained possession of it by taking an appeal from the decree and giving a supersedeas bond conditioned that he would hold the property "subject to the proper order and decree that may be entered finally in said cause." The decree was affirmed, but pending the appeal the property was destroyed by fire. Held, that such bond was a forthcoming bond, and the obligors were liable thereon for the value of the property as therein stated. Perry v. Tacoma Mill Co. (1907) 152 Fed. 115, 81 C. C. A. 333.

The surety on a bond given on appeal from a Circuit Court to the Circuit Court of Appeals, conditioned in effect as required by this section, and rule 13 of the Circuit Court of Appeals (see notes under § 1114, ante), that the appellant should prosecute his appeal to effect and to answer all costs if he should fail to make his plea good, is liable not only for the costs in the appellate court, but also for those in the court below. Fidelity & Deposit Co. of Maryland v. Expanded Metal Co. (1910) 183 Fed. 568, 106 C. C. A. 114, affirming judgment Expanded Metal Co. v. Bradford (C. C. 1910) 177 Fed. 604.

The sureties in the appeal bond are liable to the extent of its penalty, and have no right to compel the application of proceeds made under the original decree. Sessions v. Pintard (C. C. 1854) Fed. Cas. No. 12,674.

A supersedeas bond given on error in an ejectment case covers rents and profits accruing pending the proceedings in error. St. Louis Smelting Co. v. Wyman (C. C. 1884) 22 Fed. 184.

A decree for the payment of money by defendant to complainant was affirmed on appeal, and the decree entered in pursuance of the mandate allowed interest from the date of the appeal. Notice was at once given to the sureties on the supersedeas bond that plaintiff looked to them for payment of the decree. Two days later the sureties were summoned as trustees in a suit against the plaintiff, but gave no attention to the same, and were defaulted therein. Held that, as they were in

actual personal default to plaintiff from the date of receiving the notice, they could not escape payment of interest to him because of the trustee process, especially as they did not set aside and cause to remain idle any fund to meet the decree or the judgment in the trustee action. Rosenstein v. Tarr (C. C. 1892) 51 Fed. 368, judgment affirmed Tarr v. Rosenstein (1892) 53 Fed. 112, 3 C. C. A. 466.

In an action on an appeal bond neither the principal nor sureties can be mulcted beyond what was adjudged as the result of the appeal; and where a sum deposited in court by a receiver was there retained pending an appeal, and no provision was made for interest thereon in the mandate or the decree entered in pursuance thereof, no such interest could be recovered in an action on the supersedeas bond. Id.

A supersedeas bond, conditioned according to the statute for prosecuting an appeal with effect and answering all damages and costs, covers not merely compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by appellant to appellee. Id.

An appeal bond in an action in which an attachment has been levied operates as security only for the costs of appeal, where there has been no impairment of the security by waste of the property, and no burdens accruing upon it by nonpayment of taxes. Dexter, Horton & Co. v. Sayward (C. C. 1897) 79 Fed. 237.

The liability of sureties on a supersedeas bond given by a defendant for deterioration of attached property, taxes accruing thereon, and the expense of keeping pending proceedings for review of the judgment, is not affected by the fact that there was no personal judgment against the defendants, where there is a deficiency remaining on the amount found due the plaintiff after sale of the property. Dexter, Horton & Co. v. Sayward (C. C. 1897) 84 Fed. 296.

A decree and the mandate of the appellate court affirming the same construed with respect to costs chargeable against the sureties on the bond for appeal. Persons v. Wirgman (C. C. 1905) 140 Fed. 207.

The surety on a bond for costs on appeal from the United States Circuit Court to the Circuit Court of Appeals is liable, not only for the costs in the Circuit Court of Appeals, but also for those incurred in the court below. Expanded Metal Co. v. Bradford (C. C. 1910) 177 Fed. 604, judgment affirmed Fidelity & Deposit Co. of Maryland v. Expanded Metal Co. (1910) 183 Fed. 568, 106 C. C. A. 114; Young v. Daley (C. C. 1911) 185 Fed. 209.

Where bonds for costs were given on separate successive writs of error in the same case, there could be no recovery thereon except for the particular items of costs incurred on each proceeding. Anderson v. Messenger (D. C. 1913) 208 Fed. 75.

19. Enforcement of liability.—Where a decree of a circuit court was affirmed and the cause remanded, with directions to the effect "that such execution and proceedings be had * * * as according to right and justice and the laws of the United States ought to be had," held, that this mandate did not prevent the court from refusing to award execution against the sureties. In re Sawyer (1874) 21 Wall. 235, 238, 22 L. Ed. 617.

Execution against the principal on the judgment recovered in the appellate court is not necessary to charge the sureties in an appeal bond. Babbitt v. Finn (1879) 101 U. S. 7, 15, 25 L. Ed. 820.

Under a statute requiring appellant to give bond with sureties to prosecute his appeal to a decision in the appellate court, and to perform the judgment appealed from, if affirmed, and enacting that, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his sureties, a judgment of the appellate court, affirming a judgment below for a sum of money and interest, upon the appellee remitting part of the interest, may be rendered against the sureties, as well as against the appellant. Hopkins v. Orr (1887) 124 U. S. 510.

Any right to sue on a supersedeas bond on writ of error from the federal Supreme Court to review a judgment of a state court awarding mandamus to recover for business losses pending the writ of error, by defendant's refusal to obey the mandamus, does not exclude the right to sue to recover for damages, if such election should be made. Missouri Pac. R. Co. v. Larabee (1914) 34 Sup. Ct. 979, 234 U. S. 459, 58 L. Ed. 1398, reversing judgment Larabee Flour Mills Co. v. Missouri Pac. Ry. Co. (1911) 116 Pac. 901, 85 Kan. 214.

Suit on supersedeas bond given under this section and section 1666, post, to supersede judgment in action for breach of contract pending writ of error, arises out of the laws of the United States so as to give District Court jurisdiction. American Surety Co. of New York v. Schultz (1915) 35 Sup. Ct. 525, 237 U. S. 159, 59 L. Ed. 892.

A claim that certain property was not that covered by a mortgage, as it was adjudged to be by a decree of foreclosure, cannot be set up in defense to an action on a bond given to supersede said decree pending an appeal therefrom, that question having been concluded by the decree. Perry v. Tacoma Mill Co. (1907) 152 Fed. 115, 81 C. C. A. 333.

Liability to pay damages under a supersedeas bond, staying execution on a decree requiring surrender of certain property, did not accrue until the amount of damages had been assessed in a proper proceeding. Dashley v. Daniel (1913) 202 Fed. 426, 120 C. C. A. 532.

The fact that both parties to a suit mistakenly supposed that a supersedeas bond on an appeal from the Supreme Court of the state to the United States Supreme Court operated to suspend a prohibitory injunction did not estop one of the parties from contending, in an action on the bond, that such was not its effect. Green Bay & M. Canal Co. v. Norrie (1904) 128 Fed. 896, 63 C. C. A. 432, affirming judgment (C. C. 1902) 118 Fed. 923.

In an action upon an appeal bond given upon a writ of error to the supreme court, the breach to be assigned must be a single breach, denying each alternative. Tucker v. Lee (C. C. 1829) Fed. Cas. No. 14,221.

In an action on an appeal bond given on appeal to the supreme court, plaintiff must aver damages sustained by defendant's not making his plea good. Bank of the Metropolis v. Swann (C. C. 1831) Fed. Cas. No. 902.

The affidavit of the surety on an appeal bond, as to his responsibility, where he does not personally appear, is not sufficient. There must be independent evidence of his responsibility. Hobson v. Johnson (C. C. 1868) Fed. Cas. No. 6,553.

A judgment of affirmance by the supreme court fixes the liability of the principal and sureties on a supersedeas bond, as it shows conclusively that the principal did not prosecute his appeal to effect; and where the mandate has been filed in the lower court it is unnecessary for that court to make an order that the judgment be executed, before suit can be maintained on the bond. Davis v. Patrick (1893) 57 Fed. 909, 6 C. C. A. 632, following (1879) Babbitt v. Finn, 101 U. S. 7, 13, 25 L. Ed. 820.

Where sureties on appeal and writ of error bonds become voluntary parties to a suit, they are concluded by the decree for costs entered against their principals. McClaskey v. Barr (C. C. 1897) 79 Fed. 408.

That a plaintiff in error failed to take the proper steps to give the appellate court jurisdiction is no defense to liability on his supersedeas bond. Dexter, Horton & Co. v. Sayward (C. C. 1897) 84 Fed. 296.

The running of the statute against an action on an appeal undertaking given on appeal to the general term of the superior court of the city of New York is not affected by the taking of a further appeal from the judgment of the general term to the court of appeals. Howard Ins. Co. v. Silverberg (C. C. 1898) 89 Fed. 168.

An undertaking given on appeal from a judgment of a court of New York, though signed in California, is "an instrument of writing executed out of the state," within the provision of Code Civ. Proc. Cal. § 339, prescribing the limitation of actions on such instruments. Id.

An action on a supersedeas bond given on an appeal from the decree of a circuit court to the circuit court of appeals, in accordance with this section, to recover the damages sustained by the appellee, is one involving questions arising under the laws of the United States, and is removable into the federal court. Crane v. Buckley (C. C. 1900) 105 Fed. 401.

An affidavit in opposition to an application by plaintiff for an order directing the surety on the appeal bond of defendant and appellant to pay costs, made on information and belief, without disclosing the sources of information or grounds of belief, that the judgment has been assigned to the solicitors of plaintiff, is not proof of the assignment, and will not defeat the application. Young v. Daley (C. C. 1911) 185 Fed. 209.

The court in which the action was brought has jurisdiction of a suit on an appeal bond given therein. Arnold v. Frost (D. C. 1877) Fed. Cas. No. 558.

Action on bond may be brought jointly by obligee claiming interest in the suit. Id.

Where plaintiff gave bond on two writs of error to the Circuit Court of Appeals and was successful in each instance in reversing the judgment but on the third trial judgment was ordered for defendant on certiorari to the United States Supreme Court, defendant's acquiescence in the reversals devitalized the bonds and precluded a recovery thereon. Anderson v. Messenger (D. C. 1913) 208 Fed. 75.

20. Rendition of summary judgment on bond.—Code Iowa 1897, § 4140, authorizes the Supreme Court of the state on affirmance on appeal to render judgment on the appeal bond for the amount of the judgment appealed from, with damages and costs. A judgment for money was rendered by a Circuit Court of the United States in Iowa in an action at law, from which error was prosecuted and a supersedeas bond given under this section and rule 13 of the Circuit Court of Appeals (see notes under § 1114, ante). The judgment was affirmed, and the usual mandate issued. Held that, since the conformity statute (section 1537, ante), applies only to the Circuit and District Courts, and it is not the practice of the federal appellate courts in actions at law to render judgment anew on affirmance, but to remand the cause with direction to proceed according to right and justice, the Circuit Court, on receipt of the mandate had power, in conformity to the Iowa statute, to enter summary judg-

ment against the surety on the supersedeas bond for the amount of the judgment stayed, with interest and costs. Egan v. Chicago Great Western Ry. Co. (C. C. 1908) 163 Fed. 344.

Judgment on a supersedeas bond given under rule 13 of the Circuit Court of Appeals (see notes under § 1114, ante), and this section, on suing out a writ of error to review a judgment for money not otherwise secured, will not, on affirmance, be entered in the appellate court; the proper practice being to enter such judgment on motion in the trial court after remand. City of Clarksdale v. Williamson (1912) 194 Fed. 412, 114 C. C. A. 374.

That a judgment defendant is solvent is no defense to summary judgment against the surety on his supersedeas bond, on affirmance by an appeliate court, nor is the fact that the plaintiff has taken steps to secure payment from the judgment defendant. Egan v. Chicago Great Western Ry. Co. (C. C. 1908) 163 Fed. 344.

The court has power to enter a summary judgment on a supersedeas bond given on appeal from a decree foreclosing a mortgage on personal property for the value of such property, where after affirmance of the decree, it is not produced. Perry v. Tacoma Mill Co. (1907) 152 Fed. 115, 81 C. C. A. 333.

The District Court of the United States for the Eastern District of Louisiana has, as authorized by Act May 26, 1824, adopted as a rule of practice the regulations established by the laws of Louisiana by which a summary judgment may be entered on appeal bonds when appellant fails in his appeal, and under such rule, after affirmance of a decree of the District Court by the Supreme Court and the filing of the mandate, the District Court may enter summary judgment on the appeal bond. Hiriart v. Ballon (1835) 9 Pet. 156, 166, 9 L. Ed. 85.

Where, after affirmance on appeal, appellee filed in the trial court a motion to proceed containing a notice to the sureties on appellant's supersedeas bond that he would apply for a summary decree on the bond, service of which motion was admitted by the surety, such surety was a quasi party to the proceeding, and the court was authorized to render summary judgment against it, both under the state law (Ann. Code Idaho 1901, § 3576), providing that judgment may be entered on motion against the sureties by the court from which the appeal is taken, pursuant to the stipulations, and independent thereof. Empire State-Idaho Mining & Developing Co. v. Hanley (1905) 136 Fed. 99, 69 C. C. A. 87.

Persons signing supersedeas, cost, or delivery bonds in suits between other parties voluntarily become connected with such suits and subject themselves to the jurisdiction of the court and to summary judgment upon their undertakings when the amount of their liability can be ascertained without an issue and trial. Egan v. Chicago Great Western Ry. Co. (C. C. 1908) 163 Fed. 344.

Where there has been laches on each side, so that the parties stand equal in that respect, such laches is no bar to the enforcement of an appeal bond by summary proceedings on the judgment. Smith v. Pendergast (D. C. 1897) 82 Fed. 504.

An order of the state Supreme Court on appeal in a suit for accounting, remitting the record for a finding by the referee respecting a credit claimed by defendant, was an interlocutory and not a final judgment, as affecting the liability of the surety on a supersedeas bond. Commonwealth of Pennsylvania v. Fidelity & Deposit Co. of Maryland (C. C. 1909) 180 Fed. 292.

Code Ala. § 3661, provides that, on affirmation by the supreme court of a judgment of the court below, judgment shall be rendered against the obligors on the appeal bond for the amount of the affirmed judgment. Held, that in the absence of anything to the contrary in the statutes of the United States, and in view of section 1537, ante, conforming the mode of proceeding in the federal courts as nearly as may be to that of the state court, summary judgment on motion may be entered against the sureties on a supersedeas bond on the affirmation of the judgment of the circuit court for a district of Alabama, and the filing of the mandate therein. Gordon v. Third Nat. Bank (1893) 56 Fed. 790, 6 C. C. A. 125, affirming judgment Third Nat. Bank v. Gordon (C. C. 1892) 53 Fed. 471.

Where the circuit court, as the condition of a review by the supreme court of a judgment on drain bonds against a county, as the representative of the persons liable for the amount of the bonds, required a bond conditioned to pay the amount of the judgment, a judgment may be obtained thereon immediately on affirmance of the judgment appealed from, without waiting until a levy can be made by the county to pay the same. Fuller v. Aylesworth (1896) 75 Fed. 694, 21 C. C. A. 505.

Where a decree for the payment of money by defendant was affirmed on appeal, and a decree entered in pursuance of the mandate, the enforcement of such decree against the sureties on the supersedeas bond cannot be prevented by a suit against complainant in which the sureties were summoned as trustees; for while execution could not have gone against them, they were so intimately connected with defendant as to stand in the same position. Rosenstein v. Tarr (1892) 51 Fed. 368, judgment affirmed Tarr v. Rosenstein (1892) 53 Fed. 112, 3 C. C. A. 466.

A judgment of affirmance by the supreme court fixes the liability of the principal and sureties on a supersedeas

bond, as it shows conclusively that the principal did not prosecute his appeal to effect; and where the mandate has been filed in the lower court it is not necessary for that court to make an order that the judgment be executed, before suit can be maintained on the bond. Davis v. Patrick (1893) 57 Fed. 909, 6 C. C. A. 632, writ of error dismissed (1896) 16 Sup. Ct. 1200, 163 U. S. 683, 41 L. Ed. 316, following Babbitt v. Finn (1879) 101 U. S. 7, 25 L. Ed. 823.

The signers of an appeal bond make themselves parties to the suit, and their liability may be enforced by summary proceedings therein. Richards v. Harrison (D. C. 1914) 218 Fed. 134.

21. Enforcement of judgment pending appeal.—Individual bondholders, not parties to a decree of foreclosure, have no legal right to have the same executed pending an appeal which does not operate as supersedeas. Farmers' Loan & Trust Co. v. Central R. R. of Iowa (C. C. 1877) Fed. Cas. No. 4,663.

Cited without definite application, Kitchen v. Randolph (1876) 93 U. S. 86, 90, 23 L. Ed. 810; Hudson v. Parker (1895) 15 Sup. Ct. 450, 452, 156 U. S. 277, 39 L. Ed. 424; In re McKenzie (1901) 21 Sup. Ct. 468, 473, 180 U. S. 536, 45 L. Ed. 657; Bradford v. Southern Ry. Co. (1904) 25 Sup. Ct. 55, 56, 195 U. S. 243, 49 L. Ed. 178; Gunn v. Black (1894) 60 Fed. 159, 160, 8 C. C. A. 542; Marine v. Lyon (1894) 62 Fed. 153, 155, 10 C. C. A. 315; Wickelman v. A. B. Deck Co. (1898) 85 Fed. 851, 29 C. C. A. 436; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Jennings v. Johnson (1906) 148 Fed. 337, 78 C. C. A. 329; Hardesty v. U. S. (1911) 184 Fed. 269, 106 C. C. A. 411; Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98; Lamon v. Speer Hardware Co. (1912) 198 Fed. 453, 119 C. C. A. 1; Monongahela River Consol. Coal & Coke Co. v. Hurst (1912) 200 Fed. 711, 119 C. C. A. 127; Fisher v. Meyer (C. C. 1882) 10 Fed. 268; The Sydney (C. C. 1891) 47 Fed. 260, 263; Southern Building & Loan Ass'n v. Carey (C. C. 1902) 117 Fed. 325 (affirmed [1904] 128 Fed. 1022, 62 C. C. A. 684); The Brantford City (D. C. 1887) 32 Fed. 324, 325; In re Barrett (D. C. 1904) 132 Fed. 362.

§ 1661. (R. S. § 1001.) No bond required of United States, etc. Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a circuit court, either by the United States or by direction of any Department of the Government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the Department under whose directions the proceedings were instituted.

Act Feb. 21, 1863, c. 50, 12 Stat. 657. Act July 27, 1868, c. 255, § 1, 15 Stat. 226.

See notes to R. S. § 999, ante, § 1659.

Notes of Decisions

Construction of provision in general.—This section dispenses with security on "writ of error, appeal, or other process in law, admiralty, or equity," brought up by the United States. Providence Washington Ins. Co. v. Wager (C. C. 1888) 37 Fed. 59.

This section does not apply to proceedings in error in territorial courts. U. S. v. Choctaw, O. & G. R. Co. (1895) 3 Okl. 404, 41 Pac. 729.

Necessity of record showing appeal by government.—It seems that the record should show that an appeal was intended to be taken by the United States, or at the direction of any department of the government, as provided for in this section, so that a bond need not be given. Stretton v. Shaheen (1910) 176 Fed. 735, 100 C. C. A. 389.

Bond as condition precedent to action by government.—Under this section the giving of the bond provided for by provisions of the Alabama Code is not a condition precedent to the right of the United States to avail themselves of such provisions. U. S. v. Bryant (1884) 4 Sup. Ct. 601, 111 U. S. 499, 28 L. Ed. 496.

Suits by parties in name of government.—Private parties instituting an action in the name of the United States for the protection of private interests are not entitled to the benefit of a statute exempting the United States from giving security in proceedings in error. U. S. v. Choctaw, O. & G. R. Co. (1895) 3 Okl. 404, 41 Pac. 729.

Appeals by government.—The United States, in taking an appeal from an award of damages, made under the improvement act of 1836, must file an appeal bond. State v. U. S. (Ind. 1846) 8 Blackf. 252.

The United States, when plaintiffs in court, are entitled to appeal from the

award of arbitrators, without affidavit or security, and without paying costs. U. S. v. Barber (Pa. 1828) 17 Serg. & R. 348.

Appeals by departments.—In a proceeding to review a decision of the board of general appraisers, under Act June 10, 1890, § 15, costs are recoverable against the United States, since the purpose of the act was merely to "simplify the laws" and change the procedure, not to take away the previously existing right of the importer to costs; and, where the United States are appellants, and decision is against them, the costs should be paid out of the proper fund according to this section. U. S. v. Davis (1893) 54 Fed. 147, 4 C. C. A. 251.

Under this section and Circuit Court of Appeals rule No. 31 (see notes under § 1114, ante), judgment against the National Home for Disabled Volunteer Soldiers held properly affirmed without costs on appeal taken by direction of the federal department of justice. National Home for Disabled Volunteer Soldiers v. Parrish (1912) 194 Fed. 940, 114 C. C. A. 576, decree affirmed (1913) 33 Sup. Ct. 944, 229 U. S. 494, 57 L. Ed. 1296.

Exemption of receivers.—A receiver of a national bank, bringing suits in another jurisdiction against stockholders, is not exempted from being required to give security for costs. While in such suits process may, in a sense, be said to issue by direction of a department of the government, it does not appear that, in the event of an adverse decision, the costs taxed against the receiver can be paid from the contingent fund of such department, as contemplated by such section. Platt v. Adriance (C. C. 1898) 90 Fed. 772.

Under this section no security need be given by a receiver of an insolvent national bank on an appeal taken by direction of the comptroller of the currency. Pacific Nat. Bank v. Mixter (1885) 5 Sup. Ct. 944, 114 U. S. 463, 29 L. Ed. 221; Robinson v. Southern Nat. Bank (C. C. 1899) 94 Fed. 22.

Costs included.—The only costs which this section seems to contemplate are the costs of the appellate court, and by Supreme Court rule 24 and rule 21 of the Circuit Court of Appeals, Second Circuit, costs are not allowed either for or against the United States. Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98.

Cited without definite application, Marine v. Lyon (1894) 62 Fed. 153, 155, 10 C. C. A. 315; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; The Sydney (C. C. 1891) 47 Fed. 260, 263; Osborne v. Pennsylvania R. Co. (C. C. 1908) 159 Fed. 301; In re Barrett (D. C. 1904) 132 Fed. 362.

(R. S. §. 1002. Superseded.)

This section related to writs of error from judgments of district courts acting as circuit courts to the Supreme Court. It became inoperative on the repeal of the provisions conferring circuit court powers on district courts, by Act Feb. 6, 1889, c. 113, § 5, 25 Stat. 656.

§ 1662. (R. S. § 1003.) Writs of error to State courts, manner of issue.

Writs of error from the Supreme Court to a State court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

Act Sept. 24, 1789, c. 20, § 25, 1 Stat. 85, 86. Act Feb. 5, 1867, c. 28, § 2, 14 Stat. 386.

The provision in this section, that writs of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, was repeated in Jud. Code, § 237, as amended, ante, § 1214.

Notes of Decisions

Direction of writ.—The writ of error may be directed to any court in which the record and judgment on which it is to act may be found. Gelston v. Hoyt (1818) 3 Wheat. 246, 303, 4 L. Ed. 381.

A writ of error from the supreme court is properly directed to the court in which the final judgment was rendered, and by whose process it must be executed, and in which the record remains, though such court may not be the highest state court which exercised a revisory jurisdiction over points in the case, and certified its decision to the court below. Omission in the record of these points, and the action in the highest court, make no ground for certiorari on account of diminution. McGuire v. Massachusetts (1865) 3 Wall. 382, 386, 18 L. Ed. 114.

Form and contents.—A writ of error is the act of the court, and it need not state that it is directed to a final judgment of the state court. Buel v. Van Ness (1823) 8 Wheat. 312, 320, 5 L. Ed. 624.

Allowance and execution.—A writ of error, sought to review the judgment of the state court, cannot issue without

allowance either by the proper judge of the state court or by justice of the supreme court. Gleason v. Florida ex rel. Attorney General (1869) 9 Wall. 779, 784, 19 L. Ed. 730.

It seems that a writ of error to a state court will not be dismissed because it is signed by the clerk of that court only. Miller v. Texas (1894) 14 Sup. Ct. 874, 875, 153 U. S. 535, 38 L. Ed. 812.

The allowance of a writ of error by the Supreme Court of the United States does not remove the suit from the Supreme Court of the state, but merely brings up the record for review. Larabee Flour Mills Co. v. Missouri Pac. Ry. Co. (1911) 116 Pac. 901, 85 Kan. 214.

Where a writ of error is issued by the Supreme Court of the United States, to the Supreme Court of the state, its allowance did not supersede the judgment, but the taking of the bond and the supersedeas itself was the action of the Supreme Court, which brought about the superseding of the judgment. Id.

Time of issuance.—Under this section the limitation of two years prescribed by section 1649, ante, applies to writs to state courts. Cummings v. Jones (1881) 104 U. S. 419, 26 L. Ed. 824.

In view of this section, a writ of error to the state court may be sued out within the time limited by section 1649, ante, and is not limited to the time fixed by section 1648, ante. Allen v. Southern Pac. R. Co. (1899) 19 Sup. Ct. 518, 520, 173 U. S. 479, 43 L. Ed. 775, dismissing writ of error (1896) 44 Pac. 796, 112 Cal. 455.

Cited without definite application, Hudson v. Parker (1895) 15 Sup. Ct. 450, 452, 156 U. S. 277, 39 L. Ed. 424; Bartemeyer v. Iowa (1871) 14 Wall. 26, 27, 20 L. Ed. 792; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; The Sydney (C. C. 1891) 47 Fed. 260, 263.

§ 1663. (R. S. § 1004, as amended, Act Jan. 22, 1912, c. 12.) Writs of error returnable to the Supreme Court or to circuit courts of appeals, issued by clerks of district courts.

Writs of error returnable to the Supreme Court or a circuit court of appeals may be issued as well by the clerks of the district courts, under the seal thereof, as by the clerk of the Supreme Court or of a circuit court of appeals. When so issued they shall be as nearly as each case may admit agreeable to the form of a writ of error issued by the clerk of the Supreme Court or the clerk of a circuit court of appeals.

Act May 8, 1792, c. 36, § 9, 1 Stat. 278. Act Jan. 22, 1912, c. 12, 37 Stat. 54.

This section, as enacted in the Revised Statutes, provided for the issue of writs of error, returnable to the Supreme Court, by the clerks of the circuit courts. The circuit courts having been abolished, and their powers and duties having been transferred to the district courts, by Jud. Code, §§ 289–291, ante, §§ 1266–1268, this section was amended to provide for the issue of writs of error by the clerks of the district courts, as set forth here, by Act Jan. 22, 1912, c. 12, cited above.

Notes of Decisions

1. Construction in general.
2. Necessity of application for writ.
3. Issuance by clerks of district or circuit courts.
4. Issuance by supreme court or circuit court of appeals.
5. Form and requisites of writs.
6. Service of writ.
7. Time of return.
8. Effect of failure to indorse writ as filed.
9. Separate writs in consolidated actions.
10. Waiver of writ.

1. Construction in general.—The terms "brought" and "sued out," to writs of error, and meaning the issuance of the writ by proper authority and the filing of the same in the proper court, appear to be used synonymously in the statutes of the United States, in the decisions of the courts, and in the text-books. Waxahachie v. Coler (1899) 92 Fed. 284, 286, 34 C. C. A. 349.

2. Necessity of application for writ.—While the clerk of a circuit court may issue a writ of error to that court, under the statute, as well as the clerk of the appellate court, upon an order allowing the same, it is not his duty to do so unless requested, but it is the duty of the plaintiff in error to apply for the writ and to deposit it for filing when issued. Kentucky Coal, Timber, Oil & Land Co. v. Howes (1907) 153 Fed. 163, 82 C. C. A. 337.

3. Issuance by clerks of district or circuit courts.—The appellate jurisdiction of the supreme court may be exercised by writ of error issued by the clerk of the circuit court under the seal of that court in the form prescribed by Act May 8, 1792, c. 137, § 9. Buel v. Van Ness (1823) 8 Wheat. 312, 320, 5 L. Ed. 624.

Under the acts of 1789 and 1792, the clerk of the circuit court where the judgment was rendered may issue a writ of error, and a judge of that court may sign the citation and approve the

bond. Sheppard v. Wilson (1847) 46 U. S. (5 How.) 210, 12 L. Ed. 120.

A writ of error returnable to the circuit court of appeals may be issued from the clerk's office of the circuit court in which the action was tried. Northern Pac. R. Co. v. Amato (1892) 49 Fed. 881, 1 C. C. A. 468, affirming judgment Amato v. Northern Pac. R. Co. (C. C. 1891) 46 Fed. 561, judgment affirmed (1892) 12 Sup. Ct. 740, 144 U. S. 465, 36 L. Ed. 596.

A writ of error may issue by the clerks of the circuit or district courts, under the seals of their respective courts. Cotter v. Alabama G. S. R. Co. (1894) 61 Fed. 747, 748, 10 C. C. A. 35.

4. Issuance by supreme court or circuit court of appeals.—Writs of error to remove causes to the supreme court from inferior courts can regularly issue only from the clerk's office of the supreme court. West v. Barnes (1791) 2 Dall. 401, 1 L. Ed. 433.

Writs of error from the circuit court of appeals to the circuit and district courts are sued out as in cases of writs from the supreme court. Cotter v. Alabama G. S. R. Co. (1894) 61 Fed. 747, 10 C. C. A. 35.

Under this section, where a writ of error is allowed by a judge of the Circuit Court of Appeals to review a decision of that court, the writ should be issued by the clerk of the Circuit Court of Appeals or of the Supreme Court, and not by the clerk of the District Court. In re Issuing Writs of Error (1912) 199 Fed. 115, 117 C. C. A. 603.

5. Form and requisites of writs.—It is by virtue of Act May 8, 1792 (1 Stat. 278), alone that the clerk of a circuit court, or of a district court exercising the jurisdiction of a circuit court, is authorized to issue a writ of error to remove a case to the supreme court, and the legal return day having been fixed under the authority of this act, a writ issued with a different return day, or differing in any other material respect from the prescribed form, is unauthorized, and will not bring up the case to the supreme court. Insurance Co. of Valley of Virginia v. Mordecai (1858) 21 How. 195, 200, 16 L. Ed. 94.

The Judiciary Act, providing that writs of error could only issue from the office of the clerk of the Supreme Court, was modified by Act May 8, 1792, § 9, providing that the form of writ of error approved by two judges of the Supreme Court should be transmitted to the clerks of the Circuit Court and they should issue writs of error agreeably to such form returnable to the Supreme Court. Barton v. Forsyth (1866) 5 Wall. 190, 193, 18 L. Ed. 545.

It is not a fatal defect in a writ that it describes the parties as plaintiffs and defendants in error, as they appear in the Supreme Court, if their names are correctly given. Mussina v. Cavazos (1867) 6 Wall. 355, 361, 18 L. Ed. 810.

The form adopted pursuant to this statute, requiring a writ to be issued in the name of the President, and have the teste of the justice of the federal Supreme Court, a writ in the name of the chief justice of the Supreme Court of a state, bearing the teste of such justice, and signed by the clerk, and sealed by the seal of that court, has not a single requisite of a writ necessary to the jurisdiction of the federal Supreme Court. Bondurant v. Watson (1880) 103 U. S. 278, 279, 26 L. Ed. 447.

An indorsement by the judge upon the petition for a writ of error of its allowance is sufficient without an indorsement upon the writ, though the better practice is to indorse both. Warner v. Texas & P. Ry. Co. (1893) 54 Fed. 920, 4 C. C. A. 670.

A writ of error, which has been allowed, served, and returned to the appellate court with the transcript of the proceedings in the trial court, will not be dismissed because the clerk of the trial court has inadvertently failed to make an indorsement of its filing on the writ itself. United States Nat. Bank v. First Nat. Bank (1897) 79 Fed. 296, 24 C. C. A. 597.

Under Judiciary Act May 8, 1792, c. 36, § 9, 1 Stat. 278, and this section, a writ of error sued out of the United States Circuit Court of Appeals to a United States District Court should run in the name of the President and be attested by the Chief Justice of the Supreme Court and by the clerk of the Circuit Court. Long v. Farmers' State Bank (1906) 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585.

Where the record is actually returned and filed in due time, and the copy of the writ of error is correct, a mere clerical error in the return day in the original writ is immaterial, and is cured. U. S. v. Six Lots of Ground (C. C. 1872) Fed. Cas. No. 16,299.

6. Service of writ.—A writ of error must be served, and such service is made by depositing it with the clerk of the court which rendered the judgment. Kentucky Coal, Timber, Oil & Land Co. v. Howes (1907) 153 Fed. 163, 82 C. C. A. 337.

7. Time of return.—A writ of error will not be dismissed by the circuit court of appeals because return thereof was not made until one day after it was returnable by its terms. Altenberg v. Grant (1897) 83 Fed. 980, 28 C. C. A. 244.

8. Effect of failure to indorse writ as filed.—The failure of a clerk of the circuit court of appeals to indorse a writ of error as filed cannot defeat the transfer of the case, when the judge has done all that is necessary for him to do, and the party has done all that is required of him. Mutual Life Ins. Co. v. Phinney (1900) 20 Sup. Ct. 906, 909, 178 U. S. 327, 44 L. Ed. 1088.

9. Separate writs in consolidated actions.—Where two separate actions depending on the same facts were consolidated and tried together for convenience only, but the verdicts and judgments were separate, it was improper to include both in a single writ of error. Louisville & N. R. Co. v. Summers (1903) 125 Fed. 719, 60 C. C. A. 487, writ of certiorari denied (1904) 24 Sup. Ct. 851, 192 U. S. 607, 48 L. Ed. 585; Waters-Pierce Oil Co. v. Van Elderen (1905) 137 Fed. 557, 70 C. C. A. 255.

10. Waiver of writ.—After a reversal in the supreme court, where defendant entered an appearance, he cannot object that no writ of error was sued out. Evans v. Eaton (C. C. 1818) Fed. Cas. No. 4,560.

Cited without definite application, Texas & Pac. Ry. Co. v. Kirk (1884) 4 Sup. Ct. 500, 111 U. S. 486, 28 L. Ed. 481; In re Claasen (1891) 11 Sup. Ct. 735, 737, 140 U. S. 200, 35 L. Ed. 409; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; The Sydney (C. C. 1891) 47 Fed. 260, 263.

§ 1664. (R. S. § 1005.) Amendment of writ of error.

The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error.

Act June 1, 1872, c. 255, § 3, 17 Stat. 197.

Notes of Decisions

Construction in general.—If a writ of error has been even colorably issued from the supreme court it may be amended under this section; but where there is nothing which even purports to be a writ, there is nothing to amend. Bondurant v. Watson (1880) 103 U. S. 278, 280, 26 L. Ed. 447.

Amendments prior to enactment.—Prior to the enactment of this section it was held that a writ of error erroneously made returnable subsequent to the first day of a term of the supreme court could not be amended. Insurance Co. of Valley of Virginia v. Mordecai (1858) 21 How. 195, 201, 16 L. Ed. 94; Porter v. Foley (1858) 21 How. 393, 394, 16 L. Ed. 154.

Prior to the enactment of this section, a writ of error could not be amended in the supreme court. Hodge v. Williams (1859) 22 How. 87, 16 L. Ed. 237.

Discretion and power of court as to amendment.—The right of a party to amend is not absolute, but the right may be granted by the court in its discretion. An amendment for the purpose of bringing in another party will not be allowed, where the question presented has been many times decided. Pearson v. Yewdall (1877) 95 U. S. 294, 296, 24 L. Ed. 436.

The power to permit the amendment of a defective writ of error may be exercised at any time in the discretion of the court, and it is not fatal that more than six months have passed since the final decree sought to be reviewed was pronounced, for the theory is that a colorable writ shall operate as a writ of error, and that an amendment relates back to its original issuance and presupposes jurisdiction from the date of original allowance. Cotter v. Alabama G. S. R. Co. (1894) 61 Fed. 747, 750, 10 C. C. A. 35.

The power to amend a writ of error resides exclusively in the appellate court. Fitzpatrick v. Graham (1902) 119 Fed. 353, 354, 56 C. C. A. 95.

Particular amendments—As to teste.—The teste of a writ of error is amendable of course. Course v. Stead (1800) 4 Dall. 22, 25, 1 L. Ed. 724.

A mistake in the teste of a writ of error as to the date and the omission of the seal of the court therefrom may be corrected, and do not require that the writ be dismissed. Alaska United Gold Min. Co. v. Keating (1902) 116 Fed. 561, 53 C. C. A. 655.

That a writ of error was attested by the judge of the federal District Court and by the District Court clerk was a defect which was amendable. Long v. Farmers' State Bank (1906) 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585.

—— **As to parties.**—A writ of error, brought in the name of M. D. "and others," was dismissed for irregularity in failing to show the identity of the others. Deneale v. Archer (1834) 8 Pet. 526, 8 L. Ed. 1032.

Where a writ of error to a district court of Louisiana was issued in the name of the heirs of W., without naming any person as plaintiff, and the widow of W. did not join in the writ

of error, the writ was dismissed, because no person was named in it, and because the widow of W. did not join therein. Wilson v. Life & Fire Ins. Co. (1838) 12 Pet. 140, 141, 9 L. Ed. 1032.

Where a suit is against four persons, and a writ of error recites that it was against two named "and others," the writ will be dismissed. Miller v. McKenzie (1870) 10 Wall. 582, 583, 19 L. Ed. 1043.

A defect of the title of the parties in the appeal was ground for dismissal. Freeborn v. The Protector (1870) 11 Wall. 82, 86, 20 L. Ed. 47.

An irregularity in taking an appeal in the name of a firm, instead of in the names of the individual members, could be amended under this section. Moore v. Simonds (1879) 100 U. S. 145, 146, 25 L. Ed. 590.

When the writ gives all the names of the parties as they are found in the record of the case in the circuit court, and when there is nothing to show that any other person was a party than such as are so named, the supreme court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record that would lead to a manifest injustice, and hence there is nothing to amend by. Gumbel v. Pitkin (1885) 5 Sup. Ct. 616, 617, 113 U. S. 545, 28 L. Ed. 1128.

A writ of error taken out in the name of a firm will not be dismissed, where the record discloses the names of the partners. Under this section a writ defective in statement of the parties may be amended, if the defect can be remedied by reference to the accompanying record, without prejudice to the defendant in error. Where it appears that a writ of error is not joined in by all the parties against whom the judgment was rendered, without a proper summons and severance, the writ will be dismissed by the court of its own motion, as no amendment could be made under this section. Estis v. Trabue (1888) 9 Sup. Ct. 58, 59, 128 U. S. 225, 32 L. Ed. 437.

Where two of several defendants sued out a writ of error to a joint judgment, without joining the others, or without a severance, a motion for leave to amend by joining the other defendants, or by a severance, will be denied. Mason v. U. S. (1890) 10 Sup. Ct. 1062, 136 U. S. 581, 34 L. Ed. 345.

Where the writ of error describes "W., administrator of B., deceased," as plaintiff in error, and the record shows that the whole controversy was whether E. was legally such administrator in place of W., by whom the original action was brought, and that the exceptions were taken and tendered, and the bond to prosecute the writ was given, by E., the writ will be amended by substituting the name of E. for that of W. Walton v. Marietta Chair Co. (1895) 15 Sup. Ct. 626, 157 U. S. 342, 39 L. Ed. 725.

The circuit court of appeals is justified in allowing an amendment to correct a writ of error which, owing to the illness of counsel, does not set forth accurately the parties plaintiff, and in denying a motion to dismiss the writ, founded on such mistake. Green County v. Thomas' Ex'r (1909) 29 Sup. Ct. 168, 170, 211 U. S. 598, 53 L. Ed. 343.

Where an appeal was irregularly taken in the name of the collector of the port, but the parties agree to an amendment showing that the appeal was taken on application of the attorney general, the amendment may be made in the appellate court. U. S. v. Hopewell (1892) 51 Fed. 798, 800, 2 C. C. A. 510.

Where an appeal was taken by two of three defendants, against whom a joint decree for a sum of money was rendered, and the record fails to show that the third defendant, who made default in the court below, was in any manner joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect is not one of form only, which the Circuit Court of Appeals may permit the appellants to cure by amendment, but is fatal to jurisdiction of the appeal. Copland v. Waldron (1904) 133 Fed. 217, 66 C. C. A. 271.

That a writ of error designates the parties as plaintiff and defendant, following the title of the cause in the court below, is not a fatal error, but merely clerical mistake, which does not affect the right to prosecute the proceedings for review. H. Hackfeld & Co. v. U. S. (1905) 141 Fed. 9, 72 C. C. A. 265.

The right to amend a writ of error and citation by adding omitted plaintiffs depends primarily upon whether the record shows enough to authorize the amendment. If it appears from the record that the omission was accidental, the amendment should be allowed. Thomas v. Green County (1906) 146 Fed. 969, 77 C. C. A. 487.

While the appellate court cannot take jurisdiction of a writ of error which describes parties by the name of a firm, yet where the record discloses the names of the individuals comprising the firm, the writ of error can be amended under this section. Martin v. Burford (1910) 176 Fed. 554, 100 C. C. A. 159.

A writ of error, if sued out in due time, may be amended in the appellate court by inserting the name of a party omitted, although the time for suing out an original writ has expired. Gilbert v. Hopkins (1912) 198 Fed. 849, 117 C. C. A. 491.

Where a necessary party to a writ of

error has been omitted, the Circuit Court of Appeals is authorized to permit an amendment inserting the name of the omitted party and a new citation to bring it before the court. Teel v. Chesapeake & O. Ry. Co. of Virginia (1913) 204 Fed. 914, 123 C. C. A. 210.

Plaintiffs held to be permitted to amend writ of error, where one defendant was not made a party to the proceedings in error. Rininger v. Puget Sound Electric Ry. (1915) 220 Fed. 419, 136 C. C. A. 43.

—— **As to seal and signature.**—A writ of error for review by the United States supreme court of a judgment of a state court, returnable on a wrong day, bearing the teste of the chief justice of the state court, and signed by the chief justice and the clerk, and sealed with the seal of that court, may be amended in those respects, and the seal and signature of the clerk of the supreme court affixed. Texas Pac. Ry. Co. v. Kirk (1884) 4 Sup. Ct. 500, 111 U. S. 486, 28 L. Ed. 481.

If the signing of a writ of error by the clerk of the court to which it was issued, instead of by the clerk of the Supreme Court, was error, such error was amendable under this section, and not a ground for dismissing the writ. Miller v. Texas (1894) 14 Sup. Ct. 874, 875, 153 U. S. 535, 38 L. Ed. 812.

A defect in a writ of error, in that a seal is wanting, is amendable. Cotter v. Alabama G. S. R. Co. (1894) 61 Fed. 747, 10 C. C. A. 35.

—— **As to return day.**—A writ of error regularly attested with a blank for the return day was allowed to be amended, the term to which it was returnable and the time when it was filed appearing by indorsements on the writ. Mossman v. Higginson (1800) 4 Dall. 12, 13, 1 L. Ed. 720.

A writ of error may be amended under the authority of this section by inserting the proper return day. Hampton v. Rouse (1873) 15 Wall. 684, 686, 21 L. Ed. 250; Atherton v. Fowler (1875) 91 U. S. 143, 149, 23 L. Ed. 265; National Bank of Commerce v. National Bank of Commerce (1878) 99 U. S. 608, 25 L. Ed. 362; Evans v. Brown (1883) 3 Sup. Ct. 83, 109 U. S. 180, 27 L. Ed. 898, affirming judgment Brown v. Evans (C. C. 1883) 17 Fed. 912.

—— **Matters of form.**—A writ of error, good in all important respects, may be amended as to trifling matters of form. Texas Pac. Ry. Co. v. Kirk (1884) 4 Sup. Ct. 500, 111 U. S. 486, 28 L. Ed. 481.

A writ of error, defective for not having been returned attached to the transcript, is not void, since such attachment may be made in the appellate court. Cotter v. Alabama G. S. R. Co. (1894) 61 Fed. 747, 10 C. C. A. 35.

Where, on the filing of an assignment of errors in the trial court, the clerk issued a writ of error, and a judge of the circuit court of appeals approved a supersedeas bond, and issued a citation, which was duly served on the defendant in error, the failure to file a formal petition for the writ, as required by rule 11 of the court of appeals, was a defect of form rather than of substance, and is remediable; hence such failure is not ground for dismissing the writ of error. Alaska United Gold Min. Co. v. Keating (1902) 116 Fed. 561, 53 C. C. A. 655.

Where a judgment on a scire facias on forfeited recognizance was sought to be reviewed on appeal, instead of a writ of error, the objection could not be cured by amendment. The defect is not one of form. Kerr v. U. S. (1907) 159 Fed. 428, 86 C. C. A. 408.

Cited without definite application, McPhaul v. Lapsley (1873) 20 Wall. 264, 273, 22 L. Ed. 344; Burnham v. North Chicago St. Ry. Co. (1898) 87 Fed. 168, 169, 30 C. C. A. 594; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; The Sydney (C. C. 1891) 47 Fed. 260, 263.

§ 1665. (R. S. § 1006.) Amendments in prize appeals.

The Supreme Court may, if, in its judgment, the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize causes.

Act March 3, 1873, c. 230, § 2, 17 Stat. 556.

A provision similar to this section was made by R. S. § 4636, post, § 8413.

Cited without definite application, Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; The Sydney (C. C. 1891) 47 Fed. 260, 263.

§ 1666. (R. S. § 1007, as amended, Act Feb. 18, 1875, c. 80, § 1.) Supersedeas.

In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ [or] error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to

stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days.

Act Sept. 24, 1789, c. 20, § 23, 1 Stat. 85. Act June 1, 1872, c. 255, § 11, 17 Stat. 198. Act Feb. 18, 1875, c. 80, 18 Stat. 318.

The amendment of this section by Act Feb. 18, 1875, c. 80, § 1, cited above, consisted in striking out of the last sentence, after the words "the expiration of," the words, "the said term of sixty," and inserting instead thereof the word "ten."

Instead of the word "or," inclosed in brackets, read "of."

Notes of Decisions

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1. Construction in general.—Supersedeas defined. Hovey v. McDonald (1883) 3 Sup. Ct. 136, 142, 109 U. S. 150, 27 L. Ed. 888.

The supersedeas stays process for the execution of the judgment or decree brought under review by writ of error or appeal to which it applies. It operates on the judgment or decree, but not on the questions involved, considered apart from the particular suit in which they were decided. Natal v. Louisiana (1887) 8 Sup. Ct. 253, 123 U. S. 516, 31 L. Ed. 233.

This section does not affect the right of appeal or limit the time in which it shall be taken. Logan v. Goodwin (1900) 104 Fed. 490, 43 C. C. A. 658.

A writ of error and supersedeas bond suspend the execution of the judgment pending the writ of error in the appellate court and until the case is there determined or remanded. U. S. v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145.

This section provides for supersedeas of a judgment on suing out of a writ of error, and is concerned with the question of securing a review of a judgment by an appellate tribunal. Sanborn v. Bay (1911) 194 Fed. 37, 114 C. C. A. 57.

The allowance of an appeal to the supreme court relates back to the time when the original application was made to the judge of the circuit court, and entitles the party to a stay. Thornhill v. Bank of Louisiana (C. C. 1870) Fed. Cas. No. 13,991.

Upon granting a motion to remand a cause to the state court, no stay is necessary for the purpose of an appeal other than that provided for by this section. Johnston v. Donvan (1887) 30 Fed. 395.

Upon an appeal, under Act March 3, 1891, § 7, from an interlocutory order granting an injunction, appellant is entitled to a supersedeas, as a matter of right, upon furnishing such a bond as the court in its discretion may require for the protection of the appellee. Société Anonyme du Filtre Chamberland Système Pasteur v. Blount (C. C. 1892) 51 Fed. 610, order to set aside supersedeas granted Blount v. Société Anonyme du Filtre Chamberland Système Pasteur (1892) 53 Fed. 98, 3 C. C. A. 455.

Where the provisions of the statute are complied with, the right of supersedeas exists, but otherwise it cannot exist, for supersedeas is a right secured by statute, and of imperative obligation on the court and its officers. Bound v. South Carolina Ry. Co. (C. C. 1893) 55 Fed. 186, 187.

A judgment of ouster in quo warranto proceedings against an Illinois corporation goes into effect from its rendition, and is not suspended or annulled by an appeal to the state supreme court, pursuant to Rev. St. Ill. c. 112. Olmstead v. Distilling & Cattle-Feeding Co. (1895) 73 Fed. 44.

The provision that, "in any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error by lodging a copy thereof for the adverse party in the clerk's office, where the record remains," etc., is permissive, only, as to the manner of serving the writ, and not mandatory, as was the corresponding provision in Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 85, and does not

preclude service in any other manner. Under such section the filing of the original writ with the clerk is equivalent to lodging a copy with him, and constitutes a service of the writ for the purpose of a supersedeas. McCarley v. McGhee (C. C. 1901) 108 Fed. 494.

Where the terms of a bond on appeal comply with the provisions in regard to a supersedeas and stay of execution, the bond operates as a supersedeas and stay of execution without any order to that effect. Arnold v. Frost (D. C. 1877) Fed. Cas. No. 558.

Whether an appeal to the United States Supreme Court operated as a supersedeas of the judgment, being governed by the federal statutes, the decisions of the United States courts are to be followed. North Shore Boom & Driving Co. v. Nicomen Boom Co. (1909) 101 Pac. 48, 52 Wash. 564.

2. Construction and application in criminal prosecutions.—Under this section and R. S. § 716, giving the supreme court power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law, a justice of the supreme court may issue a supersedeas, on allowing a writ of error, under Act March 3, 1891, to a circuit court, in case of conviction for an infamous crime. In re Claasen (1891) 11 Sup. Ct. 735, 738, 140 U. S. 200, 35 L. Ed. 409.

Under the provision that a writ of error, when granted within 60 days after the rendition of the judgment complained of, or afterwards, with the permission of a judge of the appellate court, shall operate as a supersedeas, and under rule 38 of the circuit court of appeals (31 C. C. A. cviii, 90 F. cviii) such writ, in the case of a conviction of a crime not capital, stays execution, but such stay of proceedings does not involve the question as to whether, pending the writ of error, defendant shall be detained or go at large on bail. McKnight v. U. S. (1902) 113 Fed. 451, 51 C. C. A. 285.

Where accused were each sentenced to a term of imprisonment and to pay a fine of $1,000, and, after executing a supersedeas bond conditioned that they would prosecute their writ to effect and also damages and costs which might be awarded against them or either of them if they failed to make their pleas good, executed appearance bonds, such supersedeas bond was neither unauthorized nor without consideration, but, on the affirmance of the judgment and on defendants' surrender to serve the imprisonment portion thereof, the United States was entitled to recover the amount of the fine in a proceeding on the supersedeas bond. Hardesty v. U. S. (1911) 184 Fed. 269, 106 C. C. A. 411.

It is within the discretion of the United States court in the trial of a criminal case to grant or refuse a supersedeas, when informed by counsel for a convicted person that he purposed to sue out a writ of error or take an appeal. U. S. v. Gibson (D. C. 1911) 188 Fed. 390.

3. Application for supersedeas.—Where a conveyance is in form to A. alone, though for the joint benefit of himself with others, whatever in a decree affects the title, not only affects A., but those having a joint benefit with him, and where a supersedeas would be granted in favor of A., it should be granted on the application of those having such joint interest with him. Hunt v. Oliver (1883) 3 Sup. Ct. 114, 116, 109 U. S. 177, 27 L. Ed. 897.

4. Ground for denying supersedeas.—Where, in a suit for infringement of a patent, complainants, having succeeded on all the proofs in establishing the merits of their bill, were entitled to an interlocutory judgment, and it also appeared that before a hearing could be had on an appeal the patent would have expired, a supersedeas would not be granted. Timolat v. Philadelphia Pneumatic Tool Co. (C. C. 1904) 130 Fed. 903.

5. Power or authority to allow writ.—Where a case is properly before the Supreme Court by appeal, the court may issue a writ of supersedeas, if such writ be necessary to render its jurisdiction effectual. Ex parte Milwaukee & M. R. Co. (1866) 5 Wall. 188, 190, 18 L. Ed. 676.

Upon an appeal to the circuit court of appeals under section 7 of the judiciary act of March 3, 1891, from an interlocutory decree granting or continuing an injunction, defendant is not entitled to a supersedeas as a matter of right, and it is within the discretion of the circuit court to grant or refuse the same. In re Haberman Mfg. Co. (1893) 13 Sup. Ct. 527, 147 U. S. 525, 37 L. Ed. 266; Lalance & Grosjean Mfg. Co. v. Habermann Mfg. Co. (C. C. 1892) 53 Fed. 375; Id. (C. C. 1893) 54 Fed. 375, disapproving Société Anonyme du Filtre Chamberland Système Pasteur v. Blount (C. C. 1892) 51 Fed. 610.

The circuit court may, as the condition of a review by the supreme court of a judgment on drain bonds against a county as the representative of the persons liable for the amount of the bonds, require a bond, with sureties, conditioned for the payment of the amount of the judgment, though the county itself is not liable for such payment. Fuller v. Aylesworth (1896) 75 Fed. 694, 21 C. C. A. 505.

A single judge may grant a writ of supersedeas. Tornanses v. Melsing (1901) 106 Fed. 775, 45 C. C. A. 615.

The granting or denying of a supersedeas, on an appeal from an order granting a preliminary injunction, is

within the discretion of the court. City of Shelbyville, Ky., v. Glover (1910) 184 Fed. 234, 106 C. C. A. 376.

The power to grant a supersedeas is discretionary, to be exercised only where it is manifest that extraordinary reasons justify it. Timolat v. Philadelphia Pneumatic Tool Co. (C. C. 1904) 130 Fed. 903.

A Circuit Court, on the dismissal of a bill and dissolution of a temporary injunction, granted at suit of a telegraph company, restraining the collection of taxes by a state, has power to grant a supersedeas continuing the status quo pending an appeal, on the giving of a bond to protect the state. Western Union Telegraph Co. v. Wright (C. C. 1909) 168 Fed. 558.

6. Writ operating as supersedeas.—If the value of the matter in dispute does not appear by record, it may be shown by affidavit, but in such case the writ of error is not a supersedeas. Williamson v. Kincaid (1800) 4 Dall. 20, 21, 1 L. Ed. 723.

A writ of error from the judgment of a state court removing a county attorney from office does not operate as a supersedeas, so as to prevent a legal appointment of another person to the place, until it is properly lodged in the clerk's office of the state court; hence the new appointee is not in contempt while acting as county attorney. Foster v. Kansas (1884) 5 Sup. Ct. 8, 112 U. S. 201, 28 L. Ed. 629.

This section relates to the effect of the writ of error itself as a supersedeas, and does not in terms impose any limitation on the appellate court, in the exercise of general powers conferred by other sections. New England R. Co. v. Hyde (1900) 101 Fed. 397, 399, 41 C. C. A. 404.

A writ of error to a decree dissolving an injunction restraining enforcement of a judgment at law held not a supersedeas. Grundy v. Young (C. C. 1807) Fed. Cas. No. 5,850.

A writ of error to the judgment of the circuit court of the District of Columbia awarding a peremptory mandamus is a supersedeas. U. S. v. Columbian Ins. Co. (C. C. 1821) Fed. Cas. No. 14,840.

Both appeals and writs of error operate as a supersedeas without express order, if taken within the proper time and with an offer of the requisite security. Butchers' Ass'n v. Slaughter House Co. (C. C. 1870) Fed. Cas. No. 2,234.

A writ of error from the United States supreme to the circuit court is not a proceeding under the state code, but at common law, as modified by the Revised Statutes, and it does not have the effect, pending the proceeding, to suspend the operation of the judgment of the circuit court as a bar or an estoppel. Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. (C. C. 1886) 27 Fed. 277, judgment reversed Oregon Ry. & Nav. Co. v. Oregonian Ry. Co. (1890) 10 Sup. Ct. 1072, 136 U. S. 646, 34 L. Ed. 552.

7. Effect on further proceedings in lower court.—An appeal from a decree of a circuit court ordering execution of the original decree held not a supersedeas to further proceedings on the original decree. Carr v. Hoxie (1839) 13 Pet. 460, 462, 10 L. Ed. 247.

Appeal from decree dismissing bill to restrain collection of a judgment does not operate to supersede such judgment. Knox County v. Harshman (1889) 10 Sup. Ct. 8, 9, 132 U. S. 14, 33 L. Ed. 249.

On an appeal to the circuit court of appeals from a decree in proceedings to enforce an order of the interstate commerce commission, the decree of the circuit court is not superseded: but, if an appeal be taken to the supreme court from the decree of the circuit court of appeals, the latter decree is superseded, so that the decree of the circuit court remains in force in any event. Louisville & N. R. Co. v. Behlmer (1898) 18 Sup. Ct. 502, 169 U. S. 644, 42 L. Ed. 889.

In general a circuit court of appeals will not, pending an appeal, suspend an injunction, previous to the hearing on the merits, after the trial judge has refused to grant a supersedeas. American Strawboard Co. v. Indianapolis Water Co. (1897) 81 Fed. 423, 26 C. C. A. 470, overruling motion to sustain injunction Indianapolis Water Co. v. American Strawboard Co. (C. C. 1893) 57 Fed. 1000.

While an appeal from an order dissolving an injunction, though with a supersedeas, does not reinstate the injunction in force, yet the court may in its discretion, do so by an affirmative order; and where, in the order allowing the appeal and supersedeas, the court provided that pending such appeal the order dissolving the injunction should stand suspended and superseded, and after a decision by the circuit court of appeals affirming the order of dissolution, but before its mandate had been sent to the circuit court, the cause and record were removed to the supreme court by a writ of certiorari, the injunction remains in force, and must be respected and enforced until final disposition of the case in the supreme court. Staffords v. King (1898) 90 Fed. 136, 32 C. C. A. 536.

The granting of an appeal from an order appointing a receiver, and a supersedeas, by operation of law suspends the powers of the receiver to act further under such order, and entitles the defendant to a restoration of the property which he has taken into his possession thereunder. Tornanses v. Melsing (1901) 106 Fed. 775, 45 C. C. A. 615.

In an action to recover water rights in certain ponds, plaintiff prayed judg-

ment that defendant be commanded to rebuild and restore the embankment and drain on the south bank of the river, opposite the property conveyed by plaintiff, to the United States with a reservation of the water power. The state court rendered judgment that plaintiff was the owner of the water power created by the dam previously erected, and adjudged that defendant be perpetually restrained from drawing any water from the pond created by the dam. On appeal, it appearing that defendant, instead of the earth embankment, had constructed a series of stone piers, with openings between the same which could be closed by moveable gates, and which, when closed, operated to maintain the pond, the court held that, as defendant's headgates would stop the water as effectually as would an embankment, the plaintiff was not injured by leaving the gates, and that the refusal of the injunction as prayed was a proper exercise of the trial court's discretion. Held, that the injunction contained in the judgment of the state court was prohibitive only, and not mandatory, and was therefore not suspended by a supersedeas bond given on appeal to the United States Supreme Court, where the judgment was affirmed. Green Bay & M. Canal Co. v. Norrie (1904) 128 Fed. 896, 63 C. C. A. 432, affirming judgment (C. C. 1902) 118 Fed. 923.

The taking of security for damages and costs on an appeal from a second decree, which reforms the grant of relief and determines issues not adjudicated by the former decree, on whch the mandate of affirmance issued, supersedes the later decree and deprives the inferior court of the power, pending the appeal, to execute a part of it, which in its opinion is but a repetition of the former adjudication. McCourt v. Singers-Bigger (1906) 150 Fed. 102, 80 C. C. A. 56.

An order, after appeal from a decree that the judgment debtor pay some part of the amount unpaid on the judgment, and before determination of the case on the appeal to the effect that the levy be released, was error, where the appeal bond was not conditioned to pay the judgment if the appeal failed. Loy v. Alston (1909) 172 Fed. 90, 96 C. C. A. 578.

Where, on appeal by a judgment creditor of a corporation from a decree foreclosing mortgages, directing a sale of the property of the corporation thereunder, and denying priority to appellant's claim, the trial court has stricken from the files a supersedeas bond filed by appellant and proceeded with the sale, but has safeguarded appellant's rights, in case it should prevail on the appeal, the appellate court will not interfere to suspend proceedings in the court below, which would jeopardize the rights of some of the parties. Gay v. Hudson River Electric Power Co. (1911) 191 Fed. 828, 112 C. C. A. 342, denying suspension of execution (C. C. 1911) 190 Fed. 773.

The court having granted a stay of injunction pending defendant's appeal, complainant was not entitled to an order from the appellate court requiring a bond on facts not different from those which existed at the time of the stay. Pneumatic Scale Corporation v. Automatic Weighing Mach. Co. (1912) 200 Fed. 572, 119 C. C. A. 52.

After a writ of error has been served and returned to the supreme court, the record cannot be amended in the court below, though the writ has been dismissed in the court above. U. S. v. Hooe (C. C. 1803) Fed. Cas. No. 15,386.

A substantial defect in a declaration cannot be amended in the circuit court while the case is pending in the supreme court. Marsteller v. McClean (C. C. 1810) Fed. Cas. No. 9,140.

An appeal and the bond given in pursuance thereof do not vacate or suspend an order of injunction. Whitney v. Mowry (C. C. 1867) Fed. Cas. No. 17,592.

The purchaser under a judgment pending a writ of error or appeal, where no stay of proceedings was obtained, acquires a good title. South Fork Canal Co. v. Gordon (C. C. 1868) Fed. Cas. No. 13,189.

Further action of a justice of the supreme court of the United States is superseded by the application for and allowance of a writ of error. Butchers' Ass'n v. Slaughter House Co. (C. C. 1870) Fed. Cas. No. 2,234.

After a case has been appealed from the circuit to the supreme court, it is not the proper practice to apply to the circuit court for a request to the supreme court to send the case back for a rehearing. Roemer v. Simon (C. C. 1875) Fed. Cas. No. 11,998.

On an appeal from a final decree dissolving an injunction, taken in such form as to operate as a supersedeas, the court below has no jurisdiction to restrain the successful party from prosecuting the previously enjoined work pending the appeal. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1878) Fed. Cas. No. 4,549.

A decree granting an injunction is not nullified or suspended by an appeal to the supreme court, though all the requisites for a supersedeas are complied with. Ozark Land Co. v. Leonard (C. C. 1885) 24 Fed. 658, motion for modification of supersedeas denied Leonard v. Ozark Land Co. (1885) 6 Sup. Ct. 127, 115 U. S. 465, 29 L. Ed. 445.

The omission from an appeal bond of the statutory stipulation as to damages required to effect a supersedeas does not necessarily entitle the party to whom the property is adjudged to a discharge of the receiver, and possession of the property, pending the ap-

peal. The subsequent custody is a matter which the court will regulate, upon the equitable circumstances of each case, whether there has been a statutory supersedeas of the final decree or not. Ferguson v. Dent (C. C. 1886) 29 Fed. 1.

The court will not sanction the dispossession of its receiver by a writ issued by the clerk upon the discovery of a defect in the supersedeas bond, although the final decree, if not superseded, might authorize it. The proper practice is to apply to the court to execute the decree. Id.

After an appeal has been allowed and a supersedeas bond is taken, either during or after the term, jurisdiction as to all matters—certainly those of substance—determined by the decree is transferred to the court to which the appeal goes. Morgan's Louisiana & T. R. & S. S. Co. v. Texas Cent. Ry. Co. (C. C. 1887) 32 Fed. 525.

Where a bill to modify the method of collecting a judgment which was not stayed by giving a supersedeas bond, as allowed by statute, was dismissed, and no interlocutory order affecting such judgment was ever made in the proceeding on the bill, a supersedeas bond upon appeal from such dismissal only stays any orders made in the proceeding on such bill, and does not operate to restrain the collection of the original judgment, even though the proceeding on the bill be deemed a mere continuation of the original action. U. S. v. County Court of Knox County (C. C. 1889) 39 Fed. 757.

An appeal and supersedeas of a decree in respect to solicitors' fees in a foreclosure proceeding do not preclude the lower court from passing on the question of confirmation of the sale made under it. Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C. 1893) 54 Fed. 26.

Equity has jurisdiction of a suit to enjoin the enforcement of a judgment based on a verdict which is vitiated by the misconduct of the jury, where the complainant had lost all ground of relief at law at the time of discovering the facts. Nor does it affect the jurisdiction that the judgment is pending on error, and under a supersedeas, in the supreme court. Platt v. Threadgill (C. C. 1897) 80 Fed. 192.

A court rendering a decree granting an injunction has the power, if the purposes of justice require it, to order a continuance of the status quo until a decision shall be made by the appellate court, or until that court shall order the contrary, and the power should always be exercised when any irremediable injury may result from the effect of the decree as rendered. Interstate Commerce Commission v. Louisville & N. R. Co. (C. C. 1899) 101 Fed. 146.

A decree granting an injunction is not superseded by an appeal from the decree, even though all the requisites for a supersedeas be complied with. Id.

After appointment of a receiver. the court rendered a decree dismissing the bill, and on the same day a separate decree, reciting the filing of a report by the receiver and the lodging of exceptions against it, and ordering that the exceptions be referred to a master, and that he proceed to hear and determine them. Appeal was then taken from the former decree, and supersedeas had. Held that, even if the decrees be construed as one, the supersedeas did not prevent the making of the statement of the receiver's accounts. Blinn v. Continental Security Redemption Co. (C. C. 1901) 110 Fed. 265.

The power of a circuit court to enforce a decree entered by it on a mandate of an appellate court, notwithstanding an appeal therefrom and the tender of a proper supersedeas bond, is doubtful, and, if it exists, should be rarely exercised. Southern Building & Loan Ass'n v. Carey (C. C. 1902) 117 Fed. 325, affirmed (1904) 128 Fed. 1022, 62 C. C. A. 684.

Where an order granted an appeal from an order dissolving an injunction, and recited that supersedeas was granted to the order appealed from on the plaintiff entering into a bond with approved security, etc., on such bond having been duly given the supersedeas continued the injunction in force during appeal. New River Mineral Co. v. Seeley (C. C. 1902) 117 Fed. 981.

Where an appeal has been taken to the Circuit Court of Appeals from an interlocutory decree granting an injunction to restrain the infringement of a patent, and the Circuit Court has accepted an appeal bond and made it a supersedeas, such court has no power, after the appeal has been perfected to suspend the operation of such bond and vacate the stay prior to the receipt of a mandate from the appellate court. Shelby Steel Tube Co. v. Delaware Seamless Tube Co. (C. C. 1908) 161 Fed. 798.

Where the decision is appropriate to be reviewed, and where an absolute denial of the preliminary injunction would operate to destroy complainant's alleged rights, the restraining order will be continued pending the appeal. Louisville & N. R. Co. v. Siler (C. C. 1911) 186 Fed. 176.

Under the rule of comity against rendering a decree that may practically destroy the effect of a supersedeas, a state court will not order payment of an entire fund to one party while others, in the United States supreme court, are claiming payment out of it, under a writ of error to the state court operating as a supersedeas. State v. Burke (1883) 35 La. Ann. 185.

Where execution was levied by the sheriff, under a judgment of a state court, which judgment was removed to the supreme court of the United

States, and a stay bond executed, an action, in effect, to vacate the levy, does not interfere with the jurisdiction of the federal court. Central Trust Co. v. Moran (1894) 56 Minn. 188, 57 N. W. 471, 29 L. R. A. 212.

Where, in an action in which defendant set up a counterclaim, an appeal was taken from the judgment dismissing the counterclaim before the issues raised by the complaint were determined, a writ of error from the federal to the state Supreme Court, upon the latter's affirmance of the judgment appealed from, only removed the proceedings involving the judgment on the counterclaim to the federal court, so that the pendency of the writ of error would not stay proceedings in the trial court to determine the issues raised by the original complaint, especially where its action was not stayed by a supersedeas bond or otherwise. Grand Cent. Mining Co. v. Mammoth Mining Co. (1909) 104 Pac. 573, 36 Utah, 364, Ann. Cas. 1912A, 254.

8. Necessity of giving security.—An appeal in chancery must be perfected by giving security in order to operate as a supersedeas. Stafford v. Union Bank (1853) 16 How. 135, 139, 14 L. Ed. 876; Adams v. Law (1853) 16 How. 144, 147, 14 L. Ed. 880; Stafford v. Union Bank (1854) 17 How. 275, 279, 15 L. Ed. 101; Same v. New Orleans Canal & Banking Co. (1854) 17 How. 283, 284, 15 L. Ed. 102.

9. Amount and sufficiency of bond.—To make an appeal operate as a supersedeas, appellant must give good and sufficient security for its prosecution, and from all costs and damages that may be adjudged against him. This security is usually given by bond with one or more sureties, and section 22 of the Judiciary Act required that it be taken by the judge who signed the citation on appeal, and it is not required that the security be in any fixed proportion to the decree. What is necessary is that it be sufficient. Its sufficiency must be determined first by the judge signing the citation, but after the appeal this question is cognizable in the Supreme Court, which may in its discretion increase or diminish the bond. Providence Rubber Co. v. Goodyear (1867) 6 Wall. 153, 156, 18 L. Ed. 762.

If, after security which operated as a supersedeas has been accepted, circumstances of the case, or of the parties, or of the sureties on the bond, change, so that the security is no longer sufficient, the supreme court may, on proper application, so adjudge, and order as justice shall require. Williams v. Claflin (1880) 103 U. S. 753, 26 L. Ed. 606.

A bond on appeal from a decree for plaintiff held not to cover the amount directed to be paid to the master, and the collection thereof not subject to be stayed by the proceedings for appeal. Myers v. Dunbar (C. C. 1874) Fed. Cas. No. 9,990.

Where plaintiff was present when the amount of defendant's supersedeas bond for appeal was fixed by the trial court, and made no objection to the amount fixed, whereupon a writ of error was allowed, the bond accepted, and citation issued, the fact that the amount fixed, was, by inadvertence, some $30 less than the amount actually due on the judgment, including interest, etc., was immaterial. Clarke v. Eureka County Bank (C. C. 1904) 131 Fed. 145.

Where a supersedeas bond has been accepted, writ of error allowed, and the citation issued, a motion to increase the bond is within the exclusive jurisdiction of the appellate court. Id.

Where, as the result of the appeal, the appellees will be prevented from bringing suit pending it, while double the amount of the indebtedness for which the appellants may be ultimately found liable—some $25,000 in this case—will not be required so as to call for a bond of $50,000, held, under all the circumstances, that one of $8,000 should be given; this being to secure against the risk of delay and the possible loss resulting therefrom. Kirkpatrick v. Eastern Milling & Export Co. (1905) 135 Fed. 151.

10. Defective bonds.—The possession of a receiver will not be disturbed by reason of the giving of a defective supersedeas bond. Ferguson v. Dent (C. C. 1886) 29 Fed. 1, 5.

11. Time for filing writ or bond—Construction as to time in general.—The general provisions of this section, limiting the time within which a writ of error must be allowed and lodged in the clerk's office, if a supersedeas is desired, would govern writs of error from the federal supreme court to the circuit court of appeals, even under the mistaken hypothesis that writs of error from the circuit court of appeals to inferior courts, and appeals from such courts, to the circuit court of appeals, were all that were within the purview of the provision of Act March 3, 1891, c. 517, § 11, 26 Stat. 829, that all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and systems of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error. Title Guaranty & Surety Co. v. U. S. (1912) 32 Sup. Ct. 168, 222 U. S. 401, 56 L. Ed. 248.

Whether an appeal taken from a decree of June 3 or June 6, 1872, was in time to operate as a supersedeas, is determined by this act, and not by the

Judiciary Act of 1789. Rodd v. Heartt (1872) 17 Wall. 354, 357, 21 L. Ed. 627.

A supersedeas bond may be executed within 60 days after the rendition of the judgment, and later with the permission of the judge, and the writ of error may be served at any time before, or simultaneously with, the filing of the bond. Western U. Teleg. Co. v. Eyser (1873) 19 Wall. 419, 427, 22 L. Ed. 43.

Circuit Courts of Appeals Act, § 11, which permits a writ of error to be sued out for the review of a judgment at law at any time within six months, and this section, authorizing the allowance of a supersedeas within 60 days, govern as to the time within which a writ of error must be issued or a supersedeas obtained in that court, regardless of the provisions of state statutes. Logan v. Goodwin (1900) 101 Fed. 654, 41 C. C. A. 573.

This section contemplates that security shall be taken when the citation issues. McClellan v. Pyeatt (1892) 49 Fed. 259, 261, 1 C. C. A. 241.

A writ of error will operate as a supersedeas, under this section, if duly served within 60 days, Sundays exclusive, after a motion for a new trial has been overruled. Rutherford v. Pennsylvania Mut. Life Ins. Co. (C. C. 1880) 1 Fed. 456, 458.

A judgment is not final, so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court, through the pendency of a motion for a new trial. Clarke v. Eureka County Bank (C. C. 1904) 131 Fed. 145, 146.

Under this section, section 1673, post, and R. S. § 1909, providing that appeals from final decisions of the Supreme Court of Arizona shall be allowed to the Supreme Court of the United States, in the same manner, and under the same regulations, as from Circuit Courts of the United States, appellants from a decision in the Supreme Court of Arizona have 60 days after the judgment was rendered, exclusive of Sundays, to give security and suspend judgment upon an appeal to the Supreme Court of the United States. Sandoval v. United States Fidelity & Guaranty Co. (1909) 100 Pac. 816, 12 Ariz. 348.

Notwithstanding this section, a motion for a new trial postpones the filing of the writ and bond until decision thereon. Nevada Bank of San Francisco v. Steinmetz (1884) 65 Cal. 219, 3 Pac. 808.

12. —— **Construction and application of prior provisions.**—Where it is desired to make the appeal a supersedeas, it must be given within ten days from the rendition of the decree. Providence Rubber Co. v. Goodyear (1867) 6 Wall. 153, 156, 18 L. Ed. 762.

The supreme court in the exercise of its appellate power is not authorized to grant a supersedeas, unless the writ of error has been sued out within 10 days after the judgment and in conformity with the act. Hogan v. Ross to Use of Patterson (1850) 11 How. 294, 297, 13 L. Ed. 702.

The 10 days given by section 23 of the Judiciary Act to take a writ of error from the supreme court run from the day when judgment is entered in the court where the record remains; and when judgment is given in the highest court of a state on appeal or writ of error from an inferior court, and, on affirmance, the record is returned to such inferior court with order to enter judgment there, they run from the day when judgment is so there entered. Green v. Van Buskirk (1865) 3 Wall. 448, 450, 18 L Ed. 245.

A writ of error, not sealed until 11 days after the judgment sought to be reversed was rendered, cannot operate as a supersedeas; nor where service of citation before return day of the writ was omitted. Washington v. Dennison (1867) 6 Wall. 495, 18 L. Ed. 863.

Where writs of error are filed within 10 days from the date of the entry refusing the petition for rehearing, the writs operate as a supersedeas and stay execution, where sufficient bonds are given within 10 days from the date of the judgment. Slaughter House Cases (1869) 10 Wall. 273, 289, 19 L. Ed. 915.

Where it does not appear from the record that a copy of the writ was lodged for defendant in error in the clerk's office of the Supreme Court within 10 days, nor that a bond was allowed and filed, a writ of error cannot operate as supersedeas. O'Dowd v. Russell, Use of Glendenning (1871) 14 Wall. 402, 404, 20 L. Ed. 857.

A writ of error is not a supersedeas unless served within 10 days after rendition of the judgment, irrespective of agreements of the parties for a stay of execution. Thompson v. Voss (C. C. 1802) Fed. Cas. No. 13,979.

A writ of error is not a supersedeas unless a copy is filed in the clerk's office for the adverse party within the ten days. Act 1789, § 23. Moore v. Dunlop (C. C. 1804) Fed. Cas. No. 9,759; Ex parte Ben (C. C. 1809) Fed. Cas. No. 1,285.

Where an appeal is taken to the supreme court on the affirmance by the circuit court of a decree for libelants, and appellant fails to serve a copy of his petition of appeal within the 10 days, so as to make the appeal operate as a stay of execution under Act Sept. 24, 1789, § 23, and Act March 3, 1803, § 2, the court has no power to permit such service to be made nunc pro tunc. The Roanoke (C. C. 1855) Fed. Cas. No. 11,875.

The 10 days within which a writ of

error must be sued out to operate as a supersedeas, where a motion for a new trial is denied, commences to run from the entry of the rule for judgment in the clerk's office. Hatch v. Coddington (C. C. 1867) Fed. Cas. No. 6,205.

13. —— Notice or knowledge of entry of judgment affecting time.—The fact that the entry of judgment was without the knowledge of the attorney or plaintiff in error is immaterial, where plaintiff in error had actual knowledge thereof within 60 days, so as to have the opportunity to perfect his rights under this section. New England R. Co. v. Hyde (1900) 101 Fed. 397, 401, 41 C. C. A. 404.

14. —— Computation of time.—The time for taking an appeal operative as a supersedeas may be computed from the rendition of the decree and also from the settlement and signing thereof. Silsby v. Foote (1857) 20 How. 290, 295, 15 L. Ed. 822.

In calculating the lapse of time, the date of the entry of judgment governs. Boise County v. Gorman (1873) 19 Wall. 661, 663, 22 L. Ed. 226.

Under this section and section 1673, post, the exclusion of Sundays applies to the time for filing a supersedeas bond, as well as to the time for lodging the writ of error or taking the appeal. Town of Danville v. Brown (1888) 9 Sup. Ct. 149, 128 U. S. 503, 32 L. Ed. 507.

This section indicates that Congress intended that all Sundays should be counted as part of the time limited within which an act is to be done, unless they are excluded by express provision. Johnson v. Meyers (1893) 54 Fed. 417, 418, 4 C. C. A. 399.

15. —— Necessity of filing within time.—A writ of error not sued out within the statutory time does not stay the execution, though by mistake of the party or the court an appeal was taken within the statutory time, which appeal did not remove the case. Saltmarsh v. Tuthill (1851) 12 How. 387, 389, 13 L. Ed. 1034.

To make a writ of error operate as a supersedeas, it is indispensable that the requirements of the statute be strictly fulfilled, and it is not enough that the writ be issued and served, but a copy thereof must be lodged for the adverse party within the statutory time. Baltimore & O. R. Co. v. Harris (1868) 7 Wall. 574, 575, 19 L. Ed. 100.

The service of a writ of error or the perfection of an appeal within the 60 days is an indispensable prerequisite to a supersedeas, and it is not within the power of a justice of the appellate court to grant a stay of process on the judgment or decree, if this has not been done. Kitchen v. Randolph (1876) 93 U. S. 86, 90, 23 L. Ed. 810.

Neither a circuit court, nor a judge thereof, has power to allow a supersedeas pending a review of its judgment on writ of error after the expiration of 60 days from the date of such judgment. New England R. Co. v. Hyde (1900) 101 Fed. 397, 41 C. C. A. 404.

Where a writ of error was not sued out and lodged in the trial court within 60 days of the date of the judgment, plaintiff in error was not entitled to a supersedeas. Roberts v. Kendrick (1914) 211 Fed. 970, 128 C. C. A. 468.

A writ of error may serve as a supersedeas, if duly served within 60 days, Sundays excluded, from the date of an order made denying a motion for a new trial. Rutherford v. Pennsylvania Mut. Life Ins. Co. (C. C. 1880) 1 Fed. 456; Brown v. Evans (C. C. 1883) 18 Fed. 56.

The fact that a citation was not presented to and signed by a judge within 60 days after the entry of judgment will not necessarily prevent a writ of error from operating as a supersedeas. Tiernan v. Booth (C. C. 1880) 4 Fed. 620, judgment affirmed Booth v. Tiernan (1883) 3 Sup. Ct. 122, 109 U. S. 205, 27 L. Ed. 907.

In an action at law, in which the judgment is reviewable only by writ of error, unless such writ is issued and served within 60 days, a judge of an appellate court has no power to grant a supersedeas, and that the allowance of an appeal by the trial court will not warrant a grant of supersedeas more than 60 days after judgment. Robinson v. Furber, 189 Fed. 918.

A writ of error does not operate as a supersedeas unless it is filed in the clerk's office within the statutory 60 days, which is computed from the date of the judgment, and after the expiration of the 60 days neither a justice of the Supreme Court, the Circuit Court, nor a judge thereof, nor a judge of the Circuit Court of Appeals, has power to allow a supersedeas. Id.

16. —— Extension of time by justice or judge.—Where a court in session, and acting judicially, allows an appeal which is entered of record without taking a bond within 60 days after rendering a decree, a justice or judge of the appellate court may, in his discretion, grant a supersedeas after the expiration of that time, under the second clause of this section. Peugh v. Davis (D. C. 1884) 4 Sup. Ct. 17, 110 U. S. 227, 28 L. Ed. 127.

Where, on an appeal to the United States supreme court, the bond taken is intended to operate as a stay of the execution of that part of the decree appealed from which was for the payment of money only, and the appeal is taken within 60 days from the rendition of the decree, a motion in the supreme court for supersedeas will be denied, as the justice who is assigned to the circuit from which the appeal comes may, in his discretion, under this section, grant a further stay, if application is made to him. Covington Stock-

Yards Co. v. Keith (1887) 7 Sup. Ct. 881, 121 U. S. 248, 30 L. Ed. 914.

The time fixed by this section within which a writ of error from the supreme court to the circuit court of appeals must be allowed and lodged in the clerk's office if a supersedeas is desired cannot be extended by a stay granted to afford an opportunity to apply for a writ of certiorari, since there is no power in the federal supreme court to allow a certiorari under the act of March 3, 1891, in a case where there is authority to review the action of the lower court by writ of error or appeal. Title Guaranty & Surety Co. v. U S. (1912) 32 Sup. Ct. 168, 222 U. S. 401, 56 L. Ed. 248.

A justice of the Circuit Court of Appeals may, on the application of appellant taking a second appeal after the dismissal of his first appeal, permit him to give a supersedeas bond after the expiration of the 60 days; the dismissal of the first appeal being due to the failure of the clerk of the trial court to send up the record in due season. Sutherland v. Pearce (1911) 186 Fed. 787, 108 C. C. A. 657.

17. —— Filing nunc pro tunc.—To make a nunc pro tunc order effectual for the purposes of a supersedeas, it must appear that the delay was the act of the court, and not of the parties, and that injustice will not be done. Sage v. Central R. Co. (1876) 93 U. S. 412, 418, 23 L. Ed. 933.

18. Vacation of supersedeas.—A supersedeas will be vacated on motion, where the approval of the bond was obtained by gross fraud and perjury. Florida C. R. Co. v. Schulte (1879) 100 U. S. 644, 25 L. Ed. 605.

A motion to vacate, made before the record is printed, must be accompanied by a statement of the facts on which they rest, agreed to by the parties or supported by printed copies of so much of the record as will enable the court to act understandingly with reference to the transcript on file. The Colonel McLeod (1884) 5 Sup. Ct. 361, 112 U. S. 710, 28 L. Ed. 825.

As upon a motion to vacate a supersedeas it rests upon the party moving to show that the bond was not accepted in time, upon the failure of such party in disrespect the motion will be denied. Id.

When a writ of error has been allowed, but not issued, an order allowing a supersedeas bond is a nullity for want of jurisdiction, and the same want of jurisdiction prevents the United States supreme court from entertaining a motion to vacate. Ex parte Ralston (1887) 7 Sup. Ct. 317, 119 U. S. 613, 30 L. Ed. 506.

A motion to vacate a supersedeas, or for an order declaring that the appeal bond filed in a case does not operate as a supersedeas, will be denied as unnecessary, where the writ of error was not sued out or served, within the time required by the statute in order that the bond operate as a supersedeas. Western Air Line Const. Co. v. McGillis (1888) 8 Sup. Ct. 1390, 127 U. S. 776, 32 L. Ed. 324.

The district court approving a supersedeas bond made a part of the record in the case which has been filed in the Circuit Court of Appeals on writ of error, has no jurisdiction to vacate the supersedeas. Kendrick v. Roberts (D. C. 1914) 214 Fed. 268.

19. Suits on bonds.—Suit on supersedeas bond given under this section arises out of the laws of the United States within Judicial Code, § 24, so as to give District Court jurisdiction. American Surety Co. of New York v. Schultz (1915) 35 Sup. Ct. 525, 237 U. S. 159, 59 L. Ed. 892.

20. Release of sureties.—Where a judgment is reversed, but it is ordered that the reversal be set aside, and an affirmance entered on the filing of a remittitur of a certain amount, which is accordingly done, the sureties on the supersedeas bond are released. Seymour v. Gregory (C. C. 1867) Fed. Cas. No. 12,686.

21. Extent of liability on bond.—A supersedeas bond in an ejectment case covers rents and profits accruing pending the proceedings in error to the supreme court. St. Louis Smelting & Refining Co. v. Wyman (C. C. 1884) 22 Fed. 184.

22. Contempt in violation of writ.—A judgment obtained against plaintiffs in error for violation of a city ordinance against keeping private markets within certain limits was affirmed by the state supreme court. A writ of error and supersedeas were sued out from the supreme court. Subsequently the mayor of the city and another sued plaintiff to enjoin them from maintaining said market. Held, that the beginning of the second suit was not such process for the execution of the judgment in the first as to constitute contempt of the writ of supersedeas issued under this section. Natal v. Louisiana (1887) 8 Sup. Ct. 253, 123 U. S. 516, 31 L. Ed. 233.

23. Modification of supersedeas.—Where a proceeding to condemn real estate, or an easement therein, under the power of eminent domain, is removed from a state court into a Circuit Court of the United States, and after compensation has been ascertained a writ of error is prosecuted from the judgment, any supersedeas obtained should be modified so that the petitioner shall have the same rights as though the proceedings had remained in the state court; and, where the state statute provides that the proposed work shall not be delayed by appellate proceedings in case the amount of compensation awarded is paid into court, the supersedeas in the federal court

will be modified to conform to such provision. Broadmoor Land Co. v. Curr (1904) 133 Fed. 37, 66 C. C. A. 143.

24. Issuance and stay of execution.—An appeal from a judgment of the Circuit Court which fails to comply with a mandate of the Supreme Court on a prior appeal does not stay proceedings in the Circuit Court in execution of the judgment of the Supreme Court, unless the Circuit Court entertains doubt as to the construction and meaning of the Supreme Court decree, and deems it just and equitable to suspend execution pending a decision of the Supreme Court. Perkins v. Fourniquet (1852) 14 How. 328, 330, 14 L. Ed. 441.

A writ of error or appeal may operate as a supersedeas when it is applied for and bond is filed within 60 days from the rendition of the judgment or decree, but this does not prevent an execution from being issued after the lapse of 10 days as contemplated by Judiciary Act, § 23. Boise County v. Gorman (1873) 19 Wall. 661, 663, 22 L. Ed. 226.

The provision for delay of execution in this section, as amended by Act Feb. 18, 1875 (18 Stat. 316), refers only to judgments and decrees in the federal courts. Doyle v. Wisconsin (1876) 94 U. S. 50, 52, 24 L. Ed. 64.

An execution issued before the expiration of 10 days from the judgment will be set aside on motion. Bobyshall v. Oppenheimer (C. C. 1823) Fed. Cas. No. 1,591.

Where the writ of error pending in the supreme court was not taken out in time to operate as a supersedeas, execution against the bail will not be stayed, nor will an injunction issue. Foyles v. Law (C. C. 1827) Fed. Cas. No. 5,-024.

Execution on a judgment obtained in a suit on a judgment obtained in another state will not be stayed pending an appeal from the original judgment, where such appeal is not a supersedeas. Troy City Bank v. Lauman (C. C. 1857) Fed. Cas. No. 14,194.

The pendency of an appeal from a final decree, where no supersedeas exists, does not deprive the court below of the power to compel the decree to be executed. Farmers' Loan & Trust Co. v. Central Railroad of Iowa (C. C. 1877) Fed. Cas. No. 4,664.

Execution is not void because issued permaturely. If issued pending motion for new trial, the irregularity is cured on denial of the motion. Dawson v. Daniel (C. C. 1878) Fed. Cas. No. 3,-669.

But, in the exercise of its jurisdiction to determine whether it will grant an application to execute the decree because of a defective bond which cannot operate as a supersedeas, it may withhold execution until the supreme court can act in the matter, and should do so, if there be equitable considerations of mistake which would induce a court of equity to reform the bond on a bill for that purpose. On such an application the court is not compelled to act solely upon the one fact of a defective bond. It will inquire at large, and exercise its equitable powers of relief, as in other cases, upon all the facts. Ferguson v. Dent (C. C. 1886) 29 Fed. 1.

Under the clause providing that until the expiration of 10 days an execution shall not issue "in any case where a writ of error may be a supersedeas," Sundays are to be excluded in the computation of time. Danielson v. Northwestern Fuel Co. (C. C. 1893) 55 Fed. 49.

Where a judgment of a District Court has been affirmed by the Circuit Court of Appeals and a mandate sent down, but the defeated party has promptly applied for a writ of certiorari from the Supreme Court to review the decision of the Circuit Court of Appeals, execution on the judgment will be stayed by the District Court to await the termination of such application. Boston & M. R. Co. v. Gokey (D. C. 1907) 150 Fed. 686.

Cited without definite application, Roberts v. Cooper (1856) 19 How. 373, 374, 15 L. Ed. 689; French v. Shoemaker (1870) 12 Wall. 86, 100, 20 L. Ed. 270; Jerome v. McCarter (1874) 21 Wall. 17, 18, 22 L. Ed. 515; Ex parte Warden (1883) 2 Sup. Ct. 383, 384, 108 U. S. 153, 27 L. Ed. 685; Hudson v. Parker (1895) 15 Sup. Ct. 450, 452, 156 U. S. 277, 39 L. Ed. 424; Borgmeyer v. Idler (1895) 16 Sup. Ct. 34, 36, 159 U. S. 408, 40 L. Ed. 199; Kingman & Co. v. Western Mfg. Co. (1898) 18 Sup. Ct. 786, 787, 170 U. S. 675, 42 L. Ed. 1192; In re McKenzie (1901) 21 Sup. Ct. 468, 473, 180 U. S. 536, 45 L. Ed. 657; Amato v. Jacobus (1893) 58 Fed. 855, 7 C. C. A. 545; Gunn v. Black (1894) 60 Fed. 159, 160, 8 C. C. A. 842; Mutual Life Ins. Co. v. Phinney (1896) 76 Fed. 617, 618, 22 C. C. A. 425 (reversed [1900] 20 Sup. Ct. 906, 178 U. S. 327, 44 L. Ed. 1088); Odbert v. Marquet (1909) 175 Fed. 44, 99 C. C. A. 60 (affirming [C. C. 1908] 163 Fed. 892); Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Schmidt v. U. S. (1904) 133 Fed. 257, 66 C. C. A. 389; Monongahela River Consol. Coal & Coke Co. v. Hurst (1912) 200 Fed. 711, 119 C. C. A. 127; Brown v. Evans (C. C. 1883) 18 Fed. 56; The Sydney (C. C. 1891) 47 Fed. 260, 263; Gay v. Hudson River Electric Power Co. (C. C. 1911) 190 Fed. 812.

§ 1667. (R. S. § 565.) May proceed in prize causes after appeal.

Any district court may, notwithstanding an appeal to the Supreme Court, in any prize cause, make and execute all necessary orders for the custody and disposal of the prize property, and, in case of an appeal from a decree of condemnation, may proceed to make a decree of distribution, so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein.

Act June 30, 1864, c. 174, § 13, 13 Stat. 310.

Similar provisions were made by R. S. § 4637, post, § 8414.

All provisions of law authorizing the distribution among captors of the proceeds of vessels or any property captured were repealed by Act March 3, 1899, c. 413, § 13, post, § 8396.

§ 1668. (R. S. § 700.) Review in cases tried without the intervention of a jury.

When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

Act Sept. 24, 1789, c. 20, § 22, 1 Stat. 84. Act March 3, 1803, c. 40, § 2, 2 Stat. 244. Act March 3, 1865, c. 86, § 4, 13 Stat. 501. See Acts.

R. S. § 649, mentioned in this section, providing for trial of issues of fact without a jury, and for findings thereon, is set forth ante, § 1587.

Besides the provisions of said section 649, provisions for findings of fact and conclusions of law in admiralty cases, and for review by the Supreme Court of judgments and decrees entered on such findings, were made by Act Feb. 16, 1875, c. 77, § 1, ante, §§ 1585, 1586. And see note under that section as to the effect thereon of Act March 3, 1891, c. 517, establishing the circuit courts of appeals, and conferring on them appellate jurisdiction in admiralty.

The provisions of this section became inoperative as to trials in the circuit courts on the abolition of those courts by Jud. Code, § 289, ante, § 1266, but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts, by Jud. Code, § 291, ante, § 1268.

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See note under § 649.

1. Construction in general.—According to the practice of Louisiana, where cases are carried to an appellate tribunal in which the court below has decided questions of fact as well as of law, the appellate tribunal reviews both classes of questions. But this practice is not applicable to the federal courts. A writ of error in them brings up only questions of law. U. S. v. King (1849) 7 How. 833, 844, 12 L. Ed. 934.

The distinction between law and equity prevails in the federal courts sitting in Louisiana, notwithstanding the Civil Code governing the practice and the rights of the parties in the state

courts, and the act providing a mode by which parties who submit cases to the court without a jury may have the rulings of the court reviewed in the Supreme Court binds the federal courts sitting in Louisiana as elsewhere, and the Supreme Court cannot disregard it. Louisiana Mut. Ins. Co. v. Tweed (1868) 7 Wall. 44, 50, 19 L. Ed. 65.

The supreme court is disposed to hold parties who under Act March 3, 1865, waive a trial by jury and substitute the court for the jury, to a reasonably strict conformity to the regulations of the act, if they desire to save to themselves all the rights and privileges which belong to them in trials by jury at the common law. Flanders v. Tweed (1869) 9 Wall. 425, 431, 19 L. Ed. 678.

The statute is general in its terms and embraces the district of Louisiana. Generes v. Campbell (1870) 11 Wall. 193, 197, 20 L. Ed. 110.

This section and section 649 do not permit the Supreme Court to consider the effect of the evidence in the case, but only to determine whether the facts, found on the trial below, are sufficient to support the judgment, and to pass on the rulings of the court in the progress of the trial presented by a bill of exceptions. For all the purposes of review in the Supreme Court, the facts as found and stated by the court below are conclusive. Boogher v. New York L. Ins. Co. (1880) 103 U. S. 90, 97, 26 L. Ed. 310.

This section is the only statute providing for a review in the Supreme Court of cases where an issue of fact in a civil cause has been tried in the circuit court otherwise than by a jury. Id.

The special provisions of this section in regard to review by the supreme court of cases tried in the circuit court by the court without a jury apply only to the circuit court. There are no similar provisions in regard to trials without a jury in the district courts. Rogers v. U. S. (1891) 12 Sup. Ct. 91, 93, 141 U. S. 548, 35 L. Ed. 853.

This section is in terms limited to cases in the circuit courts. Campbell v. U. S. (1912) 32 Sup. Ct. 398, 224 U. S. 99, 56 L. Ed. 684.

The expression, "rulings of the court in the cause in the progress of the trial," refers only to rulings on the admission or rejection of evidence. City of Key West v. Baer (1895) 66 Fed. 440, 13 C. C. A. 572.

The only recognized exception to this rule is that a party may insist on a finding in his favor on the ground that there is a total lack of evidence to support a contrary finding, or, if he have the burden of the issue, on the ground that the evidence in his favor is adequate, unimpeached, and without conflict or uncertainty; and, when a motion on such ground is made before the finding is made or entered of record, an adverse ruling thereon, if proper exception is saved, may be reviewed. Wright v. Bragg (1899) 96 Fed. 729, 37 C. C. A. 574.

This section does not contemplate the finding of separate conclusions of law, but judgment should be directed on the findings of fact. Fowler v. Gowing (1908) 165 Fed. 891, 91 C. C. A. 569, affirming judgment (C. C. 1907) 152 Fed. 801.

An opinion of the trial judge is not a ruling on which error may be assigned. Childs v. Williams (1914) 212 Fed. 151, 129 C. C. A. 9.

A hearing presented on bill and exceptions is not available in an action tried and determined before a referee. Alder v. Edenborn (D. C. 1912) 198 Fed. 928.

2. Procedure under prior acts.—Prior to Act March 3, 1865, parties to an action could submit the issues of fact to be tried by the court without a jury, but they were bound by the court's judgment, and could not have a review on error of any ruling on such trial. Kearney v. Case (1870) 12 Wall. 275, 280, 20 L. Ed. 395.

Even before Act 1865, c. 86, § 4, 13 Stat. 501, it was always held that a judgment on agreed facts, spread at large on the record, could be reviewed in the supreme court on a writ of error. Such a statement was considered to be equivalent to a special verdict, and to present questions of law alone for the court's consideration, and it is manifest that the act of 1865 was not intended to interfere with this practice. Wayne County v. Kennicott (1880) 103 U. S. 554, 556, 26 L. Ed. 486.

3. Mode of review.—No appeal lies to the supreme court from the circuit court for discharging a rule to show cause why a marshal should not make a deed for land sold on execution as it can only be reviewed by writ of error. Burrows v. The Marshal (1873) 15 Wall. 682, 684, 21 L. Ed. 249.

The judgment of the United States Circuit Court entered on findings by the court on trial of an action of assumpsit, a jury having been waived by the parties, cannot be reviewed by the Supreme Court on appeal, but only on writ of error. Deland v. Platte County (1894) 15 Sup. Ct. 82, 155 U. S. 221, 39 L. Ed. 128.

Where the answer to a bill for partition of real estate entirely denies the title set up by complainant, and the question is settled by a court of law, if either party is dissatisfied with the judgment rendered, the proper method of review is by writ of error. Brown v. Cranberry Iron & Coal Co. (1896) 72 Fed. 96, 18 C. C. A. 444, cause remanded to circuit court (1896) 72 Fed. 103, 18 C. C. A. 462.

4. Stipulations waiving jury.—On a writ of error in an action at law tried

in the circuit court without a jury, none of the questions decided at the trial can be re-examined, where the record does not affirmatively show that a jury was waived by written stipulation. Kearney v. Case (1870) 12 Wall. 275, 283, 20 L. Ed. 395; Branch v. Texas Lumber Mfg. Co. (1893) 53 Fed. 849, 4 C. C. A. 52, judgment reversed (1893) 56 Fed. 707, 6 C. C. A. 92; Duncan v. Atchison, T. & S. F. R. Co. (1896) 72 Fed. 808, 19 C. C. A. 202; Ham v. Edgell (1901) 106 Fed. 820, 45 C. C. A. 661; Erkel v. U. S. (1909) 169 Fed. 623, 95 C. C. A. 151; Ladd & Tilton Bank v. Lewis A. Hicks Co. (1914) 218 Fed. 310, 134 C. C. A. 106.

Parties will be presumed in the Supreme Court to have waived their right to a trial by jury of issues of fact, whenever it appears that they were present in person or by counsel and made no demand for a jury; and unless it appears that they were so present, or otherwise consented, it is error, for which the judgment must be reversed, to try such issues in actions at law without a jury. Kearney v. Case (1870) 12 Wall. 275, 282, 283, 284, 20 L. Ed. 395.

Parties may still waive a jury as they could before the act of 1865 without filing a written stipulation, but in such case no error can be considered in the court's action on such trial, and the judgment will be held valid unless other errors are apparent in the record. Id.

To enable parties to have a review, and to enable them to make a valid agreement to waive a jury, Act March 3, 1865, was passed, which for that purpose required the waiver to be in writing and filed with the clerk. Id.

Unless it appears that the written agreement to waive a jury was filed, the judgment must be affirmed, unless error appear in other parts of the record than the finding of facts and judgment thereon. Id.

The existence of a written agreement waiving a jury may be shown in the Supreme Court by a copy of the agreement or a statement in the finding of facts by the court that it was executed, or by such statement in the record entry of the judgment or in the bill of exceptions. Id.

But to authorize a review under these sections the waiver of a jury trial must be unconditional, and by a writing which sets forth the whole agreement; and hence, where the stipulation is merely that the case shall be marked "Jury waived tentatively," there can be no such review, although the parties have acted on the agreement, and thus rendered it absolute. Merrill v. Floyd (1892) 53 Fed. 172, 3 C. C. A. 494, affirming judgment (1892) 50 Fed. 849, 2 C. C. A. 58.

In an action at law the issues were referred to an auditor, who found in favor of defendant. The parties thereupon entered into an agreement to submit the cause to the court on the auditor's report, with a stipulation that, if the court held that the auditor's rulings were erroneous, plaintiff reserved his right to go to the jury, but that, if the court sustained the same, judgment should be entered for defendant The court approved the auditor's rulings, and entered judgment accordingly. A bill of exceptions was allowed to plaintiff, who took the case on error to the circuit court of appeals. Held that the court had no authority to review the cause, for a jury was not unconditionally waived, as required thereby, but there was an express reservation of a right to go to the jury in certain contingencies. Smith v. Weeks (1893) 53 Fed. 758, 3 C. C. A. 644.

Laws Ill. 1893, p. 96, providing that no person shall be imprisoned for nonpayment of a fine or judgment except on trial by jury, or after a waiver of jury in a particular form, does not prevent the trial of a case by a federal judge without a jury on an oral stipulation, or a written stipulation different in form from that provided by the statute, so that facts found by the judge in such a case cannot be reviewed on error. U. S. v. Arnold (1895) 69 Fed. 987, 16 C. C. A. 575, certiorari denied (1896) 16 Sup. Ct. 1208, 163 U. S. 709, 41 L. Ed. 315.

A stipulation to refer the case to a special master held not a submission to the court without a jury within the statute. Shipman v. Ohio Coal Exchange (1895) 70 Fed. 652, 654, 17 C. C. A. 313.

Unless there is a written waiver of trial by jury in an action at law this section does not apply; and where findings made by a referee are ordered to stand as the findings of the court, the only question that can be reviewed by an appellate court is the sufficiency of the findings to support the judgment. Steel v. Lord (1899) 93 Fed. 728, 35 C. C. A. 555.

A written stipulation which clearly contemplates the trial to the court of an action at law and requests a special finding is a sufficient waiver of a jury to authorize a determination upon writ of error, of the sufficiency of the facts found to support the judgment. Anglo-American Land, Mortgage & Agency Co. v. Lombard (1904) 132 Fed. 721, 68 C. C. A. 89, writ of certiorari denied Lombard v. Anglo-American Land, Mortgage & Agency Co. (1904) 25 Sup. Ct. 793, 196 U. S. 638, 49 L. Ed. 630.

Under the Alaska Civil Code (31 Stat. 363, c. 19), providing that a trial by jury may be waived by the parties to an issue of fact by written consent and by oral consent in open court entered on the minutes, where it appeared both in the bill of exceptions and in the judgment that a jury was waived by stipulation of the parties in open court, the Circuit Court of Appeals

was not precluded from reviewing assignments of error relating to the admission or exclusion of evidence, because the waiver was not in writing and filed as required by this section. Shields v. Mongollon Exploration Co. (1905) 137 Fed. 539, 70 C. C. A. 123.

Since requests by counsel to the court that the jury be directed to return a verdict for one or the other party are not the equivalent of the submission of the case to the court without the intervention of a jury within the intendment of this section, such request cannot be considered as an implication of consent to the trial of the case without a jury. Minahan v. Grand Trunk Ry. Co. (1905) 138 Fed. 37, 41, 70 C. C. A. 463.

Code Civ. Proc. Cal. § 631, permitting waiver of a jury trial in actions at law by oral consent in open court entered in the minutes, does not apply to federal courts sitting in California as a substitute for a written waiver of a jury. Erkel v. U. S. (1909) 169 Fed. 623, 95 C. C. A. 151.

A stipulation to submit a case to the court without a jury must distinctly waive a jury according to the terms of R. S. § 649, ante, § 1587. Kelly v. Milan (C. C. 1884) 21 Fed. 842, 854, affirmed (1888) 8 Sup. Ct. 1101, 127 U. S. 139, 32 L. Ed. 77.

5. **Exceptions to rulings.**—Necessity and sufficiency of exceptions in cases tried to a jury, see ante, § 1590, and notes.

6. —— **In general.**—Propositions of law announced by the judge in ordering judgment on special findings of facts are not open to exception. Jennison v. Leonard (1874) 21 Wall. 302, 307, 22 L. Ed. 539.

A jury was waived in a cause, and the issue therein, which was upon the disputed boundaries of a grant, was submitted to the court. The court, after hearing the evidence and arguments at the trial, held the cause for further evidence, and, some 15 months afterwards, appointed a person to make survey of the grant. Its finding was announced as based on the evidence heard and the report of the surveyor, the parties or their attorneys being all present. No objection was made to the appointment of the surveyor or to the consideration of his report, nor any suggestion that the case had been held so long that it was desirable to offer additional evidence or to re-examine the former witnesses. Held, that it was too late to raise these objections on appeal. Maddox v. Thorn (1894) 60 Fed. 217, 8 C. C. A. 574.

On appeal, appellant is confined to the exceptions taken at the trial, and cannot urge different exceptions in his brief. McGowan v. Larsen (1895) 66 Fed. 910, 14 C. C. A. 178.

In order to question the correctness of a judgment rendered for defendant on an agreed statement of facts, it is not necessary that plaintiff should have made a formal motion for judgment on the statement, and then saved an exception to its denial. It is sufficient that he excepts to the judgment when rendered. Springfield Safe-Deposit & Trust Co. v. City of Attica (1898) 85 Fed. 387, 29 C. C. A. 214, certiorari denied City of Attica v. Springfield Safe-Deposit & Trust Co. (1898) 19 Sup. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179.

In a suit to foreclose a lien on the property of a railroad company, an objection to an order of sale because of receivership proceedings pending in a federal court sitting in another state could not be raised for the first time on appeal. Wetzel & T. Ry. Co. v. Tennis Bros. Co. (1906) 145 Fed. 458, 75 C. C. A. 266, 7 Ann. Cas. 426, affirming decree Tennis Bros. Co. v. Wetzel & T. Ry. Co. (C. C. 1905) 140 Fed. 193.

Where a case is tried before the court without a jury, exceptions may be taken to the rulings of the court and a review of the judgment may be had. Elkin v. Denver Engineering Works Co. (1910) 181 Fed. 684, 105 C. C. A. 1.

7. —— **Necessity.**—This section does not authorize a reversal of a judgment for alleged errors in the findings, where no objection was taken or exception reserved in the trial court. Press v. Davis (1893) 54 Fed. 267, 4 C. C. A. 318.

On appeal from a judgment of the circuit court rendered in a suit against the United States under Act March 3, 1887, the question whether the findings of fact of the lower court support its conclusions of law may be reviewed on seasonable assignments of error, without exceptions having been taken. U. S. v. Ady (1896) 76 Fed. 359, 22 C. C. A. 223.

Where the court makes a special finding of facts in an action at law, the question whether or not these facts warrant the judgment rendered thereon is always open for consideration by the appellate court on a writ of error without any objection or exception taken at the time of the entry of the judgment. Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (1901) 111 Fed. 81, 49 C. C. A. 229, reversing decree Hooven, Owens & Rentschler Co. v. Featherstone (C. C. 1900) 99 Fed. 180.

Where an action at law is tried without a jury, and only a general finding is made, and the ultimate facts are not agreed upon by the parties, there can be no review of the question whether the judgment is supported by the facts found, and, unless exceptions are taken to the rulings made during the trial, there is no question which can be reviewed by the appellate court. National Surety Co. v. Cincinnati, N. O. &

T. P. Ry. Co. (1906) 145 Fed. 34, 76 C. C. A. 19.

The question whether or not the facts found by the court sustain a judgment arises on the face of the record, and no objection or exception is necessary to present it to an appellate court. Webb v. National Bank of Republic of Chicago (1906) 146 Fed. 717, 77 C. C. A. 143.

Where an action at law is tried to the court and there is a general finding for plaintiff, and no objection is made to the jurisdiction at the trial, an appellate court cannot look into the bill of exceptions to ascertain whether jurisdiction was proven. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, writ of certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

Where a jury is waived, and the cause submitted to the court, without any motion for judgment at the close of the evidence, and the court makes a general finding only, and no exceptions are taken to any rulings, no question of law is presented for the consideration of the appellate court. Allen v. Knott (1909) 171 Fed. 76, 96 C. C. A. 180.

No exception is required to present a question whether a special finding warrants the judgment. Guaranty Trust Co. of New York v. Koehler (1912) 195 Fed. 669, 115 C. C. A. 475, reversing judgment (C. C. 1911) 187 Fed. 192.

Rulings during the trial not excepted to at the time and not presented by bill of exceptions will not be considered on appeal. Felker v. First Nat. Bank of Cincinnati, Ohio (1912) 196 Fed. 200, 116 C. C. A. 32.

Findings of fact, made in an action at law in which a jury was waived, held not reviewable, in the absence of exceptions or requests for other findings. Hennig v. Richey (1912) 196 Fed. 779, 116 C. C. A. 45.

No exception is necessary in a federal court to raise the question whether, when a jury has been duly waived, the special findings of fact by the court are sufficient to support the judgment rendered thereon. Philadelphia Casualty Co. v. Fechheimer (1915) 220 Fed. 401, 136 C. C. A. 25.

8. —— **Rulings on evidence or pleading.**—Where, according to the Louisiana practice, the facts of the case are stated by the court below in the nature of a special verdict, an objection that the contract sued on could be proved by one witness only comes too late when made for the first time in the federal Supreme Court. According to that practice, the judge below finds facts, and not evidence of those facts. Cucullu v. Emmerling (1859) 22 How. 83, 86, 16 L. Ed. 300.

Where a jury was waived, and at the conclusion of plaintiff's evidence no counter evidence being introduced, the court struck out plaintiff's evidence as not tending to sustain his issue, the supreme court will, on the exception taken thereto, review the evidence so far as essential to the question whether the facts proved made a prima facie case for plaintiff. American Paper-Bag Co. v. Van Nortwick (1892) 52 Fed. 752, 3 C. C. A. 274.

In a suit for the infringement of a patent, when the defense is that complainant had parted with all his interest therein by assignment before filing his bill, and a copy of the record of such assignment in the patent office is introduced in support thereof, the objection that no foundation was laid for the introduction of secondary evidence will not be considered on appeal when it was not raised below. Paine v. Trask (1893) 56 Fed. 233, 5 C. C. A. 497, affirming decree (C. C. 1892) 56 Fed. 231.

The objection that a creditors' bill to set aside a fraudulent conveyance is not broad enough to warrant a decree compelling the fraudulent grantee to account to the creditor cannot be raised for the first time on appeal. Morrow Shoe Mfg. Co. v. New England Shoe Co. (1893) 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417.

The objection that the defense, to a suit for infringement of a patent, of prior public use, was not well pleaded, in that the answer failed to allege that such use was "in this country," as the statute provides (Rev. St. § 4920, cl. 5), cannot be raised for the first time on appeal. Smith & Davis Manuf'g Co. v. Mellon (1893) 58 Fed. 705, 7 C. C. A. 439, affirming decree (C. C. 1892) 52 Fed. 149.

Objections to the form of a bill, whether original or supplemental, and to the sufficiency of the allegations thereof, cannot be taken in the appellate court for the first time. Herrick v. Tripp Giant Leveller Co. (1893) 60 Fed. 80, 8 C. C. A. 475, affirming decree Cutcheon v. Herrick (C. C. 1892) 52 Fed. 147.

Objection to admissibility of transcript of proceedings before commissioner, as not filed in proper office, is not available where not taken below, and where nothing appears in the record to rebut the presumption of proper filing. Hunt v. U. S. (1894) 61 Fed. 795, 10 C. C. A. 74, petition for rehearing denied (1894) 63 Fed. 568, 11 C. C. A. 340; writ of error dismissed (1897) 17 Sup. Ct. 609, 166 U. S. 424, 41 L. Ed. 1063.

The objection that affirmative relief should have been sought by cross bill instead of by answer is waived if not taken until after a decree of the supreme court on appeal adjudging defendants entitled to such relief. Moran v. Hagerman (1894) 64 Fed. 499, 12 C. C. A. 239.

When a jury is waived by written stipulation, and the court makes a mere general finding of facts, and there

are no exceptions to the pleadings or to the admission or rejection of evidence, there is nothing which the appellate court can review. Campbell Commission Co. v. Trammell (1896) 74 Fed. 917, 21 C. C. A. 177.

Where an action at law is tried to the court, and the finding is general, the only questions open for review, on writ of error, are such as may have been raised in the progress of the trial by exceptions taken to the admission or exclusion of evidence. Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co. (1901) 106 Fed. 798, 45 C. C. A. 638.

In the absence of a statute authorizing that mode of proceeding, no exception can be taken to any opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, where no jury is impaneled. Wear v. Mayer (C. C. 1880) 6 Fed. 658.

9. —— **Form and sufficiency.**—Where a jury is waived in the circuit court, and the case tried to the court, a general exception to a general finding which involves mixed questions of law and fact is insufficient to entitle the party excepting to have it reviewed by the circuit court of appeals. Hekking v. Pfaff (1898) 91 Fed. 60, 33 C. C. A. 328, 43 L. R. A. 618, affirming judgment (C. C. 1897) 82 Fed. 403.

An exception to each, all, and every of said finding, conclusion, and judgment, after a judgment has been rendered on special findings at the close of the trial by the court, is of no avail in the absence of any objection, exception, or request for a declaration of law. Webb v. National Bank of Republic of Chicago (1906) 146 Fed. 717, 77 C. C. A. 143.

An exception to the "entry of the judgment" is not sufficiently specific to present a question of law that there was no evidence to support the judgment. Keeley v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 598, 95 C. C. A. 96.

Where pending an action at law and before trial on the merits an issue as to the validity of a settlement is by stipulation submitted to the court to determine both the facts and law, a general exception to its finding which does not indicate the ground on which it is based does not present any question for review by an appellate court. Lake Shore & M. S. Ry. Co. v. Eder (1909) 174 Fed. 944, 98 C. C. A. 556.

The suing out of a writ of error to review a judgment is a sufficient exception to the judgment. Fellman v. Royal Ins. Co. (1911) 185 Fed. 689, 107 C. C. A. 637, denying rehearing (1911) 184 Fed. 577, 106 C. C. A. 557.

Where an action at law is tried by the court, and a general finding made, exceptions to such finding, or to the judgment, present nothing for review on a writ of error. Bell v. Union Pac. R. Co. (1912) 194 Fed. 366, 114 C. C. A. 326.

An exception to the entry of judgment as follows: "To which finding and judgment of the court and to the entry thereof" the parties "then and there duly excepted"—was too general. Gibson v. Luther (1912) 196 Fed. 203, 116 C. C. A. 35.

Without a request for a special finding, or to find generally for defendant, and a ruling thereon, an exception to a general finding for plaintiff presents no question for review. National Surety Co. v. U. S. (1912) 200 Fed. 142, 118 C. C. A. 360.

The appellant is not so conclusively estopped that it may not attack a decree by the fact that it gave a wrong reason for its exceptions to the erroneous conclusion of the master which it assails. Central Improvement Co. v. Cambria Steel Co. (1913) 210 Fed. 696, 127 C. C. A. 184.

10. —— **Objections or exceptions to mode or form of procedure.**—Though there may be a doubt whether the case made by a bill is one of equitable jurisdiction, because of the remedy that complainant may have at law, the doubt will, on appeal, be resolved in favor of the jurisdiction, where the question was not raised below. Preteca v. Maxwell Land-Grant Co. (1892) 50 Fed. 674, 1 C. C. A. 607.

The objection to an injunction suit, that the plaintiff has an adequate remedy at law, comes too late when raised for the first time on appeal. Foltz v. St. Louis & S. F. Ry. Co. (1894) 60 Fed. 316, 8 C. C. A. 635.

Where the objection that there is an adequate remedy at law is taken for the first time on appeal, the court is not obliged to entertain the same, where the subject-matter of the suit is of a class over which a court of chancery has jurisdiction. Reynolds v. Watkins (1894) 60 Fed. 824, 9 C. C. A. 273.

The circuit court of appeals will not reverse a judgment upon the ground that the plaintiff should have proceeded by a bill in equity, instead of by a suit in law, unless the objection to the mode of procedure was raised by the defendant in the court below. Fisher v. Knight (1894) 61 Fed. 491, 9 C. C. A. 582, affirming judgment Knight v. Fisher (C. C. 1893) 58 Fed. 991.

When both parties assume in the circuit court that the bill stated matters of equitable cognizance, and the case was within the jurisdiction of that court, the circuit court of appeals can dispose of the controversy on its merits, though the relief sought might have been given in a suit at law. International Trust Co. v. Norwich Union Fire Ins. Soc. (1895) 71 Fed. 81, 17 C. C. A. 608, certiorari denied (1896)

16 Sup. Ct. 1202, 163 U. S. 691, 41 L. Ed. 316.

Where a railroad company filed a bill in equity, alleging its inability to meet its obligations, and praying the court to appoint a receiver to operate its road, and to preserve and administer its property in the interests of its creditors and stockholders, a mortgagee, who entered a voluntary appearance in the suit, and also answered and contested a petition of intervention filed by a creditor seeking to establish a preferred claim, without questioning the equitable jurisdiction of the court to entertain the suit or the petition of intervention, cannot raise the question of such jurisdiction for the first time on appeal. International Trust Co. v. T. B. Townsend Brick & Contracting Co. (1899) 95 Fed. 850, 37 C. C. A. 396.

11. —— On reference.—No objection as to what a master has done upon a reference can be taken upon an appeal arising on exceptions to his report, where he has followed the decree ordering the reference and enforced its directions. City of New Orleans v. Warner (1901) 21 Sup. Ct. 353, 180 U. S. 199, 45 L. Ed. 493, decree affirmed (1900) 101 Fed. 1005, 41 C. C. A. 676.

Alleged irregularity in entering a decree for a nominal amount upon an accounting for rents and profits, without basing the same upon the master's report filed in the case, held to have been waived where no objection was made below to the form, but only to the entry of any decree at all for rents and profits, and the assignment of errors raised no question of amount. Garner v. Second Nat. Bank (1895) 67 Fed. 833, 16 C. C. A. 86, certiorari denied (1896) 16 Sup. Ct. 1201, 163 U. S. 688, 37 L. Ed. 218.

In the absence of exceptions to the report of a master, there can be no inquiry into the correctness of the facts found, but his misapprehension of the legal consequences of the facts reported is open to correction. Burke v. Davis (1897) 81 Fed. 907, 26 C. C. A. 675.

Questions involving the correctness of a master's findings, which were not raised by proper exceptions to his report, cannot be made the grounds of assignments of error on appeal. City of New Orleans v. Fisher (1899) 91 Fed. 574, 34 C. C. A. 15, certiorari granted (1899) 19 Sup. Ct. 884, 174 U. S. 802.

A defendant having consented to a reference, held to have waived objections to jurisdiction of the suit in equity by failing to take such objections in the trial court. Hattiesburg Lumber Co. v. Herrick (1914) 212 Fed. 834, 129 C. C. A. 288.

A general exception to the action of a trial court in overruling in a mass exceptions to report of referee held too indefinite to present any question for review by an appellate court. Philadelphia Casualty Co. v. Fechheimer (1915) 220 Fed. 401, 136 C. C. A. 25.

On error to the circuit court from a judgment of the district court based on the report of a referee, conclusions of law alone can be reviewed, and these only so far as excepted to below. Sicard v. Buffalo, N. Y. & P. Ry. Co. (C. C. 1879) Fed. Cas. No. 12,831.

Where the master is correct in his findings of fact, but errs as to conclusions of law, the rule requiring exceptions to his report is not applicable. Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C. 1889) 40 Fed. 476.

12. Bill of exceptions—Necessity.—A bill of exceptions is necessary to review a case tried by the circuit court without a jury. Preston v. Prather (1891) 11 Sup. Ct. 162, 137 U. S. 604, 34 L. Ed. 788, affirming judgment Prather v. Kean (C. C. 1887) 29 Fed. 498.

Where an action is tried by stipulation before the court without the intervention of a jury, and a general finding made, the only matters reviewable are the rulings made during the progress of the trial to which exception was taken and preserved by bill of exceptions. Unless so presented, questions discussed and determined by the opinion of the court cannot be reviewed. Ogden City v. Weaver (1901) 108 Fed. 564, 47 C. C. A. 485.

As a special finding, made by a trial court where a jury is waived, becomes a part of the record, the appellate court may determine its sufficiency to support the judgment without a bill of exceptions, even though no specific ruling was made on the question of law involved. Chicago, R. I. & P. Ry. Co. v. Barrett (1911) 190 Fed. 118, 111 C. C. A. 158.

Objections to the court's rulings on propositions of law, in a case tried to the court without a jury, must appear by bill of exceptions in order to be reviewed. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

13. —— Scope and contents.—Where a case is tried to the court, a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by a jury. Norris v. Jackson (1869) 9 Wall. 125, 127, 19 L. Ed. 608; Springfield F. & M. Insurance Co. v. Sea, Use of Pearson (1874) 21 Wall. 158, 160, 22 L. Ed. 511; City of St. Louis v. Western Union Telegraph Co. (1897) 17 Sup. Ct. 608, 166 U. S. 388, 41 L. Ed. 1044; Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

When the bill of exceptions does not purport to give all the evidence, and the judgment states that it was given for reasons orally assigned, which are not set forth, there is nothing on which

error can be assigned, and the judgment must be affirmed. Generes v. Campbell (1870) 11 Wall. 193, 197, 20 L. Ed. 110.

If the finding be general, only such writings in the progress of the trial can be reviewed as are presented by bill of exceptions. Springfield F. & M. Insurance Co. v. Sea, Use of Pearson (1874) 21 Wall. 158, 160, 22 L. Ed. 511.

Where, on a writ of error to the circuit court of appeals, the question of the sufficiency of the evidence to support the findings of fact made by the court in lieu of a jury is raised, the fact that the bill of exceptions does not embody all the evidence is no ground for dismissing the appeal. The proper remedy is by certiorari for diminution of the record, under rule 18 of that court. Merrill v. Floyd (1892) 50 Fed. 849, 2 C. C. A. 58, judgment affirmed (1892) 53 Fed. 172, 3 C. C. A. 494.

The question whether a general finding on the facts was supported by the evidence cannot be considered where the bill of exceptions fails to state that it contains all the evidence. United States Mut. Acc. Ass'n v. Robinson (1896) 74 Fed. 10, 20 C. C. A. 262, affirming judgment Robinson v. U. S. Mut. Acc. Ass'n (C. C. 1895) 68 Fed. 825.

Where a jury trial is waived by stipulation in an action at law, and the court makes a general finding for one party, a bill of exceptions brings up for review only rulings made in the course of the trial, to which exception was taken, which do not include the general finding, nor the conclusions of the court embodied therein. White v. German Alliance Ins. Co. of New York (1900) 103 Fed. 260, 43 C. C. A. 216.

14. —— **Signature and seal.**—A bill of exceptions, signed by the judge, but not sealed, is sufficient. Generes v. Campbell (1870) 11 Wall. 193, 197, 20 L. Ed. 110.

15. —— **Time of settlement.**—Where a jury trial is waived by stipulation in a Circuit Court in an action at law, and the case is tried to the court, and a judgment is rendered on a general finding, there is no authority for inserting special findings in the bill of exceptions signed at a succeeding term of court. Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190.

A bill of exceptions must be prepared and settled before the end of the term at which the cause was tried. Sweet v. Perkins (C. C. 1885) 24 Fed. 777.

16. —— **Sufficiency.**—To present a question to the supreme court the subordinate tribunal must ascertain the facts on which the judgment or opinion excepted to is founded, and so, where there was a reference in the circuit court and the bill of exceptions stated the objections to the award, together with the testimony of the arbitrator who was examined in open court, and that showed the facts on which the objections were founded, it was a sufficient exception. New York & Cumberland R. Co. v. Myers (1855) 18 How. 246, 251, 15 L. Ed. 380.

A bill of exceptions, which purports to be a finding of facts, but is neither a statement of facts by the parties, nor a finding of facts by the court, but merely a recapitulation of conflicting evidence, is insufficient. Moller v. U. S. (1893) 57 Fed. 490, 6 C. C. A. 459.

A statement in a bill of exceptions as to waiver of jury trial held insufficient to give the appellate court jurisdiction to review errors committed in the course of the trial. Cudahy Packing Co. v. Sioux Nat. Bank (1895) 69 Fed. 782, 784, 16 C. C. A. 409, affirmed on rehearing (1896) 75 Fed. 473, 21 C. C. A. 428.

A substitute for a formal bill of exceptions, indorsed by the trial judge, "The foregoing contains the agreed record," held not to constitute a finding of facts, or agreed statement of facts. Columbus Compress Co. v. United States Fidelity & Guaranty Co. (1911) 186 Fed. 487, 108 C. C. A. 465.

17. —— **Rulings on instructions.**—To present for review a question as to error in the giving or refusing of instructions, the bill of exceptions must be accompanied by a distinct statement of testimony given or refused, which raises the questions to which the instructions apply. Worthington v. Mason (1879) 101 U. S. 149, 152, 25 L. Ed. 848.

18. —— **Rulings on evidence.**—Where the judge tried the whole case without a jury, a bill of exceptions to the admission of testimony by the judge cannot be sustained. Weems v. George (1851) 13 How. 190, 196, 14 L. Ed. 108.

Where the court decided questions both of law and fact, admission of improper testimony is not subject of a bill of exceptions, though exclusion of improper testimony is. Arthurs v. Hart (1854) 17 How. 6, 12, 15 L. Ed. 30.

Objections to the admission or rejection of evidence, or to such rules or propositions of law as may be submitted to the court in the progress of a trial to the court, must be shown by the bill of exceptions, to warrant a review. Norris v. Jackson (1869) 9 Wall. 125, 128, 19 L. Ed. 608.

Objection to rulings on evidence, or to such propositions of law as a party may ask, must appear by bill of exceptions. Springfield F. & M. Insurance Co. v. Sea, Use of Pearson (1874) 21 Wall. 158, 160, 22 L. Ed. 511.

19. **Review on submission of questions of law and fact to court.**—Where the parties agree that the court shall decide both questions of law and fact,

none of the questions can be reviewed on writ of error. The practice in Louisiana which is sanctioned by the act of Congress requiring United States courts to conform to the practice of the state courts is an exception to this general rule. Campbell v. Boyreau (1858) 21 How. 223, 225, 16 L. Ed. 96.

Where parties in ejectment agreed to waive a jury and submit to the court both matters of law and fact, and a bill of exceptions is brought up to the Supreme Court to all the rulings and decisions below, it cannot look into errors of fact or law alleged to have been committed in such an irregular proceeding, and the judgment will be affirmed. Kelsey v. Forsyth (1858) 21 How. 85, 87, 16 L. Ed. 32.

There is no authority either at common law or by statute under which the facts in an action at law may be tried by the judge of a district Court of the United States without a jury, and where a case is so tried by stipulation the judgment is not reviewable by the Circuit Court of Appeals. U. S. v. Louisville & N. R. Co. (1909) 167 Fed. 306, 93 C. C. A. 58, affirming judgment (D. C. 1907) 156 Fed. 195.

20. Review on agreed statement of facts.—The practice of bringing cases up to the Supreme Court on an agreed state of facts held approved. Stimpson v. Baltimore & Susquehanna R. Co. (1850) 10 How. 329, 345, 13 L. Ed. 441.

A bill of exceptions must present questions of law. Where there is no dispute about the facts counsel may agree on a case stated in the nature of a special verdict, but to send the whole evidence up is not the same thing as agreeing on the facts. Graham v. Bayne (1855) 18 How. 60, 63, 15 L. Ed. 265.

Where the facts are undisputed and agreed, a statement thereof may be drawn up and entered on the record, and submitted directly to the court for decision without a jury, or a general verdict may be taken, subject to the court's opinion on the agreed facts, and in either case the aggrieved party may bring error after final judgment, and have the questions of law arising on the facts thus spread on the record re-examined, as in case of a special verdict; but rulings as to evidence during the trial are no more revisable on a special case than where the agreed statement is submitted directly to the court without a jury. Suydam v. Williamson (1857) 20 How. 427, 434, 15 L. Ed. 978.

Though the Supreme Court will give judgment on error, on an agreed statement of facts or case stated, if signed by counsel and spread on the record at large, as part thereof, it will not do so, except on that which is professionally and properly known as a case stated; that is, on a case which states facts simply, not one presenting, instead of facts, evidence from which they may or may not be inferred. Burr v. Des Moines Nav. & R. Co. (1863) 1 Wall. 99, 101, 17 L. Ed. 561.

Where counsel for both parties in the supreme court on writ of error to the circuit court for a district of Louisiana agreed to certain parts of the opinion of the court below as containing material facts of the case and to treat them in that court as facts found by the court below, the supreme court acted on the agreement as if it had been made below. Louisiana Mut. Ins. Co. v. Tweed (1868) 7 Wall. 44, 51, 19 L. Ed. 65.

An agreed statement of facts held insufficient as a special finding. Glenn v. Fant (1890) 10 Sup. Ct. 583, 584, 134 U. S. 398, 33 L. Ed. 969.

An agreed statement of facts cannot be taken as the equivalent of a special finding of facts, where such agreed statement contains, in addition to certain ultimate facts, other evidential facts from which a material ultimate fact might be inferred, but which is not agreed upon or found. Wilson v. Merchants' Loan & Trust Co. (1901) 22 Sup. Ct. 55, 183 U. S. 121, 46 L. Ed. 113, affirming judgment (1900) 98 Fed. 688, 39 C. C. A. 231.

An agreed statement of facts, certified by a territorial supreme court under Act April 7, 1874, brings nothing before the Supreme Court for consideration, where, instead of stating ultimate facts, it contains a narrative of facts, transcripts of records, and testimony witnesses would have given, if produced and sworn. U. S. Trust Co. v. New Mexico (1902) 22 Sup. Ct. 172, 174, 183 U. S. 535, 46 L. Ed. 315.

The authority of the appellate court to review the cause could not be supplied by an agreement made therein that the stipulation below should be amended nunc pro tunc by striking out the reservation of a right to go to the jury, and inserting the words "Jury waived;" for the validity of the exceptions was determined by the status at the time when they were taken. Smith v. Weeks (1893) 53 Fed. 758, 3 C. C. A. 644.

A stipulation admitting certain facts, where there is nothing to show that the cause was submitted to the court on the facts stated therein, does not constitute an agreed case on which an appellate court can consider whether the judgment is such as ought to have been rendered on the agreed facts. U. S. v. Carr (1894) 61 Fed. 802, 10 C. C. A. 80.

An agreed statement of facts, on which judgment is rendered, consisting not of the ultimate facts, but of the evidence to be submitted to the court on the issues presented by the pleadings, is not the equivalent of a special finding of the facts, allowing review of their sufficiency. Kentucky Life & Acc.

Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42.

A judgment at law, entered on an agreed statement of facts or case stated, can be reviewed on error only as to questions of law. Burrows v. Niblack (1898) 84 Fed. 111, 28 C. C. A. 130.

Where, on an appeal from a decree fixing the liability of successive trustees, a stipulation is made, dispensing with the proofs taken before the master, and assenting to the accuracy of his computations, the court will not reexamine them to ascertain whether an error was made in apportioning restitution between the two trustees. Kendall v. De Forest (1900) 101 Fed. 167, 41 C. C. A. 259.

Where an action at law tried to the court without a jury is submitted on an agreed statement of facts, which is filed and made a part of the record, such statement is equivalent to a special verdict, and the court's conclusion of law based thereon is subject to review. Mutual Life Ins. Co. of New York v. Kelly (1902) 114 Fed. 268, 52 C. C. A. 154, reversing judgment (C. C. 1901) Kelley v. Mutual Life Ins. Co. of New York, 109 Fed. 56.

Where, in a cause otherwise triable by jury, the parties agree upon a statement of the ultimate facts, and not the evidence of them, and the case is submitted to the court for its decision of the question of law arising on the facts so stated, the judgment may be reviewed on a writ of error, and this because the facts are not determined on a trial by the court, but by the agreed statement, which is spread at large on the record as would be a special verdict. U. S. v. Cleage (1908) 161 Fed. 85, 88 C. C. A. 249.

Where, in an action on an award pursuant to a fire policy imposing a short limitation within which to sue on the policy, which had expired before the commencement of the action, insurer, which had admitted liability on the award and had tendered the amount thereof, which was rejected by insured, relied on limitations and estoppel, an agreed statement of facts, submitted before judgment, which recited the tender of the amount due under the report of the appraisers and umpire and the refusal to receive the same, stated ultimate facts sufficient under the issues. Fellman v. Royal Ins. Co. (1911) 185 Fed. 689, 107 C. C. A. 637, denying rehearing (1911) 184 Fed. 577, 106 C. C. A. 557.

21. Review of questions as dependent on record.—Where a case is brought up by writ of error from the United States circuit court for Louisiana, the rules of the supreme court only require so much of the evidence to be inserted as is necessary to explain the legal questions decided. So the omission of evidence does not of itself prevent examination of questions of law presented by the record. Arthurs v. Hart (1854) 17 How. 6, 11, 15 L. Ed. 30.

A judgment was affirmed in a case where the only ruling to be found in the record was a judgment for plaintiff for a sum of money, where there was no question raised in the pleadings, no bill of exceptions, and no instructions or ruling of the court, and where what purported to be a statement of facts signed by the judge was filed more than two months after a writ of error was allowed and filed in the court, and nearly a month after the citation was issued. Generes v. Bonnemer (1868) 7 Wall. 564, 565, 19 L. Ed. 227.

A statement of facts made and filed several days after the issue and service of a writ of error is a nullity. Avendano Bros. v. Gay (1869) 8 Wall. 376, 377, 19 L. Ed. 422.

A paper, found in the record, purporting to state facts agreed, and filed with the clerk after the writ of error is issued, or after the case is disposed of by the circuit court, cannot be noticed on writ of error, though both parties consent. Kearney v. Case (1870) 12 Wall. 275, 280, 20 L. Ed. 395.

A statement of facts signed by counsel, and not made and filed until after judgment, cannot be noticed on error. Bethell v. Mathews (1871) 13 Wall. 1, 2, 20 L. Ed. 556.

Though a finding is general, any rulings in the progress of the trial, if excepted to at the time and duly presented by bills of exceptions, may be reviewed; but the rulings thus subject to review are decisions of law, and not findings of fact. Dickinson v. Planters' Bank (1872) 16 Wall. 250, 258, 21 L. Ed. 278.

Where, in a case tried without a jury, the finding of the court was general, and on writ of error a bill of exceptions embodied all the testimony tried without a jury, but no exception was taken to admission or rejection of evidence or to any ruling on the trial, and no question was raised on the pleadings, the judgment must be affirmed, for the reason that the record does not raise any question of law which the court can consider. Ohio v. Marcy (1872) 18 Wall. 552, 21 L. Ed. 813.

Where there is nothing in the record showing what was excepted to, findings of facts cannot be reviewed on writ of error. Springfield F. & M. Insurance Co. v. Sea, Use of Pearson (1874) 21 Wall. 158, 161, 22 L. Ed. 511.

Where the court's opinion, which included both findings of fact and conclusions of law was filed with the judgment, but no formal finding of facts was filed, and the court made an order at the next following term that a special finding with conclusions of law be filed, and entered it nunc pro tunc, the order was within the discretion of the court, and the special finding became a part of the record, and the judgment upon it was subjected to review without

a bill of exceptions. Ætna Ins. Co. v. Boon (1877) 95 U. S. 117, 124, 24 L. Ed. 395.

Rulings of the court cannot be reviewed unless the record shows the filing of the stipulation in writing required by R. S. § 649, ante, § 1587. Bond v. Dustin (1884) 5 Sup. Ct. 296, 297, 112 U. S. 604, 28 L. Ed. 835; Davenport v. Paris (1890) 10 Sup. Ct. 1064, 136 U. S. 580, 34 L. Ed. 548.

There is no question which can be reviewed, where there is no demurrer to the declaration or other exception to the sufficiency of the pleadings, no exceptions to the rulings of the court in the progress of the trial in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, and no motion in arrest of judgment, and the only matter presented by the bill of exceptions is the general finding by the court upon the evidence adduced. Martinton v. Fairbanks (1885) 5 Sup. Ct. 321, 322, 112 U. S. 670, 28 L. Ed. 862; Sheldon v. Day (1885) 5 Sup. Ct. 324, 112 U. S. 676, 28 L. Ed. 864.

The supreme court will not review a decision made on a statement of facts which mainly recapitulates the evidence and on a finding that the parties admitted that, so far as the facts were stated in a certain reported opinion, they were correct, but claimed that there existed additional facts, on which there is no finding, where there is no bill of exceptions, and there was issues of fact, and the facts stated in the reported opinion referred to are scattered through it, intermingled with other things. Raimond v. Terrebonne Parish (1889) 10 Sup. Ct. 57, 132 U. S. 192, 33 L. Ed. 309.

When the record discloses no findings of fact on a trial by the court without a jury, there is nothing which the supreme court can review. Lloyd v. McWilliams (1890) 11 Sup. Ct. 173, 137 U. S. 576, 34 L. Ed. 788.

On writ of error to a judgment on a referee's report in an action at law, where there is no written stipulation waiving a jury, and nothing showing a reference under the state statute, and where there is no bill of exceptions, and no specific exception was taken to the overruling of exceptions to the referee's report, or to the judgment thereon at the time it was entered, although these rulings were assigned as grounds of a motion for a new trial, no question is presented for review. Imperial Life Ins. Co. v. Newcomb (1894) 62 Fed. 97, 10 C. C. A. 288, affirming judgment Newcomb v. Imperial Life Ins. Co. (C. C. 1892) 51 Fed. 725, and motion for rehearing denied Imperial Life Ins. Co. v. Newcomb (1894) 63 Fed. 560, 11 C. C. A. 340.

Where the lower court, instead of submitting the question of amount in controversy to the jury, determined it on the evidence and affidavits, the supreme court will review the finding on the evidence in the record. Wetmore v. Rymer (1898) 18 Sup. Ct. 293, 295, 169 U. S. 115, 42 L. Ed. 682.

No question is presented, on writ of error to review a judgment at law on a referee's report, where there was no written stipulation waiving a jury, no bill of exceptions, and no specific exceptions taken to the overruling of exceptions to the report or to the judgment. Dietz v. Lymer (1894) 61 Fed. 792, 10 C. C. A. 71, petition for rehearing denied (1894) 63 Fed. 758, 11 C. C. A. 410, following Dundee Mortgage & Trust Inv. Co. v. Hughes (1888) 124 U. S. 157, 8 Sup. Ct. 377, 31 L. Ed. 357.

Whether accounts for which county warrants sued on were issued were sufficiently itemized (Gen. St. Kan. 1889, c. 25, § 28) to authorize such issuance cannot be reviewed, where the accounts are not included in the special findings, a jury having been waived. Board of Com'rs of Hamilton County v. Sherwood (1894) 64 Fed. 103, 11 C. C. A. 507.

In an action at law tried to the court without a jury, where the finding on the issues of fact is general, and no exceptions are taken to the rulings of the court in the progress of the trial, and the complaint states a cause of action, there is nothing for the appellate court to consider. United States Mut. Acc. Ass'n v. Robinson (1896) 74 Fed. 10, 20 C. C. A. 262, affirming judgment Robinson v. United States Mut. Acc. Ass'n of City of New York (C. C. 1895) 68 Fed. 825.

Where there is no bill of exceptions in a case tried by the court, only the sufficiency of the facts found to support the judgment can be considered on error. Flagler v. Kidd (1897) 78 Fed. 341, 24 C. C. A. 123, reversing judgment Kidd v. Flagler (C. C. 1893) 54 Fed. 367

In order that the opinion of the court, in a case tried without a jury, may be treated as a special finding of facts, so that assignments of error may be based thereon, its statement of the facts found should not be mingled with the evidence, or with discussions of law or the reasons for the court's conclusions. National Masonic Acc. Ass'n v. Sparks (1897) 83 Fed. 225, 28 C. C. A. 399.

In an action on a policy of life insurance, which was submitted upon an agreed statement of evidential facts from which ultimate facts were to be found, the trial court determined that a notice of assessment was insufficient, under the state laws, but made no special finding as to when the notice was served, what it contained, or to which of several classes of insurance companies provided for by the state laws the defendant belonged. Held, that since the statement of facts amounted to a mere report of the evidence, which could not be examined, the record, in

the absence of a special finding of facts, presented no question for the determination of the appellate court. Mutual Reserve Fund Life Ass'n v. Du Bois (1898) 85 Fed. 586, 29 C. C. A. 354, certiorari denied (1898) 19 Sup. Ct. 886, 171 U. S. 688, 43 L. Ed. 1178, following Raimond v. Terrebonne Parish (1889) 10 Sup. Ct. 57, 132 U. S. 192, 33 L. Ed. 309.

Where, by stipulation, an action at law is tried in a circuit court without a jury—a part of the facts being stipulated, and others specially found by the court—in the absence of a bill of exceptions the only question open for consideration by the appellate court is whether the judgment is warranted by the pleadings and sustained by the facts stipulated and found by the trial court. Garth v. Arnold (1902) 115 Fed. 468, 53 C. C. A. 200, modifying judgment Arnold v. Garth (C. C. 1901) 106 Fed. 13.

Where an action at law is tried by stipulation to the court, which makes only a general finding for plaintiff, where no exceptions were taken to any ruling, there is no bill of exceptions, and the complaint states a cause of action, there is nothing which can be reviewed on a writ of error. Gardner v. Lake (1902) 114 Fed. 306, 52 C. C. A. 218; National R. Co. of Mexico v. O'Leary (1903) 126 Fed. 363, 61 C. C. A. 562, rehearing denied (1904) 127 Fed. 819, 62 C. C. A. 125, writ of certiorari denied (1904) 24 Sup. Ct. 856, 194 U. S. 632, 48 L. Ed. 1159.

Where a jury trial is waived by stipulation in a Circuit Court in an action at law, and the cause is tried to the court and a general finding made, a review by an appellate court is limited to the rulings made during the progress of the trial which are presented by a bill of exceptions. Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190.

Where an order of the court setting an application for a peremptory writ of mandamus for hearing disclosed an admission by counsel that "by consent of parties" a jury was waived and the cause submitted to the court for determination, but the record did not disclose any "stipulation in writing waiving a jury," as prescribed by statute, the only questions of law reviewable on error were the sufficiency of the alternative writ or of the findings to support the judgment. West Virginia Northern R. Co. v. U. S. (1904) 134 Fed. 198, 67 C. C. A. 220, affirming judgment U. S. v. West Virginia Northern R. Co. (C. C. 1903) 125 Fed. 252.

Where an action at law was tried by the court without a jury by stipulation made pursuant to the statute and it does not appear that there was any special finding of facts, an assignment of error that the court "erred in rendering judgment in favor of the plaintiff, and against the defendant" presents no question which can be reviewed by the Circuit Court of Appeals. Fitzgerald v. Bassford (1906) 142 Fed. 134, 73 C. C. A. 352, affirming judgment Bassford v. Fitzgerald (C. C. 1905) 138 Fed. 958.

Where findings of fact are specifically made and filed by the trial court sitting without the intervention of a jury, and no exceptions are taken to such findings, no other or additional findings are asked, and the testimony in full is not incorporated in the record, such findings will be taken as true, and the appellate court in passing upon the case will only reverse in case it finds the judgment rendered to be contrary to the facts so found and set forth by the trial court. Vera Cruz & P. R. Co. v. Waddell (1907) 155 Fed. 401, 83 C. C. A. 673.

Under the federal practice the opinion of a trial court cannot be referred to by an appellate court for the purpose of ascertaining the facts upon which the judgment was based, nor to control the formal findings made, although a reference thereto is incorporated in the bill of exceptions. Pacific Sheet Metal Works v. Californian Canneries Co. (1908) 164 Fed. 980, 91 C. C. A. 108, affirming judgment Californian Canneries Co. v. Pacific Sheet Metal Works (C. C. 1906) 144 Fed. 886.

On writ of error to review a judgment of a Circuit Court in an action tried by stipulation to the court without a jury, where there was a general finding, in the absence of a bill of exceptions, the record presents only the question whether the pleadings support the finding and judgment. Marinette Sawmill Co. v. Scofield (1909) 174 Fed. 562, 98 C. C. A. 344.

Where a case at law is tried before the court, a jury being waived, there must be either a statement of facts by the parties or a finding of facts by the court, stating the ultimate facts and presenting questions of law only, or the appellate court on a writ of error cannot review the case on the merits. Fellman v. Royal Ins. Co. (1911) 185 Fed. 689, 107 C. C. A. 637, denying rehearing (1911) 184 Fed. 577, 106 C. C. A. 557.

As a special finding, made by a trial court where a jury is waived, becomes a part of the record, the appellate court may determine its sufficiency to support the judgment without a bill of exceptions, even though no exception was taken to the judgment in the court below. Chicago, R. I. & P. Ry. Co. v. Barrett (1911) 190 Fed. 118, 111 C. C. A. 158.

Where want of jurisdiction in equity appears on the face of the bill, it may be considered on appeal on the court's own motion. Brown v. Fletcher (1913) 206 Fed. 461, 124 C. C. A. 367, modifying decree (D. C. 1912) 203 Fed. 70.

Where a civil case is tried to the court and a general finding made, a re-

view is limited to such rulings as are presented by a bill of exceptions, which cannot be used to bring up the oral testimony. Dunsmuir v. Scott (1914) 217 Fed. 200, 133 C. C. A. 194.

Where an action was tried to the court without a written waiver of a jury, only questions arising on the record proper could be reviewed on writ of error, a judgment on a special finding for defendant could not be reversed and a new trial granted because the attempted waiver of a jury was in good faith on both sides. Ladd & Tilton Bank v. Lewis A. Hicks Co. (1914) 218 Fed. 310, 134 C. C. A. 106.

Where a motion to dismiss the complaint was denied at the close of the evidence in an action tried before the court without a jury, the correctness of such ruling was reviewable on exceptions without a special finding of facts. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

While it is impossible to prescribe any fixed rule by which the credibility of a witness is to be tested, or which shall bind the conscience of the court or commissioner, the record should ordinarily disclose to the appellate court something to justify the refusal to give his testimony full faith and credit. U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442.

22. Review as dependent on requests for findings or rulings.—If the parties desire a review of the law of the case, they must ask the court to make a special finding which raises the question, or get the court to rule on the legal propositions which they present. Norris v. Jackson (1869) 9 Wall. 125, 128, 19 L. Ed. 608; Springfield F. & M. Insurance Co. v. Sea Use of Pearson (1874) 21 Wall. 158, 160, 22 L. Ed. 511.

The question whether a defendant had not waived his right to except to the sufficiency of the evidence to support the court's findings of fact by failing to ask a ruling thereon before the court announced its conclusions did not affect the jurisdiction, but merely raised the question whether defendant was not limited to a review of the sufficiency of findings to support the judgment. Merrill v. Floyd (1892) 53 Fed. 172, 173, 3 C. C. A. 494.

Exceptions to findings and rulings in an opinion delivered by the court on a trial, without a jury, of an action at law, and to a general finding contained in the judgment, avail nothing on appeal, where no request was made at the trial for any ruling on any proposition of law, or on the sufficiency of the evidence to sustain such a finding or judgment. Mercantile Trust Co. v. Wood (1894) 8 C. C. A. 658, 60 Fed. 346; National Bank of Commerce v. First Nat. Bank (1894) 10 C. C. A. 87, 61 Fed. 809, affirming judgment National Bank of Commerce v. Atkinson (C. C. 1893) 55 Fed. 465.

Exceptions to findings and rulings in an opinion delivered by the court on a trial, without a jury, of an action at law, and to a general finding contained in the judgment, avail nothing on appeal, where no request was made at the trial for any ruling on any proposition of law, or on the sufficiency of the evidence to sustain such a finding or judgment. National Bank of Commerce v. First Nat. Bank (1894) 61 Fed. 809, 10 C. C. A. 87.

In an action submitted to the court, no exceptions to the admission or rejection of evidence were taken, nor was the court asked to make special findings of fact; but defendant requested certain rulings, on the whole case, as to the right to recovery. The court found generally for plaintiff, and defendant excepted to the refusal of the court to adopt the conclusions submitted by it. Held, that the exceptions presented nothing which the appellate court could review. Sanborn, Circuit Judge, dissenting. Searcy County v. Thompson (1895) 66 Fed. 92, 13 C. C. A. 349, affirming judgment Thompson v. Searcy County (1893) 57 Fed. 1030, 6 C. C. A. 674.

Where a court trying a case without a jury makes a general finding, no errors in giving or refusing instructions, asked to control such finding, can be reviewed on error. Kearney County Com'rs v. McMaster (1895) 68 Fed. 177, 15 C. C. A. 353.

When a jury is waived in the circuit court, a party wishing to raise any question of law upon the merits in the court above should request special findings of fact, framed like the verdict of a jury, and reserve his exceptions to those special findings if he deems them not sustained by the evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. Humphreys v. Third Nat. Bank (1896) 75 Fed. 852, 21 C. C. A. 538, affirming judgment Third Nat. Bank v. Humphreys (C. C. 1895) 66 Fed. 872.

The state practice as to propositions of law to be answered by the court is not applicable to the federal courts, in view of this section. U. S. v. Indian Grave Drainage Dist. (1898) 85 Fed. 928, 29 C. C. A. 578.

On the trial of an action at law in a circuit court without a jury, by written stipulation, as in an action tried to a jury, either party may, by motion, present the question of his right to a judgment as a matter of law upon the whole evidence; and, on appeal, an adverse ruling on such a motion may be reviewed, and the entire evidence, presented by bill of exceptions, may be considered by the circuit court of ap-

peals for that purpose. World's Columbian Exposition v. Republic of France (1899) 96 Fed. 687, 38 C. C. A. 483.

In an action to recover the amount of internal revenue taxes which plaintiff was required to pay as a brewer and for beer stamps, tried by stipulation without a jury, it was stipulated that plaintiff manufactured a beverage from ingredients and in a manner stated, but it was a disputed question, upon which testimony was taken, whether such beverage was a "fermented liquor manufactured from malt, wholly or in part, or from any substitute therefor," within the meaning of R. S. § 3244, post, §§ 5971, 6176, 6187, which rendered plaintiff liable for special tax as a brewer, and which was subject to tax under R. S. § 3339, post, § 6143. Held, that requests to the court to hold as propositions of law on the facts stipulated that plaintiff was not a brewer, and the beverage was not subject to tax under the statute, conceding the practice of requiring findings upon propositions of law in such cases to be permissible, involved a finding of the disputed question of fact whether the beverage was a fermented liquor, and, as such requests were not based on all the evidence, so as to be treated as a motion for judgment as matter of law on the entire case, the ruling of the court thereon was not reviewable on a writ of error. Davis v. Daugherty (1901) 105 Fed. 769, 45 C. C. A. 39.

If exceptions taken during the progress of a trial to the court relative to rulings on evidence do not present all questions of law desired for review, counsel should seasonably apply to the trial court to have the facts found specially by the court, which may do so in its discretion, and incorporate the finding in a bill of exceptions, and the court can then determine whether the facts found warrant the judgment. Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co. (1901) 106 Fed. 798, 45 C. C. A. 638.

In a case tried to the court, counsel cannot raise questions of law reviewable on appeal, by tendering requests for instructions and obtaining a ruling thereon. Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co. (1901) 106 Fed. 798, 45 C. C. A. 638.

In a cause tried in a Circuit Court without a jury, where there were no special findings, nor a stipulation of facts, a request for a holding, as matter of law, that plaintiffs were entitled to recover the amount claimed, requires a weighing of the evidence and a determination of facts, and the ruling thereon is not reviewable by an appellate court. Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190.

On trial of a cause in a Circuit Court without a jury, the procedure is governed by this section, and the court may, at its option, make either general or special findings. It cannot be required to rule on specific propositions of law presented by the parties in accordance with a state practice. Streeter v. Sanitary Dist. of Chicago (1904) 133 Fed. 124, 66 C. C. A. 190.

On the trial of an action at law in a Circuit Court without a jury, the court cannot be required to pass on propositions of law presented by counsel, and assignments of error based on its ruling thereon present no questions for review by an appellate court. Franklin County v. Furry (1906) 144 Fed. 663, 75 C. C. A. 465.

The omission to make findings will not be considered in an appellate court in the absence of a request therefor in the court below. Judgment, U. S. v. Lee Wing (D. C. 1905) 136 Fed. 701; Lee Joe Yen v. U. S. (1906) 148 Fed. 682, 78 C. C. A. 427, affirming judgment U. S. v. Lee Wing (D. C. 1905) 136 Fed. 701.

Where no declarations of law were requested by either party in an action tried by the court, and none were given by the court of its own motion, assignments of error directed to the holdings of the court on questions of law could not be reviewed on writ of error. Hayden v. Ogden Sav. Bank (1907) 158 Fed. 90, 85 C. C. A. 558.

That there was no evidence to support the judgment presents a question of law which cannot be reviewed, unless presented to and passed on by the trial court. Keeley v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 598, 95 C. C. A. 96.

In an action at law in a federal court, tried to the court without a jury by stipulation, where the court made a finding of facts, but omitted to state its conclusions of law thereon, a motion by plaintiff that the court instruct itself as a jury to find the issues for plaintiff, and exceptions to the overruling of such motion, and to a finding of the issues for defendant while irregular, was sufficient to present the issues of law arising on the facts found for review by the appellate court. U. S. v. Robertson (1910) 183 Fed. 711, 106 C. C. A. 149, writ of certiorari denied (1911) Robertson v. U. S., 31 Sup. Ct. 720, 220 U. S. 616, 55 L. Ed. 611.

Whether there was substantial evidence to sustain findings of fact by the trial judge may be made a reviewable question by requesting a declaration that there was no such evidence or for the rendition of a judgment for that reason, and assigning error on an exception to the refusal thereof. Felker v. First Nat. Bank of Cincinnati, Ohio (1912) 196 Fed. 200, 116 C. C. A. 32, affirming judgment First Nat. Bank of Cincinnati v. Felker (C. C. 1911) 185 Fed. 678.

Where the facts are tried to a court,

questions of law can be raised for review on writ of error by objecting and excepting to rulings on evidence, or by requesting declarations of law and excepting to the refusal thereof, or to nonconforming declarations. Seep v. Ferris-Haggarty Copper Mining Co. (1912) 201 Fed. 893, 120 C. C. A. 191.

Where an action is tried to the court, and the sufficiency of the evidence is desired to be reviewed on a writ of error, the party must request a finding or judgment in his favor. Id.

Where no request was made of the court at the close of trial by plaintiff for findings of law or fact, the Circuit Court of Appeals can review only the ruling on a motion to remove the cause to the state court made after a general finding for defendant. White v. Chase (1912) 201 Fed. 896, 120 C. C. A. 194.

Where the parties to an action at law waive a jury and submit the issues of fact to the court, the court's general finding thereon cannot be reviewed; but questions sought to be reviewed must be presented to the trial court by requests for findings or declarations of law applicable to the evidence. Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co. (1913) 205 Fed. 147, 123 C. C. A. 478.

Where the only ruling in the record was the judgment, and no findings or declarations were requested, trial court's views of the law and the evidence held not reviewable. Mason v. U. S. (1915) 219 Fed. 547, 135 C. C. A. 315, affirming judgment (D. C. 1912) U. S. v. Mason, 211 Fed. 233.

When an action at law is tried by the court upon a written waiver of a jury, the sufficiency of the evidence will not be reviewed, in the absence of a request by the complaining party at the close of the evidence, for a finding or judgment in his favor or special findings by the trial court. Tiernan v. Chicago Life Ins. Co. (1914) 214 Fed. 238, 131 C. C. A. 284.

Where parties to a suit tried to the court without a jury desired a review of the law involved in the case, a special verdict raising the legal propositions must be procured, or propositions of law must be presented and ruled on by the trial judge. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

23. Scope and extent of review—In general.—The supreme court has no authority on a writ of error to revise the evidence to ascertain whether the judge rightly interpreted it or drew right conclusions from it, and can only re-examine the law pronounced on the state of facts found. Hyde v. Booraem (1842) 16 Pet. 169, 176, 10 L. Ed. 925.

By waiving a jury trial and submitting the issues of fact to the court, the parties cannot make it the duty of the supreme court to draw inferences and conclusions of fact from the evidence, nor to examine such inferences and conclusions of fact as may be drawn from the evidence by the court below. Richmond v. Smith, Use of Clendenin (1872) 15 Wall. 429, 437, 21 L. Ed. 200.

The statement of a fact as a conclusion of law arising on the facts found in a case submitted to the court without a jury is not binding on the supreme court on writ of error, and, being manifestly erroneous, is ground for reversal of the judgment. French v. Edwards (1874) 21 Wall. 147, 151, 22 L. Ed. 534.

The proceeding in the trial of a case submitted to the court and argued without a jury not having been according to Act March 3, 1865, the Supreme Court was held to have no power to examine any ruling below excepted to during the progress of the trial. Gilman v. Illinois & M. Teleg. Co. (1875) 91 U. S. 603, 614, 23 L. Ed. 405.

A re-examination of the facts bearing on the question whether a Chinese person is unlawfully in the United States, which was decided in the affirmative by a United States commissioner and by a judge of the district court on appeal from the commissioner's decision, will not be entered on by the supreme court on appeal, though such appeal was taken on the ground that the construction of a treaty with China was drawn in question, and the supreme court has, therefore, jurisdiction to dispose of the entire case. Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891, 895, 186 U. S. 193, 46 L. Ed. 1121: Chin Ying v. Same (1902) 22 Sup. Ct. 895, 186 U. S. 202, 46 L. Ed. 1126.

Evidence on the question of citizenship of the respective parties to a suit in a federal court must be examined on appeal, though the motion to dismiss for lack of jurisdiction in the court below did not distinctly aver the absence of diverse citizenship, but merely charged that the parties were residents of the same state, where the circuit court treated the question of jurisdiction as raised, and passed upon it. Steigleder v. McQuesten (1905) 25 Sup. Ct. 616, 617, 198 U. S. 141, 49 L. Ed. 986.

The circuit court of appeals cannot examine the evidence to ascertain whether it justifies the finding. Reed v. Stapp (1892) 52 Fed. 641, 3 C. C. A. 244.

When a case is tried in a federal court otherwise than according to the strict course of the common law, the circuit court of appeals has no jurisdiction as to exceptions taken at the trial, or as to the effect of the facts found, except as given by this section, in cases where a jury is waived. Merrill v. Floyd (1892) 53 Fed. 172, 3 C. C. A. 494, affirming judgment (1892) 50 Fed. 849, 2 C. C. A. 58.

Where no requests for any declara-

tions of law are made at the trial, and exceptions to the rulings of the court on the evidence are not taken, the only question for review on appeal is the sufficiency of the findings of fact. Mercantile Trust Co. v. Wood (1894) 60 Fed. 346, 8 C. C. A. 658.

Whether an attorney is guilty of negligence in his management of a suit is a question of fact, not reviewable on writ of error. Ahlhauser v. Butler (1894) 63 Fed. 792, 11 C. C. A. 434, affirming judgment (C. C. 1893) 57 Fed. 121.

Where a case is submitted to the court without a jury, neither the correctness of a general finding nor refusal to make special findings requested can be reviewed. Distilling & Cattle Feeding Co. v. Gottschalk Co. (1895) 66 Fed. 609, 13 C. C. A. 618.

Alleged irregularity in granting affirmative relief by requiring complainant to dismiss an action at law, without basing the same upon any cross bill, are to be considered as without prejudice, where no objection was made below to the form of proceeding, and the action at law was brought under circumstances making it a contempt, which the court would have had power, in contempt proceedings, to order purged by dismissal of the action. Garner v. Second Nat. Bank (1895) 67 Fed. 833, 16 C. C. A. 86, certiorari denied (1896) 16 Sup. Ct. 1201, 163 U. S. 688, 41 L. Ed. 319.

The appellate court will not on error consider whether the evidence supports the findings of the lower court in a case submitted to it without a jury. Wile v. Farmers' State Bank (1895) 70 Fed. 138, 17 C. C. A. 25, affirming judgment Wile v. Cohn (C. C. 1894) 63 Fed. 759.

Where a decision of the circuit court turns solely upon an issue of fact, and the evidence is fully adequate to justify the finding made by the court, though different, unprejudiced minds might draw from it different inferences and reach different conclusions, the circuit court of appeals will not overrule such finding, or reverse the decree entered thereon. Snider v. Dobson (1896) 74 Fed. 757, 21 C. C. A. 76, affirming decree Dobson v. Snider (C. C. 1895) 70 Fed. 10.

Under this section and the established construction given it, the power of the court is limited to the determination of the question whether errors were committed by the trial court and whether the special findings made by the court were sufficient to support the judgment. Sayward v. Dexter, Horton & Co. (1896) 72 Fed. 758, 769, 19 C. C. A. 176.

No questions arising upon the record will in any event be reviewed by a federal appellate court, if the case is tried at nisi prius before the court on an oral stipulation waiving a jury, except the question whether the complaint is adequate to support the judgment; but if the case is sent to a referee for trial, pursuant to an oral stipulation, and the referee makes special findings of fact, the reviewing court will consider whether the facts so found warrant the judgment. Cudahy Packing Co. v. Sioux Nat. Bank (1896) 75 Fed. 473, 21 C. C. A. 428, affirming judgment Sioux Nat. Bank v. Cudahy Packing Co. (C. C. 1894) 63 Fed. 805, modifying (1895) 16 C. C. A. 410, 69 Fed. 782.

On the review of a judgment ordered on confirmation of the report of a referee, containing his full findings of fact and conclusions of law, only those assignments of error can be considered which present the question whether the judgment is justified by the facts found by the referee. Chicago, M. & St. P. Ry. Co. v. Clark (1899) 92 Fed. 968, 35 C. C. A. 120.

The sufficiency of the declaration is reviewable, and if it fails to state a cause of action the defect is not cured by the general finding. City of Pontiac v. Talbot Pav. Co. (1899) 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326.

When a case is tried in a circuit court without a jury, only the rulings of the court in the progress of the trial, and the sufficiency of the facts found to support the judgment, can be reviewed on a writ of error. "The technical sufficiency of a pleading which substantially avers the facts constituting the cause of action cannot be considered by the appellate court where it was not challenged in the trial court." McMaster v. New York Life Ins. Co. (1899) 99 Fed. 856, 40 C. C. A. 119, affirming judgment (C. C. 1898) 90 Fed. 40.

On a writ of error to review a judgment at law in a case tried without a jury by stipulation, the correctness of special findings of fact made by the circuit court is not open to inquiry, but the appellate court is required to determine whether such findings are sufficient, under the pleadings, to support the judgment rendered. Churchill v. Buck (1900) 102 Fed. 38, 42 C. C. A. 148.

The question whether there was any evidence before the circuit court in an action at law having a legal tendency to prove the facts found by it may be considered on writ of error, this being a question of law. King v. Smith (1901) 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708.

Where a case is tried to the court without a jury, and the facts are undisputed, the only questions reviewable in the appellate court are whether the judgment is supported by the facts found under the pleadings. Southern Ry. Co. v. Atlanta Nat. Bank (1902) 112 Fed. 861, 50 C. C. A. 558, 56 L. R. A. 546, writ of certiorari denied (1902) 22 Sup. Ct. 939, 184 U. S. 700, 46 L. Ed. 765.

Where a jury is waived by stipulation in an action at law in the circuit

court, and no exception is taken to any ruling made during the trial, the only exceptions being to the findings and conclusion of law, and the refusal to find conclusions of law as requested, the only question reviewable in the appellate court is whether the judgment is warranted by the pleadings and the findings of fact. Adam v. New York Life Ins. Co. (1902) 113 Fed. 303, 51 C. C. A. 263, writ of certiorari denied (1902) 22 Sup. Ct. 944, 186 U. S. 485, 46 L. Ed. 1261.

Rulings of a Circuit Court in the progress of the trial of an action at law by the court without a jury cannot be reviewed by the appellate court, unless a written stipulation waiving a jury is signed and filed with the clerk, so as to bring the case within this section, but, in the absence of such stipulation, the only question which can be considered is whether the judgment rendered is sustained by the pleadings. City of Defiance v. Schmidt (1903) 123 Fed. 1, 59 C. C. A. 159, affirming judgment Schmidt v. City of Defiance (C. C. 1902) 117 Fed. 702.

Where writs of error are prosecuted in cases tried to the court on stipulation waiving a jury trial, the court of appeals is limited to reviewing exceptions taken to the admission or exclusion of evidence, and to rulings on questions of law. Kruger v. Constable (1904) 128 Fed. 908, 63 C. C. A. 634, affirming judgment (C. C. 1902) 116 Fed. 722.

Where, at the conclusion of the trial, both parties move for a directed verdict, the court is thereby authorized to find the ultimate facts, and the only inquiries on review are whether there was any proper evidence to sustain its findings, and whether the law was correctly applied thereto. Insurance Co. of North America v. Wisconsin Cent. Ry. Co. (1905) 134 Fed. 794, 67 C. C. A. 300.

When in an action at law a jury is waived, and the court tries an issue of fact and makes a special finding upon which the substantial evidence is conflicting, the losing party may not reverse it by writ of error because it was not sustained by the weight of evidence. The only reviewable questions upon writ of error to reverse a judgment upon such a trial are the rulings upon the admission and exclusion of evidence in support of the finding and upon the question of the sufficiency of the facts to support the judgment. Barnsdall v. Waltemeyer (1905) 142 Fed. 415, 417, 73 C. C. A. 515, writ of certiorari denied (1906) 26 Sup. Ct. 759, 201 U. S. 643, 50 L. Ed. 902.

Rulings on evidence on questions of law, on the question whether or not there is any substantial evidence to warrant a finding, and whether the finding supports the judgment, are the only rulings that may be reviewed by a writ of error in a case tried by the court. Id.

Where requests for direction of a verdict are made by both parties, they are concluded by the finding of the court as to the facts, and the only question reviewable is the finding on the law, and the reviewing court must affirm if there be any evidence in support thereof. McCormick v. National City Bank of Waco (1906) 142 Fed. 132, 73 C. C. A. 350, 6 Ann. Cas. 544.

Where a jury is waived, and an action is tried by the court, which makes a finding or renders a judgment, no question of fact and no question of mixed law and fact, except those questions of law which have been reserved by exception, motion, or request, are reviewable in an appellate court. United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan. (1906) 145 Fed. 144, 76 C. C. A. 114.

Any question of law is reviewable in a trial before court without a jury, which is reviewable in a trial before a jury. Id.

In a case brought to the Circuit Court of Appeals, on appeal from the judgment of the trial court after a hearing of the case on the merits, and not on exceptions to the findings of a master, the appellate court was entitled to review the case independent of the master's findings. Merchants' Nat. Bank of Toledo v. Cole (1907) 149 Fed. 708, 79 C. C. A. 414.

Where the contention that the damages are excessive depends on the facts, it cannot be reviewed. Mason City & Ft. D. R. Co. v. Boynton (1907) 158 Fed. 599, 85 C. C. A. 421.

The rule is that the appellate court cannot review rulings of law by the Circuit Court on a trial by stipulation without a jury, except those relating to the reception of evidence or the progress of the case, though it may, perhaps, set aside the judgment where there is no evidence whatever to support the findings of fact applied. Gilbane v. Fidelity & Casualty Co. of New York (1908) 163 Fed. 673, 90 C. C. A. 265.

No question of law can be reviewed on a writ of error except those arising on the process, pleadings, or judgment, unless the facts are found by a jury, or are admitted by the parties on a case stated. Erkel v. U. S. (1909) 169 Fed. 623, 95 C. C. A. 151.

A trial and finding by a court without a jury in an action at law is reviewable to the same extent as a trial by the jury, with the single exception that, where the finding is special, the question whether the facts found sustain the judgment is open to review. Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co. (1910) 176 Fed. 237, 100 C. C. A. 41, 20 Ann. Cas. 1200.

When an action at law has been tried by the court without a jury, its findings may not be reversed for any error of fact. Id.

An appeal in equity invokes a trial de novo and a final decision, and where the decree below was clearly right, and the result could not have been otherwise if alleged errors had not been committed, they must be disregarded. Mound City Co. v. Castleman (1911) 187 Fed. 921, 110 C. C. A. 55, affirming decree (C. C. 1910) 177 Fed. 510.

Where an action at law is tried to the court, there can be no appeal on any question except those arising at the trial or as to questions of law on findings of ultimate facts. Continental & Commercial Nat. Bank of Chicago v. Cobb (1912) 200 Fed. 511, 118 C. C. A. 615.

The general rule that where exceptions are taken to parts of a master's report, the parts not excepted to will not be open to review, is subject to the exception that if the report is clearly erroneous it is within the discretion of the court to correct the error. Central Improvement Co. v. Cambria Steel Co. (1913) 210 Fed. 696, 127 C. C. A. 184.

It is the rulings in the progress of the trial excepted to at the time that may be reviewed, and it is not proper to combine the assignments of error and argue them as if the court had power to retry the case on the merits. Eastern Oil Co. v. Holcomb (1914) 212 Fed. 126, 128 C. C. A. 642.

Though appellant, instead of arguing rulings excepted to, combined the assignments of error and presented the case as if the appellate court could retry it on the merits, the sufficiency of the findings to support the judgment would be reviewed. Id.

Where an action at law was by stipulation tried before a referee, the only question reviewable by an appellate court is whether the conclusions of law are supported by the findings of fact. Delaware, L. & W. R. Co. v. Caboni (1915) 223 Fed. 631, 139 C. C. A. 177.

If upon facts to which no exceptions have been filed either party would be entitled to judgment without regard to the findings excepted to, the exceptions may be disregarded or overruled, and judgment awarded upon the undisputed findings of fact. Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1893) 57 Fed. 441.

Where a trial is had before a jury or on written stipulation by the court without a jury, the court's rulings on evidence and the sufficiency of the findings are reviewable on writ of error. Alder v. Edenborn (D. C. 1912) 198 Fed. 928.

24. —— **In absence of special findings of fact or where findings are general.**—If a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission of evidence. Dirst v. Morris (1871) 14 Wall. 484, 491, 20 L. Ed. 722.

When the finding is general, nothing is open to review but the rulings, or perhaps the instructions of the court as presented in a bill of exceptions. Richmond v. Smith, Use of Clendenin (1872) 15 Wall. 429, 438, 21 L. Ed. 200.

Where a finding of facts is general, the parties are concluded by the determination of the court, except in cases where exceptions are taken to rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed in the Supreme Court, even though the finding is general; but the general finding cannot be reviewed by bill of exceptions or otherwise. Mercantile Mut. Ins. Co. v. Folsom (1873) 18 Wall. 237, 248, 21 L. Ed. 827.

The Supreme Court will not review the finding of the Circuit Court, where it is general and unaccompanied by any authorized statement of facts, and in a case of such general finding nothing is reviewable except the rulings on the progress of the trial, not including the general finding nor the conclusions embodied therein. Cooper v. Omohundro (1873) 19 Wall. 65, 69, 22 L. Ed. 47; Crews v. Brewer (1873) 19 Wall. 70, 72, 22 L. Ed. 63.

A special verdict in order to enable the appellate court to act upon it must find the facts and not merely state the evidence of facts. In this manner it becomes a part of the record. Suydam v. Williamson (1857) 20 How. 427, 432, 15 L. Ed. 978.

In an action for unlawful detainer, tried by the court without a jury, a general finding that defendant is guilty in manner and form as charged, with findings as to the amount of plaintiff's damages, and the value of the rents and profits, where there is no special finding of facts or agreed statement of facts, has the same effect as the verdict of a jury, precludes the supreme court from examining the testimony, and limits its inquiry to the sufficiency of the complaint and the rulings preserved on questions of law arising on the trial. Lehnen v. Dickson (1893) 13 Sup. Ct. 481, 482, 148 U. S. 71, 37 L. Ed. 373, affirming judgment Dickson v. Lehnen (C. C. 1889) 37 Fed. 319.

In the absence of special findings, there can be no inquiry as to whether the facts were sufficient to sustain the conclusion. Id.

Where, in an action tried by the court, the court overrules demurrers to a number of pleas, but makes no special finding of facts, for which reason it is impossible to determine whether any particular plea which may have been erroneously sustained was not relied on in giving judgment, judgment will be reversed if any one of the pleas is erroneously sustained. Miller v. Houston City St. Ry. Co. (1893) 55 Fed. 366, 5 C. C. A. 134, judgment af-

firmed (1895) 69 Fed. 63, 16 C. C. A. 128.

On a trial by the court, where no request was made for a peremptory declaration that the evidence was insufficient to entitle plaintiff to judgment, a general finding for plaintiff cannot be reviewed on a single exception to the finding and the judgment thereon. Tabor v. Commercial Nat. Bank (1894) 62 Fed. 383, 10 C. C. A. 429.

Where a case is by consent submitted to the court without a jury, and the court makes a general finding, neither the correctness of that finding nor the refusal to make special findings can be reviewed on a writ of error. Distilling & Cattle Feeding Co. v. Gottschalk Co. (1895) 66 Fed. 609, 13 C. C. A. 618, affirming judgment Gottschalk Co. v. Distilling & Cattle Feeding Co. (C. C. 1894) 62 Fed. 901.

Where a jury is waived and the court makes a general finding, which alone is assigned as error, the only question for review is whether the evidence supports the finding. O'Neil v. Manhattan Life Ins. Co. (1895) 71 Fed. 254, 18 C. C. A. 35.

In an action involving the question whether plaintiffs were wholesale liquor dealers, within the meaning of the internal revenue laws, a trial was had to the court without a jury. The court made special findings of fact, detailing the manner in which plaintiffs, as commission merchants, had purchased liquors to fill the orders of certain foreign correspondents, and then added a general finding that, "in executing such orders in the manner already stated, the plaintiffs were not engaged in the business of wholesale liquor dealers, nor did they at any time sell or offer for sale foreign or domestic distilled spirits or wines in quantities of not less than five wine gallons at the same time." Held, that this was only the court's interpretation of the facts specially found, and did not preclude the appellate court from considering those facts, and determining therefrom whether the judgment was erroneous. Morrow, District Judge, dissenting. Quinn v. Dimond (1896) 72 Fed. 993, 19 C. C. A. 336.

Where a jury is waived in writing, and the court makes merely a general finding of facts, no question is presented on writ of error of the sufficiency of the facts found to support the judgment. Woodbury v. City of Shawneetown (1896) 74 Fed. 205, 20 C. C. A. 400.

Where a jury is waived, and the court finds generally for one side or the other, the losing party has no redress on error except for the wrongful admission or rejection of evidence. O'Hara v. Mobile & O. R. Co. (1896) 76 Fed. 718, 22 C. C. A. 512, affirming (C. C. 1895) 75 Fed. 130.

On error from proceedings upon a motion to revive a judgment in which the court made no special findings, the only questions for review are rulings of the court made at the trial. Crawford v. Foster (1897) 83 Fed. 975, 28 C. C. A. 242, petition for rehearing denied (1898) 84 Fed. 939, 28 C. C. A. 576, and affirming judgment Foster v. Crawford (C. C. 1897) 80 Fed. 991.

Where a jury is waived, and the court makes a general finding upon evidence produced, and not upon an agreed statement of facts or case stated, the appellate court cannot consider alleged error in making the finding. Burrows v. Niblack (1898) 84 Fed. 111, 28 C. C. A. 130.

On error from proceedings to revive a judgment, in which the court made no special finding, the only questions for review are rulings made on the hearing of the petition. Crawford v. Foster (1898) 84 Fed. 939, 28 C. C. A. 576.

Where the issues in an action at law, which present mixed questions of law and fact, are submitted to a circuit court, and a general finding made, no question arising upon the trial is open to review in the appellate court, except rulings made during its progress, and duly excepted to at the time, which do not include the general finding of the court; but error may be assigned in the circuit court of appeals upon a material defect apparent on the record proper, which would have been fatal on a motion in arrest of judgment after verdict. American Credit Indemnity Co. v. Athens Woolen Mills (1899) 92 Fed. 581, 34 C. C. A. 161.

Where the trial of an action at law is had before a referee, with instructions to report the testimony, with findings of fact, to the court, and the court subsequently makes the findings of fact its own, and renders judgment thereon, the only question which can be reviewed on a writ of error is whether the facts found sustain the judgment. Hudson River Pulp & Paper Co. v. H. H. Warner & Co. (1900) 99 Fed. 187, 39 C. C. A. 452.

Where a jury is waived, and there is testimony raising issues of fact, and the court finds generally for one party or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence. Hughes County, S. D., v. Livingston (1900) 104 Fed. 306, 43 C. C. A. 541, writ of certiorari denied (1901) 21 Sup. Ct. 926, 181 U. S. 623, 45 L. Ed. 1033.

Where a jury is waived, and the case is tried by the court, and no special finding of facts is made, the only questions arising on the evidence which can be presented to or considered by the appellate court are the rulings on the admission or rejection of evidence in the progress of the trial, and, in cases where that question is presented by a proper request at the close of all the evidence, the sufficiency of the evidence to warrant the finding. Barnard

v. Randle (1901) 110 Fed. 906, 49 C. C. A. 177, affirming judgment Randle v. Barnard (C. C. 1900) 99 Fed. 348.

Where a jury is waived in the circuit court, and an action at law tried to the court, which makes a general finding only, the appellate court can consider only the rulings made during the trial to which exceptions have been preserved, and cannot inquire into the special facts and conclusions of law upon which such general finding rests. McCrea v. Parsons (1902) 112 Fed. 917, 50 C. C. A. 612.

Where a case is tried by the court without a jury, and the court, notwithstanding defendant's application for special findings of fact, found generally that the plaintiff was entitled to recover, the facts cannot be reviewed on appeal. Berwind-White Coal Min. Co. v. Martin (1903) 124 Fed. 313, 60 C. C. A. 27, writ of certiorari denied (1903) 24 Sup. Ct. 841, 191 U. S. 569, 48 L. Ed. 306, and affirming judgment Martin v. Berwind-White Coal Min. Co. (C. C. 1902) 114 Fed. 553.

Where a jury is waived by stipulation in a circuit court, and no special finding of facts is made, the only questions reviewable by the Circuit Court of Appeals are whether the judgment is supported by the pleadings, whether there is any substantial evidence to support it, and whether error was committed in the admission or exclusion of evidence. City of Mankato v. Barber Asphalt Pav. Co. (1905) 142 Fed. 329, 73 C. C. A. 439.

Where the finding of a federal court in a law case tried without a jury is general, a writ of error reaches only the court's ruling in the progress of the trial, and, if the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. Southern Ry. Co. v. St. Louis Hay & Grain Co. (1907) 153 Fed. 728, 82 C. C. A. 614, judgment reversed (1909) 29 Sup. Ct. 678, 214 U. S. 297, 53 L. Ed. 1004, and affirming judgment St. Louis Hay & Grain Co. v. Southern Ry. Co. (C. C. 1906) 149 Fed. 609.

On review of a judgment in an action at law tried by the court without a jury, the law of the case must be determined from a finding by the trial court of ultimate facts in issue, and in the absence of such finding an ultimate fact cannot be supplied by the appellate court from evidence recited in the findings or findings of facts which are merely evidential in character. South Chicago Elevator Co. v. United Grain Co. (1908) 165 Fed. 132, 91 C. C. A. 166.

25. Review of special findings of fact. —Even if a special verdict be ambiguous or imperfect, if it find but the evidence of facts, and not the facts themselves, or but part of the facts in issue, and is silent as to others, it is a mistrial, and the supreme court, on writ of error, must order a venire de novo. They can render no judgment on an imperfect verdict or case stated. Graham v. Bayne (1855) 18 How. 60, 63, 15 L. Ed. 265.

When a court below makes a special finding, the Supreme Court will not examine the evidence on which it was founded, to ascertain whether it was right. The finding is equivalent to a special verdict. Phœnix Ins. Co. v. Copelin (1869) 9 Wall. 461, 467, 19 L. Ed. 739.

Whether the court's finding is general or special, the rulings of the court on the trial may be reviewed if duly excepted to, and in case of special findings the review may extend to the determination of the question whether the facts found are sufficient to support the judgment. Brooklyn L. Ins. Co. v. Miller (1870) 12 Wall. 285, 297, 20 L. Ed. 398.

Where the issue is tried by the court under Act March 3, 1865, it is only when the finding is special that the determination of the sufficiency of the facts found to support the judgment can be reviewed on error. Dickinson v. Planters' Bank (1872) 16 Wall. 250, 257, 21 L. Ed. 278.

A mere report of the evidence is not such a special finding or authorized statement of the case as will allow the Supreme Court to pass on the judgment of the lower court. Crews v. Brewer (1873) 19 Wall. 70, 72, 22 L. Ed. 63.

Where there are no exceptions to the rulings, and the court has given judgment on special findings of fact, the only question which the supreme court can pass upon is the sufficiency of the facts found to support the judgment. Jennison v. Leonard (1874) 21 Wall. 302, 307, 22 L. Ed. 539.

Though the supreme court under this section is authorized to determine whether the facts specially found by the circuit court are sufficient to support the judgment, it can take no notice of any facts not thus specially found because they were not found by the court below, and the supreme court as an appellate court cannot try an issue of fact. Chicago Tire & Spring Works Co. v. Spalding (1886) 6 Sup. Ct. 498, 500, 116 U. S. 541, 29 L. Ed. 720.

Where there is no special finding of facts, but a bill of exceptions, which, after setting forth what was proved, states that the court, after pleadings and proof, found the law for defendant, and rendered final judgment for it, and against plaintiff for costs, this is a sufficient finding of facts to authorize the Supreme Court, under this section, to determine whether the facts found are sufficient to support the judgment. Coler v. City of Cleburne (1889) 9 Sup. Ct. 720, 131 U. S. 162, 33 L. Ed. 146.

Under this section and section 649, the court's findings of fact cannot be both general and special, and where the

court has made a general finding, the recital of the evidence in the bill of exceptions, together with the statement that the court thereafter made the following findings of fact and judgment thereon, followed by an opinion of the court assigning reasons for its conclusions, cannot be treated as a special finding, so as to enable the supreme court on appeal to find whether the facts found support the judgment, nor can the general finding be disregarded. British Queen Min. Co. of Colorado v. Baker Silver Min. Co. (1891) 11 Sup. Ct. 523, 139 U. S. 222, 35 L. Ed. 147.

In cases tried by the Court without a jury under this section, findings of the circuit court are conclusive on the supreme court, and its power to review extends only to the sufficiency of the facts found to support the judgment, and if not sufficient the case may be remanded for trial on other issue involved therein. The E. A. Packer (1891) 11 Sup. Ct. 794, 796, 140 U. S. 360, 35 L. Ed. 453.

Where the court's findings are special, the circuit court of appeals cannot inquire whether the evidence supports the special findings of facts, but only whether the facts found are sufficient to support the judgment. Hill v. Woodberry (1892) 49 Fed. 138, 1 C. C. A. 206.

Where a cause was tried without a jury by stipulation of the parties, the rulings of the court duly presented by bill of exceptions may be reviewed, and where there is a special finding of facts the review may extend to a determination of the sufficiency of the facts to support the judgment. Miller v. Houston City St. Ry. Co. (1893) 55 Fed. 366, 369, 5 C. C. A. 134.

Where some of the facts are admitted by stipulation, and others left to be proved, and the court finds the issues for plaintiff "on all the evidence," the opinion of the trial court, in which the questions of fact and law are discussed, cannot be considered, in connection with the stipulation, as a special finding of facts, reviewable by the court of appeals. Adkins v. W. & J. Sloane (1894) 60 Fed. 344, 8 C. C. A. 656, motion for rehearing denied (1894) 61 Fed. 791, 10 C. C. A. 69.

The recital in a judgment entry that the court delivered an opinion, and made a finding of all the issues in favor of plaintiff, does not make the opinion a part of the record and a special finding of facts. Kentucky Life & Acc. Ins. Co. v. Hamilton (1894) 63 Fed. 93, 11 C. C. A. 42.

A bill of exceptions embodying the evidence is not a special finding allowing review of the sufficiency of the facts. Id.

When a jury is waived, and special findings made by a referee, which are adopted by the court, the questions open for review are the same as where special findings are made upon trial before the court. Board of Com'rs of Hamilton County v. Sherwood (1894) 64 Fed. 103, 11 C. C. A. 507.

A statement of the grounds of decision in an opinion of a case submitted without a jury is not equivalent to a special finding of fact. Hinkley v. City of Arkansas City (1895) 69 Fed. 768, 16 C. C. A. 395, judgment affirmed Swan v. City of Arkansas City (C. C. 1894) 61 Fed. 478.

When a jury is waived, and the court makes a special finding, an appellate court cannot look into the evidence, except to ascertain whether there was error in admitting or excluding testimony. Insurance Co. of North America v. International Trust Co. (1895) 71 Fed. 88. 17 C. C. A. 616, certiorari denied (1896) 16 Sup. Ct. 1202, 163 U. S. 691, 41 L. Ed. 316, and (1896) 16 Sup. Ct. 1207, 163 U. S. 707, 41 L. Ed. 316.

The conclusive effect of a special finding of fact cannot be made to depend upon the character of the proof on which it rests. Id.

The question for review upon a special finding, where a jury is waived in writing, is whether the facts found are sufficient to support the judgment; and the finding should be complete in itself, unaided by reference to bills of exceptions, though documents set out in the pleadings, or otherwise in the record, may be referred to without recopying. Wesson v. Saline County (1896) 73 Fed. 917, 20 C. C. A. 227.

When a case has been tried by the court without a jury, pursuant to stipulation, the circuit court of appeals will not make inquiry as to the correctness of special findings of fact made by the trial court. White v. Thacker (1897) 78 Fed. 862, 24 C. C. A. 374; Blanchard v. Commercial Bank (1896) 75 Fed. 249, 21 C. C. A. 319.

A paper purporting to be a bill of exceptions, and which opens and closes in the appropriate forms of such a bill, cannot be considered as a special finding of facts, though it contains an extended statement of the evidence submitted at the trial. Morris v. Canda (1897) 80 Fed. 739, 26 C. C. A. 128.

Where there is a special finding of facts, the appellate court will only consider whether, upon such facts, the judgment was correctly rendered. Randle v. Barnard (1897) 81 Fed. 682, 26 C. C. A. 568.

In a proceeding under the Indiana statute to revive a judgment, the question of the amount due and unpaid on the judgment is, without other pleadings than the petition or motion, an issue of fact, within this section, and on review of the decision therein on writ of error, if no special finding of the facts was made by the court below, no question touching the merits, which did not arise upon a ruling of the court on the hearing of the petition, can be con-

sidered. Crawford v. Foster (1898) 84 Fed. 939, 941, 28 C. C. A. 576.

Whether a special finding of fact made by the circuit court is in accordance with the preponderance of the evidence cannot be considered on a writ of error. Dooley v. Pease (1898) 88 Fed. 446, 31 C. C. A. 582.

Where a jury is waived, and a judgment is based on special findings of fact, the sufficiency of such findings to support the judgment may be reviewed on a writ of error. Evans v. Kister (1899) 92 Fed. 828, 35 C. C. A. 28.

Special findings of fact made by a circuit court in an action tried without a jury, by written stipulation, are conclusive on the circuit court of appeals, where the record does not contain all the evidence, so as to enable that court to determine that they are not supported by any evidence; and in such case the review is limited to the rulings of the court in the progress of the trial, duly excepted to, and a determination of the sufficiency of the facts found to support the judgment. Fales v. New York Life Ins. Co. (1899) 98 Fed. 234, 39 C. C. A. 38.

In reviewing a judgment rendered in an action at law tried by stipulation without a jury, the one question, on a special finding, is of the sufficiency of the facts found to support the judgment; and where, upon special findings upon different issues, judgment has been given in favor of the defendant, if the finding on one issue is unassailable, and sufficient to support the judgment rendered, no error of law or fact in respect to another issue can be deemed harmful, and no statement of a legal conclusion, however wrong, can affect the judgment if it is right upon the facts found. Keene Mach. Co. v. Barratt (1900) 100 Fed. 590, 40 C. C. A. 571.

The sufficiency of the evidence to support special findings of fact made by a circuit court cannot be reviewed on a writ of error. Syracuse Tp., Hamilton County, Kan., v. Rollins (1900) 104 Fed. 958, 44 C. C. A. 277.

A special finding that plaintiff was not a bona fide purchaser of a note for value, but took the same subject to any defense affecting the consideration is one of fact, and not reviewable on appeal as a conclusion of law. American Nat. Bank of Denver v. Watkins (1902) 119 Fed. 545, 56 C. C. A. 111, writ of certiorari denied (1903) 23 Sup. Ct. 854, 190 U. S. 558, 47 L. Ed. 1183.

An opinion copied into the judgment entry, but not intended to be a special finding of the ultimate facts, is not a special verdict contemplated by this section; and where the record discloses only a general finding, it has the effect of a verdict and the Circuit Court of Appeals will not determine whether the general finding is sustained by the evidence. York v. Washburn (1904) 129 Fed. 564, 64 C. C. A. 132.

A special finding by a Circuit Court in an action at law tried by stipulation without a jury must be the equivalent of a special verdict of a jury. It should cover all the issues, and state all the ultimate facts, so that in the event of proceedings in error only questions of law will be presented; and if the trial court's conclusions of law are deemed incorrect, and if the proceedings are otherwise without error, the appellate court may, under section 1669, post direct such judgment as the special finding requires, without the necessity of awarding a new trial. When such finding is imperfect in that respect, responding to only a part of the issues, and the facts found are not decisive of the case, the judgment must be reversed, and a new trial awarded. Anglo-American Land, Mortgage & Agency Co. v. Lombard (1904) 132 Fed. 721, 68 C. C. A. 89, writ of certiorari denied Lombard v. Anglo-American Land, Mortgage & Agency Co. (1904) 25 Sup. Ct. 793, 196 U. S. 638, 49 L. Ed. 630.

The making of special findings by a federal Circuit Court on waiver of a jury, and the effect thereof, is governed by this section, and not by state statutes. Jones v. U. S. (1905) 135 Fed. 518, 68 C. C. A. 68.

Special finding of facts in an action at law in which a jury has been waived is not reviewable as not supported by the weight of the evidence. Barnsdall v. Waltemeyer (1905) 142 Fed. 415, 73 C. C. A. 515, writ of certiorari denied (1906) 26 Sup. Ct. 759, 201 U. S. 643, 50 L. Ed. 902.

The special finding contemplated on trial by the court is a specific statement of the ultimate facts on which the law must determine the rights of the parties, and corresponds to the special verdict of the jury, is equally specific, and spread on the record as part thereof in like manner. U. S. v. Sioux City Stock Yards Co. (1909) 167 Fed. 126, 92 C. C. A. 578, affirming judgment (C. C. 1908) 162 Fed. 556.

An opinion of the trial judge setting forth the reasons for its decision in an action at law tried without a jury is not a special finding. Id.

An opinion of the trial judge analyzing the facts and applying the law is not a "special finding" of fact within this section. Keeley v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 598, 95 C. C. A. 96.

When special findings of fact made by a referee are adopted by the court in such manner as to show an intention to adopt them as its own, they will be so treated by the appellate court. Philadelphia Casualty Co. v. Fechheimer (1915) 220 Fed. 401, 136 C. C. A. 25.

26. Review of general findings and questions of fact.—Review of questions of fact in admiralty cases tried without a jury, see § 1536, and notes.

27. —— Review in general.—Findings of fact by the court in a jury-waived

case are not subject to exception or review. Bassett v. U. S. (1869) 9 Wall. 38, 40, 19 L. Ed. 548; Walnut v. Wade (1880) 103 U. S. 683, 688, 26 L. Ed. 526; Hathaway v. First Nat. Bank (1890) 10 Sup. Ct. 608, 610, 134 U. S. 494, 33 L. Ed. 1004; Farwell v. Sturges (1893) 56 Fed. 782, 6 C. C. A. 118 (following Reed v. Stapp [1892] 3 C. C. A. 244, 52 Fed. 641); Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248; Rodecker v. Littauer (1894) 59 Fed. 857, 8 C. C. A. 320; Walker v. Miller (1894) 59 Fed. 869, 8 C. C. A. 331; Jones v. McCormick Harvesting Mach. Co. (1897) 82 Fed. 295, 27 C. C. A. 133; Hardman v. Montana Union Ry. Co. (1897) 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 300; Fourth Nat. Bank v. City of Belleville (1897) 83 Fed. 675, 27 C. C. A. 674; State Nat. Bank v. Smith (1899) 94 Fed. 605, 36 C. C. A. 412; Mason City & Ft. Dodge R. Co. v. Boynton (1907) 158 Fed. 599, 85 C. C. A. 421; Eagle Oil Co. of New York v. Vacuum Oil Co. (1908) 162 Fed. 671, 89 C. C. A. 463 (writ of certiorari denied [1909] 29 Sup. Ct. 696, 214 U. S. 515, 53 L. Ed. 1063, and affirming decree Vacuum Oil Co. v. Eagle Oil Co. of New York [C. C. 1907] 154 Fed. 867); Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co. (1910) 184 Fed. 15, 106 C. C. A. 217; Harden v. Union Trust Co. of Philadelphia, Pa. (1911) 191 Fed. 152, 111 C. C. A. 632; J. W. Paxson Co. v. Board of Chosen Freeholders of Cumberland County (1912) 201 Fed. 656, 120 C. C. A. 84 (affirming judgment Board of Chosen Freeholders of Cumberland County v. J. V. Paxon Co. [D. C. 1912] 196 Fed. 156); Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co. (1914) 210 Fed. 599, 127 C. C. A. 235.

Findings of fact by the trial court will not be disturbed unless clearly erroneous. Metropolitan Nat. Bank v. Rogers (1893) 53 Fed. 776, 3 C. C. A. 666; Northern Alabama Ry. Co. v. Hopkins (1898) 87 Fed. 505, 31 C. C. A. 94; U. S. v. McGourin (1901) 106 Fed. 288, 45 C. C. A. 291 (modifying judgment McGourin v. U. S. [D. C. 1900] 102 Fed. 553); Same v. Puleston (1901) 106 Fed. 294, 45 C. C. A. 297; Idaho Min. & Mill. Co. v. Davis (1903) 123 Fed. 396, 59 C. C. A. 200; Board of Com'rs of Kearny County v. Irvine (1903) 126 Fed. 689, 61 C. C. A. 607 (modifying decree Coffin v. Board of Com'rs of Kearney County [C. C. 1902] 114 Fed. 518, writ of certiorari denied Board of Com'rs of Kearney County, Kan., v. Irvine [1904] 24 Sup. Ct. 851, 192 U. S. 607, 48 L. Ed. 585); Gage v. J. F. Smyth Mercantile Co. (1908) 160 Fed. 425, 87 C. C. A. 377; Babcock v. De Mott (1908) 160 Fed. 882, 88 C. C. A. 64 (writ of certiorari denied [1909] 29 Sup. Ct. 690, 212 U. S. 582, 53 L. Ed. 660); In re Snodgrass (1913) 209 Fed. 325, 126 C. C. A. 251; U. S. v. Marshall (1914) 210 Fed. 595.

Concurrent findings of fact of two courts below in a suit in equity will be accepted by the Supreme Court on appeal, unless error is clearly shown. Page v. Rogers (1909) 29 Sup. Ct. 159, 160, 211 U. S. 575, 53 L. Ed. 332.

Concurrent findings of the two courts below that two brothers were partners, and that the stock in trade belonged to the firm, do not call for reversal, where there was evidence that one brother, with the intent of forming a corporation, furnished the capital, and the other his personal services, and that the latter was interested in the profits, and was not a debtor of the former, and there was some evidence that he contributed to the assets. Manson v. Williams (1909) 29 Sup. Ct. 519, 520, 213 U. S. 453, 53 L. Ed. 869, affirming decree (1907) 153 Fed. 525, 82 C. C. A. 475.

In determining whether the evidence justifies the finding and decree, they are to be taken as presumptively correct, and, unless it clearly appears from the record that some mistake has been made in the consideration of the evidence, the decree should not be disturbed. Kunsemiller v. Hill (1898) 86 Fed. 198, 29 C. C. A. 658.

The decision of a circuit court on a mixed question of law and fact cannot be reviewed on a writ of error. Dooley v. Pease (1898) 88 Fed. 446, 31 C. C. A. 582.

The question of the credibility of witnesses must ordinarily rest with the trial court, which is necessarily vested with a large discretion in that matter; and the fact that a court in a habeas corpus proceeding for the discharge of a Chinese person held for deportation refuses to accept and act upon the testimony of Chinese witnesses, though uncontradicted and though the witnesses are not impeached, is not in itself ground for reversal. Woey Ho v. U. S. (1901) 109 Fed. 888, 48 C. C. A. 705, appeal dismissed (1903) 24 Sup. Ct. 844, 191 U. S. 558, 48 L. Ed. 301.

Where an equity cause was heard by the chancellor on testimony taken in open court, very clear and palpable error must appear, to justify a reversal on the facts by the appellate court. Espenschied v. Baum (1902) 115 Fed. 793, 53 C. C. A. 368.

The Circuit Court of Appeals will not disturb the conclusion of a trial judge on disputed questions of fact, where the hearing was on oral testimony, except for cogent reasons, such as a palpable mistake or misconception of the decided weight of the evidence. Barton Bros. v. Texas Produce Co. (1905) 136 Fed. 355, 69 C. C. A. 181.

The findings of a trial judge on an issue of fact raised on specifications to a bankrupt's discharge, will not be disturbed on appeal, where an unprejudic-

ed mind could reasonably have reached the conclusions arrived at by consideration of the entire evidence. McDonald v. Campbell (1907) 151 Fed. 743, 81 C. C. A. 101.

It matters little whether a court trying a case without the intervention of a jury formally excludes evidence which it has necessarily had to hear in order to determine its relevancy at the time when offered, or at the end, when it considers the whole with a view of maturing its judgment, for the fact that it remains in the record does not necessarily imply that it was improperly considered in making the final decision. Vera Cruz & P. R. Co. v. Waddell (1907) 155 Fed. 401, 83 C. C. A. 673.

The judgment of a court of equity on the disputed facts of a case must be taken as presumptively correct, and should be followed by an appellate court, unless an obvious error has occurred in the application of law, or a serious and important mistake has been made in the consideration of the proof. Mastin v. Noble (1907) 157 Fed. 506, 85 C. C. A. 98.

Findings of the trial judge in a suit to remove a cloud on title, while not controlling on appeal, will not be disturbed unless they rest on an erroneous view of the rights of the parties. Beamer v. Werner (1907) 159 Fed. 99, 86 C. C. A. 289.

Where an order directing a verdict for defendant is objected to on a writ of error, the Court of Appeals is required to take the view of the testimony and the inferences to be drawn therefrom most favorable to the plaintiff, the question being, not whether a verdict ought to have been rendered for plaintiff, but whether it lawfully might have been. Wolf v. Lovering (1908) 159 Fed. 91, 86 C. C. A. 281.

Where a cause in a district court triable by a jury is by consent tried to the court without a jury, no question of fact or law decided upon or in connection with the trial is subject to re-examination in an appellate court. U. S. v. Cleage (1908) 161 Fed. 85, 88 C. C. A. 249.

Where an action at law in a District Court triable by jury is by consent tried to the court, no question of law or fact decided upon in connection with the trial is subject to re-examination on appeal. U. S. v. St. Louis, I. M. & S. Ry. Co. (1909) 169 Fed. 73, 94 C. C. A. 441.

In a Chinese deportation proceeding it was assigned as error that the court did not find defendant was a citizen and entitled to remain in the United States, in sustaining the commissioner's judgment and order, and in remanding defendant to custody of the marshal, and adjudging he was unlawfully in the United States. Held, that the issues presented by such assignments were issues of fact, and could not, therefore, be reviewed on writ of error. Chin Man Can v. U. S. (1909) 170 Fed. 187, 95 C. C. A. 370.

Where issues are tried by the court without the intervention of a jury, the court's findings of fact are entitled to great weight on appeal. Thompson v. Mauzy (1909) 174 Fed. 611, 98 C. C. A. 457.

On a motion for judgment at the close of the trial of an action at law by the court, the only question reviewable is whether there was any substantial evidence to sustain the finding of the court. Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co. (1910) 176 Fed. 237, 100 C. C. A. 41, 20 Ann. Cas. 1200.

On appeal in a habeas corpus case for the discharge of a Chinese person held for deportation, the findings of the lower court are not conclusive, and all questions of fact on the evidence are open to consideration by the appellate court; but such findings should not be set aside, unless the evidence in the record is such as to convince the court that they are erroneous. Wong Heung v. Elliott (1910) 179 Fed. 110, 102 C. C. A. 408.

On an equity appeal, the facts as well as the law are open for consideration, regardless of whether there has been a jury trial, and the issues must be disposed of on the record. Alexander v. Redmond (1910) 180 Fed. 92, 103 C. C. A. 446.

The rule obtaining on writs of error that, when there is any material evidence tending to support the verdict of a jury, the appellate court will not review the evidence, does not obtain in favor of findings in equity cases which come up on a broad appeal, especially when it appears that all the evidence was in the shape of depositions, and not given orally before the court. Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co. (1911) 188 Fed. 164, 110 C. C. A. 200.

Where motions are made by both parties to an action at law for a directed verdict, unaccompanied by requests for specific instructions in case the motion should be denied, each party is estopped from assailing the finding upon disputed issues of fact, and is limited in the appellate court to a review of the question whether there was any substantial evidence, not inconsistent with the undisputed evidence in the case, upon which to support the verdict as directed under the issues presented by the pleadings. Melton v. Pensacola Bank & Trust Co. (1911) 190 Fed. 126, 111 C. C. A. 166.

A finding that the placing of the filling pipe extending from the engine room to the trimming tank in the forepeak of a steamship upon the floor of the intermediate hold, boxed in, without a valve within or immediately without the tank to shut off the water in the

tank from the pipe in case of a break in the pipe to prevent the flooding of the hold, rendered the vessel unseaworthy as to cargo in such hold, will not be reversed by an appellate court where there was expert testimony that such construction was faulty. The Indrapura (1911) 190 Fed. 711, 112 C. C. A. 351, affirming decree (D. C. 1910) 178 Fed. 591.

A finding of fact made and sustained by two different tribunals will not be set aside on appeal, unless there is a demonstration of mistake. Constam v. Haley (1913) 206 Fed. 260, 124 C. C. A. 128.

Where complainant claimed that defendant corporation was organized as a subterfuge in violation of a contract between complainant and P. that the latter would not engage in a conflicting business, and after complainant had introduced certain testimony indicating that such was the fact defendants rested without introducing testimony, and the case was dismissed, the decree would be reversed, and the cause remanded for further proceedings. Ferrell v. Prame (1913) 206 Fed. 278, 124 C. C. A. 342.

Errors alleged in the findings of the court on a trial without a jury are not subject to revision by the Circuit Court of Appeals, that court being limited in that connection to the question whether there is any evidence on which such findings could be made. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

28. —— **Findings on conflicting evidence.**—Finding and decree of chancellor on conflicting evidence are presumptively right, and not to be interfered with, unless obvious error has intervened. Warren v. Keep (1894) 15 Sup. Ct. 83, 155 U. S. 265, 39 L. Ed. 144; McKinley v. Williams (1896) 74 Fed. 94, 20 C. C. A. 312 (affirming decree Williams v. McKinley [C. C. 1894] 65 Fed. 4); Mann v. Keene Guaranty Sav. Bank of Keene, N. H. (1898) 86 Fed. 51, 29 C. C. A. 547; Gorham Mfg. Co. v. Emery-Bird Thayer Dry-Goods Co. (1900) 104 Fed. 243, 43 C. C. A. 511 (affirming decree [C. C. 1899] 92 Fed. 774); Thallmann v. Thomas (1901) 111 Fed. 277, 49 C. C. A. 317 (affirming decree Thallman v. Same [C. C. 1900] 102 Fed. 935); Harding v. Hart (1902) 113 Fed. 304, 51 C. C. A. 264 (appeal dismissed [1902] 23 Sup. Ct. 846, 187 U. S. 638, 47 L. Ed. 344); Lilienthal v. McCormich (1902) 117 Fed. 89, 54 C. C. A. 475; Order of United Commercial Travelers of America v. McAdam (1903) 125 Fed. 358, 61 C. C. A. 22; Lopez v. Collier (1904) 129 Fed. 104, 63 C. C. A. 606; Paulus v. M. M. Buck Mfg. Co. (1904) 129 Fed. 594, 64 C. C. A. 162; Dodge v. Norlin (1904) 133 Fed. 363, 66 C. C. A. 425; Shields v. Mongollon Exploration Co. (1905) 137 Fed. 539, 70 C. C. A. 123; Hussey v. Richardson-Roberts Dry Goods Co. (1906) 148 Fed. 598, 78 C. C. A. 370; Harrison v. Fite (1906) 148 Fed. 781, 78 C. C. A. 447; Blank v. Aronson (1911) 187 Fed. 241, 109 C. C. A. 327; State of Iowa v. Carr (1911) 191 Fed. 257, 112 C. C. A. 477; Same v. John A. Creighton Real Estate & Trust Co. (1911) 191 Fed. 270, 112 C. C. A. 496; De Laval Separator Co. v. Iowa Dairy Separator Co. (1912) 194 Fed. 423, 114 C. C. A. 385; Brandt v. U. S. (1912) 198 Fed. 449, 117 C. C. A. 208; Silver King Coalition Mines Co. of Nevada v. Silver King Consol. Mining Co. of Utah (1913) 204 Fed. 166, 122 C. C. A. 402.

A finding of the chancellor on conflicting evidence will not be disturbed on appeal. Hewitt v. Campbell (1883) 109 U. S. 103, 3 Sup. Ct. 68, 27 L. Ed. 871; Jeffries v. Mutual Life Ins. Co. (1884) 110 U. S. 305, 4 Sup. Ct. 8, 28 L. Ed. 156 (affirming orders Same v. Union Mut. Life Ins. Co. [C. C. 1880] 1 Fed. 450, and Latta v. Granger [1895] 68 Fed. 69, 15 C. C. A. 228; and decree reversed [1897] 17 Sup. Ct. 746, 167 U. S. 81, 42 L. Ed. 85); McKinley Creek Min. Co. v. Alaska United Min. Co. (1901) 22 Sup. Ct. 84, 86, 183 U. S. 563, 46 L. Ed. 331; Hill v. McCord (1904) 195 U. S. 395, 25 Sup. Ct. 96, 49 L. Ed. 251 (affirming McCord v. Hill [1903] 94 N. W. 65, 117 Wis. 306); Gaffner v. Pigott (1902) 116 Fed. 486, 54 C. C. A. 641; Moore v. Moore (1903) 121 Fed. 737, 58 C. C. A. 19; Burns v. Burns (1904) 131 Fed. 238, 65 C. C. A. 224 (affirming decree [D. C. 1903] 125 Fed. 432); Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt (1908) 162 Fed. 447, 89 C. C. A. 333 (reversing decree [C. C. 1907] 151 Fed. 681, and judgment affirming on rehearing [1909] 175 Fed. 720, 99 C. C. A. 296); Thorndyke v. Alaska Perseverance Mining Co. (1908) 164 Fed. 657, 90 C. C. A. 473; Union County Nat. Bank, Liberty, Ind., v. Ozan Lumber Co. (1910) 179 Fed. 710, 103 C. C. A. 584; Hamilton v. Loeb (1911) 186 Fed. 7, 108 C. C. A. 109 (affirming judgment [C. C. 1910] 179 Fed. 728, writ of certiorari denied [1911] 32 Sup. Ct. 523, 223 U. S. 720, 46 L. Ed. 629); Vanderbilt v. Bishop (1912) 199 Fed. 420, 117 C. C. A. 652, affirming judgment (C. C. 1911) 188 Fed. 971.

Findings by a court of equity on conflicting evidence will not be disturbed unless manifestly against the weight of evidence. Latta v. Granger (1895) 68 Fed. 69, 15 C. C. A. 228 (decree reversed [1897] 17 Sup. Ct. 746, 167 U. S. 81, 42 L. Ed. 85); Big Six Development Co. v. Mitchell (1905) 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332 (writ of certiorari denied [1905] 26 Sup. Ct. 746, 199 U. S. 606, 50 L. Ed. 330); Carey v. Donohue (1913) 209 Fed. 328, 126 C. C. A. 254.

A reviewing court will not, on an accounting between partners, reverse the

action of the court below in disallowing, on conflicting evidence, certain claims which were first presented on exceptions to the master's report, when the consideration of such claims was necessarily excluded by the order under which the accounting was conducted, and when the opposite party and one of the bookkeepers having knowledge of the matters had died in the mean time. Gunn v. Black (1894) 60 Fed. 151, 8 C. C. A. 534.

When the finding in the circuit court involves mixed questions of law and fact, and is general in its form, nothing is open to review in the circuit court of appeals except the rulings made in the progress of the trial, the findings being conclusive as to the facts. Humphreys v. Third Nat. Bank (1896) 75 Fed. 852, 21 C. C. A. 538 (affirming judgment Third Nat. Bank v. Humphreys [C. C. 1895] 66 Fed. 872); Ryan v. Staples (1897) 78 Fed. 563, 23 C. C. A. 551 (certiorari denied [1897] 17 Sup. Ct. 998, 166 U. S. 720, 41 L. Ed. 1186).

A finding by the court in an equity case that a note and mortgage were fraudulent in fact because executed with intent to hinder and delay the other creditors of the mortgagor will not be disturbed on appeal, where the evidence is conflicting, unless some serious or important mistake has been made in its consideration. Daugherty v. Bogy (1900) 104 Fed. 938, 44 C. C. A. 266, appeal dismissed Bogy v. Daugherty (1902) 22 Sup. Ct. 938, 184 U. S. 696, 46 L. Ed. 763.

Where an injunction and receiver were properly awarded on the bill, affidavits, and exhibits presented by complainants, and the answer and testimony presented by defendants on their application to set aside such order did not materially change the case, and the application was denied, though the evidence is conflicting, it not being plainly apparent that the court erred in entering the orders, they should not be reversed. Universal Savings & Trust Co. v. Stoneburner (1902) 113 Fed. 251, 51 C. C. A. 208.

Where an action at law was by stipulation tried in a Circuit Court without a jury, and a general finding was made and judgment rendered for defendants on conflicting evidence, the previous overruling of a motion to find for plaintiff cannot be assigned for error in the Circuit Court of Appeals, since it involved the decision of questions of fact as well as law, and the appellate court can look into the evidence only to ascertain whether there is any substantial evidence to sustain the judgment rendered. Swensen v. Cunningham (1907) 157 Fed. 753, 85 C. C. A. 146, writ of certiorari denied (1908) 29 Sup. Ct. 682, 212 U. S. 571, 53 L. Ed. 655.

It is a well-established rule that an appellate court will not ordinarily interfere with the action of a trial court in either granting or withholding an injunction in cases in which the evidence is substantially conflicting, and especially where the trial judge at the request of the respective parties has had the benefit of a personal inspection of the premises which are the subject of controversy. McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co. (1908) 164 Fed. 927, 92 C. C. A. 259, writ of certiorari denied (1909) 29 Sup. Ct. 692, 212 U. S. 583, 53 L. Ed. 660, and modifying judgment McCarthy v. Bunker Hill & Sullivan Mining & Coal Co. (C. C. 1906) 147 Fed. 981.

A steamer loaded with a cargo of shingles, both below and on deck, as she was being towed out of Humboldt Bay, Cal., where she loaded, on making a turn to enter the jetty listed heavily to port, shifted her deck load, and it was necessary to jettison a part of it before she could be righted. There were no unusual conditions of weather or tide. Held, that a finding would not be disturbed made by the trial court on conflicting evidence that the accident was due to the unseaworthiness of the vessel by reason of the manner in which she was loaded, rendering her unstable, and not a peril of the sea, within the exemption in the bill of lading, nor to a fault in navigation within Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445. Steamship Wellesley Co. v. C. A. Hooper & Co. (1911) 185 Fed. 733, 108 C. C. A. 71.

Findings of a trial court, made on conflicting evidence, and affirming those of a master before whom the witnesses testified as to the damage done to farmers by smoke and fumes from a smelter, especially where both the judge and the master had the benefit of a personal inspection of the premises, are to be taken as presumptively correct, and will not be reversed by an appellate court, unless some serious or important mistake has clearly been made in the consideration of the evidence. Bliss v. Washoe Copper Co. (1911) 186 Fed. 789, 109 C. C. A. 133, affirming judgment Same v. Anaconda Copper Mining Co. (C. C. 1909) 167 Fed. 342.

Where the court, in a suit by a trustee in bankruptcy to recover an alleged preference, has considered conflicting evidence, and made findings of fact which render the preference voidable and entitle the complainant to recover, such findings must be taken as presumptively correct by the appellate court, and this presumption is materially strengthened by the master's prior findings to the same effect. Boswell Nat. Bank v. Simmons (1911) 190 Fed. 735, 111 C. C. A. 463.

On an issue of citizenship in Chinese deportation proceedings, a finding of the trial court, based on conflicting evidence heard orally, will not be set aside on appeal, unless the record clear-

ly shows that an obvious mistake was made in considering the evidence. Fong Gum Tong v. U. S. (1911) 192 Fed. 320, 112 C. C. A. 572.

29. —— **Conclusiveness of findings.**— Findings of fact by the trial court are conclusive on appeal. Saulet v. Shepherd (1866) 4 Wall. 502, 507, 18 L. Ed. 442; Stanley v. Albany County (1887) 7 Sup. Ct. 1234, 1238, 121 U. S. 535, 30 L. Ed. 1000; Dooley v. Pease (1901) 21 Sup. Ct. 329, 331, 180 U. S. 126, 45 L. Ed. 457; Kunkel v. Brown (1900) 99 Fed. 593, 39 C. C. A. 665; Dooley v. Pease (1901) 21 Sup. Ct. 329, 180 U. S. 126, 45 L. Ed. 457 (affirming judgment [1898] 88 Fed. 446, 31 C. C. A. 582); West v. East Coast Cedar Co. (1902) 113 Fed. 737, 51 C. C. A. 411 (affirming decree [C. C. 1901] 110 Fed. 725); Wolff v. Wells Fargo & Co. (1902) 115 Fed. 32, 52 C. C. A. 626; American Nat. Bank v. Watkins (1902) 119 Fed. 545, 56 C. C. A. 111 (writ of certiorari denied [1903] 23 Sup. Ct. 854, 190 U. S. 558, 47 L. Ed. 1183); In re Antigo Screen Door Co. (1903) 123 Fed. 249, 59 C. C. A. 248; The Gladestry (1904) 128 Fed. 591, 63 C. C. A. 198 (affirming decree [D. C. 1903] 124 Fed. 112); American Bridge Co. v. Camden Interstate Ry. Co. (1904) 135 Fed. 323, 68 C. C. A. 131; Hayden v. Ogden Sav. Bank (1907) 158 Fed. 90, 85 C. C. A. 558; Pacific Sheet Metal Works v. Californian Canneries Co. (1908) 164 Fed. 980, 91 C. C. A. 108 (affirming judgment Californian Canneries Co. v. Pacific Sheet Metal Works [C. C. 1906] 144 Fed. 886); Schmid v. Dohan (1909) 167 Fed. 804, 93 C. C. A. 194; Jackson v. Mutual Life Ins. Co. of New York (1911) 186 Fed. 447, 108 C. C. A. 369; Cook v. Robinson (1912) 194 Fed. 753, 114 C. C. A. 473; Felker v. First Nat. Bank of Cincinnati, Ohio (1912) 196 Fed. 200, 116 C. C. A. 32 (affirming judgment First Nat. Bank of Cincinnati v. Felker [1911] 185 Fed. 678); Gibson v. Luther (1912) 196 Fed. 203, 116 C. C. A. 35; U. S. v. Two Baskets (1913) 205 Fed. 37, 123 C. C. A. 310; Los Angeles Gas & Electric Corporation v. Western Gas Const. Co. (1913) 205 Fed. 707, 124 C. C. A. 75; Washington & C. R. Co. v. Murray (1914) 211 Fed. 440, 128 C. C. A. 112.

A decision of the Circuit Court in an action at law on a question of fact is as conclusive on the Supreme Court as the verdict of a jury, where under the practice of the state the whole case is decided by the court, where neither party claims a jury trial. Bond v. Brown (1851) 12 How. 254, 256, 13 L. Ed. 977.

Under this section, a bill of exceptions cannot be used to bring up the evidence for a review of the findings of fact. The facts as found and stated by the court below are conclusive, and a case pending in the Supreme Court stands precisely the same as though they had been found by the verdict of a jury. The Abbotsford (1878) 98 U. S. 440, 443, 25 L. Ed. 168.

Where, in the trial of a cause by the court without the intervention of a jury, there is no demurrer to the declaration or other exception to the sufficiency of the pleadings, no exceptions to the rulings of the court in the progress of the trial in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, and no motion in arrest of judgment, and the only matter presented by the bill of exceptions is the general finding by the court upon the evidence adduced at the trial, the general finding is conclusive of the issue of fact, and is not reviewable upon appeal by the court. Martinton v. Fairbanks (1885) 5 Sup. Ct. 321, 112 U. S. 670, 28 L. Ed. 862.

On an appeal in equity, findings of fact made by the court below are entitled to some weight, but are not binding on the appellate court. The whole case is before the latter court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 27 C. C. A. 50.

While the findings of fact made by the court are not as conclusive as the findings of a jury, they are presumptively correct, and will not be disturbed by the appellate court, unless they are against the weight of evidence. Dickey v. Dickey (1899) 94 Fed. 231, 36 C. C. A. 211.

When a common-law action is tried to the court, its findings of fact are conclusive on appeal; and, if the facts found are sufficient in law to support the judgment, it must stand, unless the court erred in admitting or rejecting evidence over the objection of the complaining party. Eli Mining & Land Co. v. Carleton (1901) 108 Fed. 24, 47 C. C. A. 166.

It is settled law in the federal courts that, where an action at law is tried to the court, its findings upon questions of fact are conclusive, and that the only matters reviewable in the appellate court are the rulings on questions of law, when properly presented by bill of exceptions, and, when special findings are made, whether the facts found are sufficient to sustain the judgment. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1902) 114 Fed. 417, 52 C. C. A. 219, writ of certiorari denied Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (1902) 22 S. Ct. 941, 186 U. S. 482, 46 L. Ed. 1260, and reversing judgment Bunker Hill & S. Mining & Con-

centrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C. 1901) 106 Fed. 471.

A general finding by a Circuit Court, where a jury has been waived, is conclusive in the courts of review on all issues of fact, if there was any evidence on which it could have been made, and the rule is applicable notwithstanding a motion by the defeated party for judgment raising an assumed question of law as to the sufficiency of the evidence. Hall v. Western Union Telegraph Co. (1908) 162 Fed. 657, 89 C. C. A. 449.

While the findings of fact of a chancellor are not conclusive on an appeal in equity, they are presumptively correct and persuasive, and unless an obvious error has occurred in the application of the law, or a serious mistake has been made in the consideration of the evidence, such findings will not be disturbed. Harper v. Taylor (1911) 193 Fed. 944, 113 C. C. A. 572.

The attorneys for the respective parties to a suit at law, brought in the district court of the United States, by a written stipulation waived a jury trial, and agreed that the court should hear the action "without a jury." The action was tried; a written decision was filed, finding certain facts and certain conclusions of law thereon; and a judgment entered. The cause was afterwards taken to the circuit court on a writ of error. Held, that the rulings on findings of fact, and the conclusions of law connected therewith, were not open to revision, as facts so found were found in a way unknown to the common law, nor yet provided by statute. Town of Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369.

30. —— **Effect of findings as verdict.**—A general finding in a case tried by the court without a jury will be given the same weight and effect on appeal as the verdict of a jury. French v. Edwards (1874) 21 Wall. 147, 151, 22 L. Ed. 534; Ryan v. Carter (1876) 93 U. S. 78, 81, 23 L. Ed. 807; Heinze v. Butte & B. Consol. Min. Co. (1903) 126 Fed. 1, 61 C. C. A. 63 (writ of certiorari denied [1904] 25 Sup. Ct. 788, 195 U. S. 631, 49 L. Ed. 353); York v. Washburn (1904) 129 Fed. 564, 64 C. C. A. 132 (affirming judgment [C. C. 1902] 118 Fed. 316); Davis v. McEwen Bros. (1912) 193 Fed. 305, 113 C. C. A. 229; Seep v. Ferris-Haggarty Copper Mining Co. (1912) 201 Fed. 893, 120 C. C. A. 191; Elliott v. Peet (1913) 202 Fed. 434, 120 C. C. A. 540 (affirming judgment [D. C. 1912] 192 Fed. 699).

Under Alaska Code (31 Stat. 393, c. 38), making certain provisions for the trial of actions of an equitable nature, and providing that the section shall not be construed to bar an equitable owner in possession of real property from defending his possession by means of his equitable title, where defendants pleaded an equitable title to an interest in a mining claim sought to be recovered in ejectment, and prayed reformation of a deed to plaintiff's prior grantor for mutual mistake, the trial court's findings of fact on a jury being waived did not have the conclusive effect on appeal of a verdict of a jury. Shields v. Mongollon Exploration Co. (1905) 137 Fed. 539, 70 C. C. A. 123.

When, upon a trial without a jury in a federal court, the findings of fact and of law by the court are general, exceptions to a ruling denying a motion for judgment for the defendant present for the consideration of an appellate court the question whether upon the whole evidence, with all the inferences which a jury could justifiably draw from it, the plaintiff was entitled to recover; the general finding is to be accepted as equivalent to the verdict of a jury on all matters of fact, and the appellate court cannot review the weight of the evidence. Delaware, L. & W. R. Co. v. Kutter (1906) 147 Fed. 51, 77 C. C. A. 315, writ of certiorari denied Same v. Rutter (1906) 27 Sup. Ct. 776, 203 U. S. 588, 51 L. Ed. 330.

When an action at law is tried to the court, the court's general finding has the effect of a jury's verdict, and may not be reviewed unless the lack of evidence to sustain the finding has been suggested by proper motion before the close of the trial. Pennsylvania Casualty Co. v. Whiteway (1914) 210 Fed. 782, 127 C. C. A. 332.

31. —— **Weight and sufficiency of evidence.**—A finding by the trial court will not be disturbed by the court on appeal, when there is any evidence to support it, or the evidence tends to support it. Dooley v. Pease (1901) 21 Sup. Ct. 329, 180 U. S. 126, 45 L. Ed. 457 (affirming judgment [1898] 88 Fed. 446, 31 C. C. A. 582); American Sales Book Co. v. Bullivant (1902) 117 Fed. 255, 54 C. C. A. 287 (writ of certiorari denied [1903] 23 Sup. Ct. 855, 190 U. S. 560, 47 L. Ed. 1184); San Fernando Copper Mining & Reduction Co. v. Humphrey (1904) 130 Fed. 298, 64 C. C. A. 544; Eureka County Bank v. Clarke (1904) 130 Fed. 325, 64 C. C. A. 571 (affirming judgment Clarke v. Eureka County Bank [C. C. 1903] 123 Fed. 922, writ of certiorari denied [1904] 25 Sup. Ct. 788, 195 U. S. 631, 49 L. Ed. 353); West Virginia Northern R. Co. v. U. S. (1904) 134 Fed. 198, 67 C. C. A. 220 (affirming judgment U. S. v. West Virginia Northern R. Co. [C. C. 1903] 125 Fed. 252).

On error to a circuit court in a case wherein there was a trial of the facts before the court, a jury being waived, the supreme court does not look into the evidence embodied in the record.

Coddington v. Richardson (1870) 10 Wall. 516, 518, 19 L. Ed. 981.

In a case tried by the court without a jury under Act March 3, 1865, the supreme court on a writ of error cannot pass on the weight and sufficiency of the evidence. Dirst v. Morris (1871) 14 Wall. 484, 490, 20 L. Ed. 722.

Findings of fact on the weight of the evidence are not reviewable. Hathaway v. First Nat. Bank (1890) 10 Sup. Ct. 608, 610, 134 U. S. 494, 33 L. Ed. 1004.

Errors alleged in the findings of a United States circuit court are not subject to revision by the circuit court of appeals or by the supreme court of the United States, if there was any evidence upon which such findings could be made. Dooley v. Pease (1901) 21 Sup. Ct. 329, 331, 180 U. S. 126, 45 L. Ed. 457.

When a jury has been waived in writing, the review on error does not extend to the sufficiency of the evidence to support the findings of fact. Walker v. Miller (1894) 59 Fed. 869, 8 C. C. A. 331.

The sufficiency of the evidence to support a general finding by the court on a trial at law without a jury cannot be reviewed on writ of error, where the case was submitted by both parties without a request for a peremptory instruction on the facts, though a general exception was taken to the judgment at the time it was entered. Adkins v. W. & J. Sloane (1894) 61 Fed. 791, 10 C. C. A. 69, denying motion for rehearing (1894) 60 Fed. 344, 8 C. C. A. 656.

The circuit court of appeals has no authority, in any case, to examine the testimony with a view of determining whether it was sufficient to support a finding of the trial court to which a case has been submitted without a jury. Minchen v. Hart (1896) 72 Fed. 294, 18 C. C. A. 570. Affirming judgment Hart v. Minchen (C. C. 1895) 69 Fed. 520.

In an action at law, tried by the court without a jury, assignments of error which would involve an examination of the evidence cannot be considered by the appellate court. Woodbury v. City of Shawneetown (1896) 74 Fed. 205, 20 C. C. A. 400.

Where a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its findings of fact cannot be considered by the appellate court. Hoge v. Magnes (1898) 85 Fed. 355, 29 C. C. A. 564.

Plaintiff sued in the circuit court on a judgment rendered against the defendant prior to his discharge in bankruptcy, alleging that the debt was not discharged because created by the fraud of the defendant. Defendant denied the allegations of fraud, and pleaded the discharge as a defense. By stipulation of the parties, a jury was waived, and the case submitted to the court. Held, that it was the duty of the court to make a finding upon the issue of fraud, and that the circuit court of appeals could not, on a writ of error, examine the evidence nor supply such finding. Packer v. Whittier (1899) 91 Fed. 511, 33 C. C. A. 658, reversing judgment (C. C. 1897) 81 Fed. 335.

Where a case is tried by a federal court without a jury, the sufficiency of the evidence to sustain its findings of fact cannot be considered by the appellate court. Suppreme Lodge, Knights of Pythias, v. England (1899) 94 Fed. 369, 36 C. C. A. 298; Myers v. Hettinger (1899) 94 Fed. 370, 37 C. C. A. 369, affirming judgment Hettinger v. Meyers (C. C. 1897) 81 Fed. 805.

The findings of the chancellor on a question of fact will not be disturbed, unless clearly shown to be against the weight of evidence. Lansing v. Stanisics (1899) 94 Fed. 380, 36 C. C. A. 306.

Where there is evidence to sustain the findings of the trial court, they will not be disturbed on appeal. McIntosh v. Price (1903) 121 Fed. 716, 58 C. C. A. 136; Hemple v. Raymond (1906) 144 Fed. 796, 75 C. C. A. 526.

Where an issue of fact in a civil case is tried by the court without a jury, and the court did not make a special finding of facts, the sufficiency of the facts found to support the judgment could not be reviewed. West v. Houston Oil Co. (1905) 136 Fed. 343, 69 C. C. A. 169.

While the findings of the trial judge will not be disturbed by an appellate court upon mere questions of fact depending upon the credibility of witnesses who testified before him, unless there is found to be a decided preponderance of evidence to the contrary, a finding based solely on the preponderance of the testimony is open to review and consideration de novo by the Appellate Court. The Fin MacCool (1906) 147 Fed. 123, 77 C. C. A. 349.

Reversal of the lower's court's judgment as to the facts will only be made when such judgment is shown to be against the clear preponderating weight of all the evidence. Vera Cruz & P. R. Co. v. Waddell (1907) 155 Fed. 401, 83 C. C. A. 673.

An appellate court on a writ of error cannot weigh the evidence, but must take the facts as found by the court below, unless there is a total want of evidence to sustain the findings. Ware v. Wunder Brewing Co. of San Francisco (1908) 160 Fed. 79, 87 C. C. A. 235.

Where, on appeal from a decree in favor of libelant in a proceeding to recover for the loss of a pile driver from the charterer, the trial judge found that the charterer had failed to show that it was free from negligence, and

the appellate court is unable under the evidence to hold that the charterer has sustained the burden of proof on such issue, the decree will be affirmed. Swenson v. Snare & Triest Co. (1908) 160 Fed. 459, 87 C. C. A. 443, affirming decree (D. C. 1906) 145 Fed. 727.

Where there is abundant evidence from which a fact found by the trial judge may have fairly been found, such finding will be sustained on appeal, unless an obvious error has occurred in the application of the law or a serious mistake in the consideration of the proof. Taber Lumber Co. v. O'Neal (1908) 160 Fed. 596, 87 C. C. A. 498.

Where, on an accounting in a suit for infringement of a patent, there was a finding of damages in favor of complainant, and the overruling of an exception to such finding is assigned as error, the appellate court may ascertain whether there was any legal evidence to sustain the finding. McSherry Mfg. Co. v. Dowagiac Mfg. Co. (1908) 163 Fed. 34, 89 C. C. A. 512, writ of certiorari denied Dowagiac Mfg. Co. v. McSherry Mfg. Co. (1909) 29 Sup. Ct. 694, 214 U. S. 512, 53 L. Ed. 1062, denying rehearing (1908) 160 Fed. 948, 89 C. C. A. 26.

A finding of fact by the Circuit Court, though based on doubtful evidence, will not be set aside on appeal, where it is not entirely without support. Steinhauser v. Order of St. Benedict of New Jersey (1912) 194 Fed. 289, 114 C. C. A. 249, reversing decree Order of St. Benedict of New Jersey v. Steinhauser (C. C. 1910) 179 Fed. 137.

A judgment should not be disturbed on the facts, if there is evidence to support it. Fetzer v. South Side Lumber Co. of Chicago (1913) 202 Fed. 878, 121 C. C. A. 236.

Where a case is tried by the court without a jury, the sufficiency of the evidence to sustain its findings of fact cannot be considered by the appellate court. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

32. Review of findings on reference —In general.—The findings of a master on matters of fact are prima facie correct, and should not be overruled in an appellate court, unless without evidence to sustain them. Gay Mfg. Co. v. Camp (1895) 65 Fed. 794, 13 C. C. A. 137, petition for rehearing denied (1895) 68 Fed. 67, 15 C. C. A. 226.

A trial had under a stipulation that the cause be referred to a master, who should report evidence, with his conclusions of fact and law, and that either party might except to the report, which should be disposed of by the court, was a trial by a master sitting as referee, and it was essential to present questions for review that the court trying exceptions should ascertain the facts on which the judgment was founded. Shipman v. Ohio Coal Exchange (1895) 70 Fed. 652, 17 C. C. A. 313.

The findings of fact and conclusions of law contained in the confirmed report of a special master appointed by consent of the parties to the suit to report the facts and the law are conclusive, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence. Moline Plow Co. of Kansas City, Mo., v. Carson (1895) 72 Fed. 387, 18 C. C. A. 606.

The law of a foreign country being required to be proved as a fact in the courts of this country, a finding by a referee as to such law is a finding of fact, not subject to review as a question of law. Hudson River Pulp & Paper Co. v. H. H. Warner & Co. (1900) 99 Fed. 187, 39 C. C. A. 452.

Where a case is referred to a master to hear the evidence, and to report his findings and conclusions both of law and fact, so far as the master has to deal with conflicting testimony, or pass upon questions of credibility, his findings are to be treated as so far presumptively correct as not to be subject to review on appeal, unless manifest error is shown in his conclusions of fact or in the application of the law. Singleton v. Felton (1900) 101 Fed. 526, 42 C. C. A. 57.

Where there was conflicting evidence before the commissioner in proceedings to limit liability after collision, his decision as to the value of the vessel will not be disturbed. The George L. Garlick (1901) 107 Fed. 542, 46 C. C. A. 456.

Findings of fact by special master are conclusive on appeal, there being some evidence to support them, and reference to him being by consent, and covering the law and facts in the case. Murphy v. Southern Ry. Co. (1902) 115 Fed. 257, 53 C. C. A. 477.

A finding by a master that certain appliances were attached to a factory must be taken as correct in determining whether or not such appliances became subject to a prior mortgage on the building and machinery therein where it was not excepted to, and there is no evidence showing the character of the appliances, or whether or not they were detachable. General Fire Extinguisher Co. v. Lamar (1905) 141 Fed. 353, 72 C. C. A. 501, writ of certiorari denied (1906) 26 Sup. Ct. 761, 201 U. S. 647, 50 L. Ed. 904.

The court will not reverse the conclusions of fact of a referee, in the absence of clear and convincing indication that it is wrong. Love v. Export Storage Co. (1906) 143 Fed. 1, 74 C. C. A. 155.

A finding of fact by a master on a reference made without consent does not have the weight of a special verdict of a jury, or of a finding where the reference is by consent of parties,

but is advisory only, and the question must be determined on the evidence where exceptions are taken both in the trial court and the appellate court. Hapgood v. Berry (1907) 157 Fed. 807, 85 C. C. A. 171.

The legal presumption is that findings of the master on conflicting evidence are correct, and they will not be set aside unless it appears with reasonable clearness that he has fallen into a mistake of fact or committed an error of law. Guarantee Gold Bond Loan & Savings Co. v. Edwards (1908) 164 Fed. 809, 90 C. C. A. 585, affirming judgment (1907) 104 S. W. 624, 7 Ind. T. 297.

Findings of a master on conflicting evidence are presumed correct, and will not be disturbed unless obvious error or mistake appears. Provident Life & Trust Co. of Philadelphia v. Camden & T. Ry. Co. (1910) 177 Fed. 854, 101 C. C. A. 68.

A reference by consent of parties of an entire case for the determination of all the issues entitles the findings of the master to the same presumption of correctness as those of an independent tribunal, and they are reviewable only for manifest error in the consideration given to the evidence or in the application of the law. Spring Garden Ins. Co. v. Amusement Syndicate Co. (1910) 178 Fed. 519, 102 C. C. A. 29.

Findings of fact made by a referee by consent under Act Pa. 1889 (P. L. 80), although subject to review on exceptions, are entitled to great weight. Bemis Car Box Co. v. J. G. Brill Co. (1912) 200 Fed. 749, 119 C. C. A. 229.

Even though a reference was by consent of parties, such fact does not preclude the Circuit Court of Appeals from correcting manifest errors. Central Improvement Co. v. Cambria Steel Co. (1912) 201 Fed. 811, 120 C. C. A. 121.

Where a case was referred to a special master to hear and determine all matters in controversy, the master's findings of fact on conflicting evidence will not be reviewed unless manifestly incorrect. Haines v. First Nat. Bank (1913) 203 Fed. 225, 121 C. C. A. 431.

The findings of a referee whether the submission is by mere consent or made in conformity to statutory authority are not reviewable by the court, unless there is such manifest error in the same as would justify a court in setting aside, under like circumstances, the verdict of a jury. Paine v. Standard Plunger Elevator Co. (1913) 203 Fed. 242, 121 C. C. A. 440, affirming judgment (C. C. 1911) 192 Fed. 75.

A referee's finding, in an action to recover a contribution to a syndicate agreement for alleged fraud of one of the managers, that there was no actual fraud, but that the manager was guilty of constructive fraud, held conclusive on writ of error. Edenborn v. Sim (1913) 206 Fed. 275, 124 C. C. A. 339.

Findings of fact by a master may not be set aside, in the absence of convincing evidence to the contrary. Curtice Bros. Co. v. Barnard (1913) 209 Fed. 589, 126 C. C. A. 411.

Where it appears on the face of a master's report that he has drawn an erroneous conclusion from the facts found, the absence of an exception does not disable an appellate court from correcting the error and entering a just decree. Central Improvement Co. v. Cambria Steel Co. (1913) 210 Fed. 696, 127 C. C. A. 184.

In an action for damages which is referred to the master, where the evidence is so conflicting that, to reach a finding of the facts, some testimony must be rejected as untruthful, the finding of the master should be as conclusive as the verdict of a jury; no error being shown. Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C. 1888) 33 Fed. 803.

The finding of a master that a rail of a railway track was so worn as to render its use negligence, made on conflicting testimony, and an examination of the rail by him in person with counsel, will not be reviewed. Clyde v. Richmond & D. R. Co. (C. C. 1894) 59 Fed. 394.

The finding of a referee, upon conflicting evidence, that an injunction defendant has not violated the injunction, will not be disturbed. Hennessey v. Budde (C. C. 1897) 82 Fed. 541.

Where a reference was made to a master in a suit for an accounting to determine the value of certain property conveyed to one of the parties and sold by him, finding of the master will not be disturbed where based upon the evidence. Kilgour v. Scott (C. C. 1901) 107 Fed. 32.

A finding of fact by a referee, master, or commissioner will not be disturbed on appeal, unless clearly against the weight or preponderance of the evidence. John Hancock Mut. Life Ins. Co. v. Houpt (C. C. 1901) 113 Fed. 572.

The conclusions of a referee, master, or auditor, on questions of fact submitted to him, are entitled to the same consideration as the verdict of a jury. Alexander v. Louisville & N. R. Co. (C. C. 1902) 114 Fed. 774.

Under an agreement that findings of fact made by a referee shall have the same force and effect as the verdict of a jury, such findings cannot be reviewed by the court on exceptions. Campbell v. Equitable Life Assur. Soc. (C. C. 1904) 130 Fed. 786.

The findings of a master as to the cost of restoring a vessel injured in collision, based on conflicting testimony, will not be disturbed unless there is a clear error or mistake. In re Merritt & Chapman Derrick & Wrecking Co. (D. C. 1900) 103 Fed. 988.

Where there is a conflict in the evidence before a referee, but his findings are supported thereby, they will not be disturbed. In re Royce Dry Goods Co. (D. C. 1904) 133 Fed. 100.

The findings of a referee in bankruptcy as to the date of a transfer of a claim against the bankrupt's estate will not be disturbed on petition to review, unless manifestly against the weight of the evidence. In re Shults (D. C. 1905) 135 Fed. 623.

Findings of fact by a special master on conflicting testimony, uninfluenced by mistaken conclusions of law, will not be disturbed. In re Doyle (D. C. 1912) 199 Fed. 247.

The findings of a referee, who heard the witnesses on conflicting evidence, or when different inferences may be drawn from a conceded state of facts, are entitled to the same consideration as those of a district judge and should be reversed only in clear case of error. In re Hodge (D. C. 1913) 205 Fed. 824.

33. —— **Findings approved by court.** —In the absence of clear evidence of fraud or of mistake of fact or error of law, a finding of fact by a master, auditor, or commissioner, concurred in by the court below, is binding upon an appellate court. Hy-yu-tse-mil-kin v. Smith (1904) 24 Sup. Ct. 676, 680, 194 U. S. 401, 48 L. Ed. 1039 (affirming judgment [1902] 119 Fed. 114, 55 C. C. A. 216); Tug River Coal & Salt Co. v. Brigel (1898) 86 Fed. 818, 30 C. C. A. 415 (affirming decree Brigel v. Tug River Coal & Salt Co. [C. C. 1896] 73 Fed. 13); Ruhlender v. Chesapeake, O. & S. W. R. Co. (1898) 91 Fed. 5, 33 C. C. A. 299; Dillingham v. Moran (1900) 101 Fed. 933, 42 C. C. A. 91; Sanders v. Bluefield Waterworks & Improvement Co. (1901) 106 Fed. 587, 45 C. C. A. 475; Ferguson Contracting Co. v. Manhattan Trust Co. (1902) 118 Fed. 791, 55 C. C. A. 529; Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co. (1904) 127 Fed. 625, 62 C. C. A. 351; Buckingham v. Estes (1904) 128 Fed. 584, 63 C. C. A. 20; Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (1904) 131 Fed. 579, 66 C. C. A. 299 (writ of certiorari denied [1906] 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622); Moffatt v. Blake (1906) 145 Fed. 40, 75 C. C. A. 265; Mercantile Trust Co. v. Chicago P. & St. L. Ry. Co. (1906) 147 Fed. 699, 78 C. C. A. 87 (writ of certiorari denied Same v. Wheeler [1906] 27 S. Ct. 781, 203 U. S. 593, 51 L. Ed. 332); Houck v. Christy (1907) 152 Fed. 612, 81 C. C. A. 602; City of Memphis v. Postal Telegraph & Cable Co. (1908) 164 Fed. 600, 91 C. C. A. 135, 16 Ann. Cas. 342; Jefferson Hotel Co. v. Brumbaugh (1909) 168 Fed. 867, 94 C. C. A. 279; Brown Bag Filling Mach. Co. v. Drohen (1910) 175 Fed. 576, 99 C. C. A. 192 (affirming decree [C. C. 1909] 171 Fed. 438); Brown v. Lanyon Zinc Co. (1910) 179 Fed. 309, 102 C. C. A. 497; Boehm v. Fairchild Bros. & Foster (1910) 179 Fed. 700, 103 C. C. A. 242; Jackson v. White (1911) 188 Fed. 775, 110 C. C. A. 481 (rehearing denied [1912] 194 Fed. 677, 115 C. C. A. 71); Gibson v. Samples (1912) 202 Fed. 743, 121 C. C. A. 620; In re Schwab-Kepner Co. (1913) 203 Fed. 475, 121 C. C. A. 597 (decree affirmed Greey v. Dockendorff [1913] 34 Sup. Ct. 166, 231 U. S. 513, 58 L. Ed. 339).

Where a District Court has concurred with the findings of a master on questions of fact, such findings should not be disregarded by an appellate court, except for strong reasons. Emerson & Norris Co. v. Simpson Bros. Corporation (1914) 214 Fed. 572, 131 C. C. A. 121.

See, also, Abbott v. Underwood (1914) 216 Fed. 335, 132 C. C. A. 479; Brooks v. Kerr (1915) 223 Fed. 1016, 139 C. C. A. 612.

The general rule respecting the conclusiveness of a master's findings of fact when confirmed by the court will not be applied by the federal Supreme Court on an appeal from a decree enjoining the enforcement of a municipal ordinance fixing maximum water rates, on the ground that the ordinance is invalid under Const. Amend. 14, as confiscatory. Knoxville v. Knoxville Water Co. (1909) 29 Sup. Ct. 148, 150, 212 U. S. 1, 53 L. Ed. 371.

Where all the issues have been referred to a master to hear and decide, and his report is confirmed, after the overruling of exceptions thereto, an appellate court is required to treat his findings as so far correct as not to be disturbed, unless clearly in conflict with the weight of the evidence. Randolph v. Allen (1896) 73 Fed. 23, 19 C. C. A. 353, following Kimberly v. Arms (1889) 9 Sup. Ct. 355, 129 U. S. 512, 32 L. Ed. 764.

The finding of the commissioner of the district court on an issue of fact, approved by such district court, will be regarded on appeal as, in effect, "successive and concurrent decisions of two courts in the same case," and will not be disturbed. Simpson's Patent Dry-Dock Co. v. Atlantic & E. S. S. Co. (1901) 108 Fed. 425, 47 C. C. A. 443, writ of certiorari denied (1901) 22 S. Ct. 934, 183 U. S. 697, 46 L. Ed. 395.

While findings of fact made by a master and concurred in by the Circuit Court are entitled to great weight, and will generally be followed by the Appellate Court, they are not conclusive, and it is the duty of the Appellate Court to examine the record and form its own conclusions. Briggs v. Neal (1903) 120 Fed. 224, 56 C. C. A. 572,

reversing decree Neal v. Briggs (C. C. 1901) 110 Fed. 477.

If a patent covers only a particular feature of an article sold by an infringer, a finding of a special master, in a suit for infringement, that the profits realized by the infringer were solely attributable to such feature, approved by the trial court, will not be disturbed on appeal unless there is clear evidence of mistake or error. McSherry Mfg. Co. v. Dowagiac Mfg. Co. (1908) 160 Fed. 948, 89 C. C. A. 26, rehearing denied (1908) 163 Fed. 34, 89 C. C. A. 512, writ of certiorari denied Dowagiac Mfg. Co. v. McSherry Mfg. Co. (1909) 29 S. Ct. 694, 214 U. S. 512, 53 L. Ed. 1062.

The determination of questions of fact on an intricate accounting by a master selected for his special fitness for the work, and affirmed by the Circuit Court, will not be overturned by the appellate court on anything less than a demonstration of plain mistake. Wabash Ry. Co. v. Compton (1909) 172 Fed. 17, 96 C. C. A. 603.

When a jury has been waived in writing, and the findings of the referee have been confirmed by the trial court as reported or as modified by it, the sufficiency of the facts found to warrant the judgment will be reviewed as though the findings were wholly made by the trial court. Tiernan v. Chicago Life Ins. Co. (1914) 214 Fed. 238, 131 C. C. A. 284.

Cited without definite application, Ex parte French (1875) 91 U. S. 423, 425, 426, 23 L. Ed. 249; Parks v. Booth (1880) 102 U. S. 96, 97, 26 L. Ed. 54; U. S. v. Harris (1883) 1 Sup. Ct. 601, 605, 106 U. S. 629, 27 L. Ed. 290; Paine v. Central Vt. R. Co. (1886) 6 Sup. Ct. 1019, 1022, 118 U. S. 152, 30 L. Ed. 193; Allen v. St. Louis Nat. Bank (1887) 7 Sup. Ct. 460, 461, 120 U. S. 20, 30 L. Ed. 573; Bacon v. Northwestern Mut. Life Ins. Co. (1889) 9 Sup. Ct. 787, 788, 131 U. S. 258, 33 L. Ed. 128; Banigan v. Bard (1890) 10 Sup. Ct. 565, 134 U. S. 291, 33 L. Ed. 932 (affirming [C. C. 1889] 39 Fed. 13); Dower v. Richards (1894) 14 Sup. Ct. 452, 455, 151 U. S. 658, 38 L. Ed. 305; O'Reilly De Comara v. Brooke (1908) 28 Sup. Ct. 439, 209 U. S. 45, 52 L. Ed. 676; Skinner v. Franklin (1893) 56 Fed. 783, 785, 6 C. C. A. 118; Dietz v. Lymer (1894) 63 Fed. 758, 11 C. C. A. 410; Rhodes v. United States Nat. Bank (1895) 66 Fed. 512, 514, 13 C. C. A. 612, 34 L. R. A. 742; Newbegin v. Newton Nat. Bank (1895) 66 Fed. 701, 702, 14 C. C. A. 71; Insurance Co. of North America v. International Trust Co. (1895) 71 Fed. 88, 92, 17 C. C. A. 616 (writ of certiorari denied [1896] 16 Sup. Ct. 1202, 163 U. S. 691, 41 L. Ed. 316); Packer v. Whittier (1899) 91 Fed. 511, 512, 33 C. C. A. 658 (writ of certiorari denied [1899] 19 Sup. Ct. 887, 174 U. S. 802, 43 L. Ed. 1187); Sarrazin v. W. R. Irby Cigar & Tobacco Co. (1899) 93 Fed. 624, 626, 35 C. C. A. 496, 46 L. R. A. 541; Powers v. U. S. (1903) 119 Fed. 562, 566, 56 C. C. A. 128; In re Boston Dry Goods Co. (1903) 125 Fed. 226, 60 C. C. A. 118 (writ of certiorari denied [1904] 24 Sup. Ct. 848, 192 U. S. 604, 48 L. Ed. 584); Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co. (1906) 147 Fed. 457, 77 C. C. A. 601 (affirmed [1908] 28 Sup. Ct. 607, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70); W. L. Perkins & Co. v. Von Baumbach (1911) 185 Fed. 265, 107 C. C. A. 371; Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98; Lawton v. Carpenter (1912) 195 Fed. 362, 115 C. C. A. 264 (certiorari denied [1912] 32 Sup. Ct. 840, 225 U. S. 710, 56 L. Ed. 1267); Bickel v. Rockwood (1913) 209 Fed. 187, 189, 126 C. C. A. 135; Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369, 371; J. Ellwood Lee Co. v. McClain (C. C. 1901) 106 Fed. 164; Black v. Supreme Council American Legion of Honor (C. C. 1903) 120 Fed. 580 (affirmed [1903] 123 Fed. 650, 59 C. C. A. 414); Joline v. Metropolitan Securities Co. (C. C. 1908) 164 Fed. 650.

§ 1669. (R. S. § 701.) Judgment or decree on review.

The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.

Act Sept. 24, 1789, c. 20, § 24, 1 Stat. 85. Act March 3, 1803, c. 40, § 2, 2 Stat. 244. Act June 30, 1864, c. 174, § 13, 13 Stat. 310. Act June 1, 1872, c. 255, § 2, 17 Stat. 196.

This section was superseded to a great extent by the provisions for remand of cases on determination on appeal, etc., by the Supreme Court or by a circuit court of appeals, contained in the Circuit Courts of Appeals Act of March 3, 1891, c. 517, § 10, post, § 1670. So far as it remained in force, it

was made applicable to appeals and writs of error provided for in said Circuit Courts of Appeals Act in respect of the circuit courts of appeals, by section 11 of that act, ante, § 1651. The last sentence of this section may be regarded as applicable, to cases reviewed in the circuit courts of appeals, so as to require the issue by such a court of a special mandate to an inferior court to award execution.

The application of the provisions of this section and of said section 10 of the Circuit Courts of Appeals Act, post, § 1670, to judgments, etc., of circuit courts, was also superseded by the abolition of those courts by Jud. Code, § 289, ante, § 1266, but those provisions were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts, by Jud. Code, § 291, ante, § 1268.

Notes of Decisions

1. Construction in general.
2. Application to circuit court of appeals.
3. Application to criminal prosecutions.
4. Affirmance or reversal.
5. Modification of judgment or decree.
6. Division of court.
7. Dismissal by supreme court.
8. Rendition of judgment by supreme court.
9. Direction of judgment.
10. Mandate and proceedings in lower court.
11. Mandate awarding execution.
12. Appeal from decree entered in conformity to mandate.
13. Bill of review after affirmance.

See, also, notes under § 1670, post.

1. Construction in general.—This section and section 1214, ante, proceed on the idea that the power to issue writs of execution is in possession of the courts. Wayman v. Southard (1825) 10 Wheat. 1, 23, 6 L. Ed. 253.

This section did not limit the court's consideration of questions of law apparent on the record, but every case on appeal is considered as a case to be tried de novo on all considerations of law and fact relative to it. Murdock v. Memphis (1874) 20 Wall. 590, 624, 22 L. Ed. 429.

This section would seem to give authority to the circuit court to try every appeal case de novo, as it may direct such judgment, decree, or order to be rendered as the justice of the case may require. Warren v. Moody (C. C. 1881) 9 Fed. 673, 674.

2. Application to circuit court of appeals.—When the court below has considered conflicting evidence, and made a finding and decree thereon, the finding must be taken as presumptively correct, and the decree should be affirmed, if the appellate court is in doubt in respect to the facts found. McKinley v. Williams (1896) 74 Fed. 94, 20 C. C. A. 312, affirming decree Williams v. McKinley (C. C. 1894) 65 Fed. 4.

In determining whether the evidence justifies the finding and decree, they are to be taken as presumptively correct, and, unless it clearly appears from the record that some mistake has been made in the consideration of the evidence, the decree should not be disturbed. Kunsemiller v. Hill (1898) 86 Fed. 198, 29 C. C. A. 658.

Where, on appeal to the Circuit Court of Appeals, the bill of costs was taxed by the clerk and annexed to the mandate as required by Circuit Court of Appeals rule 29 (5) [notes under § 1114, ante], 79 C. C. A. cviii, the mandate was sufficient, both for incorporation of the costs in the order with reference to costs in the Circuit Court and for the issuance of execution out of the Circuit Court for the collection of the residue after a set-off. Corn Products Refining Co. v. Chicago Real Estate Loan & Trust Co. (1911) 185 Fed. 63, 107 C. C. A. 283.

A judgment appealed from will be affirmed if the appellate court finds in the record any reason which it considers sound, though such reason may have been rejected by the trial judge. Dean v. Davis (1914) 212 Fed. 88, 128 C. C. A. 658.

Under this section the Circuit Court of Appeals, after reversing judgment of District Court held empowered to render the proper judgment. U. S. v. Illinois Surety Co. (C. C. A. 1915) 226 Fed. 653.

To authorize a Circuit Court to issue execution for costs awarded by the Circuit Court of Appeals on a writ of error, the mandate from the latter court should contain a special provision directing the same. American Trust & Savings Bank v. Zeigler Coal Co. (C. C. 1908) 165 Fed. 512.

3. Application to criminal prosecutions.—This provision applies to criminal cases. Ballew v. U. S. (1895) 16 Sup. Ct. 263, 268, 160 U. S. 187, 40 L. Ed. 388.

4. Affirmance or reversal.—In admiralty cases a decree is not final while an appeal from the court is depending in the Supreme Court, and any statute governing the case must be an existing, valid statute at the time of confirming the decrees below. U. S. v. Preston (1830) 3 Pet. 57, 66, 7 L. Ed. 601.

Unless the jurisdiction of the circuit or district court appear in the record, the judgment may be reversed on a writ of error. Cervantes v. U. S. (1853) 16 How. 619, 621, 14 L. Ed. 1083.

Where both the courts below have concurred in the decision of questions of fact on conflicting evidence in a suit in admiralty, the supreme court will not reverse the decree on a mere

doubt founded on the number or credibility of witnesses. Baxter v. Camp (1861) 1 Black, 414, 417, 17 L. Ed. 217.

If the cause is brought up from a circuit court, it is to be either affirmed or reversed; and it will of course be affirmed if the record does not present some ground of reversal. Taylor v. Morton (1862) 67 U. S. (2 Black) 481, 17 L. Ed. 277.

Where there is no bill of exceptions, and nothing on which error can be assigned, the supreme court obtaining jurisdiction will not dismiss the appeal, but will affirm the judgment. James v. Bank of Mobile (1868) 7 Wall. 692, 693, 19 L. Ed. 275.

The granting or overruling a motion for new trial in the courts of the United States rests wholly in the discretion of the court, and the action of the court is not ground for error, and the judgment must be affirmed. Home Insurance Co. v. Barton (1871) 13 Wall. 603, 604, 20 L. Ed. 708.

Where, in a suit on a marine policy, error in allowing damages in addition to the amount insured, with interest, does not require an order for a new venire. The judgment in such case may be reversed and modified by disallowing the damages. New Orleans Ins. Asso. v. Piaggio (1872) 16 Wall. 378, 387, 21 L. Ed. 358.

Where a subordinate court without jurisdiction gave a judgment or decree for plaintiff or improperly decreed affirmative relief to a claimant, its judgment or decree must be reversed. U. S. v. Huckabee (1872) 16 Wall. 414, 435, 21 L. Ed. 457.

The Supreme Court will not reverse a decree in chancery for an immaterial departure from the technical rules of proceeding, when it can see that no harm resulted to the appellant. Allis v. Northwestern Mut. L. Insurance Co. (1877) 97 U. S. 144, 24 L. Ed. 1008.

In a suit to recover a tax on the profits of a railroad company carried to the supreme court by a writ of error, the supreme court is authorized under this section to remand the cause, so that further inquiry may be made to determine whether there should be a deduction of loss, the court being unable to decide the point owing to an omission below to make a sufficiently specific finding in this particular. Little Miami & C. & X. R. Co. v. U. S. (1883) 2 Sup. Ct. 627, 108 U. S. 277, 27 L. Ed. 724.

Where a decree on the merits dismissing an appeal in the United States circuit court is reversed by the supreme court for want of jurisdiction to render such a decree, and the cause remanded to the circuit court, with directions to dismiss for want of jurisdiction, the costs of the appeal will be taxed to appellants. Peninsular Iron Co. v. Stone (1887) 7 Sup. Ct. 1010, 1011, 121 U. S. 631, 30 L. Ed. 1021.

Since the act of 1875, in a salvage case the United States supreme court may revise the decree of the circuit court for matter of law only, and will not alter such decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. Hence a decree allowing $5,600 as compensation for safely and expeditiously removing a cargo worth $10,000 from a steamer sunk by a collision, worth $150,000, and pumping out, raising, and towing such steamer several miles into port, at great risk and expense to the salving company, will not be reversed on the ground that the award is excessive. Potomac Steamboat Co. v. Baker Salvage Co. (1887) 8 Sup. Ct. 33, 123 U. S. 40, 31 L. Ed. 75.

The rule that successive and concurrent decisions of two courts in the same case on a mere question of fact will not be reversed by the supreme court, unless clearly shown to be erroneous, is applicable to appeals in equity as well as in admiralty. Towson v. Moore (1899) 19 Sup. Ct. 332, 335, 173 U. S. 17, 43 L. Ed. 597.

Where in a proceeding by the United States for the forfeiture of certain property for an alleged violation of the internal revenue laws, the claimants answered denying the unlawful acts charged in the information and filed an amended and supplemental answer setting up an additional defense, but expressly reserving the right to rely on the denials of the original answer, and a demurrer to the amended answer was overruled, and the cause was submitted to the court generally on an admission of the facts alleged in the amended answer and on the pleadings, in the absence of proof of the allegations of the information, a judgment of dismissal was proper, and could not be reversed, and the sufficiency of the amended answer and the correctness of the ruling on the demurrer thereto became immaterial. U. S. v. One Distillery (1899) 19 Sup. Ct. 624, 625, 174 U. S. 149, 43 L. Ed. 929.

The supreme court will not reverse a decision, if correct on the merits, simply because the lower court may not have sufficiently recognized the doctrine of comity. Mast, Foos & Co. v. Stover Mfg. Co. (1900) 20 Sup. Ct. 708, 177 U. S. 485, 44 L. Ed. 856, affirming decree Stover Mfg. Co. v Mast, Foos & Co. (1898) 89 Fed. 333, 32 C. C. A. 231.

A judgment dismissing an action by a legatee against the United States to recover an alleged illegal tax under the war revenue act, where the statute is held constitutional, but on a proper con-

struction thereof is held not to justify the imposition of the whole amount of the tax that was collected, will be reversed, although in another action the executor has established his right to recover the illegal excess from the internal revenue collector, in order that judgment of dismissal in the present case may not embarrass the plaintiff's right to claim indemnity from the executor. Sherman v. U. S. (1900) 20 Sup. Ct. 779, 780, 178 U. S. 150, 44 L. Ed. 1014.

On direct appeal in a case brought as arising under the Constitution of the United States, the Supreme Court, if it finds no constitutional question involved, will not simply dismiss the appeal because of want of jurisdiction, but will reverse the decree below, with instructions to dismiss the bill. Newburyport Water Co. v. Newburyport (1904) 24 Sup. Ct. 553, 556, 193 U. S. 561, 48 L. Ed. 795.

A decree dismissing, for want of jurisdiction, a bill to quiet title, on the theory that either complainant's rights as mortgagee in possession had not been held by a decision of the highest state court, in a prior ejectment suit between the same parties, to have been destroyed by a subsequent state statute, and hence no constitutional question was involved, or that, if the state court so held, the remedy was by writ of error from the federal Supreme Court, will be affirmed on appeal, where the judgment of the state court, on a second appeal in the ejectment suit, and in a subsequent suit to quiet title, has been reversed by the federal Supreme Court for error in deciding the federal questions involved. Bradley v. Lightcap (1904) 24 Sup. Ct. 753, 195 U. S. 25, 49 L. Ed. 75.

Concurrent findings of the courts below that the Liddell patent No. 558,969, for an improvement in paper bag machines, which combines a rotary cylinder with a forming plate oscillating about its rear edge upon the surface of the cylinder, is a broad invention, and is infringed by a machine in which the surface of the cylinder is depressed away from the forming plate, while the patent adopts the device of causing the pivot or axis of the forming plate to yield away from the cylinder, will not be disturbed by the federal Supreme Court on certiorari, as clearly erroneous. Continental Paper Bag Co. v. Eastern Paper Bag Co. (1908) 28 Sup. Ct. 748, 210 U. S. 405, 52 L. Ed. 1122, affirming decree (1906) 150 Fed. 741, 80 C. C. A. 407.

A judgment of a federal Circuit Court will be affirmed on motion under Supreme Court rule 6, subd. 5, where the questions urged have been so plainly foreclosed by decisions of the Supreme Court as to make further argument unnecessary. Missouri Pac. R. Co. v. Castle (1912) 32 Sup. Ct. 606, 224 U. S. 541, 56 L. Ed. 875.

The concurrent findings of the two lower courts that the claimants against the bankrupt estate of a firm of stockbrokers had failed to trace into the hands of the receiver in bankruptcy any of the proceeds of stock purchased by the bankrupts with the claimants' money, and wrongfully converted by the bankrupts, will not be disturbed by the federal Supreme Court on appeal, where not manifestly erroneous. First Nat. Bank of Princeton, Ill., v. Littlefield (1912) 33 Sup. Ct. 78, 226 U. S. 110, 57 L. Ed. 145.

5. Modification of judgment or decree.—Where a decree, though properly dismissing a bill, is so broad as to shut out any further suit, however great the exigency, it will be modified on appeal; but appellant will not thereby be relieved of costs, he not having made a motion below to amend, and his contention on appeal not having been limited to such amendment. Texas & P. Ry. Co. v. Interstate Transp. Co. (1895) 15 Sup. Ct. 228, 230, 155 U. S. 585, 39 L. Ed. 271.

6. Division of court.—Where the supreme court is equally divided, the decree will stand affirmed. The Antelope (1825) 10 Wheat. 66, 126, 6 L. Ed. 268; Etting v. Bank of U. S. (1826) 11 Wheat. 59, 78, 6 L. Ed. 419; Albany Bridge Case (1864) 2 Wall. 403, 17 L. Ed. 876; Durant v. Essex Co. (1868) 7 Wall. 107, 112, 19 L. Ed. 154; Carmichael v. Eberle (1900) 20 Sup. Ct. 571, 572, 177 U. S. 63, 44 L. Ed. 672.

7. Dismissal by supreme court.—Reinstatement of cause after dismissal of appeal held authorized. The Palmyra (1827) 12 Wheat. 1, 9, 6 L. Ed. 531.

When the United States supreme court dismisses a writ of error because it does not clearly appear who the plaintiffs in error are, a new writ may thereafter be brought to revise the judgment. Deneale v. Archer (1834) 33 U. S. (8 Pet.) 526, 8 L. Ed. 1032.

If it is apparent from the record that the Supreme Court has not acquired jurisdiction for want of a proper appeal, it will be dismissed, though neither party ask it. Edmonson v. Bloomshire (1868) 7 Wall. 306, 310, 19 L. Ed. 91.

The supreme court held without authority to dismiss an appeal, even if it appeared that the amount in controversy was not sufficient to sustain the appellate jurisdiction under previous statutes, but must reverse the decree, with directions. Mattingly v. Northwestern Virginia R. Co. (1895) 15 Sup. Ct. 725, 727, 158 U. S. 53, 39 L. Ed. 894.

An appeal solely for a review of a decision sustaining the jurisdiction of the lower court will be dismissed, when that court has rendered a decree for the defendant sustaining a demurrer to the bill "for want of equity, with full reservation of complainant's right to sue and proceed at law," since this decree

does not injure the defendant, but sustains its contention, and cannot be reversed at defendant's instance, because put on one, rather than another, of the grounds which defendant alleged. New Orleans v. Emsheimer (1901) 21 Sup. Ct. 584, 585, 181 U. S. 153, 45 L. Ed. 794.

Writ of error will not be dismissed because the constitutional questions raised had, since allowance of the writ been decided by such court adversely to plaintiff in error in another case. Michigan Cent. R. Co. v. Vreeland (1913) 33 S. Ct. 192, 227 U. S. 59, 57 L. Ed. 417, reversing judgment Vreeland v. Michigan Cent. R. Co. (C. C. 1910) 189 Fed. 495.

8. Rendition of judgment by supreme court.—Under section 24 of the Judiciary Act, where the only error is in the rendition of a judgment for plaintiff against all the defendants jointly, the supreme court on writ of error must render such judgment as the court below should have rendered. Germania Fire Ins. Co. v. Boykin (1870) 12 Wall. 433, 437, 20 L. Ed. 442.

The supreme court may render the proper judgment or decree. Ballew v. U. S. (1895) 16 Sup. Ct. 263, 268, 160 U. S. 187, 40 L. Ed. 388.

9. Direction of judgment.—Where a case brought to the Supreme Court by writ of error was tried on an immaterial issue, a repleader will not be allowed in the Supreme Court, but the judgment will be reversed and the case remanded for further proceedings below. Garland v. Davis (1846) 4 How. 131, 155, 11 L. Ed. 907.

Where two persons have conflicting claims to land in California, and the United States do not appear to have any interest in the matter, and the action is brought to the supreme court by proceedings to which the United States are a party, the supreme court will remand, with directions. U. S. v. White (1859) 64 U. S. (23 How.) 249, 16 L. Ed. 560.

Where a territorial supreme court on appeal from the district court decides that the district court had no jurisdiction and did not examine any of the questions raised in the bill of exceptions, on reversal of the case by the United States Supreme Court it will be remanded to the territorial supreme court, with directions to hear and determine the questions arising by petition in error. Upton v. McLaughlin (1881) 105 U. S. 640, 646, 26 L. Ed. 1197.

Where a circuit court on trial of an action at law on waiver of a jury makes a special finding of facts on all the issues raised by the pleadings, it is proper for the supreme court under this section, on reversing an erroneous judgment thereon, to direct such judgment to be entered as the special finding requires. Ft. Scott v. Hickman (1884) 5 Sup. Ct. 56, 64, 112 U. S. 150, 28 L. Ed. 636.

Where the judgment of the circuit court, in a cause removed from a state court on the ground of diverse citizenship of the parties, is reversed by the supreme court because the record does not show the citizenship of the parties at the commencement of the action as well as at the time of the application for removal, the judgment of reversal will direct the circuit court to remand the cause to the state court, without allowing the petition for removal and the record to be amended in the circuit court, as a cause is not removed unless, at the time of the application for removal, the record shows on its face that it is removable. Cameron v. Hodges (1888) 8 Sup. Ct. 1154, 127 U. S. 322, 32 L. Ed. 132; Crehore v. Ohio & M. Ry. Co. (1889) 9 Sup. Ct. 692, 131 U. S. 240, 33 L. Ed. 144; Jackson v. Allen (1889) 10 Sup. Ct. 9, 132 U. S. 27, 33 L. Ed. 249.

The supreme court can only direct such judgment as is authorized by the facts specially found by the court below. Pullman Palace-Car Co. v. Metropolitan St. Ry. Co. (1895) 15 Sup. Ct. 503, 508, 157 U. S. 94, 39 L. Ed. 632.

A mandate from the Supreme Court of the United States, which directs the entry of a decree in conformity with its opinion dividing the damages caused in a collision between vessels held in fault, but leaving undisturbed a judgment obtained by the owners of the cargo against one of such vessels for the full amount of their damages, does not require that such decree provide for the recoupment by the latter vessel of one-half of the damages to such cargo from the moiety of damages awarded to the other vessel. Union Steamboat Co. v. Erie & W. Transp. Co. (1903) 23 Sup. Ct. 504, 506, 189 U. S. 363, 47 L. Ed. 854.

Upon a writ of error from the circuit court to a judgment of the district court, dismissing a seizure made upon land for want of prosecution, the record, etc., remain below, and the circuit court, under this section can only reverse, affirm, or modify the judgment by remitting the proceedings with instructions to render the proper judgment; a judgment by the circuit court, affirming the district court and dismissing the action, will be set aside. Ten Cases v. U. S. (C. C. 1887) 34 Fed. 100.

The mandate of the United States supreme court, in effect a reversal of a verdict and judgment for the plaintiff, and a judgment for defendant's costs, and which directs the lower court to proceed in conformity with the mandate, is not a judgment such as will support an action in another state. Germania Fire Ins. Co. v. Francis (N. Y. 1887) 43 Hun, 621.

10. Mandate and proceedings in lower court.—After a cause is remanded, the court below may receive additional pleas, or admit amendments to those already filed, even after the appellate court had decided such pleas to be bad on demurrer. Marine Ins. Co. v. Hodgson (1810) 6 Cranch, 206, 217, 3 L. Ed. 200.

Where the merits of a case have been decided by the supreme court of the United States, and its mandate to the circuit court only requires the execution of its decree, the circuit court is bound to carry that decree into execution, although the jurisdiction of the court is not alleged in the pleadings. Skillern's Ex'rs v. May's Ex'rs (1810) 10 U. S. (6 Cranch) 267, 3 L. Ed. 220; Ex parte Story (1838) 37 U. S. (12 Pet.) 339, 9 L. Ed. 1108.

The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, nor give any other or further relief, nor review it on any matter decided on appeal, for error apparent, nor intermeddle with it, further than to settle so much as has been remanded. Sibbald v. U. S. (1838) 12 Pet. 488, 492, 9 L. Ed. 1167.

The mandate of the supreme court to the circuit court must be its guide in executing the judgment or decree on which it is issued. West v. Brashear (1840) 14 Pet. 51, 54, 10 L. Ed. 350.

A case having been brought up from the circuit court on a writ of error, and its judgment on a demurrer in favor of defendant and against the United States having been reversed, the case will be in the circuit court as if the demurrer had been overruled, and will be subject to additional pleadings or an amendment of the present pleadings according to the rules and practice of that court, and on such terms as it may impose. U. S. v. Boyd (1841) 15 Pet. 187, 209, 10 L. Ed. 706.

Under a mandate from the supreme court of the United States to a circuit court, to put a party into possession of lands recovered in certain ejectment suits, the circuit court has no authority to extend such possession beyond the lands specified to other lands claimed under a like title. Walden v. Bodley's Heirs (1850) 50 U. S. (9 How.) 34, 13 L. Ed. 36.

When the Supreme Court under section 24 of the Judiciary Act reverses a judgment on a case stated and brought up on error, remanding the case, with a mandate to the court below to enter judgment for the defendant, the court below has no authority but to execute the mandate, and it is final in that court. So such court cannot, after entering the judgment, hear affidavits or testimony, and grant a rule for a new trial, and, if it does grant such rule, mandamus will issue from the Supreme Court ordering it to vacate the rule. Ex parte Dubuque & P. R. Co. (1863) 1 Wall. 69, 73, 17 L. Ed. 514.

Though the court below is bound to follow the instructions given to it by a mandate from the Supreme Court, yet where a mandate has plainly been framed, as regards a minor point, on a supposition proved by the subsequent course of things to be without base, it must not be so followed as to work manifest injustice. On the contrary, it must be construed otherwise, and reasonably. Milwaukie & M. R. Co. v. Soutter (1864) 2 Wall. 510, 519, 17 L. Ed. 900.

It is the duty of a court below to obey and give effect to the mandate of the Supreme Court so far as practicable. Where the mandate is for restitution of moneys, recovered under a decree below, all persons within the reach of the territorial jurisdiction of the court below should be required by proper order to refund what they have received, and, if they fail to do so, they should be dealt with promptly by attachment, for contempt. This in no wise interferes with common-law remedies, except that parties entitled to restitution cannot be paid twice. In re Morris (1869) 9 Wall. 605, 607, 19 L. Ed. 799.

Where the Supreme Court decided that the finding for defendants brought for review met only a part of the issues, and that the facts found did not justify the conclusion reached, and the court below was ordered to proceed with the case, notwithstanding the finding, it only precluded it from adjudging for defendants on the special facts found, and otherwise it was at liberty to proceed in such manner as, according to its judgment, justice may require. Ex parte French (1875) 91 U. S. 423, 426, 23 L. Ed. 249.

Where there is uncertainty in the findings of fact of the court below, on which the judgment, in accordance with the principles of law as fixed by the decision of the supreme court, must be based, it is proper for the latter to remand the cause for "such further proceedings as the justice of the case may require." Little Miami & C. & X. R. Co. v. U. S. (1883) 2 Sup. Ct. 627, 108 U. S. 277, 27 L. Ed. 724.

A decision of the federal Supreme Court which reversed without prejudice, because the evidence of confiscation was not so clear as to dispense with the test of actual experiment, a decree of a District Court enjoining the enforcement as confiscatory of an ordinance fixing telephone rates, and remanded the cause for further proceedings, gives the District Court discretion to retain the case for an actual experiment with the rates, which is not abused by a subsequent order appointing a master to ascertain the net income after the rate ordinance had gone

into effect, where an actual experiment with the rates had been voluntarily undertaken. In re City of Louisville (1914) 34 Sup. Ct. 255, 231 U. S. 639, 58 L. Ed. 413; City of Louisville v. Cumberland Telephone & Telegraph Co. (1914) 34 Sup. Ct. 260, 231 U. S. 652, 58 L. Ed. 419.

11. Mandate awarding execution.—When the supreme court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, they cannot issue an execution, but will send a special mandate to the court below to award it. Sibbald v. U. S. (1838) 12 Pet. 488, 492, 9 L. Ed. 1167.

12. Appeal from decree entered in conformity to mandate.—After a mandate no rehearing will be granted, and on a subsequent appeal nothing is brought up subsequent to the proceeding on the mandate. Sibbald v. U. S. (1838) 12 Pet. 488, 492, 9 L. Ed. 1167.

Where a cause is brought before the supreme court for review, after it has once reviewed it and remanded it to the subordinate court, only the proceedings of the subordinate court subsequent to the mandate will be reviewed. Tyler v. Magwire (1872) 84 U. S. (17 Wall.) 253, 283, 21 L. Ed. 576.

A final judgment of the supreme court is conclusive on the parties, and will not be re-examined at a subsequent term, except in cases of fraud. Id.

An appeal will not be entertained by the Supreme Court from a decree entered in exact accordance with its mandate on a previous appeal; but, if such an appeal is taken, the court will, on application of the appellee, examine the decree entered, and, if it conforms to the mandate, will dismiss the case, with costs, and, if it does not, the case will be remanded, with appropriate directions to correct the error. Stewart v. Salamon (1878) 97 U. S. 361, 362, 24 L. Ed. 1044.

Every matter embraced by a decree of a United States circuit court, and not left open by a decree of the United States supreme court affirming the former decree in all respects but one, and as to that one remanding the case for further investigation of the facts upon which it depended, is conclusively determined, as between the parties, by such affirmance, and is not subject to re-examination on a second appeal. Illinois v. Illinois Central R. Co. (1902) 22 Sup. Ct. 300, 184 U. S. 77, 46 L. Ed. 440.

13. Bill of review after affirmance.—A bill of review will not lie where the original decree has been affirmed on appeal, without the right being reserved in the decree, or leave obtained of the appellate court. Franklin Savings Bank v. Taylor (1893) 53 Fed. 854, 4 C. C. A. 55, reversing decree Taylor v. Franklin Sav. Bank (C. C. 1891) 50 Fed. 289, and petition for writ of certiorari denied Franklin Sav. Bank v. Taylor (1894) 14 Sup. Ct. 1146, 154 U. S. 503, 38 L. Ed. 1078.

A bill of review will not lie to set aside for alleged error of law a judgment which has been affirmed by the supreme court, even though such affirmance was the result of an even division between the judges of the supreme court. Leslie v. Town of Urbana (1893) 56 Fed. 762, 6 C. C. A. 111.

Cited without definite application, Martin v. Hunter's Lessee (1816) 1 Wheat. 304, 4 L. Ed. 97; Parsons v. Bedford (1830) 3 Pet. 433, 448, 7 L. Ed. 732; U. S. v. The Amistad (1841) 15 Pet. 518, 567, 10 L. Ed. 826; Roberts v. Cooper (1856) 19 How. 373, 374, 15 L. Ed. 687; Parks v. Booth (1880) 102 U. S. 96, 97, 26 L. Ed. 54; Ex parte Cooper (1892) 12 Sup. Ct. 453, 463, 143 U. S. 472, 36 L. Ed. 232; Smith v. Vulcan Iron Works (1897) 17 Sup. Ct. 407, 410, 165 U S. 518, 41 L. Ed. 810; Standard Elevator Co. v. Crane Elevator Co. (1896) 76 Fed. 767, 775, 22 C. C. A. 549; Scott v. U. S. (1908) 165 Fed. 172, 91 C. C. A. 206; Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C A. 360 (certiorari denied [1909] 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068); Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co. (1910) 185 Fed. 487, 107 C. C. A. 587.

§ 1670. (Act March 3, 1891, c. 517, § 10.) Remand of cause on determination on appeal, etc., by Supreme Court or by circuit court of appeals.

Whenever on appeal or writ of error or otherwise a case coming directly from the district court [or existing circuit court] shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district [or circuit] court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district [or circuit] court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a district [or circuit] court shall be reviewed and determined in the circuit court of ap-

peals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district [or circuit] court for further proceedings to be there taken in pursuance of such determination. (26 Stat. 829.)

This section was part of the Circuit Courts of Appeals Act of March 3, 1891, cited above.

The words of this section inclosed in brackets, "or existing circuit court," and "or circuit," became inoperative on the abolition of the circuit courts and the transfer of their powers and duties to the district courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

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See, also, § 1591, ante.

I. REVIEW AND DETERMINATION IN SUPREME COURT

1. Application to criminal prosecutions.—The previous statutory provisions giving the supréme court power, upon reversing a judgment of conviction, to remand to the lower court, with directions to render such proper judgment as the case might require, apply to criminal cases in which jurisdiction by writ of error is conferred by this act. Ballew v. U. S. (1895) 16 Sup. Ct. 263, 268, 160 U. S. 187, 40 L. Ed. 388.

2. Questions considered.—On appeal from an order denying a motion for a new trial in a suit wherein judgment was rendered in favor of defendants who appeared, only, an order of dismissal as to other defendants was not involved. United Land Ass'n v. Abrahams (1908) 28 Sup. Ct. 569, 208 U. S. 614, 52 L. Ed. 645, affirming judgment United Land Ass'n v. Pacific Imp. Co. (1902) 69 Pac. 1064, 139 Cal. 370.

3. Persons entitled to allege error.—One who succeeds, on a bill of review, in having upheld as to her alone a trust declared void by the original decree, cannot, on appeal, where she does not herself appeal, go beyond supporting the modified decree and opposing every assignment of error. Landram v. Jordan (1906) 27 Sup. Ct. 17, 203 U. S. 56, 51 L. Ed. 88, affirming decree (1905) 25 App. D. C. 291.

Parties who have not appealed from the judgment below cannot object, on an appeal sued out by their adversaries, to the failure of the court below to sustain a motion to dismiss the cause. Southern Pine Lumber Co. v. Ward (1908) 28 Sup. Ct. 239, 208 U. S. 126, 52 L. Ed. 420, affirming judgment (1906) 85 Pac. 459, 16 Okl. 131.

Counsel for the executors has no right to appear and be heard against the decree below in an action involving the validity and construction of a testamentary trust where his clients have not appealed. Fitchie v. Brown (1908) 29 Sup. Ct. 106, 211 U. S. 321, 53 L. Ed. 202.

Concessions that assessment of railway property by the state board of assessors was on the basis of one-third of what the board regarded as its value, and the use of estimates based thereon in calculations submitted on issue of reasonableness of state rates, do not prevent the state from objecting on appeal to valuation based on such assessments. Knott v. Chicago, B. & Q. R. Co. (1913) 33 Sup. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, modifying decree St. Louis & S. F. R. Co. v. Hadley (C. C. 1909) 168 Fed. 317.

4. Presumptions on appeal or error.—In the absence of a bill of exceptions or statement of facts in the record on appeal showing the evidence introduced, the verdict, findings, or judgment will be presumed to have been warranted by the evidence. Clipper Min. Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 48 L. Ed. 944.

An appellate court cannot assume that an amended instruction was not taken out by the jury when it retired, in the absence of any statement to that effect in the record. Cunningham v. Springer (1907) 27 Sup. Ct. 301, 204 U. S. 647, 51 L. Ed. 662, 9 Ann. Cas. 897, affirming judgment (1905) 82 P. 232, 13 N. M. 259.

Where on appeal the evidence is not brought up, the court will presume that it supports the verdict, finding, judgment or decree. Stone v. Southern Illinois & M. Bridge Co. (1907) 27 Sup. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

A decree, so far as it stands on questions of fact, will be presumed to be supported by the evidence not objected to, where the record does not contain all the evidence. Zimmerman v. Harding (1913) 33 Sup. Ct. 387, 227 U. S. 489, 57 L. Ed. 608.

5. Review of discretionary rulings.—The action of an inferior court as to the terms on which it allows amendment of a bill in equity to which it has sustained a demurrer is a matter within its discretion, and not reviewable in the Supreme Court. Sheets v. Selden (1868) 7 Wall. 416, 421, 19 L. Ed. 166.

The ruling on a motion for new trial is discretionary, and not reviewable in the federal courts. Ward v. Joslin (1902) 22 Sup. Ct. 807, 186 U. S. 142, 46 L. Ed. 1093 (affirming judgment [1900] 105 Fed. 224, 44 C. C. A. 456); Missouri Pac. Ry. Co. v. Chicago & A. Ry. Co. (1889) 10 Sup. Ct. 65, 132 U. S. 191, 33 L. Ed. 309; New York, L. E. & W. R. Co. v. Winter (1892) 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Van Stone v. Stillwell & Bierce Mfg. Co. (1891) 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961.

An application to set aside a default judgment is addressed to the discretion of the court, and unless such discretion has been abused the order will not be disturbed on appeal. Copper King of Arizona v. Johnson (1904) 25 Sup. Ct. 793, 195 U. S. 627, 49 L. Ed. 351 (affirming judgment [1904] 76 P. 594, 9 Ariz. 67); Metropolitan St. Ry. Co. v. Davis (1901) 112 Fed. 633, 50 C. C. A. 402.

The discretion of the trial court in allowing leading questions will not be reviewed where the witness was of foreign birth and did not readily understand the questions put. Southwestern Brewery & Ice Co. v. Schmidt (1912) 33 Sup. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment Schmidt v. Southwestern Brewery Ice Co. (1910) 107 Pac. 677, 15 N. M. 232.

6. Subsequent appeals.—The Supreme Court will not grant a rehearing in an equity case after it has been remitted to the court below to carry into effect

the decree of the supreme court according to its mandate, and a subsequent appeal from the court below for supposed error in carrying into effect the mandate brings up only the proceedings subsequent to the mandate. Browder v. McArthur (1822) 7 Wheat. 58, 5 L. Ed. 397.

The decision of a question on a former appeal is the law of the case on a subsequent appeal. People of State of Illinois v. Illinois Cent. Ry. Co. (1902) 22 Sup. Ct. 300, 184 U. S. 77, 46 L. Ed. 440 (affirming decree [1899] 91 Fed. 955, 34 C. C. A. 138); Thompson v. Maxwell Land Grant & Ry. Co. (1897) 18 Sup. Ct. 121, 168 U. S. 451, 42 L. Ed. 539; Stone v. Southern Ill. & M. Bridge Co. (1907) 27 Sup. Ct. 615, 206 U. S. 267, 51 L. Ed. 1057.

7. Affirmance.—Writ of error based on refusal of defendant's request to continue a cause set for trial on the fourth day after a mistrial, defendant claiming it was physically impossible to bring back the witnesses in time is not so frivolous as to require affirmance of the judgment on motion, but presents a substantial question of abuse of the court's discretion. Guardian Assur. Co. of London v. Quintana (1913) 33 Sup. Ct. 236, 227 U. S. 100, 57 L. Ed. 437.

8. Reversal.—The circuit court having on a trial before it without a jury made findings of fact, which did not cover the issue as to damages, and given a judgment for the defendant, the supreme court, on reversing that judgment, remanded the case for a new trial, being unable to render a judgment for the plaintiff for any specific amount of damages. Exchange Nat. Bank v. Third Nat. Bank (1884) 5 Sup. Ct. 141, 112 U. S. 276, 28 L. Ed. 722.

Where a defendant files several pleas to the declaration of the plaintiff on which issues are joined, and a general verdict is found by the jury in favor of defendant, if upon any one issue error was committed, either in the admission of evidence or in the charge of the court, such verdict on writ of error cannot be upheld. Maryland v. Baldwin (1884) 5 Sup. Ct. 278, 112 U. S. 490, 28 L. Ed. 822.

Where an amendment to a bill may show that the amount involved is within the jurisdiction of the federal court, the supreme court will not direct the dismissal of the bill, but will remand the case to the lower court with directions. Northern Pacific R. Co. v. Walker (1893) 13 Sup. Ct. 650, 148 U. S. 391, 37 L. Ed. 494.

A proceeding to establish a tax lien is reinstated in the trial court as of the date of an order therein dismissing the petition on the ground that it presented no claim against the property or the parties, by the reversal of such order by the Supreme Court of the United States. United States Trust Co. v. New Mexico (1901) 22 Sup. Ct. 172, 175, 183 U. S. 535, 46 L. Ed. 315.

Uncertainties which have confronted plaintiff in an action against an interstate carrier under Act April 22, 1908, by parents of an employé dying from the injuries received in interstate commerce will not justify the federal Supreme Court to remand the cause for new trial on the declaration being amended to allege pecuniary loss, lack of which caused judgment to go against the plaintiff below. Garrett v. Louisville & N. R. Co. (1914) 35 Sup. Ct. 32, 235 U. S. 308, 59 L. Ed. 242, affirming judgment (1912) 197 Fed. 715, 117 C. C. A. 109.

9. Mandate and proceedings in lower court.—Upon an appeal from the circuit court of the District of Columbia, not properly prepared in the circuit court for a hearing, the decree was reversed and the cause remanded, with liberty to the plaintiff to amend his bill. Estho v. Lear (1833) 7 Pet. 130, 131, 8 L. Ed. 632.

This section did not preclude a new trial as of right pursuant to a state statute, after a judgment entered on a mandate of the supreme court in an action of ejectment removed to a federal court. Smale v. Mitchell (1892) 12 Sup. Ct. 353, 355, 356, 143 U. S. 99, 36 L. Ed. 90.

The circuit court of appeals, and not the circuit court, is the court to which the cause will be remanded by the federal supreme court for hearing and decision, upon reversing, on certiorari, a judgment of the circuit court of appeals which affirmed a judgment of the circuit court on the ground that the defenses relied upon below were of an equitable nature, not cognizable in a court of law, while the trial court, with the acquiescence of all parties, treated the defenses interposed by the answer as legal in their nature, and no such question was raised by either party or considered when the cause was submitted to the circuit court of appeals. Lutcher & Moore Lumber Co. v. Knight (1909) 30 Sup. Ct. 505, 509, 217 U. S. 257, 54 L. Ed. 757.

Persons not parties can be heard originally in the federal Supreme Court as to the settlement of a decree entered on a mandate from the Supreme Court directing decree for reorganization of railroad terminal facilities violating Anti-Trust Act July 2, 1890, so far as it operates prejudicially to their rights. U. S. v. Terminal R. Ass'n of St. Louis (1915) 35 Sup. Ct. 408, 236 U. S. 194, 59 L. Ed. 535.

An appeal by defendants from a refusal to modify final decree entered under mandate from the federal Supreme Court directing a decree for reorganization of railroad terminal facilities violating Anti-Trust Act July 2, 1890, will not be dismissed because the United States had appealed from

the decree before petitions for modification were filed. Id.

Right of combination of railway terminal facilities found to violate Anti-Trust Act July 2, 1890, to carry on such transportation business as originates and terminates on its own lines, must be recognized in the decree giving effect to a mandate of the Supreme Court under which the combination is to be reorganized. Id.

Parties to an unlawful combination, and not parties to the suit, were meant by the word "parties" in mandate from the Supreme Court remanding a suit to enforce Anti-Trust Act July 2, 1890, against combination of railway terminal facilities, with directions to enter decree requiring the parties to submit plan for reorganization. U. S. v. Terminal R. Ass'n of St. Louis (1915) 35 Sup. Ct. 408, 236 U. S. 194, 59 L. Ed. 535.

A federal District Court cannot permit persons not parties to intervene after final decree on mandate of Supreme Court by decree reorganizing combination in violation of Anti-Trust Act July 2, 1890, after appeal from such decree has been taken. Evans & Howard Fire Brick Co. v. U. S. (1915) 35 Sup. Ct. 415, 236 U. S. 210, 59 L. Ed. 535.

After a judgment against defendant in the supreme court on appeal on demurrer, he will not be allowed to amend. Hodgson v. Marine Ins. Co. (C. C. 1809) Fed. Cas. No. 6,566.

The court may allow the general issue to be pleaded after judgment upon demurrer has been awarded by the supreme court, and a mandate issued to enter the judgment and award a writ of inquiry. Sheehy v. Mandeville (C. C. 1810) Fed. Cas. No. 12,740.

The effect of a remitter of the cause on reversal by the supreme court. Harvey v. Richards (C. C. 1814) Fed. Cas. No. 6,182.

Unless modified or restrained by subsequent events, the mandate of the supreme court must be promptly and implicitly enforced by the court below. South Fork Canal Co. v. Gordon (C. C. 1868) Fed. Cas. No. 13,189.

In passing upon a collateral branch of a case which has been to the supreme court, the circuit court will not admit that the supreme court made a mistake in regard to any facts actually passed upon. Kennicott v. Wayne County (C. C. 1874) Fed. Cas. No. 7,710.

After reversal, on error to the supreme court, of an order sustaining demurrers to the plaintiff's petition, further demurrers cannot be filed. Hitchcock v. Galveston (C. C. 1878) Fed. Cas. No. 6,533.

10. Jurisdiction and proceedings after remand.—A mandate, ordering remand of cause with directions to enter a decree canceling every percentage coal contract referred to in the pleadings, modified so as to exclude from cancellation the contracts described in the petition praying for such modification. U. S. v. Reading Co. (1913) 33 Sup. Ct. 509, 228 U. S. 158, 57 L. Ed. 779, modifying mandate (1912) 33 Sup. Ct. 90, 226 U. S. 324, 57 L. Ed. 243.

11. Dismissal or withdrawal of appeal or error.—See Hecker v. Fowler (1861) 1 Black, 95, 17 L. Ed. 45; Latham v. U. S. (1869) 9 Wall. 145, 146, 19 L. Ed. 771; New Orleans Ins. Co. v. E. D. Albro Co. (1884) 5 Sup. Ct. 289, 112 U. S. 506, 28 L. Ed. 809.

II. REVIEW AND DETERMINATION IN CIRCUIT COURT OF APPEALS

12. Scope and extent of review—Matters or evidence considered in determining questions.—On writ of error from a judgment sustaining a demurrer to an amended complaint, suggestions made by the defendant in error, based on the answer to the original complaint, cannot be considered. Barnes v. Union Pac. Ry. Co. (1893) 54 Fed. 87, 4 C. C. A. 199, judgment reversed Union Pac. Ry. Co. v. Barnes (1894) 64 Fed. 80, 12 C. C. A. 48.

On an appeal by defendants from a general decree against them, the plaintiffs cannot have reinstated an injunction which was dismissed by the trial court as to one of the parties, when they took no appeal therefrom. Calder v. Henderson (1893) 54 Fed. 802, 4 C. C. A. 584.

On appeal from a decretal order directing the enforcement of a former final decree, matters embraced in the original decree cannot be considered. Long v. Maxwell (1894) 59 Fed. 948, 8 C. C. A. 410.

On appeal after dismissal or nonsuit at the close of plaintiff's evidence, or after direction of verdict for defendant, the most favorable view of the evidence will be taken which a jury might have taken if the case had been submitted to them. Sonnenberg v. Southern Pac. Co. (1908) 159 Fed. 884, 87 C. C. A. 64.

The court on reviewing a judgment for defendant, entered on a directed verdict, must consider the testimony of plaintiff most favorable to him. Sowles v. Norcross Bros. Co. (1912) 195 Fed. 889, 115 C. C. A. 577.

Where no objection was made to an amendment of a petition alleging facts, arising after suit brought, essential to establish the cause of action, and it did not appear that any statute of limitations had run pending suit, defendant was not prejudiced by the court treating the amended petition as a commencement of a new suit. O'Brien v. Illinois Surety Co. (1913) 203 Fed. 436, 121 C C. A. 546.

13. —— Questions considered.—On appeal from a decretal order which in effect merely directs the execution of

a former final decree, which has been temporarily suspended on motion of the losing party, the court cannot consider alleged errors relating to matters embraced in the original decree, from which no appeal has been taken. Long v. Maxwell (1894) 59 Fed. 948, 8 C. C. A. 410.

It is no objection that an appeal is expressly limited to a part of the decree, when this is the only part from which the appellant could appeal. Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp. (1894) 61 Fed. 237, 9 C. C. A. 468, modifying decree (C. C. 1892) 49 Fed. 774.

The question whether a verdict was excessive is one of fact, which cannot be reviewed on a writ of error. Metropolitan St. Ry. Co. v. Jacobi (1901) 112 Fed. 924, 50 C. C. A. 619.

In an action at law the United States Circuit Court of Appeals is a court for the correction of errors of the court below only, and, where there was a fatal error at the trial, the appellate court will not ordinarily determine other questions of law not ruled on by the court below. Dysart v. Missouri, K. & T. Ry. Co. (1903) 122 Fed. 228, 58 C. C. A. 592.

The fact that, after entering a decree on the merits dismissing a bill, other suits in the same court, brought by the same complainant against some of the same defendants, and involving the same matters, were dismissed by the court on the ground that the issues had been determined in the prior suit, from which decrees no appeal was taken, does not prevent a review of the first decree on the merits by the appellate court. Copper River Min. Co. v. McClellan (1905) 138 Fed. 333, 70 C. C. A. 623, writ of certiorari denied (1906) 26 Sup. Ct. 753, 200 U. S. 616, 50 L. Ed. 622.

Under the Illinois practice, where a demurrer has been sustained to a special count in a declaration in assumpsit, the plaintiff may dismiss as to the common counts and assign error on the judgment rendered on the demurrer, notwithstanding the fact that he might have proved the same facts alleged in the special count under the common counts. Barrows v. Mutual Reserve Life Ins. Co. (1907) 151 Fed. 461, 81 C. C. A. 71.

Where, in an action on a fidelity bond, the court gave an instruction with reference to the allowance of a credit in favor of defendant, whether the verdict contravened such instruction was reviewable on a writ of error. Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. (1907) 154 Fed. 545, 83 C. C. A. 431, writ of certiorari denied (1907) 28 Sup. Ct. 256, 207 U. S. 589, 52 L. Ed. 354.

A question not put in issue by the pleadings, nor covered by the decree of the court below, and the determination of which was not necessary to the decision made, will not be determined by the appellate court, although the trial court may have made a finding thereon. Hessian v. Patten, 156 Fed. 956, 84 C. C. A. 456, denying rehearing (1907) 154 Fed. 829, 83 C. C. A. 545.

On review of an order of a Circuit Court adjudging a contempt for violation of an injunction against infringement of a patent and imposing a punitive fine payable to the United States, only matters of law appearing on the record can be considered. Continental Gin Co. v. Murray Co. (1908) 162 Fed. 873, 89 C. C. A. 563.

The power of a court to order the disinterment of the body of assured, that an autopsy may be held for purposes of discovery, will not be reviewed after such disinterment and autopsy; the question being then academic. Griesa v. Mutual Life Ins. Co. of New York (1909) 169 Fed. 509, 94 C. C. A. 635, reversing order Mutual Life Ins. Co. of New York (C. C. 1907) 156 Fed. 398, writ of certiorari denied Mutual Life Ins. Co. of New York v. Griesa (1909) 30 Sup. Ct. 400, 215 U. S. 600, 54 L. Ed. 344.

While the right to a review of an order overruling a demurrer, challenging the right of complainant to maintain the suit, is waived by the filing of an answer, the right of complainant to maintain the suit is the foundation of its right to an injunction, and may properly be considered on review of an order granting a preliminary injunction. Henry Gas Co. v. U. S. (1911) 191 Fed. 132, 111 C. C. A. 612.

Under Act May 14, 1898, c. 299, § 3, 30 Stat. 410, relating to the use of railroad tracks by other roads in Alaska, held, that whether plaintiff entered peacefully and lawfully was a question of fact and could not be reviewed. Copper River & N. W. Ry. Co. v. Phillips (1912) 196 Fed. 328, 116 C. C. A. 148.

A moot question held not reviewable on appeal. Delaware, L. & W. R. Co. v. Lyne (1912) 193 Fed. 984, 113 C. C. A. 604.

Legal issues other than those specifically presented may be considered by an appellate court, where they naturally arise and are pertinent to the questions at issue, and to further proceedings in the trial court. Guaranty Trust Co. of New York v. Koehler (1912) 195 Fed. 669, 115 C. C. A. 475, reversing judgment (C. C. 1911) 187 Fed. 192.

Whether a complaint states a cause of action is a question of law arising on the face of the record, which is reviewable on a writ of error in connection with the question whether the facts found by the referee support the judgment. Edenborn v. Sim (1913) 206 Fed. 275, 124 C. C. A. 339.

Where a general verdict is rendered, only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions

or as may arise on the pleadings. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

14. —— Review dependent on mode of trial in lower court.—A judgment of the circuit court entered upon the report of a referee to hear, try, and determine may be reviewed on writ of error in respect to rulings and decisions in matter of law after the filing of the referee's report, including the action of the court upon a motion to strike out a notice of termination of the reference, which it had reserved until the filing of the report. Parker v. Ogdensburgh & L. C. R. Co. (1897) 79 Fed. 817, 25 C. C. A. 205.

On appeal in a federal court the rules applicable to a trial at law will prevail if the action was tried at law and presented by writ of error and the rules applicable to a hearing in equity of the suit was heard in equity and presented by appeal. Highland Boy Gold Min. Co. v. Strickley (1902) 116 Fed. 852, 54 C. C. A. 186.

Where a special verdict is rendered, the defeated party is entitled to review the question whether the facts thus found required the judgment entered. Paul v. Delaware, L. & W. R. Co. (1904) 130 Fed. 951.

Where a party asks the direction of a verdict, and one is directed against him, his position is the same as to all controverted facts and all inferable facts as though an adverse verdict had been rendered by the jury. City Trust, Safe Deposit & Surety Co. of Philadelphia v. U. S. (1906) 147 Fed. 155, 77 C. C. A. 397.

In a suit in equity, the appellate court will not consider assignments of error based on rulings on the admissibility of evidence. Kuzek v. Magaha (1906) 148 Fed. 618, 78 C. C. A. 465.

15. —— Theory and grounds of decision in lower court.—Where the trial court's decision is correct, it will not be reversed because a wrong reason was given. Moffat v. Smith (1900) 101 Fed. 771, 41 C. C. A. 671.

A defendant in whose favor a verdict has been rendered by direction of the court is entitled to support such verdict upon any ground which the evidence in the record permits, and of which he has not by his conduct waived the right to avail himself. If, upon all the evidence, the verdict was one which must necessarily have been rendered, it must stand, regardless of the sufficiency of the particular ground on which it was directed. Whitney v. New York, N. H. & H. R. Co. (1900) 102 Fed. 850, 43 C. C. A. 19, 50 L. R. A. 615; Currier v. Trustees of Dartmouth College (1902) 117 Fed. 44, 54 C. C. A. 430, affirming judgment (C. C. 1900) 105 Fed. 886.

An appeal in equity brings up the whole case, and any matter of law apparent on the face of the record is open to the consideration of the court. The appellee may insist on a ground of demurrer to sustain a decree dismissing the bill, although such ground was overruled by the court below. Blythe Co. v. Hinckley (1901) 111 Fed. 827, 49 C. C. A. 647, writ of certiorari denied (1902) 22 Sup. Ct. 941, 184 U. S. 701, 46 L. Ed. 766.

The general rule that a theory of a case or an assumption of fact adopted by a trial court with the acquiescence of the parties will be followed by an appellate court to which the cause is taken will be applied where the ground relied on in the appellate court to support a judgment otherwise erroneous involves a question of fact not fully developed at the trial, to which the attention of neither the trial court nor opposing counsel was called. Baker v. Kaiser (1903) 126 Fed. 317, 61 C. C. A. 303.

Where a decree dismissing a bill is general, all defenses pleaded are open to the defendant on appeal, although one only may have been sustained by the trial court in its opinion. American Tube Works v. Bridgewater Iron Co. (1904) 132 Fed. 16, 65 C. C. A. 636, affirming decree (C. C. 1903) 124 Fed. 782.

The fact that in a personal injury case the trial judge has submitted, or refused to submit, a question involving the inference as to contributory negligence to be reasonably drawn from undisputed facts, cannot conclude a reviewing tribunal, since the opinion thus expressed as to what might or might not be reasonably inferred cannot furnish an arbitrary standard. Swift & Co. v. Langbein (1904) 127 Fed. 111, 62 C. C. A. 111, affirming judgment Langbein v. Swift (C. C. 1903) 121 Fed. 416.

Where a former decision of an inferior court erroneously reverses the dismissal of a bill on a demurrer to it and, after answer, on the same facts the final decree of the same court affirms such a dismissal, that decree should not be reversed, because it is in legal effect the decree which should have been affirmed on the demurrer to the bill. Buster v. Wright (1905) 135 Fed. 947, 68 C. C. A. 505, affirming decree Buster & Jones v. Wright (1904) 82 S. W. 855, 5 Ind. T. 404.

The assigning of a wrong reason by a trial judge for directing a verdict for a defendant after the close of the evidence is not prejudicial to the plaintiff nor ground for the reversal of the judgment if the direction of the verdict was right upon other grounds. Latting v. Owasso Mfg. Co. (1906) 148 Fed. 369, 78 C. C. A. 183.

Where both parties joined in the rehearing of a demurrer to the complaint on a motion for judgment on the pleadings and treated the complaint, bill of particulars, and affirmative allegations of the answer as true, the same prac-

tice would be followed on a writ of error. Singers-Bigger v. Young (1908) 166 Fed. 82, 91 C. C. A. 510.

Where the complaint in a suit to determine an adverse claim to an application for a patent to land in Alaska for trade purposes, under Act May 14, 1898, c. 299, § 10, 30 Stat. 413, was several times amended, and so changed as to convert the cause into a simple suit in equity to remove a cloud from title, and such amended complaint was the only one appearing in the record on appeal, the appellate court can only consider the cause of action as therein stated. Ripinsky v. Hinchman (1911) 186 Fed. 151, 108 C. C. A. 263, modifying decree on rehearing (1910) 181 Fed. 786, 105 C. C. A. 462.

Where the circuit court sitting in equity in a suit for receiver of a foreign corporation had power to sustain a demurrer to the bill for want of equity, it was not material, on an appeal by the receiver from an order denying the receiver's right to retain fees and expenses out of the corporation's assets on being ordered to return the same to the corporation's officers, that the court may have assigned an erroneous reason for sustaining the demurrer. Chicago Title & Trust Co. v. Newman (1911) 187 Fed. 573, 109 C. C. A. 263.

Where the District Court of the United States, in a suit involving defendant's right of flowage on complainant's land, reached a correct determination of the case, without reference to any findings in a prior suit in the state court, or inquiry as to how far complainant's rights had been determined thereby, the question of res judicata would not be considered. Newmarket Mfg. Co. v. Chapman (1913) 202 Fed. 164, 120 C. C. A. 452.

16. —— Extent of review dependent on mode of review or nature of decision.—A writ of error only brings up errors of law, while on an appeal the facts also are open to inquiry. U. S. v. Diamond Match Co. (1902) 115 Fed. 288, 53 C. C. A. 90.

A writ of error brings before the appellate court for review the record of the case, the pleadings, the judgment, bill of exceptions, and any agreed statement of facts. Fellman v. Royal Ins. Co. (1911) 185 Fed. 689, 107 C. C. A. 637, denying rehearing (1911) 184 Fed. 577, 106 C. C. A. 557.

On a writ of error in an action at law, the appellate court is confined to questions of law. Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co. (1913) 205 Fed. 147, 123 C. C. A. 478.

Where both parties ask a directed verdict, an appellate court, in reviewing the action of the trial court, is limited to a consideration of the correctness of the findings of the law, and must affirm if there is any evidence in support thereof. City of Camden v. Armstrong Cork Co. (1913) 210 Fed. 818.

17. Interlocutory judgments or orders.—On appeal from a decree dissolving a partnership, and ordering a sale of the property and a division of the proceeds, any errors or fraud in the proceedings subsequent to the decree are not open to review, there being no appeal from the final decree. Wiegand v. Copeland (C. C. 1882) 14 Fed. 118.

A decree fixing the amount of an annuity to which a legatee was entitled under a will, adjudging it to be a charge upon the lands of the testator, and appointing a receiver to collect the same from such lands, is not final and conclusive of the rights of the annuitant, where, during the same term, it was suspended as to certain purchasers of the lands and afterward a reference was made and a further hearing had, and an appeal from the decree subsequently entered brings up the entire case for review. Ohio River R. Co. v. Fisher (1902) 115 Fed. 929, 53 C. C. A. 411.

Where an appeal is from the final decree only, an order subsequently made denying a motion to set the decree aside cannot be reviewed by the appellate court. Nowell v. International Trust Co. (1909) 169 Fed. 497, 94 C. C. A. 589, writ of certiorari denied (1910) 30 Sup. Ct. 694, 217 U. S. 603, 54 L. Ed. 899.

18. Persons entitled to allege error —Appellees or defendants in error.—On a writ of error sued out by plaintiff to review a judgment for defendant, exceptions taken by defendant cannot be considered. Pauly Jail Bldg. & Manuf'g Co. v. Hemphill County (1893) 62 Fed. 698, 10 C. C. A. 595.

Cross appeals must be prosecuted like other appeals, and an assignment of error by an appellee cannot be considered unless an appeal has been regularly taken by him. Building & Loan Ass'n of Dakota v. Logan (1895) 66 Fed. 827, 14 C. C. A. 133.

Where a vessel, though warranted seaworthy at the commencement of the voyage, was not so, and broke down from that cause, and was repaired by the charterer and returned to her home port, the charterer, not having appealed from an allowance of what it would have cost to tow her back, cannot object, on appeal by the owner to the charge allowed on the trial for charter hire after the breakdown. Ronalds v. Leiter (1901) 109 Fed. 905, 48 C. C. A. 708.

An appellee who does not take an appeal, and defendant in error who does not sue out a writ of error, cannot confer jurisdiction to review decisions adverse to him, but can be heard only in support of the order of judgment appealed from. Board of Com'rs of

Shawnee County, Kansas, v. Hurley (1909) 169 Fed. 92, 94 C. C. A. 362.

An appellee or defendant in error who takes no appeal or writ of error himself cannot by assigning cross-errors, or by brief or argument confer on a federal appellate court jurisdiction to consider, review or decide upon rulings against him in the court below. Texas Co. v. Central Fuel Oil Co. (1912) 194 Fed. 1, 114 C. C. A. 21.

Mere assertion of error in appellee's brief where no cross-appeal was taken did not confer jurisdiction to review the error. Swager v. Smith (1912) 194 Fed. 762, 114 C. C. A. 482.

Where a defendant brings error, and the plaintiff does not complain of the judgment, though it is for less than he is entitled to, the error cannot be corrected in the circuit court. Kingory v. U. S. (C. C. 1891) 44 Fed. 669.

19. —— **Persons not parties in appellate court.**—One who is named as a party to the bill, but who is never served with process, and does not appear, is not a party to the record, and cannot be heard on appeal. Cook v. Lasher (1896) 73 Fed. 701, 19 C. C. A. 654.

A party not appealing from the decision of the district court cannot be heard in opposition thereto. Bush v. The Alonzo (C. C. 1866) Fed. Cas. No. 2,223.

20. —— **Error affecting only coparty.**—Where two actions by the same plaintiff are consolidated and tried together, the defendant in one of such actions, who is also a defendant in the other action, and who exercises all the peremptory challenges allowed by law in his case, cannot, on appeal of his case, avail himself of an error of the court in overruling a peremptory challenge by defendants in the other case. Stone v. U. S. (1894) 64 Fed. 667, 12 C. C. A. 451, judgment affirmed (1897) 17 Sup. Ct. 778, 164 U. S. 380, 41 L. Ed. 477.

Where a bill to recover personal property claimed to have been sold and delivered through the buyer's fraud alleged that one of the stockholders of the buyer had not paid for his stock and had received money from the buyer, which he should refund, such allegations, though improper, where not prejudicial to other defendants, and the bill having been dismissed as to such stockholder, such other defendants could not claim that the bill was multifarious. Missouri Broom Mfg. Co. v. Guymon (1902) 115 Fed. 112, 53 C. C. A. 16.

In a joint action against a street car and omnibus company for personal injuries to a passenger from a collision at a street crossing, with a verdict of not guilty as to the omnibus company and guilty as to the street car company on error sued out by the street car company no error committed in favor of the omnibus company can avail plaintiff in error, except in so far as it may have prejudiced the defense of the plaintiff in error in showing that the injury resulted from the negligence of the omnibus company without the concurrence of the railroad company. Denver City Tramway Co. v. Norton (1905) 141 Fed. 599, 73 C. C. A. 1.

Where plaintiff sued his master and the M. Co., alleging a joint and several liability, and the jury found against the master only, the latter could not urge error in the instructions given in regard to the M. Co. Albert Miller & Co. v. Wilkins (1913) 209 Fed. 582, 126 C. C. A. 404.

21. —— **Estoppel to allege error.**—A party will not be heard to complain of errors which he himself has induced the trial court to commit. Walton v. Chicago, St. P., M. & O. Ry. Co. (1893) 56 Fed. 1006, 6 C. C. A. 223.

In ejectment to recover certain mining grounds as between the owners of adjoining claims, defendant held estopped from claiming on writ of error that the recovery was for more than was warranted by the evidence relating to the exact point at which the vein crossed the boundary line between the claims. Colorado Cent. Consolidated Min. Co. v. Turck (1893) 54 Fed. 262, 4 C. C. A. 313, denying rehearing (1892) 50 Fed 888, 2 C. C. A. 67, writ of error dismissed (1893) 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030, petition for rehearing denied (1895) 70 Fed. 294, 17 C. C. A. 128.

A party cannot take advantage of error in instructions given at his request, and stating the law too favorably to him. Bridgewater Gas Co. v. Home Gas Fuel Co. (1893) 59 Fed. 40, 7 C. C. A. 652.

A party who has requested an instruction which assumes that there is some evidence as to a certain matter cannot allege error in the giving of another instruction, relating to the same matter, on the ground that there was no evidence in relation thereto. Little Rock & M. R. Co. v. Moseley (1893) 56 Fed. 1009, 6 C. C. A. 225.

Where the case was tried in the lower court on the theory that all the averments of the complaint were put in issue by the answer, without objection, plaintiff cannot, on appeal, question the sufficiency of the denials of the answer. Kansas & A. V. Ry. Co. v. Dye (1895) 70 Fed. 24, 16 C. C. A. 604.

In an action at law on a policy of insurance, evidence of previous verbal understandings, and of the intention of the insurance agent as to what should be put into the policy, is incompetent, but, if received at the instance of the insurance company, such company cannot complain of an instruction to the jury that such understanding must have been reached between persons authorized to bind the parties. Phenix Ins. Co. v. Wilcox & Gibbs Guano Co. (1895) 65 Fed. 724, 13 C. C. A. 88, affirming judgment Wilcox

& Gibbs Guano Co. v. Phœnix Ins. Co. of Brooklyn (C. C. 1894) 61 Fed. 199.

A party cannot object that the court predicated an instruction on a state of facts unsupported by the evidence, when he himself asked an instruction involving the same state of facts. Badgett v. Johnson-Fife Hat Co. (1898) 85 Fed. 408, 29 C. C. A. 230.

A party who has asked an instruction which required the jury to determine a question cannot complain that such question was submitted to the jury. Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co. (1898) 85 Fed. 417, 29 C. C. A. 239.

Defendants, who have answered an amended bill, and given evidence and submitted the cause thereunder, without objection, cannot, on appeal, raise the point that it states a different cause of action from the original bill. Pendery v. Carleton (1898) 87 Fed. 41, 30 C. C. A. 510.

A party cannot assign as error a finding of a judge or referee made at his request. National Loan & Investment Co. v. Rockland Co. (1899) 94 Fed. 335, 36 C. C. A. 370.

A complainant cannot assign as error, on appeal, the action of the court in permitting the filing of a cross bill, and making an order that the original bill should stand as an answer thereto, although no process had issued thereon, where he appeared and took part in the hearing on the issues joined without objection. Troendle v. Van Nortwick (1900) 98 Fed. 785, 39 C. C. A. 286.

A plaintiff cannot raise the objection of variance because of the absence of an allegation which was stricken from defendant's answer on his own motion. Haley v. Kilpatrick (1900) 104 Fed. 647, 44 C. C. A. 102.

One who consents to the hearing in equity of a legal cause of action or to the trial of an equitable cause of action at law is thereby estopped from successfully objecting to the method of trial in an appellate court. Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (1901) 111 Fed. 81, 49 C. C. A. 229, reversing decree Hooven, Owens & Rentschler Co. v. Featherstone (C. C. 1900) 99 Fed. 180.

Where, at the close of a trial, each party requested a peremptory instruction in his favor, and the court grants one of them, both parties are estopped from claiming that any question should have been submitted to the jury. U. S. v. Bishop (1903) 125 Fed. 181, 60 C. C. A. 123.

Where counsel for both parties read decided cases to the jury for the purpose of showing how courts had applied the law to similar cases, they could not object that the court, as a part of its charge, referred to a case he had previously tried merely as an illustration of the rules and principles he was enunciating. Louisville & N. R. Co. v. Summers (1903) 125 Fed. 719, 60 C. C. A. 487, writ of certiorari denied (1904) 24 Sup. Ct. 851, 192 U. S. 607, 48 L. Ed. 585.

Where the trial of an alleged false issue was induced by defendant's own procurement, over plaintiff's objection, defendant could not object thereto on a writ of error. Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. (1907) 154 Fed. 545, 83 C. C. A. 431, writ of certiorari denied (1907) 28 Sup. Ct. 256, 207 U. S. 589, 52 L. Ed. 354.

Where, after the entry of an ex parte order appointing a temporary receiver, the defendant by agreement made by counsel consented to the retention of the receivership, he cannot review such order on an appeal taken from a subsequent decree in the cause. Haight & Freese Co. v. Weiss (1907) 156 Fed. 328, 84 C. C. A. 224, writ of certiorari denied 28 Sup. Ct. 260, 207 U. S. 594, 52 L. Ed. 356.

In an action for injuries to a servant, defendant held not entitled to urge on writ of error to reverse the judgment that an instruction that one of the things which an employer is required under the law to do for the employé is to provide reasonably safe places at which, or on which, or in which the employé is required to work, etc., was defective because an employer was bound only to use ordinary care to provide a reasonably safe place. Toledo, St. L. & W. R. Co. v. Reardon (1908) 159 Fed. 366, 86 C. C. A. 366.

Ordinarily a party cannot complain of error procured or acquiesced in by him, but the rule does not apply when the trial court was without jurisdiction. Street Grading Dist. No. 60, of Little Rock, Ark., v. Hagadorn (1911) 186 Fed. 451, 108 C. C. A. 429 (writ of certiorari denied Hagadorn v. Street Grading Dist. No. 60, of Little Rock, Ark. [1911] 32 Sup. Ct. 524, 223 U. S. 721, 56 L. Ed. 630); Çonnor v. Kimball (1911) 186 Fed. 458, 108 C. C. A. 436.

A party who has tried a cause on the theory that a question was in issue and determinable by the evidence is estopped to reverse the judgment on the ground that such question was not in issue and was erroneously submitted to the jury. Bort v. E. H. McCutchen & Co. (1911) 187 Fed. 798, 109 C. C. A. 558.

Where the complaint, in an action in a court of Alaska, was in form a bill in equity and prayed for equitable relief, and the suit was treated as one in equity by the court below, the plaintiff cannot object that proceedings for review taken by defendant were by appeal rather than by writ of error. Madden v. McKenzie (1906) 144 Fed. 64, 75 C. C. A. 222.

Where a case was tried on the theory that contributory negligence would defeat recovery, the error, if any, in a

charge on contributory negligence held invited and not reviewable. Winfrey v. Missouri, K. & T. Ry. Co. (1912) 194 Fed. 808, 114 C. C. A. 218.

Where the defendants consent to an order requiring them to produce papers before a grand jury, they waive the right to assign error as to matters of procedure or questions of privilege arising prior to such order. Brown v. U. S. (1912) 196 Fed. 351, 116 C. C. A. 171.

Where defendant resisted a motion to remand on the ground that the action did not arise under the federal Employer's Liability Act and so insisted throughout the trial, it could not successfully allege the contrary for the first time on writ of error. Illinois Cent. R. Co. v. Egan (1913) 203 Fed. 937, 122 C. C. A. 239.

Where two actions for injuries to different individuals were joined and tried with plaintiff's express consent, he could not successfully claim that he was prejudiced by such procedure on writ of error. Donohue v. Boston & M. R. R. (1913) 209 Fed. 824, 126 C. C. A. 548.

22. Amendments of proceedings of lower court.—In a suit wherein federal jurisdiction depends wholly on diversity of citizenship, and the record shows that such diversity has been insufficiently alleged, no amendment will be permitted in the appellate court. St. Louis, I. M. & S. Ry. Co. v. Newcom (1893) 56 Fed. 951, 6 C. C. A. 172.

Amendments of the pleadings are not permitted, in the appellate court, except by consent of the adverse party. Post v. Beacon Vacuum Pump & Electrical Co. (1898) 89 Fed. 1, 32 C. C. A. 151, reversing judgment on rehearing (1898) 84 Fed. 371, 28 C. C. A. 151.

There should be a liberal practice in allowing amendments of notices of special matter of defense or counterclaim accompanying a plea of the general issue in an action of assumpsit; and, on appeal or error, any amendment necessary to avoid a variance, and which might have been permitted had objection been taken in the trial court, will be regarded as having been made. Columbus Const. Co. v. Crane Co. (1900) 98 Fed. 946, 40 C. C. A. 35.

The fact alone that an action was brought in the name of the wrong party as plaintiff is not ground for reversal, but the appellate court will direct the substitution of the proper party. Howard v. U. S. (1900) 102 Fed. 77, 42 C. C. A. 169 (affirming judgment U. S. v. Howard [C. C. 1899] 93 Fed. 719, and judgment affirmed Howard v. U. S. [1902] 22 Sup. Ct. 543, 184 U. S. 676, 46 L. Ed. 754); Chicago G. W. Ry. Co. v. First Methodist Episcopal Church of Leavenworth City, Kan. (1900) 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488.

Where the evidence received without objection supports the verdict, the pleadings, if defective, will be considered by an appellate court to have been amended to conform to the proof. A. Coolot Co. v. L. Kahner & Co. (1905) 140 Fed. 836, 72 C. C. A. 248.

The circuit courts, on appeal from the district courts, may allow any amendments of defects in form occurring in the court below, or may disregard them; otherwise as to defects in substance. Smith v. Jackson (C. C. 1825) Fed. Cas. No. 13,065.

On appeal in equity from the district court of the United States, the circuit court can permit an amendment of substance. Warren v. Moody (C. C. 1881) 9 Fed. 673.

On appeal from district to circuit court, defective process cannot be cured by amendment. Mason v. Ervine (C. C. 1885) 27 Fed. 240.

Amendments may be made in the appellate court only when the suits are on the admiralty side. U. S. v. Three Hundred and Ninety-Six Barrels of Distilled Spirits (D. C. 1866) Fed. Cas. No. 16,503.

23. Additional proofs.—A patent not set up in the answer, but first introduced in the court below on a motion for rehearing, which was denied, cannot be considered on appeal. Andrews v. Thum (1895) 67 Fed. 911, 15 C. C. A. 67, reversing decrees Thum v. Andrews (C. C. 1892) 53 Fed. 84, and Andrews v. Thum (1894) 64 Fed. 149, 12 C. C. A. 77, decree reversed (1895) 70 Fed. 65, 16 C. C. A. 677, and judgment modified (1896) 71 Fed. 763, 18 C. C. A. 308.

An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court, when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuity of proceedings, to preserve a jurisdiction lawfully acquired or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled or for other reasons has ceased to exist. Ridge v. Manker (1904) 132 Fed. 599, 67 C. C. A. 596.

24. Trial de novo.—An appeal in an admiralty cause, which by Act March 3, 1891, c. 517, § 11, 26 Stat. 829, is taken to that court instead of to the circuit court, as formerly, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the circuit courts prior to the passage of that act; and, under the settled rule, such an appeal vacates entirely the decree of the district court, and brings the cause up for trial de novo upon every issue raised by the pleadings, those determined by the district court in favor of the appellant as well as those determined against him. Gilchrist v. Chicago Ins. Co. (1899) 104 Fed. 566, 44 C. C. A. 43.

On reversal of a judgment in an action brought by a writ of error from the district court, the circuit court may, if justice require, award a venire facias de novo, triable at the bar of the circuit court. U. S. v. Sawyer (C. C. 1812) Fed. Cas. No. 16,227.

25. **Presumptions on appeal or error —Burden of showing error.**—The burden rests on appellant to show that the master's report is erroneous and not justified by the evidence. Curtice Bros. Co. v. Barnard (1913) 209 Fed. 589, 126 C. C. A. 411.

Appellate courts do not presume error, but grant relief only in cases where error is made affirmatively to appear. Williamson v. Richardson (1913) 205 Fed. 245, 123 C. C. A. 427.

26. —— **Facts or evidence not shown by record.**—Where a petition set out a contract for the sale of corporate stock, alleged its breach, and prayed judgment for the full amount of damages recovered, as it was competent for plaintiff to prove that the stock was of no value, it would be presumed that such proof was made. Rush v. Newman (1893) 58 Fed. 158, 7 C. C. A. 136.

Neither the evidence nor the charge of the court on an issue as to the citizenship of plaintiff in error being before the court, as no bill of exceptions was taken, it will be assumed that the jury properly found the issue against him. Terry v. Davy (1901) 107 Fed. 50, 46 C. C. A. 141.

Where the whole testimony has not been incorporated in the record, it will be presumed that such testimony preponderates in favor of and sustains the judgment of the trial court. Vera Cruz & P. R. Co. v. Waddell (1907) 155 Fed. 401, 83 C. C. A. 673.

Where the state court in which an action against an insurance company was brought would have had jurisdiction under the service made, if defendant was an insurance company not on the assessment plan, and the record on a writ of error did not show that it was made to appear on the hearing of a plea of abatement raising an objection to the jurisdiction that the insurance company did business on the assessment plan, error in overruling the plea was not shown. Mutual Reserve Fund Life Ass'n v. Tuchfeld (1908) 159 Fed. 833, 86 C. C. A. 657.

An order with reference to costs in equity recited three several allowances, one in favor of appellant and two stated to be allowed in favor of appellee as complainant, submitted for apportionment under the decree as reserved; one of the last-mentioned items being referred to as "costs in the Circuit Court of Appeals, as appears in its mandate," and "due to complainant for the benefit of the appellants named in the appeal." Held that, in the absence of a showing to the contrary, the matter was subject to the controlling presumptions that the parties affected were before the court, that support appeared for the finding in reference to the costs of appeal, in the mandate, that they were "due to the complainant for the benefit of the appellants," and that the apportionment so made was equitable as between the parties. Corn Products Refining Co. v. Chicago Real Estate Loan & Trust Co. (1911) 185 Fed. 63, 107 C. C. A. 283.

In the absence of a complete record of the evidence, it will be presumed that a statement of a fact by the court to which no objection was made was correct. Journal Pub. Co. v. Drake (1912) 199 Fed. 572, 118 C. C. A. 46.

Where, on an appeal by plaintiff, it appeared that, subsequent to the contract relied on by him, he failed to comply therewith and suit was brought against him, which was compromised by the giving of a new contract, it might be inferred, in the absence of evidence as to the terms of the new contract, that it superseded the first contract. Griffin v. Allen (1913) 207 Fed. 61, 124 C. C. A. 621.

27. —— **Organization and jurisdiction of lower court.**—Where the decree in a case in the S. district appeared on its face to have been made at a stated term held in that district by the judge of the E. district, and no application to set it aside was disclosed in the record, it would be conclusively presumed that he was actually holding such court when the decree was rendered, and that the decree was valid. The Alaska (C. C. 1888) 35 Fed. 555.

28. —— **Pleading.**—Where complainant by leave of court files an amended bill, from which he omits one of the parties made defendant in the original bill, it will be presumed on appeal, in the absence of an affirmative showing to the contrary, that leave was given to dismiss as to such party. Hicklin v. Marco (1893) 56 Fed. 549, 6 C. C. A. 10, affirming decree (C. C. 1891) 46 Fed. 424.

Where parts of the record have been accidentally destroyed, and it does not appear what action was taken on a demurrer, or whether any plea was ever filed, but the parties have tried the case on the merits, the appellate court will assume the demurrer was waived, and the case tried on the general issue. Southern Ry. Co. v. Rhodes (1898) 86 Fed. 422, 30 C. C. A. 157.

A decree dismissing a bill upon a general demurrer thereto must be presumed to have been passed upon the merits, and not for want of jurisdiction, in the absence of any statement therein to the contrary. Bradford Belting Co. v. Kisinger-Ison Co. (1902) 113 Fed. 811, 51 C. C. A. 483.

An amendment of a pleading held not to be considered by an appellate court as an abandonment of the original cause of action, especially where it was not so treated by the trial court, nor

by the parties therein. Melton v. Pensacola Bank & Trust Co. (1911) 190 Fed. 126, 111 C. C. A. 166.

On a writ of error to review an order sustaining a demurrer to the declaration, the allegations contained in the declaration, with all reasonable inferences to be drawn therefrom, are to be treated as true. Heckert v. Central District & Printing Telegraph Co. (1913) 206 Fed. 653, 124 C. C. A. 441.

29. —— **Interlocutory orders.**—While an order of reference was open to the construction that the actual value of the work and material was to be ascertained, yet, as the trial court had held that it was not intended to bear so broad a construction and had confirmed the report, an appellate court would not be justified in holding the contrary, where no injustice had resulted. Girard Life Insurance Annuity & Trust Co. v. Cooper (1892) 51 Fed. 332, 2 C. C. A. 245, decree affirmed (1896) 16 S. Ct. 879, 162 U. S. 529, 40 L. Ed. 1062.

30. —— **Conduct of trial and rulings in general.**—Where the jury, after retiring, are recalled at their own request, and given additional instructions, in the absence of counsel, and there is no showing as to the reasons for such absence, or whether any efforts were made to secure their presence, it will be presumed on appeal that the court acted with regularity and propriety. Colorado Cent. Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 2 C. C. A. 67, writ of error dismissed (1893) 14 S. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030, rehearing denied (1893) 54 Fed. 262, 4 C. C. A. 313.

When the substance only of the court's language, in expressing its opinion as to the weight that ought to be given to the statement of a witness, is preserved in the bill of exceptions, it must be presumed that it did not transcend the limits of judicial discretion. Atchison, T. & S. F. R. Co. v. Howard (1892) 49 Fed. 206, 1 C. C. A. 229.

31. —— **Dismissal, demurrer to evidence, or directing verdict.**—In reviewing a decision sustaining a demurrer to a plea which alleges that a judgment set up in bar was rendered upon due notice, and that the court had jurisdiction of the subject-matter and the parties, the appellate court must take such allegations as true, and cannot look into exhibits attached to the answer to ascertain whether the judgment does in fact show all the elements of jurisdiction. Merritt v. American Steel Barge Co. (1897) 79 Fed. 228, 24 C. C. A. 530.

In reviewing a judgment dismissing a complaint over objection before plaintiffs' testimony had closed, it must be assumed that plaintiffs, if permitted to proceed, would have established that which they alleged, unless negatived by their evidence or admissions. Thomsen v. Union Castle Mail S. S. Co. (1908) 166 Fed. 251, 92 C. C. A. 315, reversing judgment Thomson v. Union Castle Mail S. S. Co. (C. C. 1907) 149 Fed. 933.

Where defendant's motion to dismiss the complaint for failure to state a cause of action was granted, it must be assumed that plaintiff, if given an opportunity, would have established the allegations. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. (1908) 166 Fed. 254, 92 C. C. A. 318, reversing judgment (C. C. 1908) 160 Fed. 144.

In passing on an exception to an instruction directing a verdict, the evidence is to be considered in the light most favorable to the party against whom the verdict is directed; and where there is a contradiction between witnesses in regard to a material question, it must be taken that the jury would have accepted the testimony of the witnesses for such party as true. Lewis v. Bloede (1912) 202 Fed. 7, 120 C. C. A. 335.

Where, on motion by both parties for a directed verdict, the court directed a verdict for plaintiff, the Court of Appeals, on writ of error, would adopt that view of the facts most favorable to plaintiff. Murch Bros. Const. Co. v. Johnson (1913) 203 Fed. 1, 121 C. C. A. 353.

On review of an order denying a motion for a peremptory instruction at the close of the evidence, the evidence must be given the strongest probative force in favor of the party against whom the instruction is asked. Illinois Cent. R. Co. v. Egan (1913) 203 Fed. 937, 122 C. C. A. 239.

On review of a judgment on a directed verdict, the appellate court must take that view of the evidence most favorable to the defeated party. Goldman v. Goldberger (1913) 208 Fed. 877, 126 C. C. A. 35.

32. —— **Instructions.**—Instructions will be presumed to be correct where the evidence is not spread upon the record by exception or otherwise. Blakely v. Ruddell (Super. Ct. Ark. 1822) Fed. Cas. No. 18,241.

33. —— **Verdict, findings, or judgment.**—It will not be presumed on appeal that the jury, in arriving at their verdict, disregarded any of the instructions of the court, but the bill of exceptions must affirmatively show that they did so, to entitle appellant to any relief on that ground. Harper & Reynolds Co. v. Wilgus (1893) 56 Fed. 587, 6 C. C. A. 45.

On appeal to the circuit court of appeals, the findings and decree of a circuit court as to the facts are taken as presumptively correct, and, unless it clearly appears from the record that some miskate has been made in the consideration of the evidence, the decree should not be disturbed. Savings & Loan Soc. v. Davidson (1899) 97

Fed. 696, 38 C. C. A. 365, affirming decree Sanford v. Savings & Loan Soc. (C. C. 1893) 80 Fed. 54.

The presumption in an appellate court is that the judgment below was right, and the burden of showing to the contrary rests upon the plaintiff in error; and to show that the exclusion of testimony offered was erroneous and harmful he must show what he claimed such testimony would have been and would have proved, if admitted. Southern Ry. Co. v. Lester (1907) 151 Fed. 573, 81 C. C. A. 53.

On appeal appellant must make the errors complained of clearly appear; every presumption being in favor of the correctness of the rulings below. U. S. v. Ute Coal & Coke Co. (1908) 158 Fed. 20, 85 C. C. A. 302.

The presumption that a decree in equity is correct exists not only where the testimony was taken in open court but also where the submission was entirely upon depositions, but is less strong in the latter instance. U. S. v. Marshall (1914) 210 Fed. 595, 127 C. C. A. 231.

34. **Review of discretionary rulings of lower court—Rulings on application by intervener for continuance.**—An appellate court cannot review the exercise of discretion by the trial court in refusing an application by an intervener, made after the commencement of a trial, for a continuance, in order to enable the intervener to take steps necessary to bring his intervention to an issue. Baker v. Texarkana Nat. Bank (1896) 74 Fed. 598, 20 C. C. A. 545.

35. —— **On pleadings.**—Rulings in respect to the amendment of pleadings or process are largely within the discretion of the trial court, and constitute no ground for reversal unless a gross abuse of that discretion is shown. Rucker v. Bolles (1904) 133 Fed. 858, 67 C. C. A. 30.

Federal courts have large discretion to permit the correction of defects in pleadings or process by amendment, and rulings on the subject constitute no ground for reversal unless the discretion is grossly abused. Great Northern Ry. Co. v. Herron (1905) 136 Fed. 49, 68 C. C. A. 599.

36. —— **Dismissal or nonsuit before trial.**—A refusal to reinstate a cause after dismissal is in the discretion of the court, and not reviewable on writ of error. Dexter v. Kellas (1902) 113 Fed. 48, 51 C. C. A. 35.

Unless it clearly appears that some fundamental rule of a court of equity was violated, or that there was an abuse of legal discretion, a decree dismissing a cause on complainant's motion will not be reversed on appeal. Where no evidence had been taken, and no hearing had upon the merits, the fact alone that defendant may be subjected to another suit is not a ground for denying leave to dismiss. Penn Phonograph Co. v. Columbia Phonograph Co. (1904) 132 Fed. 808, 66 C. C. A. 127.

On a writ of error to review an order permitting plaintiff to take a voluntary nonsuit, in order to avoid a directed verdict and to permit him to institute a new suit in a state court, the record held insufficient to show an abuse of discretion. Worthington v. McGough (1912) 192 Fed. 512, 112 C. C. A. 662.

37. —— **Continuance.**—A continuance is in the discretion of the court, and subject to review only for abuse of discretion. Drexel v. True (1896) 74 Fed. 12, 20 C. C. A. 265; Texas & P. Ry. Co. v. Humble (1899) 97 Fed. 837, 38 C. C. A. 502; Coltrane v. Templeton (1901) 106 Fed. 370, 45 C. C. A. 328; Lyman v. Warner (1902) 113 Fed. 87, 51 C. C. A. 73; Copper River Min. Co. v. McClellan (1905) 138 Fed. 333, 70 C. C. A. 623 (writ of certiorari [1906] 26 Sup. Ct. 753, 200 U. S. 616, 50 L. Ed. 622); Dexter v. Kellas (1902) 113 Fed. 48, 51 C. C. A. 35; Myers v. Kessler (1906) 142 Fed. 730, 74 C. C. A. 62; Sun Pub. Co. v. Lake Erie Asphalt Block Co. (1907) 157 Fed. 80, 84 C. C. A. 584; St. Louis Stave & Lumber Co. v. U. S. (1910) 177 Fed. 178, 100 C. C. A. 640; Campbell v. Strong (Super. Ct. Ark. 1835) Fed. Cas. No. 2,367a.

38. —— **Reference.**—An order of a Circuit Court overruling exceptions to the report of a master for the reason that the record was not printed as required by the rules was within its discretion, and is not reviewable on appeal. Du Bois v. City of New York (1904) 128 Fed. 418, 63 C. C. A. 160.

39. —— **Relating to jury.**—The discretionary finding of the trial judge in passing upon a juror's qualifications will not be reviewed unless it appears to have been exercised arbitrarily. Southern Pac. Co. v. Rauh (1892) 49 Fed. 696, 1 C. C. A. 416.

The decision of a trial judge, upon a challenge to the favor, the question before him being in the main one of fact, upon which he has the benefit of seeing the bearing and appearance of the juror, should not be set aside by an appellate court except for manifest error. Press Pub. Co. v. McDonald (1896) 73 Fed. 440, 19 C. C. A. 516, affirming judgment (1894) 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 531; certiorari denied (1896) 16 Sup. Ct. 1205, 163 U. S. 700, 41 L. Ed. 320.

Where the record states that the jury were sworn, it will be presumed that the proper oath was administered. Dillingham v. Skein (Super. Ct. Ark. 1832) Fed. Cas. No. 3,912a.

The appointment of an elisor, to summon a jury, will be presumed to be correct, and to have been done for reasons satisfactory to the court. Camp-

bell v. Strong (Super. Ct. Ark. 1835) Fed. Cas. No. 2,367a.

40. —— Conduct of trial or hearing.—In the federal courts the question of which party is permitted to close the argument to the jury is not the proper subject of a bill of exceptions or a writ of error, because it does not affect the merits of the controversy, and is a matter which should be left largely to the discretion of the trial judge. May v. International Loan & Trust Co. (1899) 92 Fed. 445, 34 C. C. A. 448.

Where an objection, that the court refused to permit counsel for plaintiff in error to file affidavits of jurors disclosing what occurred with reference to alleged instructions given after the jury had retired, was not supported by anything appearing in the bill of exceptions, it would be presumed that the procedure objected to had not occurred. State of Missouri ex rel. Dykes v. Hencken (1909) 174 Fed. 624, 98 C. C. A. 378.

Rulings by a federal court during a trial refusing to grant leave to plaintiff to withdraw a juror, and continue the case or to file a bill in equity to reform a contract, were discretionary, and are not reviewable by an appellate court. Huntington v. Toledo, St. L. & W. R. Co. (1909) 175 Fed. 532, 99 C. C. A. 154.

That the trial court makes a special finding of facts in the exercise of its discretion will not be interfered with on a writ of error, unless the discretion was abused. Jackson v. Mutual Life Ins. Co. of New York (1911) 186 Fed. 447, 108 C. C. A. 369.

Where the trial court in its discretion permitted separation of the jury before a verdict, error cannot be predicated thereon, unless a fair trial was adversely affected. Guardian Fire Ins. Co. of Pennsylvania v. Central Glass Co. (1912) 194 Fed. 851, 114 C. C. A. 639; B. J. Wolf & Sons v. Royal Ins. Co., Limited, of Liverpool (1912) 194 Fed. 853, 114 C. C. A. 641.

41. —— Rulings on evidence.—The refusal of the trial court to allow a reexamination of a witness as to the kind of fence now made of iron, when life and limb are dependent on its tensile strength, being a collateral issue, and its allowance largely within the discretion of the court, was not erroneous, where no prejudice arose from the exclusion of the particular question. Sutherland v. Round (1893) 57 Fed. 467, 6 C. C. A. 428.

A refusal to allow defendant in an action on an acceptance, who has been examined by plaintiff to prove the acceptance and the performance of a condition thereof, to give evidence on cross-examination to sustain his defense, is not reviewable. Seymour v. Malcolm McDonald Lumber Co. (1893) 58 Fed. 957, 7 C. C. A. 593.

Where the only objection made on an offer of testimony was that the question was leading, the ruling thereon was discretionary, and an exception saves no question for review. Ross v. Raphael Tuck & Sons Co. (1898) 91 Fed. 128, 33 C. C. A. 405.

Permission to plaintiff to examine expert witnesses after defendant has rested is within the discretion of the trial judge. Commercial Travelers' Mut. Acc. Ass'n of America v. Fulton (1899) 93 Fed. 621, 35 C. C. A. 493.

The order in which testimony shall be introduced is discretionary with the trial court, and its ruling in that regard is no cause for reversal, where no abuse of discretion is shown. Western Gas Const. Co. v. Danner (1899) 97 Fed. 882, 38 C. C. A. 528.

Where it is sought to avoid a policy of life insurance upon the ground of the falsity of the representation of the assured, in his application, that he had never used intoxicating liquors to excess, a reasonable time limit may be made by the court, within which the inquiry into the falsity of the representation is to be confined, and the determination of such limit involves a discretion which is not ordinarily subject to review. Provident Sav. Life Assur. Soc. of New York v. Hadley (1900) 102 Fed. 856, 43 C. C. A. 25, writ of certiorari denied (1900) 21 Sup. Ct. 919, 179 U. S. 686, 45 L. Ed. 386, affirming judgment Hadley v. Provident Sav. Life Assur. Soc. of New York (C. C. 1898) 90 Fed. 390.

Allowance of a leading question is within the discretion of the trial court and cannot be reviewed. Eli Mining & Land Co. v. Carleton (1901) 108 Fed. 24, 47 C. C. A. 166.

The decision of the trial judge as to the qualification of a witness to testify to a matter of opinion is conclusive unless clearly shown to be erroneous in matter of law. Bradford Glycerine Co. v. Kizer (1902) 113 Fed. 894, 51 C. C. A. 524.

While conceding to the trial court wide discretion in the suspension or enforcement of the rule limiting cross-examination to matters testified to in chief, and in respect to the order in which evidence is introduced, an appellate court must reserve the right to grant a new trial, even for the relaxation of such rules of practice, when necessary to prevent serious injury to the rights of a party. O'Connell v. Pennsylvania Co. (1902) 118 Fed. 989, 55 C. C. A. 483.

The admission in rebuttal of testimony which is properly rebuttal evidence is not error for which the judgment will be reversed, merely because other evidence as to the same matter was introduced in chief; the order of the introduction of evidence being a matter in the legal discretion of the trial court, which discretion, in the absence of gross abuse, is not reviewable by the appellate court. Atchison, T. &

S. F. Ry. Co. v. Phipps (1903) 125 Fed. 478, 60 C. C. A. 314.

The action of a trial judge in asking questions of witnesses is discretionary, and can only be reviewed for an abuse of discretion. New York Transp. Co. v. Garside (1907) 157 Fed. 521, 85 C. C. A. 285, modifying judgment (C. C. 1906) 146 Fed. 588.

Refusal of the trial judge in the exercise of discretion to submit special interrogatories to the jury because they were not filed until during the argument cannot be assigned as error. Toledo, St. L. & W. R. Co. v. Reardon (1908) 159 Fed. 366, 86 C. C. A. 366.

Whether a witness tendered as an expert possesses the requisite qualifications rests largely in the discretion of the trial court, and its decision will not be disturbed unless clearly erroneous. Chicago Great Western Ry. Co. v. McDonough (1908) 161 Fed. 657, 88 C. C. A. 517.

The trial judge has discretion as to the admission of expert evidence, and his decision will not be disturbed, unless it plainly appears the testimony was calculated to prejudice the jury. United States Smelting Co. v. Parry (1909) 166 Fed. 407, 92 C. C. A. 159.

The discretion of the trial court in ruling on a motion to reopen a case for further evidence after the party has rested will not be reviewed, except in case of abuse. Render v. Arkansas Valley Trust Co. (1912) 196 Fed. 1, 115 C. C. A. 635.

The action of the trial judge in limiting the cross-examination of a party testifying as a witness, is not reviewable by an appellate court except for an abuse of discretion. Baltimore & O. R. Co. v. Thornton (1911) 188 Fed. 868, 110 C. C. A. 502.

Limitation on cross-examination held not reviewable except for abuse of discretion. Post Pub. Co. v. Peck (1912) 199 Fed. 6, 120 C. C. A. 1.

42. —— **Directing verdict.**—While the direction of a verdict is a matter resting in the legal discretion of the trial court, its action in refusing to direct a verdict is subject to review, where the evidence is before the appellate court. Texas & P. Ry. Co. v. Eason (1899) 92 Fed. 553, 34 C. C. A. 530.

43. —— **Submission of questions to jury.**—The refusal to submit questions of fact in an equity case will not be reviewed, except for abuse of discretion. Pacific Coal & Transportation Co. v. Pioneer Mining Co. (1913) 205 Fed. 577, 123 C. C. A. 593.

44. —— **New trial or rehearing.**—The ruling on a motion for new trial is discretionary, and not reviewable in the federal courts. Atchison, T. & S. F. R. Co. v. Howard (1892) 49 Fed. 206, 1 C. C. A. 229; Richmond Railroad & Electric Co. v. Dick (1892) 52 Fed. 379, 3 C. C. A. 149; Fitzsimmons v. U. S. (1893) 54 Fed. 812, 4 C. C. A. 589; Southwestern Virginia Imp. Co. v. Frari (1893) 58 Fed. 171, 7 C. C. A. 149; Edge Moor Bridge Works v. Fields (1893) 58 Fed. 173, 7 C. C. A. 152; Little Josephine Min. Co. v. Fullerton (1893) 58 Fed. 521, 7 C. C. A. 340; McLeod v. City of New Albany (1895) 66 Fed. 378, 13 C. C. A. 525; Condran v. Chicago, M. & St. P. Ry. Co. (1895) 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; Criner v. Mathews (1895) 67 Fed. 945, 15 C. C. A. 93; Woodbury v. City of Shawneetown (1896) 74 Fed. 205, 20 C. C. A. 400; Prichard v. Budd (1896) 76 Fed. 710, 22 C. C. A. 504; Philip Schneider Brewing Co. v. American Ice-Mach. Co. (1896) 77 Fed. 138, 23 C. C. A. 89; The Natchez (1896) 78 Fed. 183, 24 C. C. A. 49; New Orleans Nav. Co. v. St. Louis & N. O. Anchor Line (1896) 78 Fed. 183, 24 C. C. A. 49; Rhodes v. U. S. (1897) 79 Fed. 740, 25 C. C. A. 186; Morris v. Canda (1897) 80 Fed. 739, 26 C. C. A. 128; Minneapolis, St. P. & S. S. M. Ry. Co. v. Emerson (1897) 80 Fed. 993, 26 C. C. A. 296; Atlas Distilling Co. v. Rheinstrom (1898) 86 Fed. 244, 30 C. C. A. 10; Willis v. Board of Com'rs of Wyandotte County, Kan. (1898) 86 Fed. 872, 30 C. C. A. 445; Ash v. Prunier (1901) 105 Fed. 722, 44 C. C. A. 675; City of Manning v. German Ins. Co. (1901) 107 Fed. 52, 46 C. C. A. 144 (reversing order German Ins. Co. v. Town of Manning [C. C. 1900] 100 Fed. 581); Board of Com'rs of Lake County v. Keene Five-Cents Sav. Bank (1901) 108 Fed. 505, 47 C. C. A. 464 (rehearing denied [1901] 110 Fed. 79, 49 C. C. A. 31, and writ of certiorari denied [1902] 22 Sup. Ct. 936, 46 L. Ed. 1264); New River Mineral Co. v. Roanoke Coal & Coke Co. (1901) 110 Fed. 343, 49 C. C. A. 78; Eastman, Gardner & Co. v. Newman (1901) 112 Fed. 122, 50 C. C. A. 155; Walker v. Moser (1902) 117 Fed. 230, 54 C. C. A. 262; Smith v. Hopkins (1902) 120 Fed. 921, 57 C. C. A. 193; Lazier Gas Engine Co. v. Du Bois (1904) 130 Fed. 834, 65 C. C. A. 172; Newport News & Old Point Ry. & Electric Co. v. Yount (1905) 136 Fed. 589, 69 C. C. A. 363; Clement v. Wilson (1905) 135 Fed. 749, 68 C. C. A. 387; J. W. Bishop Co. v. Shelhorse (1905) 141 Fed. 643, 72 C. C. A. 337; Myers v. Kessler (1906) 142 Fed. 730, 74 C. C. A. 62; Illinois Cent. R. Co. v. Coughlin (1906) 145 Fed. 37, 75 C. C. A. 262; Tacoma Ry. & Power Co. v. Geiger (1906) 145 Fed. 504, 76 C. C. A. 252; St. Louis Southwestern Ry. Co. v. Wainwright (1907) 152 Fed. 624, 82 C. C. A. 16; Fidelity & Casualty Co. of New York v. Thompson (1907) 154 Fed. 484, 83 C. C. A. 324, 11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181; Chicago, M. & St. P. Ry. Co. v. Heil (1907) 154 Fed. 626, 83 C. C. A. 400; Reader v. Haggin (1908) 160 Fed. 909, 88 C. C. A. 91; Murhard Estate

Co. v. Portland & S. Ry. Co. (1908) 163 Fed. 194, 90 C. C. A. 64; Chesapeake & O. Ry. Co. v. Dandridge (1909) 171 Fed. 74, 96 C. C. A. 178; American Smelting & Refining Co. v. Karapa (1909) 173 Fed. 607, 97 C. C. A. 517; Big Brushy Coal & Coke Co. v. Williams (1910) 176 Fed. 529, 99 C. C. A. 102; American Bonding Co. of Baltimore v. Strasburger (1910) 176 Fed. 348, 99 C. C. A. 622; Latchtimacker v. Jacksonville Towing & Wrecking Co. (C. C. 1910) 181 Fed. 276; Wells Fargo & Co. v. Zimmer (1911) 186 Fed. 130, 108 C. C. A. 242; Brazil Block Coal Co. v. Hotel (1911) 192 Fed. 108, 112 C. C. A. 448; Mason v. Smith (1911) 191 Fed. 502, 112 C. C. A. 146; Gibson v. Luther (1912) 196 Fed. 203, 116 C. C. A. 35; McIntyre v. Modern Woodmen of America (1912) 200 Fed. 1, 121 C. C. A. 1; Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co. (1913) 205 Fed. 147, 123 C. C. A. 478; Louisville & N. R. Co. v. Bell (1913) 206 Fed. 395, 124 C. C. A. 277; Worthington v. Elner (1913) 207 Fed. 306, 125 C. C. A. 50.

The refusal of the court below to set aside a verdict on the ground that it was against the weight of the evidence cannot be reviewed on appeal. Emanuel v. Gates (1893) 53 Fed. 772, 3 C. C. A. 663; City of Lincoln v. Sun Vapor Street-Light Co. (1894) 59 Fed. 756, 8 C. C. A. 253.

A motion to set aside a special finding of a jury is a motion for a new trial on the issue thereby decided, is addressed solely to the discretion of the trial court, and is not reviewable by writ of error. Berry v. Seawall (1895) 65 Fed. 742, 13 C. C. A. 101, reversing judgment Seawell v. Berry (C. C. 1893) 55 Fed. 731.

The action of a circuit court in refusing to set aside the special findings of a jury to questions in writing submitted to it, and in overruling a motion to set aside a verdict and grant a new trial, cannot be reviewed in a circuit court of appeals. Supreme Lodge of Knights of Pythias of the World v. Hill (1896) 76 Fed. 468, 22 C. C. A. 280.

The rule of the federal courts that the action of a trial court in granting or refusing a new trial is not reviewable in the appellate court is not changed by the fact that such action was taken by the trial judge on his own motion, or that he refused to give his reasons therefor, in the absence of anything in the record showing an abuse of the judicial discretion vested in him. Patton v. Southern Ry. Co. (1901) 111 Fed. 712, 49 C. C. A. 569, writ of certiorari denied (1902) 22 S. Ct. 944, 186 U. S. 484, 46 L. Ed. 1261.

The circuit court of appeals cannot review the discretion of the court below in refusing a new trial sought on the ground that the verdict was against the evidence. Manhattan Oil Co. v. Richardson Lubricating Co. (1902) 113 Fed. 923, 51 C. C. A. 553.

Where, in an action for negligence, the trial court entertained a motion for a new trial on the ground that the damages awarded by the jury were excessive, and considered the reasons urged in support thereof, his estimate of the weight and sufficiency of such reasons is not reviewable. Louisville & N. R. Co. v. Summers (1903) 125 Fed. 719, 60 C. C. A. 487, writ of certiorari denied (1904) 24 S. Ct. 851, 192 U. S. 607, 48 L. Ed. 585.

An objection that a verdict is excessive, being within the discretion of the trial court on a motion for a new trial, will not be reviewed by the Circuit Court of Appeals. Cook v. Proskey (1905) 138 Fed. 273, 70 C. C. A. 563.

The rule that the allowance or refusal of a new trial rests in the discretion of the trial court, and will not be interfered with on a writ of error, has no application, where such allowance or refusal results from a clear abuse of discretion. James v. Evans (1906) 149 Fed. 136, 80 C. C. A. 240, reversing order Evans v. Freeman (C. C. 1906) 140 Fed. 419.

Where a new trial was awarded solely by reason of an erroneous opinion that, under the pleadings, the verdict could not by any possibility lawfully have been found, there was an abuse of discretion, which might be corrected by writ of error. Id.

The Circuit Court of Appeals has no jurisdiction to review an objection that the damages awarded in an action for wrongful death are excessive, though it is convinced that the trial court improperly exercised its discretion in refusing to grant defendant relief on such ground on the motion for a new trial. Chicago & N. W. Ry. Co. v. O'Brien (1907) 153 Fed. 511, 82 C. C. A. 461.

Denial of a motion to set aside a verdict for plaintiff in a federal court because the damages awarded were inadequate, in the exercise of the trial court's discretion, is not subject to review in an appellate court. Denison v. Shawmut Min. Co. (1908) 159 Fed. 102, 86 C. C. A. 292, affirming judgment (C. C. 1905) 135 Fed. 864.

The rule that the overruling of a motion for a new trial is an exercise of discretion, which will not be reviewed, does not apply where the verdict is inconsistent on its face and shows an abuse of power on the jury's part. Pugh v. Bluff City Excursion Co. (1910) 177 Fed. 399, 101 C. C. A. 403.

45. —— **Proceedings after judgment, and costs and allowances.**—The award of costs in equity cases rests in the sound discretion of the trial court, and will not be disturbed by an appellate court except in cases of manifest abuse of such discretion. Accordingly, held, in this case, that no sufficient reason

appeared for disturbing the decision of the trial court refusing to award costs against a successful defendant, on the ground that it was the real party in interest, behind two other defendants, who were unsuccessful. Tyler Min. Co. v. Sweeney (1897) 79 Fed. 277, 24 C. C. A. 578.

Where an allowance of $2,500, as attorney's fees, was recommended by the special master, but the sum was increased by the court to $3,300, held, that the allowance, though liberal, would not be disturbed on appeal. Central Trust Co. v. Ingersoll (1898) 87 Fed. 427, 31 C. C. A. 41.

The amount to be allowed as counsel fees to the petitioning creditors does not rest in the arbitrary determination of the district court, but in legal judgment and judicial discretion, and the exercise of such discretion is subject to review by the appellate court. The amount must in all cases be reasonable, and depends upon the services rendered and their value, such value to be determined upon evidence, or, in the absence of evidence, upon the court's knowledge of their worth. In re Curtis (1900) 100 Fed. 784, reversing order (D. C. 1899) 91 Fed. 737.

In a suit in equity the matter of costs rests in the discretion of the court, and from a decree for costs in the courts of the United States no appeal lies except where they are made payable from a fund in court. Foster v. Elk Fork Oil & Gas Co. (1900) 99 Fed. 617, 40 C. C. A. 21.

According to the practice in the federal courts, an appellate tribunal is precluded from revising the exercise of discretion in setting aside a judicial sale by a court having equitable jurisdiction, unless there is an abuse of power, or the case is otherwise extreme. In re Shea (1903) 126 Fed. 153, 61 C. C. A. 219, affirming decree (D. C. 1903) 122 Fed. 742.

The rule applied that an allowance of counsel fees by a court of equity from a fund in court is largely discretionary, and will not ordinarily be disturbed by an appellate court, where the judge who made the same presided throughout all of the proceedings, and therefore had personal knowledge of the services rendered. Weiss v. Haight & Freese Co. (1908) 165 Fed. 432, 91 C. C. A. 382.

A motion that an exception be inserted in a bill of exceptions, where no exception was in fact taken, is addressed to the discretion of the trial judge, and his denial of the motion cannot be reviewed on a writ of error. Reader v. Haggin (1908) 160 Fed. 909, 88 C. C. A. 91.

The sale of the property of an insolvent corporation pending contested litigation as to the right, while not usual, is within the sound discretion of the court, and its action cannot be reviewed where the fairness and validity of the sale are not otherwise attacked. McGraw v. Mott (1910) 179 Fed. 646, 103 C. C. A. 204.

On appeal from an equity decree, the court's allowance of costs is generally treated as final, unless a palpable abuse of judicial discretion is shown. Blassengame v. Boyd (1910) 178 Fed. 1, 101 C. C. A. 129, 21 Ann. Cas. 800, affirming decree Blassingame v. Board of Com'rs of Haywood County (C. C. 1909) 172 Fed. 630.

The denial of a motion for a nunc pro tunc order to amend a judgment, being within the discretion of the trial court, is not reviewable in the federal courts. Mason v. Smith (1911) 191 Fed. 502, 112 C. C. A. 146.

46. Error waived in appellate court.—Errors assigned but not urged or discussed in the briefs or argument of counsel will be deemed waived. Van Gunden v. Virginia Coal & Iron Co. (1892) 52 Fed. 838, 3 C. C. A. 294; Branch v. Texas Lumber Manuf'g Co. (1893) 53 Fed. 849, 4 C. C. A. 52 (judgment reversed [1893] 56 Fed. 707, 6 C. C. A. 92); Wetherby v. Stinson (1894) 62 Fed. 173, 10 C. C. A. 243; Allen v. Seawell (1895) 70 Fed. 561, 17 C. C. A. 217; American Fibre-Chamois Co. v. Buckskin-Fibre Co. (1896) 72 Fed. 508, 18 C. C. A. 662 (affirming judgment Miller's Adm'r v. Norfolk & W. R. Co. [C. C. 1891] 47 Fed. 264); Texas & P. Ry. Co. v. Reeder (1896) 76 Fed. 550, 22 C. C. A. 314 (judgment affirmed [1898] 18 S. Ct. 705, 170 U. S. 530, 42 L. Ed. 1134); Pickham v. Wheeler-Bliss Manuf'g Co. (1897) 77 Fed. 663, 23 C. C. A. 391 (affirming judgment Wheeler-Bliss Mfg. Co. v. Pickham [C. C. 1895] 69 Fed. 419, certiorari denied Pickham v. Wheeler-Bliss Mfg. Co. [1897] 18 S. Ct. 945, 168 U. S. 708, 42 L. Ed. 1211); Red Jacket Mfg. Co. v. Davis (1897) 82 Fed. 432, 27 C. C. A. 204; Repauno Chemical Co. v. Victor Hardware Co. (1900) 101 Fed. 948, 42 C. C. A. 106; Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. (1908) 159 Fed. 824, 86 C. C. A. 648; McNeil v. McNeil (1909) 170 Fed. 289, 95 C. C. A. 485 (affirming decree [C. C. 1897] 78 Fed. 834); Chesapeake & O. Ry. Co. v. Dandridge (1909) 171 Fed. 74, 96 C. C. A. 178; Bibber-White Co. v. White River Valley Electric R. Co. (1909) 175 Fed. 470; Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509.

47. Subsequent appeals—Scope and extent of review.—After reversal of a judgment on writ of error, a second writ, sued out to correct alleged errors in taxation of costs after rendition of judgment, which might have been incorporated in the same record, will be dismissed at the cost of plaintiff in error. St. Louis & S. F. Ry. Co. v. McLelland (1894) 62 Fed. 118, 10 C. C.

A. 302, dismissing second writ of error (1894) 62 Fed. 116, 10 C. C. A. 300.

Where the judgment of the circuit court of appeals, and the mandates pursuant to it, cover the entire case, and provide for its final disposition in all respects, another appeal cannot be taken, after the mandates are received by the circuit court, for matter arising previous thereto. In re Pike (1896) 76 Fed. 400, 22 C. C. A. 244.

An appeal from a decree entered in a circuit court pursuant to a mandate from the circuit court of appeals should not be entertained by the latter when no errors are assigned as to matters arising subsequent to the mandate, or when permission for appeal was not obtained or asked of the appellate court. Gregory v. Pike (1896) 77 Fed. 241, 23 C. C. A. 138.

An appeal, taken to the circuit court of appeals from a decree of the circuit court entered in accordance wtih the mandate of the former court upon a previous appeal, will be dismissed, even though an appeal lie to the supreme court from the decision of the circuit court of appeals. Merrill v. National Bank (1896) 78 Fed. 208, 24 C. C. A. 63, decree affirmed (1899) 19 S. Ct. 360, 173 U. S. 131, 43 L. Ed. 640.

Where the record shows that the questions presented were necessarily involved and were decided on a previous appeal by another party from the same decree, and in accordance with such decision the judgment below was modified, the court will simply direct an affirmance of the modified decree. Morrison v. Kuhn (1897) 80 Fed. 740, 26 C. C. A. 130.

A decree entered in accordance with the mandate of the appellate court issued on appeal from a former decree is not appealable. Tyler Min. Co. v. Last Chance Min. Co. (1899) 97 Fed. 394, 38 C. C. A. 219.

A decree entered by a district court in a suit in admiralty, after receipt of a mandate from the supreme court, may be reviewed by an appeal to the circuit court of appeals as to matters not considered by the supreme court, and left open by the mandate. The New York (1900) 104 Fed. 561, 44 C. C. A. 38.

Where a cause is brought up by a second appeal, no matter necessarily involved in the first appeal will be re-examined. Board of Com'rs of Ouray County v. Geer (1901) 108 Fed. 478, 47 C. C. A. 450.

Questions raised on a second appeal which might have been raised and determined in the former appeal are res judicata. Clark v. Brown (1902) 119 Fed. 130, 57 C. C. A. 76.

An interlocutory decree was entered enjoining defendants from infringing a patent, and directing an accounting for past infringement, from which on appeal was taken by defendants. On the mandate of the Circuit Court of Appeals, a second and modified decree was entered, enlarging the scope of the injunction, but still interlocutory. Held that, since such decree was merely in execution of the mandate of the appellate court, it was not appealable. Minnesota Moline Plow Co. v. Dowagiac Mfg. Co. (1903) 126 Fed. 746, 61 C. C. A. 352, writ of certiorari denied (1904) 25 S. Ct. 788, 195 U. S. 630, 49 L. Ed. 352.

The Circuit Court rendered judgment for defendant on a general verdict and special findings. Plaintiff brought error on the ground that the judgment should have been in its favor. The court on appeal reversed judgment, and the Circuit Court rendered judgment for plaintiff. Defendant brought error on the ground that the rulings on the trial were erroneous. Held, that the writ was maintainable, because defendant could not have maintained a writ to challenge the former judgment. Guarantee Co. of North America v. Phenix Ins. Co. (1903) 124 Fed. 170, 59 C. C. A. 376.

After reversal of a judgment in his favor, defendant in error may maintain error or appeal to review questions of law which could not have been litigated on the first writ or appeal, and to reverse the judgment directed by the appellate court. Id.

Assignments of error not discussed in plaintiff in error's brief need not be reviewed. Mann v. Dempster (1910) 181 Fed. 76, 104 C. C. A. 110.

Errors not pointed out or discussed in plaintiff in error's brief will not be considered. Ireton v. Pennsylvania Co. (1911) 185 Fed. 84, 107 C. C. A. 304, writ of certiorari denied (1912) 32 S. Ct. 526, 223 U. S. 728, 56 L. Ed. 633.

A Circuit Court of Appeals will not entertain an appeal from a decree entered in accordance with its mandate by a Circuit Court. Singer Mfg. Co. v. Adams (1911) 185 Fed. 768, 107 C. C. A. 658.

An issue raised by the pleadings, but not argued in the appellate court, will be treated as abandoned, and not considered. Texas Co. v. Central Fuel Oil Co. (1912) 194 Fed. 1, 114 C. C. A. 21.

48. —— **Former decision as law of case.**—The decision of a question on a former appeal is the law of the case on a subsequent appeal in the same case. Alabama G. S. R. Co. v. Carroll (1898) 84 Fed. 772, 28 C. C. A. 207 (petition for rehearing withdrawn [1897] 88 Fed. 985, 31 C. C. A. 591); Mohrenstecher v. Westervelt (1898) 87 Fed. 157, 30 C. C. A. 584; Mutual Reserve Fund Life Ass'n v. Beatty (1899) 93 Fed. 747, 35 C. C. A. 573; Patton v. Texas & P. Ry. Co. (1899) 95 Fed. 244, 37 C. C. A. 56; Texas & P. Ry. Co. v. Wilder (1900) 101 Fed. 198, 41 C. C. A. 305 (writ of error dismissed [1902] 22 S. Ct. 936, 46 L. Ed. 1264); Supreme Lodge Knights of Pythias v.

Lloyd (1901) 107 Fed. 70, 46 C. C. A. 153; Morgan v. Johnson (1901) 106 Fed. 452, 45 C. C. A. 421 (judgment affirmed [1903] Wright v. Morgan, 24 S. Ct. 6, 191 U. S. 55, 48 L. Ed. 89); Cable v. United States Life Ins. Co. in City of New York (1901) 111 Fed. 19, 49 C. C. A. 216 (judgment reversed [1903] 24 S. Ct. 74, 191 U. S. 288, 48 L. Ed. 188); City of Austin v. Bartholomew (1901) 107 Fed. 349, 46 C. C. A. 327 (writ of certiorari denied [1901] 22 S. Ct. 934, 183 U. S. 698, 46 L. Ed. 395); Mutual Life Ins. Co. of New York v. Hill (1902) 118 Fed. 708, 55 C. C. A. 536 (affirming judgment Hill v. Mutual Life Ins. Co. [C. C. 1902] 113 Fed. 44, and writ of certiorari granted Mutual Life Ins. Co. of New York v. Hill [1903] 23 S. Ct. 856, 188 U. S. 742, 47 L. Ed. 678, judgment reversed [1904] 24 Sup. Ct. 538, 193 U. S. 551, 48 L. Ed. 788); Standard Sewing Mach. Co. v. Leslie (1902) 118 Fed. 557, 55 C. C. A. 323 (writ of certiorari denied [1903] 23 S. Ct. 848, 188 U. S. 740, 47 L. Ed. 677); Montgomery County v. Cochran (1903) 126 Fed. 456, 62 C. C. A. 70; Stoll v. Loving (1903) 120 Fed. 805, 57 C. C. A. 173; Guarantee Co. of North America v. Phenix Ins. Co. (1903) 124 Fed. 170, 59 C. C. A. 376; Souer v. De Bary (1900) 105 Fed. 293, 44 C. C. A. 484; Mutual Reserve Fund Life Ass'n v. Ferrenbach (1906) 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163; Buster v. Wright (1905) 135 Fed. 947, 68 C. C. A. 505 (affirming decree Buster & Jones v. Wright [1904] 82 S. W. 855, 5 Ind. T. 404); Anderson v. Messenger (1907) 158 Fed. 250, 85 C. C. A. 468; Roth v. Mutual Reserve Life Ins. Co. (1908) 162 Fed. 282, 89 C. C. A. 262; Development Co. of America v. King (1909) 170 Fed. 923, 96 C. C. A. 139; Great Northern Ry. Co. v. Western Union Telegraph Co. (1909) 174 Fed. 321, 98 C. C. A. 193; National Surety Co. v. Kansas City Hydraulic Press Brick Co. (1910) 182 Fed. 54, 104 C. C. A. 494; Columbia Chemical Co. v. Duff (1911) 184 Fed. 876, 107 C. C. A. 200; U. S. v. Axman (1912) 193 Fed. 644, 113 C. C. A. 512; Stone, Sand & Gravel Co. v. U. S. (1912) 195 Fed. 68, 115 C. C. A. 252; New York, N. H. & H. R. Co. v. Lehtohner (1913) 204 Fed. 775, 123 C. C. A. 587; Wolf Bros. & Co. v. Hamilton Brown Shoe Co. (1913) 206 Fed. 611, 124 C. C. A. 409 (reversing decree [C. C. 1912] 192 Fed. 930); Town of Fletcher v. Hickman (1913) 208 Fed. 118, 125 C. C. A. 346.

Where the supreme court decides that the circuit court has jurisdiction of a cause, and remands the same for the taking of an account, the circuit court of appeals cannot, on a subsequent appeal, reopen the question of jurisdiction. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1892) 51 Fed. 929, 2 C. C. A. 542, denying motion to dismiss appeal (C. C. 1892) 49 Fed. 774.

An expression of opinion on the merits by the supreme court in reversing and remanding an admiralty cause, which was again tried in the circuit court after the passage of the judiciary act of March 3, 1891, is not binding on the circuit court of appeals when, according to its practice, the case is brought before it on all the evidence, which shows an additional material fact not in the record before the supreme court, and the absence of which that court expressly recognized. The E. A. Packer (1893) 58 Fed. 251, 7 C. C. A. 216, affirming decree (C. C. 1892) 49 Fed. 92, petition for writ of certiorari denied The E. A. Packer v. New Jersey Lighterage Co. (1893) 14 S. Ct. 1150, 154 U. S. 518, 38 L. Ed. 1077.

A decision by an appellate court that facts found by the trial court in place of a jury showed, as matter of law, that certain color of title was "made in good faith," becomes the law of the case, when, on a new trial, the facts proved to the jury are substantially the same. Thatcher v. Gottlieb (1894) 59 Fed. 872, 8 C. C. A. 334, affirming judgment Gottlieb v. Thatcher (1892) 51 Fed. 373, 2 C. C. A. 278.

An allowance to a special master being contested on appeal, the court stated that the allowance appeared to be excessive, and that, as the cause must be remanded, the allowance should be regularly contested. The case was referred to a different master, and the special master proved by his own evidence that he had earned the amount asked, but his allowance was considerably reduced. Held, that on a second appeal the reduced allowance should not be disturbed. Florida Cent. & P. R. Co. v. Cutting (1895) 68 Fed. 586, 15 C. C. A. 597, affirming decree Cutting v. Tavares, O. & A. R. Co. (1894) 61 Fed. 150, 9 C. C. A. 401.

On a second writ of error an appellate court is bound by its prior decision only upon points distinctly made and determined, and not upon points which might have been, but were not, raised. Balch v. Haas (1896) 73 Fed. 974, 20 C. C. A. 151, reversing judgment Haas v. Balch (1893) 56 Fed. 984, 6 C. C. A. 201.

The rule that an appellate court is bound by its decision on a former appeal in the same case is not applicable where the point decided was dependent on the evidence, and on the second trial the evidence is different in a material respect. Balch v. Haas (1896) 73 Fed. 974, 20 C. C. A. 151, reversing judgment Haas v. Balch (1893) 56 Fed. 984, 6 C. C. A. 201.

Where a mandate from the supreme court reserves but a single question of fact for the further determination of the trial court, all other questions involved in the case are res judicata between the parties, and not open to further consideration by the trial court,

nor on a review of its decision. People of State of Illinois v. Illinois Cent. R. Co. (1899) 91 Fed. 955, 34 C. C. A. 138.

A second writ of error or appeal does not authorize a reconsideration of any question determined on the first writ of error or appeal, and where the appellate court, on the first hearing, had construed the contract in suit, and had determined that one of the parties thereto was estopped to deny his liability thereunder, its decision is a final adjudication on that question, and becomes the law of the case, notwithstanding additional findings made on the second trial, which in no way modify the facts contained in the original finding, by which the contract was established. Mathews v. Columbia Nat. Bank (1900) 100 Fed. 393, 40 C. C. A. 444.

A second appeal of writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question, either of law or fact, which was considered and determined on the first appeal or writ of error, notwithstanding a contrary decision of such question in the meantime by a state court in a different case. Haley v. Kilpatrick (1900) 104 Fed. 647, 44 C. C. A. 102.

Where the action of a trial court in a certain respect was specifically assigned as error in the appellate court, and was approved, at least by implication, the trial court is justified in following the same course on a second trial, and its action in so doing will not be again reviewed on a second appeal. Olsen v. North Pacific Lumber Co. (1902) 119 Fed. 77, 55 C. C. A. 665, affirming judgment (C. C. 1901) 106 Fed. 298.

While an appellate court has the abstract power upon a second review to reach a result inconsistent with its decision on the first review of the same case, this power is to be exercised very sparingly, and only under extraordinary conditions. Chesapeake & O. R. Co. v. McKell (1913) 209 Fed. 514, 126 C. C. A. 336.

Propositions once decided on appeal cannot be reconsidered on second appeal but such questions may be considered as arise from a substantial change in the evidence. Crotty v. Chicago Great Western Ry. Co. (1909) 169 Fed. 593, 95 C. C. A. 91.

Where a case has been once taken to the Circuit Court of Appeals on a writ of error and determined, and remanded for a new trial, the decision of such court on all questions of law becomes the law of the case, and a second writ of error brings up for review nothing but the proceedings had on the second trial, requiring a consideration of new evidence or a different state of facts. Beiseker v. Moore (1909) 174 Fed. 368, 98 C. C. A. 272.

Propositions of law once decided on appeal are not open to reconsideration on a second appeal in the same case, though the first appeal was from an interlocutory decree. Brown v. Lanyon Zinc Co. (1910) 179 Fed. 309, 102 C. C. A. 497.

The decision of the Circuit Court of Appeals rendered on appeal from a judgment sustaining a demurrer to the bill in a suit by a legatee against the executor to establish and enforce rights under the will is the law of the case on a subsequent trial. Higgins v. Eaton (C. C. 1911) 188 Fed. 938, decree reversed (1913) 202 Fed. 75, 122 C. C. A. 1.

Where a judgment for plaintiff is reversed on a former appeal for error in refusing to direct a verdict for defendant, because plaintiff was negligent, as a matter of law, such determination is the law of the case on a retrial, unless the evidence then introduced is so different from that previously considered by the appellate court as to justify a different conclusion. St. Louis & S. F. R. Co. v. Cundieff (1911) 184 Fed. 891, 107 C. C. A. 213.

Every question of fact or law which was before a Circuit Court of Appeals upon a writ of error, and decided by its opinion, is conclusively settled for that court in further proceedings in the same action, and the finality of such decision is not affected by the fact that the judgment was one of reversal and direction of a new trial; but in such case the rule of conclusiveness is confined to questions actually discussed and decided by the opinion. E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co. (1911) 191 Fed. 543, 112 C. C. A. 153, petition for writ of certiorari dismissed (1911) 32 S. Ct. 533, 223 U. S. 746, 56 L. Ed. 640.

Plaintiff, a passenger on a steamer lying in a river, was injured by a rock thrown out by a blast on shore. In an action for such injuries, the Circuit Court of Appeals held that evidence showing that defendants gave no notice to the boat passengers that a blast was about to be fired was sufficient evidence of negligence to justify submitting the case to the jury. Held, that additional evidence introduced on a subsequent trial after reversal that the blasts fired were not in a series, but were continuous, with short intervals of time between them, so that it was practically impossible that there should be separate notices of the firing of each blast, did not so change the rights of the parties as to deprive the former decision on appeal of its effect as the law of the case. Smith v. Day (C. C. 1905) 136 Fed. 964.

49. —— **Questions concluded.**—Where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; and the appellate court

is not bound to consider any of the questions which were before it on the first writ of error. Republican Min. Co. v. Tyler Min. Co. (1897) 79 Fed. 733, 25 C. C. A. 178, certiorari denied (1897) 17 Sup. Ct. 998, 166 U. S. 720, 41 L. Ed. 1187.

In a suit by shipowners, under the statute, to limit their liability to certain libelants of vessels, the court adjudicated the claims of the defendants, and distributed between them the fund in court. An appeal was taken by the defendants, and the decree was reversed, on the ground that the petitioners had not surrendered all the property liable; but on such appeal no question was raised as to the validity of the claims allowed to the several defendants, nor was such question raised by new pleadings after the case was remanded. Held that, as between the defendants, the validity of the claim of each was res judicata, and could not be questioned by any of the other defendants on a subsequent appeal. Oregon R. R. & Nav. Co. v. Balfour (1898) 90 Fed. 295, 33 C. C. A. 57.

On a writ of error taken by defendant to review a judgment subsequently entered on a verdict for plaintiff, where plaintiff's evidence was the same and defendant introduced no evidence except such as had previously been held incompetent, the appellate court would not consider the instructions given or refused, since under its prior decision it would not have been error to direct a verdict for plaintiff. Standard Sewing Mach. Co. v. Leslie (1902) 118 Fed. 557, 55 C. C. A. 323, writ of certiorari denied (1903) 23 Sup. Ct. 848, 188 U. S. 740, 47 L. Ed. 677.

The fact that plaintiff withdrew all objection to the admission of incompetent evidence does not entitle defendant to have it considered by the appellate court and given an effect different from that to which it is entitled under the law of the case as previously settled. Id.

Where the questions presented on an appeal from a final decree finding infringement of a patent do not differ in any material respect from those determined adversely to the appellant on a former appeal from an interlocutory order granting a preliminary injunction, and the membership of the court has changed in the meantime, such questions will not be again reviewed. Cimiotti Unhairing Co. v. Nearseal Unhairing Co. (1903) 123 Fed. 479, 59 C. C. A. 58, affirming decree (C. C. 1902) 118 Fed. 1021.

Where, on a prior appeal, the question of the validity of certain bonds issued by the bankrupt corporation and of the claim made thereon was presented and determined, the bankrupt's trustee was not entitled to contest questions relating to interest on such bonds on a subsequent appeal. In re Water-100 Organ Co. (1907) 154 Fed. 657, 83 C. C. A. 481, modifying decree (D. C. 1906) 147 Fed. 814.

Where, after a verdict for a plaintiff suing as administrator, a motion in arrest of judgment was sustained and judgment entered dismissing the action on the ground that plaintiff's appointment as administrator was void, which judgment was reversed by the appellate court, and a judgment on the verdict directed which was entered, the only question concluded by such decision of the appellate court was that of the validity of plaintiff's appointment, and the defendant may maintain proceedings in error after the entry of the final judgment to review questions which arose on the trial and which could not have been considered by the appellate court on the prior hearing. Alaska-Treadwell Gold Min. Co. v. Cheney (1908) 162 Fed. 593, 89 C. C. A. 351.

The decision of an appellate court becomes the law of the case, and the legal effect of evidence once determined will not be reconsidered, where, without material change, it is again brought to the court on a second appeal or writ of error. Baldwin v. Chicago, R. I. & P. Ry. Co. (1911) 192 Fed. 554, 113 C. C. A. 26.

A decision of the Circuit Court of Appeals that a contract of sale of blue grass seed is ambiguous as to the number of pounds to be delivered for a bushel, and remanding the case for the jury to determine the meaning of the contract in view of the facts, conclusively determines the materiality of evidence of custom that 14 pounds constituted a bushel, admitted on the trial. Brent v. Chas. H. Lilly Co. (D. C. 1913) 202 Fed. 335.

50. Decision of cause—Necessity of decision.—Pending an appeal in a suit in equity to enforce a conveyance of lands, the commencement by the plaintiff of an action of ejectment against the defendant to recover the same lands, and the rendition of a verdict and judgment therein adverse to the plaintiff, may properly be treated by the appellate court as an abandonment of the equity suit, or as a conclusive adjudication against the plaintiff of the facts on which the case rests, either of which will justify a dismissal of the bill. Bryar v. Campbell (1898) 90 Fed. 690, 33 C. C. A. 236, decree affirmed (1900) 20 Sup. Ct. 794, 177 U. S. 649, 44 L. Ed. 926.

51. —— Remand without decision.—When the appellate court has no jurisdiction to review a decision of the circuit court rendered without a jury because the stipulation waiving a jury was not unconditional, an agreement made in the appellate court to amend the stipulation by making it unconditional does not constitute a ground for remanding the cause to the circuit court in order that the stipulation may there

be amended, since the court has no power in such case to remand unless it reverses. Smith v. Weeks (1893) 53 Fed. 758, 3 C. C. A. 644.

A motion having been made to dismiss a writ of error on the ground that no final judgment was entered in the lower court, the entry being, "Verdict for plaintiff, and his damages assessed at $1,000, besides costs, and judgment accordingly," the appellate court would not determine whether the entry constituted a valid judgment, but would remit the case to the court below that it might first pass thereon. Blumenthal v. Shaw (1895) 70 Fed. 801, 17 C. C. A. 423.

Under this section an admiralty cause will be remanded to the court below for decree as in case of other appeals. Chicago Ins. Co. v. Graham & Morton Transp. Co. (1901) 108 Fed. 271, 47 C. C. A. 320, rehearing denied (1901) 109 Fed. 352, 48 C. C. A. 397.

Where an issue was not determined by the trial court, which erroneously ruled that it was not within the pleadings, it will not be determined by the appellate court on a writ of error, but the cause will be remanded for a new trial. City of Abilene v. Cornell University (1902) 118 Fed. 379, 55 C. C. A. 205.

Where an appeal has been taken from an interlocutory decree for an injunction and accounting in a patent suit, the Circuit Court of Appeals cannot remand the cause, with leave to the Circuit Court to reopen the decree for further proceedings, without first reversing, nor will it reverse the decree for that purpose, or with any directions, without an examination of the merits, but it may, on a proper application by appellant, dismiss the appeal without prejudice, where it does not appear that the appellee will be unduly prejudiced thereby. Greene v. United Shoe Machinery Co. (1903) 124 Fed. 961, 60 C. C. A. 93, applying Marden v. Campbell Co., 67 Fed. 809, 15 C. C. A. 26.

Where the record on appeal in a suit for infringement fails to show any connection between the defendant and the act of infringement proved, the court will not remand the case to permit the amendment of the pleadings and the introduction of new evidence to prove such connection, nor to substitute as defendant the party shown to have infringed. National Casket Co. v. Stolts (1905) 135 Fed. 534, 68 C. C. A. 84, affirming decree National Casket Co. v. Stoltz (C. C. 1904) 127 Fed. 158.

Where it appeared that separate and affirmative defenses were pleaded by certain of the defendants, which had not been tried, the court would not render judgment for plaintiffs, but would remand the case for a new trial. Allen v. Parmalee (1906) 142 Fed. 354, 73 C. C. A. 402.

The Circuit Court of Appeals may on its own motion authorize a party to file an amended pleading in the court below to cover relief to which the evidence in the record shows him entitled. Dietz v. Horton Mfg. Co. (1909) 170 Fed. 865, 96 C. C. A. 41.

Where counsel in the trial of a cause and the court in its charge to the jury proceeded on an erroneous construction of the statute on which the action was based, an appellate court will not undertake to determine the case on the evidence in the record, but will remand for a new trial. Union Castle Mail S. S. Co. v. Thomsen (1911) 190 Fed. 536, 111 C. C. A. 368.

52. —— **Effect of change in law or facts.**—An amendment of the statute taking away the jurisdiction of the circuit or district court over a case after judgment therein, and while a writ of error for its review is pending in the circuit court of appeals, deprives the latter court of the means of making its judgment effective by means of a mandate to the court below, and the writ of error will be abated. U. S. v. McCrory (1899) 91 Fed. 295, 33 C. C. A. 515.

Where a judgment of a state court, which has been successfully pleaded in bar of another suit between the same parties in a circuit court of the United States, is reversed on appeal by the supreme court of the state during the pendency of proceedings to review the judgment of the circuit court on a writ of error from the circuit court of appeals, the latter court may properly depart from the ordinary rule which requires it to determine the cause upon the facts as shown by the record, and, upon being advised in an authentic manner of the action of the state court, may, in the exercise of its discretionary power, vacate the judgment below, although the record discloses no error, where such action will shorten litigation, and best subserve the ends of justice. Ransom v. City of Pierre (1900) 101 Fed. 665, 41 C. C. A. 585.

53. —— **Change of parties.**—Where a part of a right of action survived against the administrator of a defendant, who died pending appeal to the Supreme Court of the Indian Territory but his death was not known to such court at the time it affirmed a decree, as he might have been substituted for the deceased by such court, he may be substituted in the United States Circuit Court of Appeals on an appeal from the decision of the territorial court. Wilhite v. Skelton (1906) 149 Fed. 67, 78 C. C. A. 635, reversing judgment (Ind. T. 1904) 82 S. W. 932.

54. —— **Scope of decision or relief.**—Though the court of appeals can grant injunctions in aid of its jurisdiction, it cannot, on appeal from an order dissolving an injunction against enforcement of an execution, modify the order so as to permit the sheriff to

collect the money, and then restrain him from paying it over to the execution plaintiff, where no such order was asked, and the right thereto was not considered in the court below. Leathe v. Thomas (1899) 97 Fed. 136, 38 C. C. A. 75.

The appellate court cannot re-examine the facts and render the judgment it deems right. Mutual Reserve Life Ins. Co. v. Heidel (1908) 161 Fed. 535, 88 C. C. A. 477.

A decision on demurrer by an appellate court on the facts alleged in the bill is an adjudication of the rights of the parties to that extent where the proof sustains such allegations, but not where it is materially different. Williams v. American Ass'n (1912) 197 Fed. 500, 118 C. C. A. 1.

55. —— **Findings and conclusions.**—In appeals taken under the Circuit Court of Appeals Act, findings of fact or conclusions of law are not required. In re Martin (1912) 201 Fed. 31, 119 C. C. A. 363.

56. —— **Divided court.**—Where one judge of the circuit court of appeals is disqualified, and the other two are divided in opinion, the decision below must be affirmed. Texas & P. Ry. Co. v. Gentry (1893) 57 Fed. 422, 6 C. C. A. 413.

The rule applied that affirmances by the federal Supreme Court, by reason of the court being equally divided, settle no principle of law. Kinney v. Conant (1909) 166 Fed. 720, 92 C. C. A. 410, affirming judgment Conant v. Kinney (C. C. 1908) 162 Fed. 581, and writ of certiorari denied (1909) 29 S. Ct. 703, 214 U. S. 526, 53 L. Ed. 1068.

57. **Affirmance — Preserving existing status.**—On an appeal from an order denying a motion to dissolve an injunction pendente lite, restraining an execution sale of personal property, held that, as the questions arising were proper subjects for deliberate examination, the order would be affirmed, under the rule that, where a stay of proceedings will not cause too great injury to defendants, it is proper to preserve the existing state of things until the rights of the parties can be fully investigated. Hadden v. Dooley (1896) 74 Fed. 429, 20 C. C. A. 494.

58. —— **Error not shown.**—In a suit on an assigned contract, no objection was made in the federal Circuit Court, nor on writ of error in the Circuit Court of Appeals, to the fact that defendant's citizenship was not shown, but objection was made to the fact that it did not appear that the suit might have been prosecuted in the Circuit Court on the contract, if no assignment had been made; and, a general demurrer being sustained, plaintiff refused to further amend. Held, that the Circuit Court of Appeals is bound to affirm the judgment of dismissal for want of jurisdiction in the Circuit Court. J. J. McCaskill Co. v. Dickson (1908) 159 Fed. 704, 86 C. C. A. 572.

If a declaration is fatally defective, the court will affirm a judgment nonsuiting a plaintiff, without considering whether nonsuit was proper. Earhart v. Campbell (Super. Ct. Ark. 1827) Fed. Cas. No. 4,241a.

59. —— **Reversal ineffectual or not beneficial.**—When no substantial right is involved, a judgment against a plaintiff will not be reversed, when it appears from the statement of his cause of action that, at most, he is only entitled to recover nominal damages. Kelly v. Fahrney (1899) 97 Fed. 176, 38 C. C. A. 103.

It is only where there is no doubt that an error committed on the trial of a cause was without prejudice, and that a second trial must result in the same judgment, that an appellate court may disregard such error, and affirm the judgment rendered. U. S. v. Price Trading Co. (1901) 109 Fed. 239, 48 C. C. A. 331.

Where a bill of review showed on its face that the circuit court lacked the power to hear it, a reversal of the decree dismissing the bill for the purpose of having affidavits of the defendants, erroneously omitted from the demurrers to the bill, attached, would be frivolous. Chamberlin v. Peoria, D. & E. Ry. Co. (1902) 118 Fed. 32, 55 C. C. A. 54.

60. —— **Remission of part of recovery.**—A party who appeals from a decree in his favor in a collision case is not entitled to interest on the original recovery pending the appeal. New York & Cuba Mail Steamship Co. v. The Express, The N. B. Starbuck, and The Charm (1892) 59 Fed. 476, 8 C. C. A. 182, judgment reversed The Haytian Republic (1894) 14 S. Ct. 992, 154 U. S. 118, 38 L. Ed. 930.

Where the trial court has erroneously instructed the jury as to the measure of damages in a certain particular, and it is apparent that the erroneous assessment under the instruction could not have exceeded a given sum, the appellate court may affirm the judgment on condition that plaintiff remit such excess. Hazard Powder Co. v. Volger (1893) 58 Fed. 152, 7 C. C. A. 130; Id., 58 Fed. 158, 7 C. C. A. 136.

Where plaintiff, upon the findings of the jury, is entitled to recover a specific sum, but evidence of damage in a larger sum has erroneously been admitted, and judgment given for such larger sum, the plaintiff may, by filing a remittitur as to the excess in the appellate court, obtain an affirmance of the judgment. Loewer v. Harris (1893) 57 Fed. 368, 6 C. C. A. 394.

Interest on the amount of a verdict may be allowed from the date of the

verdict to the date of the judgment, when entry of judgment is delayed by a motion for new trial. Equitable Life Assur. Soc. of United States v. Trimble (1897) 83 Fed. 85, 27 C. C. A. 404.

A correction of a judgment on appeal in charging interest may be made without reversing the case. American Nat. Bank v. Williams (1900) 101 Fed. 943, 42 C. C. A. 101.

Where excessive damages are awarded, and plaintiff makes a remittitur sufficient to reduce the judgment to an amount not excessive, the judgment will not be reversed solely because of the excessiveness of the verdict. Cunningham v. Underwood (1902) 116 Fed. 803, 53 C. C. A. 99.

Though a verdict for excessive damages is usually to be regarded as indicating partiality or inconsiderateness necessitating a reversal, the court may allow such a verdict to stand, if the excess be remitted, where it is satisfied that the jury acted honestly, and that their error as to damages arose from lack of a full presentation of that issue. Hawes v. Warren (C. C. 1902) 119 Fed. 978.

Where a railroad company, when sued by a shipper for a loss of goods, pleaded a limitation of its liability, but did not tender or offer to pay the amount due upon its own construction of the contract, and, relying on another defense, contested the case and carried it through several courts, incurring heavy costs, on a final decision sustaining its contention as to the limitation, the appellate court will affirm the judgment for the reduced amount on a remittitur of the excess by plaintiff. Missouri, K. & T. Ry. Co. of Texas v. Patrick (1906) 144 Fed. 682, 75 C. C. A. 434, modifying judgment Patrick v. Missouri, K. & T. Ry. Co., 88 S. W. 330, 5 Ind. T. 742.

Where, in an action for injuries to a minor defendant excepted to the court's instruction permitting a recovery for the loss of the minor's services during minority, the error was not affected by the father's offer after verdict to release all claims for damages for loss of time, services, or earning capacity during the minority of his son, provided the judgment was affirmed. Farrar v. Wheeler (1906) 145 Fed. 482, 75 C. C. A. 386.

Where a judgment sought to be reviewed on writ of error had for its sole support a verdict which was not only beyond the issues, but in direct conflict with the complaint, the court could not remit the excess of the verdict, so as to reduce the judgment to the amount plaintiff was entitled to recover and affirm the same. Phœnix Assur. Co. v. Maryland Gold Mining & Development Co. (1906) 146 Fed. 501, 77 C. C. A. 15.

Where a judgment is excessive, but capable of correction by computation merely, it will not be reversed by an appellate court if the defendant in error files a remittitur of the excess. Van Boskerck v. Torbert (1911) 184 Fed. 419, 107 C. C. A. 383.

Where a judgment is erroneous only in the amounts of damages allowed, and the items for which plaintiff was not entitled to recover were clearly ascertainable, the Court of Appeals was authorized to affirm the judgment in case plaintiff would agree to remit an amount sufficient to cover the items for which he was not entitled to recover. C. J. Huebel Co. v. Leaper (1911) 188 Fed. 769, 110 C. C. A. 475.

The practice of permitting a remission of part of the recovery and as so modified affirming a judgment which must otherwise be reversed for error at the trial can only be followed where it appears from the record that certain elements of the verdict may have been affected by the error, and that the remainder of the verdict could not have been so affected. Chesbrough v. Woodworth (1912) 195 Fed. 875, 116 C. C. A. 465.

61. —— **Rendering final judgment.**—When a decree for libelant, which included interest, is affirmed, he, when appellee, is entitled to interest on the whole decree, unless special circumstances induce the court to disallow it. The Umbria (1892) 59 Fed. 475, 8 C. C. A. 181, disapproving Deems v. Canal Line (C. C. 1878) Fed. Cas. No. 3736, 14 Blatchf. 474, and following The Blenheim (C. C. 1883) 18 Fed. 47.

In a criminal case, the circuit court, though affirming the judgment of the lower court on writ of error, is not bound to impose the same sentence. It can award execution in its discretion as to the degree of punishment which should be imposed. Bates v. U. S. (C. C. 1881) 10 Fed. 92.

In a criminal case, brought before it on a writ of error, a circuit court may alter the sentence where it affirms the judgment. U. S. v. Wynn (C. C. 1882) 11 Fed. 57.

Ordinarily, when an admiralty decree of the district court, which includes interest, is affirmed by the circuit court, interest will be allowed on the full amount of the decree below. The Blenheim (C. C. 1883) 18 Fed. 47.

The power to affix the penalty on conviction in a criminal case is vested exclusively in the trial court, and the appellate court is vested with no jurisdiction in respect to the exercise of that power, provided it does not exceed the statutory limit. Raymond v. U. S. (1905) 26 App. D. C. 250.

62. —— **Directing further proceedings in lower court.**—It is not within the province of a United States circuit court of appeals, on affirming a judgment of a circuit court on appeal by an importer from a decision of the

board of general appraisers, to grant or withhold leave to apply to an officer of the customs for remission of the duties, or to direct or suggest the action of the circuit court in regard to a new trial upon newly-discovered evidence. In re Marquand (1893) 57 Fed. 189, 6 C. C. A. 309, denying motion U. S. v. Glaenzer (1893) 55 Fed. 642, 5 C. C. A. 225.

On affirmance of a decree on an issue not raised by the parties, and which appellants suggested might be met by further proofs, the affirmance should be with liberty to apply to the court below for leave to file a bill of review. Woodward v. Boston Lasting Mach. Co. (1894) 63 Fed. 609, 11 C. C. A. 353, affirming decree (1894) 60 Fed. 283, 8 C. C. A. 622.

On appeal by complainant from a decree rendered after final hearing, the appellate court, on affirming, will not ordinarily reserve leave for an amendment of the bill which would require the taking of new evidence. American Bell Tel. Co. v. U. S. (1895) 68 Fed. 542, 15 C. C. A. 569, decree affirmed U. S. v. American Bell Tel. Co. (1897) 17 Sup. Ct. 809, 167 U. S. 224, 42 L. Ed. 144, motion to dismiss denied (1895) 16 Sup. Ct. 69, 159 U. S. 548, 40 L. Ed. 255.

Where an order refusing to dissolve an injunction pendente lite restraining a sheriff from selling certain silks on execution was affirmed, but it appeared to the court that a sale of the goods would be to the pecuniary advantage of both parties, held, that leave would be reserved to the court below to modify its order so that by consent of the parties the silk might be sold under the execution, after ample notice, and the proceeds placed in the registry to await a final decision. Hadden v. Dooley (1896) 74 Fed. 429, 20 C. C. A. 494.

Where, pending appeal from an adverse decision in an action to eject a mining company from plaintiff's land, used for the operation of its tramway, defendant brought suit to condemn a right of way therefor, and obtained an order permitting it to occupy the property pendente lite, the circuit court, on the affirmance of his decree in the ejectment suit, had jurisdiction to suspend the enforcement of the order of restitution pending the condemnation proceedings. U. S. v. Marshall (1903) 122 Fed. 428, 58 C. C. A. 410.

63. —— **Effect of affirmance.**—Where a Circuit Court of Appeals affirms a decision "on the opinion below," it approves the reasoning, adopts the findings, and concurs in the conclusions of the court below; but, where the decision below is merely "affirmed," such approval and concurrence are not to be inferred, but, on the contrary, it is to be understood that for some reason the appellate court prefers not to adopt the opinion below. Victor Talking Mach. Co. v. Hoschke (1911) 188 Fed. 326, 110 C. C. A. 304, reversing decree Same v. Sonora Phonograph Co. (C. C. 1911) 188 Fed. 330.

64. **Modification—Amendment of defects and correction of errors.**—An error in a sentence in a criminal prosecution, consisting in adding "at hard labor" to the "imprisonment in the penitentiary" provided by statute, and which renders the judgment voidable only, and not void, may be corrected by amendment by the United States circuit court of appeals before which the case is brought on writ of error, without the reversal of the judgment and the granting of a new trial. Jackson v. U. S. (1900) 102 Fed. 473, 42 C. C. A. 452.

Errors in a sentence, in directing the manner or place of its execution, do not necessitate a new trial; but the appellate court may either correct the sentence or remand the case for its correction by the trial court. Haynes v. U. S. (1900) 101 Fed. 817, 42 C. C. A. 34.

Where, in a prosecution for cutting timber from government land with intent to export or dispose of the same, the jury might have found under the indictment that defendant cut the timber innocently with intent to use and employ the same for permissible building, agriculture, mining, or other domestic purposes, the Circuit Court of Appeals could not, where the sentence to a fine and imprisonment was illegal because the provision of the statute providing for imprisonment had been repealed, correct the sentence by eliminating the portion providing for imprisonment; it being impossible to say that the jury found defendant guilty of cutting timber with intent to export and dispose of the same. Morgan v. U. S. (1906) 148 Fed. 189, 78 C. C. A. 323, writ of certiorari denied U. S. v. Morgan, 27 S. Ct. 784, 203 U. S. 595, 51 L. Ed. 333.

Where all questions of fact have been tried and determined without error, the incorporation in the judgment of unauthorized provisions does not necessitate a new trial, but only a modification of the judgment. Mason City & Ft. Dodge R. Co. v. Boynton (1907) 158 Fed. 599, 85 C. C. A. 421.

The Circuit Court of Appeals held authorized to correct an erroneous finding of fact based on an erroneous construction of a contract, by placing a proper construction on the contract and rendering judgment accordingly. Bayne v. U. S. (1912) 195 Fed. 236, 115 C. C. A. 188.

65. —— **Modification as to amount of recovery.**—An excessive verdict in an action for libel cannot be corrected on writ of error, where the jury has been properly instructed as to the rule of damages. Morning Journal Ass'n v. Rutherford (1892) 51 Fed. 513, 2 C. C.

A. 354, 16 L. R. A. 803, affirming judgment Rutherford v. Morning Journal (C. C. 1891) 47 Fed. 487.

Where error is discovered in a criminal case brought to the circuit court of appeals for review, the court can enter such judgment and impose such sentence as the law prescribes, or reverse the judgment and direct the court below to take further proceedings. Whitworth v. U. S. (1902) 114 Fed. 302, 52 C. C. A. 214.

A Circuit Court of Appeals has ample power, on reversal of the judgment in a criminal case because of the imposition of an excessive sentence, to correct the error without disturbing the conviction, by remanding the case, with instructions to modify the judgment by remitting the excess. Hanley v. U. S. (1903) 123 Fed. 849, 59 C. C. A. 153, rehearing granted (1903) 126 Fed. 944, 61 C. C. A. 688, judgment reversed on rehearing (1904) 127 Fed. 929, 62 C. C. A. 561, writ of certiorari denied (1904) 24 S. Ct. 858, 194 U. S. 634, 48 L. Ed. 1160.

Where plaintiff is at least entitled to nominal damages, he should be permitted to avoid a new trial for erroneous instructions by remitting damages. Cowing v. Rumsey (C. C. 1870) Fed. Cas. No. 3,296.

66. —— **Modifying provisions of judgment.**—On appeal from a final decree dismissing a defective bill in which equities justifying amendment were shown, the decree will be so amended as to dismiss without prejudice. Appleton v. Smelser (1894) 60 Fed. 137, 8 C. C. A. 519.

When a decree dismissing a bill absolutely is erroneous, in that the dismissal should be without prejudice, the court will modify it on appeal, though complainant does not urge the error. Harrison v. Farmers' Loan & Trust Co. of New York (1899) 94 Fed. 728, 36 C. C. A. 443.

Where, in a suit to restrain the driving of piles on a water front, the evidence shows no possession in complainant warranting the relief asked, but also fails to show any ownership in defendant, on review of the decree denying the injunction, and adjudging title and possession in defendant, it will be modified to one merely denying the injunction and dismissing the suit. Juneau Ferry & Navigation Co. v. Alaska S. S. Co. (1903) 121 Fed. 356, 58 C. C. A. 34.

A Circuit Court of Appeals has ample power, on reversal of the judgment in a criminal case because of the imposition of an excessive sentence, to correct the error without disturbing the conviction, by remanding the case, with instructions to modify the judgment by remitting the excess. Hanley v. U. S. (1903) 123 Fed. 849, 59 C. C. A. 153, rehearing granted (1903) 126 Fed. 944, 61 C. C. A. 688, judgment reversed on rehearing (1904) 127 Fed. 929, 62 C. C. A. 561, writ of certiorari denied (1904) 24 S. Ct. 858, 194 U. S. 634, 48 L. Ed. 1160.

On affirmance of a judgment of conviction in a criminal case, the Circuit Court of Appeals may, at least with the consent of the United States Attorney, authorize the trial judge to modify the sentence imposed. Scott v. U. S. (1908) 165 Fed. 172, 91 C. C. A. 206, affirming judgment U. S. v. Scott (C. C. 1905) 135 Fed. 697.

67. —— **Rendering judgment that should have been rendered.**—On appeal from a final decree the circuit court of appeals has authority to go beyond a mere reversal, and enter such a decree as should have been rendered by the court below on the whole case, as shown by the record; and it is its duty to review all interlocutory proceedings, of every character, to which seasonable objection has been made and insisted upon. Potter v. Beal (1892) 50 Fed. 860, 2 C. C. A. 60.

On appeal from a decree which sustains the validity of a patent, declares infringement, and awards a perpetual injunction and an accounting, the circuit court of appeals, upon reaching the conclusion that there is no infringement, may not only reverse the decree and dissolve the injunction, but may also vacate the order for an accounting, and order the bill dismissed, thus rendering such a decree as the lower court should have rendered on the whole case. Richmond v. Atwood (1892) 52 Fed. 10, 2 C. C. A. 596, 17 L. R. A. 615, reversing decree (1892) 48 Fed. 910, 1 C. C. A. 144, and disapproving Jones Co. v. Munger Improved Cotton Mach. Mfg. Co. (1892) 50 Fed. 785, 1 C. C. A. 668.

Where a motion for leave to file a plea in abatement for nonjoinder of parties was erroneously denied, and at the time of such ruling there appeared of record all the facts essential to such a plea, an appellate court will order the same judgment as if the plea had been filed and sustained. Walker v. Windsor Nat. Bank (1893) 56 Fed. 76, 5 C. C. A. 421.

68. **Reversal—By court on its own motion.**—Where the record fails to disclose proof of all the essential elements of an offense, or evidence from which the jury might have found them, the Circuit Court of Appeals may set aside the conviction, though the appropriate objection has not been made. Ripper v. U. S. (1910) 179 Fed. 497, 103 C. C. A. 478, denying rehearing 178 Fed. 24, 101 C. C. A. 152.

Where, on appeal to a federal appellate court, jurisdiction of the court below does not affirmatively appear, it is incumbent on the court of its own motion to reverse, without reviewing the merits. Newcomb v. Burbank (1910) 181 Fed. 334, 104 C. C. A. 164.

69. —— **Jurisdictional defects.**—The proper remedy is a reversal of the judgment, where the court below has no jurisdiction. Nashua & L. R. Corp. v. Boston & L. R. Corp. (1892) 51 Fed. 929, 2 C. C. A. 542, denying motion to dismiss appeal (C. C. 1892) 49 Fed. 774.

One of six legatees entitled to equal shares in a residuary estate filed a bill against her colegatees to compel them to pay to the executor $5,377.83, which they claimed by gift inter vivos from the testatrix. The circuit court dismissed the bill on the merits, and, plaintiff having appealed, the supreme court dismissed the appeal, holding that the interest of plaintiff was only one sixth of that sum, and insufficient to give that court jurisdiction. Held, that this decision was also decisive against the jurisdiction of the circuit court, and on a bill of review the original decree should be reversed, and the bill dismissed for want of jurisdiction, without prejudice. Miller v. Clark (C. C. 1892) 52 Fed. 900, appeal dismissed Clark v. Miller (1892) 13 S. Ct. 1045, 149 U. S. 770, 37 L. Ed. 960.

The jurisdiction of a federal circuit court must appear affirmatively on the record, and a default therein will be noticed by the appellate court of its own motion, and the case reversed and remanded, with directions to dismiss, unless proper amendments are made. Tinsley v. Hoot (1893) 53 Fed. 682, 3 C. C. A. 612.

Where the court was without jurisdiction, because of defective averment as to diversity of citizenship, the cause would be remanded for appropriate action by the circuit court, which might, in its discretion, permit an amendment. Hunt v. Howes (1896) 74 Fed. 657, 21 C. C. A. 356.

Where the circuit court is without jurisdiction, but perhaps by amendment the bill may be retained as to some or all of the parties, the court on appeal will not direct a dismissal, but will reverse the decree of the circuit court, at the cost of plaintiffs, and remand the cause for further proceedings. Eaton v. Hoge (1905) 141 Fed. 64, 72 C. C. A. 74.

70. —— **Error as to ground of decision.**—Where, in an action tried by the court under § 1668, ante, the court overrules demurrers to a number of pleas, but makes no special finding of facts, for which reason it is impossible to determine whether any particular plea which may have been erroneously sustained was not relied on in giving judgment, judgment will be reversed if any one of the pleas is erroneously sustained. Miller v. Houston City St. Ry. Co. (1893) 55 Fed. 366, 5 C. C. A. 134, judgment affirmed (1895) 69 Fed. 63, 16 C. C. A. 128.

In an action for personal injuries sustained in crossing a railroad track, the court directed a verdict for defendant on the sole ground that, notwithstanding the custom of many people to pass that way daily, the place of the accident was not a "crossing" in respect to which the company could be charged with negligence. Held, that where, on appeal, this ruling was found erroneous, the better practice required that the judgment be reversed, and a new trial directed, without considering a defense of contributory negligence which was not considered by the court below. Cahill v. Chicago, M. & St. P. Ry. Co. (1896) 74 Fed. 285, 20 C. C. A. 184, distinguishing Lancaster v. Collins (1884) 6 S. Ct. 33, 115 U. S. 222, 29 L. Ed. 373.

A just judgment, which is warranted by the record and the facts, will not be reversed because it was based on a wrong reason. Smiley v. Barker (1897) 83 Fed. 684, 28 C. C. A. 9, certiorari denied (1898) 18 Sup. Ct. 946, 169 U. S. 736, 42 L. Ed. 1216.

If, upon writ of error, upon consideration of the whole findings or facts, and upon a proper view of the law applicable thereto, the judgment is right, it will not be reversed merely because the lower court ruled erroneously upon the law of the case. Gray v. Smith (1897) 83 Fed. 824, 28 C. C. A. 168, affirming judgment (C. C. 1896) 76 Fed. 525.

A judgment will not be reversed because of an error in failing to award nominal damages, where the question of costs is not dependent thereon. East Moline Co. v. Weir Plow Co. (1899) 95 Fed. 250, 37 C. C. A. 62.

Where a bill contains no averments of the amount or value in controversy essential to give a federal court jurisdiction, on appeal from a decree of the circuit court sustaining a demurrer to the bill, and dismissing the suit on the merits, the decree will be reversed. Cochran v. Childs (1901) 111 Fed. 433, 49 C. C. A. 421.

Where, in an action for injuries to a passenger resulting from an explosion of one of the boilers of a steamboat, findings of a commissioner in favor of the plaintiff were based on a statute which had been expressly repealed, and it could not be ascertained to what extent the findings had been influenced by the supposition that the section was still in force, a judgment in favor of plaintiff entered thereon will be reversed. Richtman v. Haley (1903) 121 Fed. 353, 58 C. C. A. 31.

Error cannot be predicated of an opinion or reason given by the court for a ruling or decision, but must be of the ruling or decision itself. Eureka County Bank v. Clarke (1904) 130 Fed. 325, 64 C. C. A. 571, affirming judgment Clarke v. Eureka County Bank (C. C. 1903) 123 Fed. 922, writ of certiorari denied (1904) 25 S. Ct. 788, 195 U. S. 631, 49 L. Ed. 353.

A Circuit Court of Appeals is without power to dismiss an appeal on motion

of the appellant and remand the case to the court below with directions to permit the amendment of a pleading on a showing that facts were inadvertently omitted therefrom, which was not known to appellant until after the appeal was taken. Strand v. Griffith (1905) 135 Fed. 739, 68 C. C. A. 377.

A decree awarding an injunction will not be disturbed on appeal, though based on an erroneous theory, if the pleadings and proof present any tenable ground on which it might be sustained. McCloskey v. Pacific Coast Co. (1908) 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

If an appeal is taken from a decree on the merits, it will not be reversed on a question of costs. Conrad Inv. Co. v. U. S. (1908) 161 Fed. 829, 88 C. C. A. 647, affirming decree U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123.

A judgment will not be reversed because of the direction of a verdict on an erroneous ground if it was proper on other grounds. Joslyn v. Cadillac Automobile Co. (1910) 177 Fed. 863, 101 C. C. A. 77.

Where the equity of a bill is challenged on appeal from an injunction pendente lite and the appellate court is of the opinion that the bill is without equity or that the lower court was without jurisdiction, a decree for complainant must be reversed. Texas Traction Co. v. Barron G. Collier (1912) 195 Fed. 65, 115 C. C. A. 82.

Where the trial court erroneously allowed recovery upon one of two grounds alleged in the bill, without giving full opportunity to present the other ground, the bill will not be dismissed, but the cause will be remanded. Fifth Third Nat. Bank v. Johnson (1915) 219 Fed. 89, 134 C. C. A. 529.

A decree will not be disturbed on appeal as against evidence, where the evidence is conflicting and the preponderance is doubtful. Davison v. Seal-Skins (C. C. 1835) Fed. Cas. No. 3,-661.

Where the instructions are not applicable to the facts proved in the case, and have no influence on the verdict, they are not ground of a reversal, however erroneous they may be. U. S. v. Wright (C. C. 1839) Fed. Cas. No. 16,-775.

A decision on a question of fact, established with reasonable satisfaction, will not be disturbed. Baker v. The Potomac (C. C. 1859) Fed. Cas. No. 778.

The error in the admission or rejection of evidence on a question of fraud or deceit must not only be striking, but must necessarily have been calculated to mislead the jury, before the verdict will be interfered with. Walker v. Hawxhurst (C. C. 1867) Fed. Cas. No. 17,071.

Error in rulings is no ground for reversal where the appealing party had no case. Marionneaux's Case (C. C. 1870) Fed. Cas. No. 9,088.

A decree of the district court, based wholly upon a question of fact, will not be reversed where the evidence raises only a doubt as to the fact. Baker v. Smith (C. C. 1872) Fed. Cas. No. 781.

A finding of fact by the district court will not be reversed unless clearly erroneous. In re Clark (C. C. 1872) Fed. Cas. No. 2,802.

A judgment will not be reversed for a refusal to admit evidence offered, unless it appears affirmatively that, if admitted, it would tend to prove a material fact in the cause. Watt v. U. S. (C. C. 1878) Fed. Cas. No. 17,292.

Where there was a stipulation that the interveners should pay all costs and expenses which should be awarded against them, and the final decree awarded no costs or expenses against the interveners, notwithstanding there was a deficiency in the proceeds to pay all the costs and expenses, the decree must be reversed. The Orient (C. C. 1881) 12 Fed. 158.

It is reversible error to allow evidence to go to the jury which would constitute the ground of a separate action. Wyatt v. Harden (Super. Ct. Ark. 1822) Fed. Cas. No. 18,106a.

Where the judgment on the whole record is right, it will not be disturbed, though errors were committed. Johnson v. McLain (Super. Ct. Ark. 1828) Fed. Cas. No. 7,395a; Anonymous (Super. Ct. Ark. 1833) Fed. Cas. No. 18,224.

Where there is a good and bad count in a declaration, and it appears that the evidence applied solely to the bad count, the judgment will be reversed. Scull v. Roane (Super. Ct. Ark. 1831) Fed. Cas. No. 12,570c.

A new trial will not be granted for error in instructions if it be apparent that justice has been done. Mirick v. Hemphill (Super. Ct. Ark. 1832) Fed. Cas. No. 9,647a.

71. —— **Technical or trivial defects or errors.**—A judgment will not be reversed for a technical informality not affecting the merits of the case. City of Chicago v. Le Moyne (1902) 119 Fed. 662, 56 C. C. A. 278.

A judgment will not be reversed by an appellate court for the mere purpose of striking out a portion of the complaint, or correcting some other technical defect in a pleading, when it is not shown that the substance of the pleading in question would be materially changed thereby. Pacey v. McKinney (1903) 125 Fed. 675, 60 C. C. A. 365.

The failure of the court, on the separation of the jury for a noon recess during a trial, to admonish them against conversing about the case or forming an opinion thereon, as required by a statutory provision, is not a material error, where the admonition had been given on their previous separations

during the same trial. McKnight v. U. S. (1904) 130 Fed. 659, 65 C. C. A. 37.

An appellate court of the United States will rarely reverse a decree in equity on the sole ground that the bill was multifarious, and it will not do so where the causes of action joined are not repugnant or inconsistent with each other, and where the only loss or inconvenience to a defendant from such joinder arises from his having been subjected to the payment of costs with which he is not justly chargeable, which can be remedied by a modification of the decree. Hosmer v. Wyoming Ry. & Iron Co. (1904) 129 Fed. 883, 65 C. C. A. 81.

Under the rule that a judgment should not be reversed for an immaterial error, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the defeated party. Consolidated Grocery Co. v. Hammond (1910) 175 Fed. 641, 99 C. C. A. 195.

A decree in equity, which does substantial justice between the parties, should not be reversed by an appellate court on technical objections. Norfolk Southern R. Co. v. Talbott (1911) 190 Fed. 737, 111 C. C. A. 465, affirming judgment Trust Co. of America v. Norfolk & S. Ry. Co. (C. C. 1911) 183 Fed. 803.

Judgment will not be reversed because papers recognized on the trial as in evidence were not formally read. Andrews v. Graves (C. C. 1870) Fed. Cas. No. 376.

A judgment, broader and more advantageous than a party is entitled to, will be reversed or modified, although, upon the record, it appears to be technically correct. Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989.

Whether Mansf. Dig. Ark. § 5083 (Ind. T. Ann. St. 1899, § 3288), in force in Indian Territory when the case at bar was tried and appealed to the Court of Appeals, of which the federal Circuit Court is the successor, providing that the court must disregard any error which does not affect the substantial rights of the adverse party, is binding on the federal Circuit Court or not, it embodies a sound principle of law. Choctaw, O. & G. R. Co. v. Jackson (C. C. 1910) 182 Fed. 342, judgment affirmed (1911) 192 Fed. 792, 114 C. C. A. 12.

An appellate court will not reverse a judgment on technical grounds, where substantial justice has been done. Fisher v. Reider (Super. Ct. Ark. 1829) Fed. Cas. No. 4,822a.

72. —— **Amount or extent of recovery.**—For a trifling error in computing interest the court will not reverse, but will direct a remittitur. Gulf, C. & S. F. Ry. Co. v. Johnson (1893) 54 Fed. 474, 4 C. C. A. 447.

A judgment will not be reversed to enable a party to recover nominal damages only. U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11, writ of error dismissed (1898) 18 S. Ct. 949, 42 L. Ed. 1216.

Technical error in failing to award nominal damages in respect to one of a number of items sued for is no ground for reversal, where there has been a substantial recovery. Id.

A decree will not be reversed on a question of costs, where it is affirmed in respect to the merits. Sproull v. Pratt & Whitney Co. (1901) 108 Fed. 963, 48 C. C. A. 167, affirming decree (C. C. 1900) 101 Fed. 265.

Plaintiff, a tribal Indian, was confined in jail some nine days while awaiting trial in the state court, in which he was acquitted by direction of the court. There was no actual malice on the part of defendant, who caused the false imprisonment, and no ground for the recovery of anything beyond compensatory damages. Held, that a verdict awarding $10 damages, while smaller than should have been rendered, would not be set aside, in view of the improbability that a verdict would be secured on a second trial for an amount sufficiently greater to compensate plaintiff for the additional expense. Peters v. Malin (C. C. 1901) 111 Fed. 244.

The failure to award nominal damages, unless it be upon a matter which involves the settlement of a right other than the right to recover damages, is not ground for reversal. U. S. v. Withers (1904) 130 Fed. 696, 65 C. C. A. 16.

Failure to assess nominal damages for breach of contract will not be reviewed on appeal. Thomas China Co. v. C. W. Raymond Co. (1905) 135 Fed. 25, 67 C. C. A. 629.

Where the verdict was for a large amount against two of defendants, and for but nominal damages against the third defendant, such defendant is not injured by the finding of nominal damages against him, and cannot have the verdict set aside even though it was inconsistent with the charge of the court. Fisher v. Meyer (C. C. 1882) 12 Fed. 842.

The judgment will not be reversed for the small excess of $1.90. Tunstall v. Robinson (Super. Ct. Ark. 1833) Fed. Cas. No. 14,238a.

73. —— **Reversal in part, or as to one or more coparties.**—An appellate court, on affirmance of the decree appealed from as between the original parties, has no power to reverse it so far as it denied the relief prayed for by an intervener in his own right, where such intervener did not join in the appeal. Muskogee Nat. Tel. Co. v. Hall (1902) 118 Fed. 382, 55 C. C. A. 208.

Where two defendants tried together after conviction sued out a joint writ of error and joined in the assignment of errors and argument, the appellate court cannot consider their cases sep-

of the appellant and remand the case to the court below with directions to permit the amendment of a pleading on a showing that facts were inadvertently omitted therefrom, which was not known to appellant until after the appeal was taken. Strand v. Griffith (1905) 135 Fed. 739, 68 C. C. A. 377.

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A decree will not be disturbed on appeal as against evidence, where the evidence is conflicting and the preponderance is doubtful. Davison v. Seal-Skins (C. C. 1835) Fed. Cas. No. 3,-661.

Where the instructions are not applicable to the facts proved in the case, and have no influence on the verdict, they are not ground of a reversal, however erroneous they may be. U. S. v. Wright (C. C. 1839) Fed. Cas. No. 16,-775.

A decision on a question of fact, established with reasonable satisfaction, will not be disturbed. Baker v. The Potomac (C. C. 1859) Fed. Cas. No. 778.

The error in the admission or rejection of evidence on a question of fraud or deceit must not only be striking, but must necessarily have been calculated to mislead the jury, before the verdict will be interfered with. Walker v. Hawxhurst (C. C. 1867) Fed. Cas. No. 17,071.

Error in rulings is no ground for reversal where the appealing party had no case. Marionneaux's Case (C. C. 1870) Fed. Cas. No. 9,088.

A decree of the district court, based wholly upon a question of fact, will not be reversed where the evidence raises only a doubt as to the fact. Baker v. Smith (C. C. 1872) Fed. Cas. No. 781.

A finding of fact by the district court will not be reversed unless clearly erroneous. In re Clark (C. C. 1872) Fed. Cas. No. 2,802.

A judgment will not be reversed for a refusal to admit evidence offered, unless it appears affirmatively that, if admitted, it would tend to prove a material fact in the cause. Watt v. U. S. (C. C. 1878) Fed. Cas. No. 17,292.

Where there was a stipulation that the interveners should pay all costs and expenses which should be awarded against them, and the final decree awarded no costs or expenses against the interveners, notwithstanding there was a deficiency in the proceeds to pay all the costs and expenses, the decree must be reversed. The Orient (C. C. 1881) 12 Fed. 158.

It is reversible error to allow evidence to go to the jury which would constitute the ground of a separate action. Wyatt v. Harden (Super. Ct. Ark. 1822) Fed. Cas. No. 18,106a.

Where the judgment on the whole record is right, it will not be disturbed, though errors were committed. Johnson v. McLain (Super. Ct. Ark. 1828) Fed. Cas. No. 7,395a; Anonymous (Super. Ct. Ark. 1833) Fed. Cas. No. 18,224.

Where there is a good and bad count in a declaration, and it appears that the evidence applied solely to the bad count, the judgment will be reversed. Scull v. Roane (Super. Ct. Ark. 1831) Fed. Cas. No. 12,570c.

A new trial will not be granted for error in instructions if it be apparent that justice has been done. Mirick v. Hemphill (Super. Ct. Ark. 1832) Fed. Cas. No. 9,647a.

71. —— Technical or trivial defects or errors.—A judgment will not be reversed for a technical informality not affecting the merits of the case. City of Chicago v. Le Moyne (1902) 119 Fed. 662, 56 C. C. A. 278.

A judgment will not be reversed by an appellate court for the mere purpose of striking out a portion of the complaint, or correcting some other technical defect in a pleading, when it is not shown that the substance of the pleading in question would be materially changed thereby. Pacey v. McKinney (1903) 125 Fed. 675, 60 C. C. A. 365.

The failure of the court, on the separation of the jury for a noon recess during a trial, to admonish them against conversing about the case or forming an opinion thereon, as required by a statutory provision, is not a material error, where the admonition had been given on their previous separations

during the same trial. McKnight v. U. S. (1904) 130 Fed. 659, 65 C. C. A. 37.

An appellate court of the United States will rarely reverse a decree in equity on the sole ground that the bill was multifarious, and it will not do so where the causes of action joined are not repugnant or inconsistent with each other, and where the only loss or inconvenience to a defendant from such joinder arises from his having been subjected to the payment of costs with which he is not justly chargeable, which can be remedied by a modification of the decree. Hosmer v. Wyoming Ry. & Iron Co. (1904) 129 Fed. 883, 65 C. C. A. 81.

Under the rule that a judgment should not be reversed for an immaterial error, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the defeated party. Consolidated Grocery Co. v. Hammond (1910) 175 Fed. 641, 99 C. C. A. 195.

A decree in equity, which does substantial justice between the parties, should not be reversed by an appellate court on technical objections. Norfolk Southern R. Co. v. Talbott (1911) 190 Fed. 737, 111 C. C. A. 465, affirming judgment Trust Co. of America v. Norfolk & S. Ry. Co. (C. C. 1911) 183 Fed. 803.

Judgment will not be reversed because papers recognized on the trial as in evidence were not formally read. Andrews v. Graves (C. C. 1870) Fed. Cas. No. 376.

A judgment, broader and more advantageous than a party is entitled to, will be reversed or modified, although, upon the record, it appears to be technically correct. Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989.

Whether Mansf. Dig. Ark. § 5083 (Ind. T. Ann. St. 1899, § 3288), in force in Indian Territory when the case at bar was tried and appealed to the Court of Appeals, of which the federal Circuit Court is the successor, providing that the court must disregard any error which does not affect the substantial rights of the adverse party, is binding on the federal Circuit Court or not, it embodies a sound principle of law. Choctaw, O. & G. R. Co. v. Jackson (C. C. 1910) 182 Fed. 342, judgment affirmed (1911) 192 Fed. 792, 114 C. C. A. 12.

An appellate court will not reverse a judgment on technical grounds, where substantial justice has been done. Fisher v. Reider (Super. Ct. Ark. 1829) Fed. Cas. No. 4,822a.

72. —— **Amount or extent of recovery.**—For a trifling error in computing interest the court will not reverse, but will direct a remittitur. Gulf, C. & S. F. Ry. Co. v. Johnson (1893) 54 Fed. 474, 4 C. C. A. 447.

A judgment will not be reversed to enable a party to recover nominal damages only. U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11, writ of error dismissed (1898) 18 S. Ct. 949, 42 L. Ed. 1216.

Technical error in failing to award nominal damages in respect to one of a number of items sued for is no ground for reversal, where there has been a substantial recovery. Id.

A decree will not be reversed on a question of costs, where it is affirmed in respect to the merits. Sproull v. Pratt & Whitney Co. (1901) 108 Fed. 963, 48 C. C. A. 167, affirming decree (C. C. 1900) 101 Fed. 265.

Plaintiff, a tribal Indian, was confined in jail some nine days while awaiting trial in the state court, in which he was acquitted by direction of the court. There was no actual malice on the part of defendant, who caused the false imprisonment, and no ground for the recovery of anything beyond compensatory damages. Held, that a verdict awarding $10 damages, while smaller than should have been rendered, would not be set aside, in view of the improbability that a verdict would be secured on a second trial for an amount sufficiently greater to compensate plaintiff for the additional expense. Peters v. Malin (C. C. 1901) 111 Fed. 244.

The failure to award nominal damages, unless it be upon a matter which involves the settlement of a right other than the right to recover damages, is not ground for reversal. U. S. v. Withers (1904) 130 Fed. 696, 65 C. C. A. 16.

Failure to assess nominal damages for breach of contract will not be reviewed on appeal. Thomas China Co. v. C. W. Raymond Co. (1905) 135 Fed. 25, 67 C. C. A. 629.

Where the verdict was for a large amount against two of defendants, and for but nominal damages against the third defendant, such defendant is not injured by the finding of nominal damages against him, and cannot have the verdict set aside even though it was inconsistent with the charge of the court. Fisher v. Meyer (C. C. 1882) 12 Fed. 842.

The judgment will not be reversed for the small excess of $1.90. Tunstall v. Robinson (Super. Ct. Ark. 1833) Fed. Cas. No. 14,238a.

73. —— **Reversal in part, or as to one or more coparties.**—An appellate court, on affirmance of the decree appealed from as between the original parties, has no power to reverse it so far as it denied the relief prayed for by an intervener in his own right, where such intervener did not join in the appeal. Muskogee Nat. Tel. Co. v. Hall (1902) 118 Fed. 382, 55 C. C. A. 208.

Where two defendants tried together after conviction sued out a joint writ of error and joined in the assignment of errors and argument, the appellate court cannot consider their cases sep-

arately, but must affirm or reverse as to both. Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642.

A plaintiff was erroneously required to elect, before trial, between two counts of his petition, which stated the same cause of action in different forms to meet the proof, and on his election a judgment of dismissal was entered as to the abandoned count. A trial on the remaining count resulted in a judgment for defendant. Held, it appearing that there was no error in the trial, that the judgment on the count so tried would be affirmed, that plaintiff was entitled to a reversal, and a trial on the count dismissed. Great Western Coal Co. v. Chicago G. W. Ry. Co. (1899) 98 Fed. 274, 39 C. C. A. 79.

Where, in an action against four defendants, a judgment is entered in favor of one and against the others, and they alone appeal, a subsequent reversal of judgment does not affect the one entered in favor of the other defendant. Bloch v. Price (C. C. 1887) 32 Fed. 447.

74. —— **Rendering final judgment.**—Where a suit in equity for infringement of a patent had been pending 18 years, had survived two masters to whom it was referred, had been before one master for over 9 years, and finally resulted in a decree for nominal damages only, held, that the court, on appeal, though satisfied that the conclusions below were too sweeping in character, and that complainants were entitled to recover a substantial sum, would not remand the cause for further proceedings, but would itself, from the evidence in the record, ascertain the proper amount, and render a decree therefor. Tuttle v. Claflin (1896) 76 Fed. 227, 22 C. C. A. 138, modifying decree (C. C. 1894) 62 Fed. 453, motion to modify decree denied (1897) 82 Fed. 744, 27 C. C. A. 255, and certiorari denied Claflin v. Tuttle (1897) 17 Sup. Ct. 992, 166 U. S. 721, 41 L. Ed. 1187.

On review of a judgment in favor of plaintiff in an action of replevin, who claimed under a chattel mortgage, it is error for the court, on reversal, to render judgment for defendant on the ground that plaintiff's mortgage is void for fraud in fact, where no such issue was made by the pleadings or submitted to the jury on the trial. Bradley v. Hargadine-McKittrick Dry-Goods Co. (1899) 96 Fed. 914, 37 C. C. A. 623.

On appeal from an order appointing a receiver, the appellate court will render a final decree dismissing the bill if it appears that there is no equity therein, or that the court has no jurisdiction. Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1, reversing decrees Gaddie v. Mann (C. C. 1906) 147 Fed. 955, 960.

The Circuit Court of Appeals does not enter and execute its own decree, but remands the cause to the lower court for further proceedings. Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C. A. 360, certiorari denied (1909) 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068.

Where it appears that there is no equity in the bill, the appellate court may determine that question, and, if it is of opinion that the relief sought cannot be granted, dismiss the bill, to save the parties expense resulting from the endeavor to secure impossible relief. Guardian Trust Co. v. Kansas City Southern Ry. Co. (1909) 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620.

A reservation of a motion to reopen a case does not extend to the circuit court of appeals. Appeal in equity brings the cause up for final disposition. Alexander v. Redmond (1910) 180 Fed. 92, 103 C. C. A. 446.

Where, in an action on an award pursuant to a fire policy, a reversal was required because of an error of the trial court in disposing of a question of law and there was no disputed question of fact in the case, the Court of Appeals would render final judgment, instead of remanding the cause for a new trial. Fellman v. Royal Ins. Co. (1911) 184 Fed. 577, 106 C. C. A. 557, rehearing denied (1911) 185 Fed. 689, 107 C. C. A. 637.

An appellate court in an equity suit has power to remand the case to permit the filing of new or amended pleadings by a party praying for the specific relief to which such party is shown by the proofs to be entitled; but, where such new pleadings would serve no useful purpose, it may enter a final decree granting such relief although different from that prayed for. Central Improvement Co. v. Cambria Steel Co. (1913) 210 Fed. 696, 127 C. C. A. 184.

If the verdict below was given upon an immaterial issue, a repleader cannot be awarded, but judgment must be rendered against the party who committed the first fault. U. S. v. Burnham (C. C. 1816) Fed. Cas. No. 14,690.

75. —— **Directing judgment in lower court.**—The circuit court of appeals will, on writ of error, remand a case, with directions that it be dismissed, when it plainly appears that such case was brought within the jurisdiction by means of collusion. Ashley v. Board Supervisors Presque Isle County (1893) 60 Fed. 55, 8 C. C. A. 455.

In an action on a bond, one of the sureties claimed a release by reason of an alteration, and presented the question of praying an instruction in his favor. The court reserved the question, and a verdict was returned against all the defendants. The surety then moved for judgment in his favor, non obstante, but the motion was dismissed, and judgment entered against

the defendants generally. On writ of error, the appellate court decided in the surety's favor. Held, that the proper practice was to reverse the judgment, with directions to allow plaintiff to enter a nolle prosequi against the surety, and then to enter judgment on the verdict against the other defendants. Mundy v. Stevens (1894) 61 Fed. 77, 9 C. C. A. 366.

Where the only error is in allowing interest, the amount of which may be ascertained by computation, the judgment will not be reversed in toto, and a new trial ordered, but the court below will be directed to enter a judgment such as should have been entered in the first place. Pacific Postal Telegraph Cable Co. v. Fleischner (1895) 66 Fed. 899, 14 C. C. A. 166, reversing judgment Fleischner v. Pacific Postal Tel. Cable Co. (C. C. 1893) 55 Fed. 738.

When a jury has been duly waived, and the case tried to the court on an agreed statement of facts, and the damages recoverable are a liquidated sum, the appellate court, on reversing a judgment for defendant, will not award a new trial, but will direct a judgment to be entered against defendant. Rathbone v. Board of Com'rs of Kiowa County, Kan. (1897) 83 Fed. 125, 27 C. C. A. 477, reversing judgment (C. C. 1896) 73 Fed. 395, and certiorari denied Board of Com'rs of Kiowa County v. Rathbone (1898) 18 S. Ct. 940, 170 U. S. 705, 42 L. Ed. 1218.

Where a bill has been dismissed on demurrer for laches, because no sufficient explanation of the delay is pleaded, the appellate court may, in the absence of positive inequity, reverse the decree, and direct the allowance of an amendment to the bill. Hubbard v. Manhattan Trust Co. (1898) 87 Fed. 51, 30 C. C. A. 520.

When it appears from the bill of exceptions that the evidence upon the trial consisted of admissions of fact made by the parties in open court, the circuit court of appeals will treat such admissions as equivalent to a formal case agreed, and thereupon direct the circuit court to render a proper judgment upon such undisputed facts. Irvine v. Angus (1899) 93 Fed. 629, 35 C. C. A. 501.

Where the facts found by the trial court cover all the issues, and are inadequate to support the judgment rendered in favor of the plaintiff, a new trial will not be awarded on reversal, but a judgment for defendant will be directed. Churchill v. Buck (1900) 102 Fed. 38, 42 C. C. A. 148.

On appeal from an interlocutory order granting or continuing an injunction the appellate court may direct the dismissal of the bill, where it is found to be without equity to support it. Worth Mfg. Co. v. Bingham (1902) 116 Fed. 785, 54 C. C. A. 119.

If the averments of a bill in a federal court furnish no support for the relief prayed for, its dismissal may be directed by the appellate court on an appeal from an interlocutory order granting an injunction. La Hogue Drainage Dist. No. 1 of Iroquois County, Ill., v. Watts (1910) 179 Fed. 690, 103 C. C. A. 236.

An appellate court, on reversal of a judgment, will not direct the judgment to be entered below, unless it can thereby finally dispose of the case. Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co. (1910) 185 Fed. 487, 107 C. C. A. 587, denying motion to amend mandate Exchange Mut. Fire Ins. Co. v. Same (1910) 181 Fed. 330, 104 C. C. A. 518.

The reversal of a judgment in a criminal case for error in imposing an excessive sentence does not entitle the defendant to a discharge, but the cause will be remanded, with directions to enter the appropriate judgment. Mitchell v. U. S. (1912) 196 Fed. 874, 116 C. C. A. 436.

76. —— **New trial and directing further proceedings in lower court.**—A case of purely legal nature was brought in a state court, in the form of a bill in equity, under a local statute, and, after removal to the federal court, was conducted as an equity proceeding, and resulted in a decree dismissing the bill. On complainant's appeal, defendant, by motion to dismiss, objected that the proceeding was one at law, which could be reviewed only by writ of error. Held, that the decree should be reversed with instructions to redocket the same as at law, and proceed accordingly. McConnell v. Provident Savings Life Assur. Soc. of New York (1895) 69 Fed. 113, 16 C. C. A. 172, decree affirmed (1899) 92 Fed. 769, 34 C. C. A. 663, and certiorari denied (1895) 16 Sup. Ct. 1203, 163 U. S. 693, 41 L. Ed. 311.

An appellate court cannot remand a suit in equity merely for the purpose of a rehearing in the court below in view of new matter to be produced by the defeated party. Marden v. Campbell Printing-Press & Manufacturing Co. (1895) 67 Fed. 809, 15 C. C. A. 26, dismissing appeal Campbell Printing-Press & Manufacturing Co. v. Marden (C. C. 1894) 64 Fed. 782.

A bill set forth a fraudulent sale of complainants' property by one defendant, and purchases thereof by other defendants, with notice, and concluded with a prayer for "citation in terms of law," for a decree annulling deeds, and for possession. One defendant filed a demurrer, as attorney for himself, to which he appended a certificate that he "thought the demurrer was well taken." Other defendants filed a general demurrer, to which was appended a proper certificate of counsel, but no affidavit, as required by rule 31. Later, some of the latter defendants filed an answer, which was a gen-

eral denial, concluding with a prayer for a decree quieting their title to the land. Held, that the decree dismissing the bill should be reversed, with directions to set aside all the pleadings subsequent to the bill, with leave to amend the bill to conform to the rules, and thereafter to proceed according to the equity rules. Ruby v. Atkinson (1896) 71 Fed. 567, 18 C. C. A. 249, appeal dismissed (1899) 93 Fed. 577, 35 C. C. A. 458.

A judgment of reversal based solely on the ground that the trial court erred in not exercising its discretion on a motion for new trial requires, not the ordering of a new trial, but only a remanding of the case, for further proceedings from the point where the error was committed. Felton v. Spiro (1897) 78 Fed. 576, 24 C. C. A. 321, reversing judgment Spiro v. Felton (C. C. 1896) 73 Fed. 91.

Where a judgment based on agreed facts is reversed and the cause remanded on the ground that the facts stipulated are evidential only, and cannot take the place of findings, a new trial is required, in which either party has the right to introduce additional evidence not inconsistent with the stipulation. Burnham v. North Chicago St. Ry. Co., 88 Fed. 627, 32 C. C. A. 64, reversing judgment (1897) 78 Fed. 101, 23 C. C. A. 677.

Where a declaration in a circuit court in a case in which the decision of the circuit court of appeals is final was perhaps fatally defective on one ground, but was amendable, and a demurrer, which under the practice of the court was confined to the causes specified, did not assign such ground, but was erroneously sustained and judgment rendered for the defendant, the circuit court of appeals will reverse the judgment and permit the plaintiff to apply to the circuit court for leave to amend. Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282.

Where the variance between the evidence and the bill filed in a United States district court is such that the latter requires amendment to support the decree, the circuit court of appeals will reverse it, and remand the case to the lower court for an amendment and further proceedings. Union Cent. Life Ins. Co. v. Phillips (1900) 102 Fed. 19, 41 C. C. A. 263, reversing decree Phillips v. Union Cent. Life Ins. Co. (C. C. 1900) 101 Fed. 33.

In a suit to charge a tug with liability for the loss of a tow, the evidence was such as to establish gross fault on the part of the tug, and to create a strong presumption against her; but upon the issue whether the loss was due to such fault neither party produced evidence which it was apparently within its power to produce, and without which the court on appeal was left to mere conjecture as to material facts, and unable to reach a satisfactory decision. Held, that the case would be remanded to the district court for further proofs, and if none were offered the libel should be dismissed. The Carbonero (1901) 106 Fed. 329, 45 C. C. A. 314.

Where through mistake or inadvertence the requisite averments as to citizenship of one of the parties have not been made, the appellate court may reverse the case, with leave to permit amendments to show jurisdiction, but cannot permit such amendments in the appellate court. Watson v. Bonfils (1902) 116 Fed. 157, 53 C. C. A. 535, writ of certiorari denied Burlington Trust Co. v. Porter (1902) 23 S. Ct. 841, 187 U. S. 641, 47 L. Ed. 345.

Where the record fails to show facts which are essential to enable the appellate court to safely decide the cause, it will reverse the decree on its own motion, and remand the case for a rehearing. Barber v. Coit (1902) 118 Fed. 272, 55 C. C. A. 145.

Where, in an action for injuries to a minor, it was held on a writ of error that the only error in the judgment was in an instruction permitting a recovery for loss of services during minority, the Circuit Court of Appeals on reversal and ordering a new trial only as to the question of damages would not limit the trial to an estimate of such services, and direct the jury to find their value and deduct it from the amount of the verdict already rendered. Farrar v. Wheeler (1906) 145 Fed. 482, 75 C. C. A. 386.

A new trial should be had upon the question of damages only, if exceptions which are sustained relate to that question only. Id.

Where the record fails to show facts essential to a proper decision of the case by the appellate court it will reverse the decree on its own motion, and remand the case for a rehearing with directions to permit the taking of further evidence. Standard Computing Scale Co. v. Computing Scale Co. (1906) 145 Fed. 627, 76 C. C. A. 384.

Where a Circuit Court was without jurisdiction of a cause because of the absence from the complaint of necessary jurisdictional allegations, the appellate court, in reversing the judgment therein for that reason, may properly remand the cause and direct that plaintiff be permitted to amend the complaint in that respect, especially where the question of jurisdiction was not raised in the trial court. Puget Sound Navigation Co. v. Lavendar (1907) 156 Fed. 361, 84 C. C. A. 259.

Where a cause has been properly tried on the merits in a Circuit Court and a judgment rendered for plaintiff, on a reversal because of the failure of the declaration to allege the requisite diversity of citizenship between the parties to give the court jurisdiction, it is competent for the appellate court to

remand with leave to permit an amendment, and to try the question of jurisdiction alone, if issue is taken thereon according to the practice with respect to pleas in abatement. Grand Trunk Western Ry. Co. v. Reddick (1908) 160 Fed. 898, 88 C. C. A. 80.

The only remedy for prejudicial error in a trial at law in a national court is a new trial. Mutual Reserve Life Ins. Co. v. Heidel (1908) 161 Fed. 535, 88 C. C. A. 477.

Reversal of judgment for defendant on a directed verdict for error in refusing to allow plaintiff to dismiss without prejudice does not require a new trial, but merely a direction to sustain the motion. Knight v. Illinois Cent. R. Co. (1910) 180 Fed. 368, 103 C. C. A. 514.

Where a judgment entered non obstante veredicto under the Pennsylvania practice is reversed by the appellate court, that court has power, on an alternative request by the defendant in error, to grant a new trial, whereby resort to a second writ of error may be avoided. Western Bank Note & Engraving Co. v. Slentz (1911) 188 Fed. 57, 110 C. C. A. 127.

An order distributing costs under a judgment for costs among persons claiming to have made advances during the progress of the litigation reviewed, and reversed for further evidence in support of such claims. Robinson v. Hays (1911) 186 Fed. 295, 108 C. C. A. 373.

Where on a writ of error a special finding is found to be insufficient to support the judgment, and silent as to essential facts involved under the issues, and as to which there is a conflict in the testimony, the appellate court, being limited to a determination of the questions of law arising upon the record, cannot supplement or piece out the imperfect findings of fact by its own original investigation and determination of original facts, but in such case the judgment should be reversed, and the case remanded for a new trial. Chicago, R. I. & P. Ry. Co. v. Barrett (1911) 190 Fed. 118, 111 C. C. A. 158.

Where a cause has been tried in a federal court on the merits with verdict and judgment for plaintiff, on reversal because of the absence of allegation in the declaration or proof in the record to show the requisite diversity of citizenship to give the court jurisdiction, the appellate court may remand with leave to permit that issue to be joined and tried, and, if jurisdiction is found, to enter a new judgment on the verdict. Parker Washington Co. v. Cramer (1912) 201 Fed. 878, 120 C. C. A. 216.

Where a decree granting a preliminary injunction was reversed on appeal, because the complaint did not state facts authorizing equitable relief, the suit would not be dismissed, but would be remanded, with leave to amend. Southern Express Co. v. Long (1913) 202 Fed. 462, 120 C. C. A. 568, reversing decree Long v. Southern Exp. Co. (D. C. 1912) 201 Fed. 441.

Where, in a suit between a tenant and the devisee of the landlord, the tenant's claim of ownership of personal property had not been dully developed, and both parties on the argument of an appeal expressed their ability to produce additional testimony, the decree would be modified, and opened conditionally for that purpose. Kirkpatrick v. McBride (1913) 203 Fed. 449, 120 C. C. A. 328, modifying decree on rehearing (1912) 202 Fed. 144, 120 C. C. A. 322.

Where in an action for conversion, the court sustained exceptions to a master's report on the ground that plaintiff had failed to prove the market value of the property by competent proof, but the evidence showed the conversion and plaintiff's right to recover, the judgment would be reversed, with leave to introduce further proof. Dillingham v. T. B. Allen & Co. (1913) 205 Fed. 146, 123 C. C. A. 378.

Where diverse citizenship was not sufficiently alleged or proved, cause will be remanded with permission to frame and try issue as to such diversity without setting aside the verdict. Chicago, R. I. & P. Ry. Co. v. Stephens (1914) 218 Fed. 535, 134 C. C. A. 263.

77. —— **Directing restitution.**—Restitution of money paid under an erroneous decree will not be directed by the appellate court, where the interests of the parties defendant are, or may be, diverse, except, possibly, in a very plain case; but leave will be reserved in the mandate to present a petition for restitution to the court below. Andrews v. Thum (1896) 71 Fed. 763, 18 C. C. A. 308, modifying judgment (1895) 67 Fed. 911, 15 C. C. A. 67.

78. —— **Effect of reversal.**—The reversal of a judgment under which property has been sold does not affect the rights of the holder of another judgment who redeemed the property, under sections 2547-2549, Mills' Ann. St. Colo., before the writ of error was sued out, and who was a stranger to the writ of error. Ryan v. Staples (1896) 76 Fed. 721, 23 C. C. A. 541 affirming judgment Staples v. Ryan (C. C. 1894) 62 Fed. 635, rehearing denied (1897) 78 Fed. 563, 23 C. C. A. 551.

In general, on the reversal of a judgment with out more a new trial follows. Newcomb v. Burbank (C. C. 1910) 182 Fed. 954.

Reversal of an order granting an injunction which contemnors are charged with having violated leaves no basis on which to rest a judgment for a compensatory fine. S. Anargyros v. Anargyros & Co. (C. C. 1911) 191 Fed. 208.

79. **Mandate and proceedings in lower court—Mandate and order of re-**

mand.—On appeal from an interlocutory order granting an injunction after a final hearing, where the circuit court of appeals necessarily expresses an opinion upon the merits, the mandate, upon affirming the decree, should simply recite that the court finds no error in the decree. Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co. (1895) 72 Fed. 67, 19 C. C. A. 13; decree reversed Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. (1896) 72 Fed. 545, 19 C. C. A. 25.

Where, after the entry of a final decree, a motion was made for a rehearing and to reopen the case, which was denied after a hearing, held, that an appeal subsequently taken was from the final decree itself, and not from the order denying the said motion. Andrews v. Thum (1896) 72 Fed. 290, 18 C. C. A. 566, denying motion to stay issuing of mandate (1895) 70 Fed. 65, 16 C. C. A. 677, and certiorari denied (1896) 16 S. Ct. 1198, 163 U. S. 676, 41 L. Ed. 313.

A Circuit Court may take judicial notice of a mandate of the Supreme Court filed in such Circuit Court in another case. Coram v. Davis (C. C. 1909) 174 Fed. 664.

In view of the general power to remand granted to the United States Circuit Court of Appeals by Act March 3, 1891, c. 517, § 10, 26 Stat. 829, held, that the United States Circuit Court of Appeals for the Eighth District had authority under the Enabling Act of the State of Oklahoma, § 15, to remand to the United States District Court for the Eastern District of Oklahoma a habeas corpus case in which it had affirmed an order denying the petition, as if it had reversed the petition. Harper v. Victor (1914) 212 Fed. 903, 129 C. C. A. 423.

80. —— Effect in lower court of appellate court decision.—A decision on appeal, reversing an order granting a temporary injunction, is conclusive only of the rights of the parties on the showing made in support of the order. Andrews v. National Foundry & Pipe Works (1894) 61 Fed. 782, 10 C. C. A. 60, denying a petition for rehearing National Foundry & Pipe Co. v. Oconto Water Co. (C. C. 1892) 52 Fed. 29.

Defendants' grantor leased a lot from plaintiff, and was subsequently ousted by the United States under a superior title. He then leased the lot from the United States, and subsequently purchased it, in pursuance of an award made by commissioners appointed to adjust conflicting land claims. Afterwards plaintiff obtained a decree against defendants, declaring that they held the title in trust for him, and requiring a conveyance. On appeal plaintiff's title was affirmed, but the decree was reversed because the account of rents and profits was not properly stated; the court saying that rents and profits should not be allowed prior to the commencement of the suit, and that increased rent should not be allowed on account of improvements. Held, that the decree merely directed the ascertainment of the fair rental value, and that plaintiff was not entitled to rent according to the lease from him to defendants' grantor. Latta v. Granger (1895) 68 Fed. 69, 15 C. C. A. 228, decree reversed (1897) 17 S. Ct. 746, 167 U. S. 81, 42 L. Ed. 85.

Whatever is before the court by virtue of the appeal, and is disposed of by it, is finally settled, and becomes the law of the case, so that the court below must carry it into execution according to the mandate, without power to modify or suspend it. Bissel Carpet-Sweeper Co. v. Goshen Sweeper Co. (1896) 72 Fed. 545, 19 C. C. A. 25.

While the rule that an adjudication by an appellate tribunal becomes the law of the case on all subsequent trials is a wholesome one, which should be enforced, yet it should be confined to questions that were actually considered and decided, and not extended to dicta or intimations contained in an opinion which may be thought to foreshadow the views of the court on other questions. Patillo v. Allen-West Commission Co. (1901) 108 Fed. 723, 47 C. C. A. 637.

Where the opinion of the appellate court determined every issue upon which plaintiff based his right of recovery adversely to his contention, it cannot be inferred from the fact that a judgment against him was reversed because of errors on the trial, and the cause remanded for a new trial, that such court intended to hold that the evidence was sufficient to sustain a verdict in his favor. Smith v. Day (C. C. 1902) 117 Fed. 956.

Where an application to the Supreme Court for a writ of certiorari to a Circuit Court of Appeals, presenting the identical issues which were determined by that court, has been summarily denied, unless in exceptional cases, it must be assumed that the Supreme Court has impliedly passed on such issues, and the Circuit Court of Appeals is precluded from proceeding anew on the same subject-matter by entertaining a petition for a rehearing. Burget v. Robinson (1903) 123 Fed. 262, 59 C. C. A. 260.

Questions determined on appeal become the law of the case as to subsequent proceedings. Orient Ins. Co. v. Leonard (1902) 120 Fed. 808, 57 C. C. A. 176, writ of certiorari denied (1902) 23 S. Ct. 845, 187 U. S. 645, 47 L. Ed. 347; Western Union Telegraph Co. v. City of Toledo (1903) 121 Fed. 734, 58 C. C. A. 16; Pennsylvania Co. v. Scofield (1903) 121 Fed. 814, 58 C. C. A. 176; National Surety Co. v. Kansas City Hydraulic Press Brick Co. (1910) 182 Fed. 54, 104 C. C. A. 494; Columbia Chemical Co. v. Duff (1911) 184 Fed. 876, 107 C. C. A. 200; U. S. v.

Axman (1912) 193 Fed. 644, 113 C. C. A. 512; New York, N. H. & H. R. Co. v. Lehtohner (1913) 204 Fed. 775, 123 C. C. A. 587; D'Arcy v. Jackson Cushion Spring Co. (1914) 212 Fed. 889, 129 C. C. A. 409.

Where, on a prior appeal, it was held that defendant had excluded plaintiff from a mining property at least until 1901, such holding constituted the law of the case on a subsequent hearing with reference to damages sustained, though it was not contained in the mandate issued to the trial court. Empire State-Idaho Mining & Developing Co. v. Hanley (1905) 136 Fed. 99, 69 C. C. A. 87.

A mortgage having been executed by a husband and wife, suit was brought to foreclose the same, and a decree rendered charging the life estate of the wife, as widow of a former husband, as well as her after-acquired title to the remainder. This decree was reversed, in so far as it affected such after-acquired title, and the cause was remanded, with directions to render a decree charging the wife's life estate. Held, that such judgment constituted the law of the case so far as the wife's life estate was concerned, and that a decree following such mandate was not objectionable for failure of the Circuit Court to declare the decree without prejudice to the future determination of the nature and extent of the wife's interest in the premises at the date of the mortgage. Burns v. Cooper (1907) 153 Fed. 148, 82 C. C. A. 300.

Where, on a former writ of error in an action for injuries to a servant, the court reversed a judgment for defendant, and held that the court should have submitted the case to the jury, such determination constituted the law of the case on a retrial, where the evidence was conflicting and much the same as on the first trial. Toledo, St. L. & W. R. Co. v. Reardon (1908) 159 Fed. 366, 86 C. C. A. 366.

Where the law of a case had been settled in favor of a plaintiff on a material issue by the appellate court, in reversing a prior judgment, on the facts as they then appeared, and on the second trial the evidence was substantially the same and without conflict, it was not error to instruct that plaintiff was entitled to recover on such issue. Good v. Central Coal & Coke Co. (1909) 170 Fed. 416, 95 C. C. A. 586, affirming judgment George S. Good & Co. v. Central Coal & Coke Co. (1907) 104 S. W. 613, 7 Ind. T. 268.

Where a judgment for plaintiff is reversed on appeal for error in denying defendant's motion for a peremptory instruction at the close of the evidence, such decision, though not concurred in by the whole court, is the law of the case on retrial, requiring the granting of a similar motion, unless the evidence is such as to change the state of facts to which the law in the previous case was applied, until the decision of the Circuit Court of Appeals is reversed by the Supreme Court, either on certiorari or certified questions. Toledo, St. L. & W. R. Co. v. Sellers (1911) 184 Fed. 885, 107 C. C. A. 114.

Every question of fact or law which was before a Circuit Court of Appeals upon a writ of error and decided by its opinion is conclusively settled for the court below in further proceedings in the same action, and the finality of such decision is not affected by the fact that the judgment was one of reversal and direction of a new trial, but in such case the rule of conclusiveness is confined to questions actually discussed and decided by the opinion. E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co. (1911) 191 Fed. 543, 112 C. C. A. 153, petition for writ of certiorari dismissed (1912) 32 S. Ct. 533, 223 U. S. 746, 56 L. Ed. 640.

In an action for fraud in the sale of certain corporate stock, the appellate court having held that plaintiff could only recover on proof that the stock had been previously issued, plaintiff could not recover on retrial, where the evidence showed that the prior issue of the stock had not been accomplished in fact, and that the issue to plaintiff's assignor was an original issue. Barnes-King Development Co. v. Assets Collecting Co. (1913) 205 Fed. 362, 123 C. C. A. 490.

Where on a prior writ of error the Court of Appeals held that defendant was estopped by judgments in other actions between the same parties to claim that municipal bonds sued on were void because the ordinance under which they were issued had not been properly published, defendant on a second trial could not defeat any of the bonds pleaded at the first trial on that ground. Town of Fletcher v. Hickman (1913) 208 Fed. 118, 125 C. C. A. 346.

The Court of Appeals on a prior appeal having held that defendants on the facts were liable to plaintiff for a fraud committed by A. & Son, such determination was the law of the case, and the trial court on retrial on the same proof properly held that plaintiffs' damage was the only question remaining for determination. Kershaw Oil Mill v. National Bank of Savannah (1913) 209 Fed. 835, 126 C. C. A. 559.

Where an appeal was taken under Judicial Code, § 129, from an order holding complainant's patent valid and infringed and granting an interlocutory injunction, such decree was interlocutory in character, and the mandate of affirmance could not be regarded as determining questions relevant to the ascertainment of any damages complainant might be entitled to on the reference to determine such question. A. D. Howe Mach. Co. v. Dayton (C. C. A. 1913) 210 Fed. 801.

In a suit for infringement, the supreme court, reversing the decree be-

low, said, in its opinion: "The complainants must be content with the protection of an injunction, and a recovery of the profits realized from the infringing sales." Held that, on the return of the case, nothing could be allowed by way of damages, nor could a recovery of the profits be prevented on the assumption that the supreme court did not mean what it said. Graff v. Boesch (C. C. 1892) 50 Fed. 660.

Where, in a creditors' suit, the circuit court decreed that a conveyance of property by the debtor to a co-defendant be set aside as in fraud of complainants' rights, subject to a lien on the property by a third person for money advanced towards the erection of a building thereon after the conveyance, which decree was affirmed by the circuit court of appeals, the question of the right of such third person to a lien is res judicata in the suit, and cannot be reopened by a supplemental bill, though such third person was not a party to the original bill or the decree. Voorheis v. Blanton (C. C. 1899) 96 Fed. 497.

81. —— **Powers and duties of lower court.**—The affirmance, in a circuit court of appeals, of a preliminary order or interlocutory decree granting an injunction, does not deprive the circuit court of its inherent power temporarily to suspend such injunction. Edison Electric-Light Co. v. U. S. Electric-Lighting Co. (1892) 59 Fed. 501, 8 C. C. A. 200, denying motion to amend form of mandate (1892) 52 Fed. 300, 3 C. C. A. 83.

A decree entered on a mandate of the supreme court which falls short of a fulfillment of the decision of that court is not final, and may be modified at a subsequent term. Moran v. Hagerman (1894) 64 Fed. 499, 12 C. C. A. 239.

Where the supreme court, on reversing a decree, gives specific directions as to the decree to be entered below, the court below is bound to presume that the supreme court passed on all the issues, and must enter and execute the decree as ordered. Groves v. Sentell (1895) 66 Fed. 179, 13 C. C. A. 386, judgment affirmed (1895) 69 Fed. 223, 16 C. C. A. 217.

In each of two actions an attachment was issued and levied on property described in the returns, and, on the consolidation of the actions, a judgment was rendered condemning the property levied on, but describing only that described on one writ, which differed from that described on the other, and in the record on appeal only one writ and return were set out. In the mandate sent down on an affirmance of the judgment the property was also described according to the return on one writ only, and in an order of sale it was described in the same way. Held, that as the original judgment showed the property condemned, and the mandate of the court of appeals described the same property, the circuit court had no power to amend the judgment, and order a sale, so as to include the property described in the return to the other writ. North Alabama Development Co. v. Orman (1896) 71 Fed. 764, 18 C. C. A. 309.

A decision by a federal appellate court settles everything disposed of by it, so that the court below has no power to entertain a bill of review, on newly-discovered evidence, unless permission is given in the mandate. In re Gamewell Fire-Alarm Tel. Co. (1896) 73 Fed. 908, 20 C. C. A. 111, granting rehearing and modifying petition for rehearing Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co. (1894) 61 Fed. 948, 10 C. C. A. 184.

Where, on appeal from interlocutory decree granting a perpetual injunction, the court necessarily examines and determines the entire merits of the cause, its power to decree is not limited to the matter of the injunction alone, but extends to the whole merits, and its decision is final and conclusive on every point actually decided. Consequently, the court below has no power to modify, in any respect, a decree which is thus affirmed, but must give it full effect in the very terms of the decree of the appellate court. Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. (1896) 72 Fed. 545, 19 C. C. A. 25, reversing decree Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co. (1895) 72 Fed. 67, 19 C. C. A. 13, following Richmond v. Atwood (1892) 52 Fed. 10, 2 C. C. A. 596, 17 L. R. A. 615, and Marden v. Campbell Printing-Press & Manufacturing Co. (1895) 52 Fed. 337, 3 C. C. A. 103, and overruling Columbus Watch Co. v. Robbins (1892) 52 Fed. 337, 3 C. C. A. 103; Martin v. People's Bank (C. C. 1902) 115 Fed. 226.

Where the supreme court has considered a case at length on its merits, and remanded it to the circuit for further proceedings not inconsistent with its opinion, the circuit court will not permit the defendant to amend his answer so as to deny a fact affirmatively passed upon and determined by the supreme court. Walker v. Brown (C. C. 1897) 86 Fed. 364.

Where a judgment is reversed by the circuit court of appeals, and by its mandate the circuit court is directed to order a new trial, it is proper for such court to refuse to make the order conditional on the payment of the costs of the former trial. Chapman v. Yellow Poplar Lumber Co. (1898) 89 Fed. 903, 32 C. C. A. 402.

When a decree is reversed, and the mandate does not direct the entry of any particular decree, but only that further proceedings be had not inconsistent with the opinion of the appellate court, the effect is to put the case in the same position in the court below

as if no decree had ever been entered; and the court has the same authority to permit amendments of the pleadings to enlarge the issues, and admit further proofs, as it had before the entry of the decree. Hawkins v. Cleveland, C., C. & St. L. Ry. Co. (1900) 99 Fed. 322, 39 C. C. A. 538, denying mandate motion to modify (1898) 89 Fed. 266, 32 C. C. A. 198.

Where a circuit court of appeals on a writ of error has affirmed the judgment of a circuit court, condemned the plaintiff in error and the sureties on the writ of error bond to pay the costs, and issued its mandate in the usual form, the circuit court has no discretion to do otherwise than to obey the command of the mandate, and cannot entertain a defense there sought to be set up by the sureties, based on the alleged invalidity of the original judgment or a claim that the bond never became operative as a supersedeas, and its refusal to do so gives the sureties no right to the allowance of a second writ of error. White v. Bruce (1901) 109 Fed. 355, 48 C. C. A. 400.

Where, pending appeal from an adverse decision in an action to eject a mining company from plaintiff's land, used for the operation of its tramway, defendant brought suit to condemn a right of way therefor, and obtained an order permitting it to occupy the property pendente lite, the circuit court, on the affirmance of his decree in the ejectment suit, had jurisdiction to suspend the enforcement of the order of restitution pending the condemnation proceedings. U S. v. Marshall (1903) 122 Fed. 428, 58 C. C. A. 410.

Where a mandate from the Circuit Court of Appeals, directing the entry of a decree granting an injunction, has been filed in the Circuit Court, jurisdiction to punish for contempt for a subsequent violation of such injunction is in the Circuit Court, and not in the appellate court. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. (1903) 124 Fed. 735, 61 C. C. A. 57.

Where a mandate after appeal directed the trial court to take such further proceedings in the cause as according to right and justice and the laws of the United States ought to be had, it authorized such court, on ascertaining that a mistake had been made in the computation of the amount of the judgment, to correct the error. Ex parte Marks (1905) 136 Fed. 168, 69 C. C. A. 80.

The Supreme Court having held, in an action at law for the infringement of a patent by the device of another patent, that from a comparison of the two patents alone, without the aid of extrinsic evidence, it appeared that there was no infringement, and remanded the case to the Circuit Court for a new trial, that court was required on such trial to direct a verdict for defendant regardless of any new evidence. Cramer v. Singer Mfg. Co. (1906) 147 Fed. 917, 78 C. C. A. 53.

In a suit for unlawful competition in the use of the name "Rowley," the court restrained defendant from making or selling goods on which the address, covering, or appearance was such as would be likely to deceive the public, and from using the name "Rowley," with or without initials, in any manner in the manufacture or sale of his goods. This decree was reversed on the ground that defendant was entitled to use "Rowley," which was his own name, if an explanation was added. On remand the court entered a new decree restraining defendant from using the name "Rowley," without initials, in any manner in the manufacture and sale of his goods, and from using that name with initials in any manner, unless accompanied by explanatory words. Held, that such decree was a compliance with the instructions in remanding the cause. Rowley v. J. F. Rowley Co. (1909) 171 Fed. 415, 96 C. C. A. 371.

When an appellate court definitely describes the decree to be entered in the court below, there is no discretion in the latter court, but its duty is to obey the mandate and enter the decree accordingly, and when so entered it is the decree of the appellate court, and an appeal from it will be dismissed; but if the mandate does not cover the entire case, but leaves something undetermined, and to be inquired into and adjudicated, or if the court below misconstrues the decree of the appellate court, and does not give full effect to its mandate, a new appeal is an appropriate remedy. Great Northern Ry. Co. v. Western Union Telegraph Co. (1909) 174 Fed. 321, 98 C. C. A. 193.

Where, upon the death of a defendant in a criminal case in a federal court pending proceedings in error in the Supreme Court to review a judgment of conviction, the writ of error was dismissed and the cause was remanded for such further proceedings as "according to right and justice and the laws of the United States ought to be had," on the filing of such mandate the jurisdiction of the trial court reattached, and continued until action was taken pursuant to the mandate, and the court had authority to consider and act upon a motion in abatement. U. S. v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145, affirming judgment U. S. v. Mitchell (C. C. 1908) 163 Fed. 1014.

Where the Circuit Court of Appeals on determination of an appeal in an equity case directed the modification of the decree below by increasing the amount awarded complainant by a sum specified and adjudging the costs against defendants, such decision was a final adjudication of all of the issues in the

case, leaving to the Circuit Court only the duty of obeying the mandate without enlargement or change. Harrison v. Clarke (1910) 182 Fed. 765, 105 C. C. A. 197.

A decree of a Circuit Court, entered after a reversal and remand by the Circuit Court of Appeals, affirmed, as in strict conformity to the opinion and mandate of the appellate court. Pittsburgh Mfg. Co. v. Ludlow Valve Mfg. Co. (1910) 177 Fed. 691, 101 C. C. A. 181, writ of certiorari denied (1910) 30 S. Ct. 697, 217 U. S. 608, 54 L. Ed. 901.

Where the Kansas Court of Appeals in an action on certain coupons taken from municipal bonds reversed a judgment in favor of the holder and remanded the cause to the district court, that court was authorized to render a judgment not inconsistent with that of the Court of Appeals. Fitch v. Stanton Tp. (1911) 190 Fed. 310, 111 C. C. A. 210.

It does not necessarily result, from the fact that on reversal of a judgment by an appellate court the mandate does not specifically direct a venire de novo, that the judgment of reversal finally disposes of the case, so that a new trial cannot be had; but the grounds of reversal, as disclosed in the opinion of the appellate court, may be considered in determining the propriety of a second trial, especially where the mandate requires of the lower court that further proceedings be had "in conformity with the opinion and judgment of this court." Steinman v. U. S. (1911) 185 Fed. 47, 107 C. C. A. 151.

The trial court in a criminal case can enter no other or different judgment than is directed by the mandate from the appellate court. Morris v. U. S. (1911) 185 Fed. 73, 107 C. C. A. 293.

Where the Supreme Court dismissed a writ of error to review a judgment of the circuit court for want of jurisdiction, and by mandate directed the recovery of costs and execution and proceedings according to law, the Circuit Court could only proceed to execute its original judgment or the equivalent thereof. Hubbard v. Worcester Art Museum (1912) 196 Fed. 871, 116 C. C. A. 433.

Under Circuit Court of Appeals rule 32, providing for the issuance of a mandate on the determination of an appeal, the mandate is controlling on the trial court as to the further proceedings in the case. Farmer v. Atlantic Coast Line R. Co. (D. C. 1913) 205 Fed. 319.

An application to amend the complaint after reversal and remand for a new trial is addressed to the discretion of the court, to be determined after hearing. Id.

While a complaint may be amended to conform to the proof, even in the appellate court, where reversal is obtained, because the complaint alleged a specific cause of action, plaintiff, on new trial, is limited to proof of that action, and cannot amend to set up a different cause of action. Barnes-King Development Co. v. Assets Collecting Co. (1913) 205 Fed. 362, 123 C. C. A. 490.

Where, after reversal of a conviction for invalidity of a sentence imposed, the Department of Justice directed the district attorney not to oppose a motion for new trial, which was thereupon granted, the government thereby waived its right to sentence on the mandate. In re Cain (1913) 209 Fed. 40, 126 C. C. A. 182.

Where an appellate court decided that patent was not infringed, that an injunction against defendant was erroneously granted and reversed, and remanded the case, the lower court had no power to reopen the case for further proof as to the scope of the patent. D'Arcy v. Jackson Cushion Spring Co. (1914) 212 Fed. 889, 129 C. C. A. 409.

On remand after appeal by part of the defendants, taken while the court still had jurisdiction, the trial court can vacate or revise its decree as to the defendants not appealing. Fifth Third Nat. Bank v. Johnson (1915) 219 Fed. 89, 134 C. C. A. 529.

A decree of a Circuit Court of Appeals, set aside on rehearing after the term, where mandate had been stayed pending an appeal to the Supreme Court, which was dismissed for want of jurisdiction, and a new decree entered to conform to a decree of the Supreme Court in a later case, determining the precise question involved. Omaha Electric Light & Power Co. v. City of Omaha (1914) 216 Fed. 848, 133 C. C. A. 52, on bill of review reversing decree (1910) 179 Fed. 455, 102 C. C. A. 601, which affirmed (C. C. 1909) 172 Fed. 494.

The circuit court cannot entertain a motion for a new trial upon the ground of newly-discovered evidence, after a mandate has been received from the supreme court entitling the plaintiff to an absolute and final judgment. John Hancock Mut. Life Ins. Co. v. Manning (C. C. 1881) 7 Fed. 299.

A decree of the supreme court of Oregon allowed the plaintiff, in a suit to redeem from a mortgage, to redeem the property therein mentioned from certain conveyances to the defendant, on the payment of a certain sum of money within 90 days therefrom. The circuit court to which the mandate was sent, on the application and consent of the parties, made an order enlarging the time for redemption to three years, and placing the property in the hands of two persons as receivers during that time. Held, that the circuit court had no power to thus depart from the mandate, and that the power of any receivers appointed by the circuit court

would cease at the end of the 90 days named in the mandate, and that their appointment would not prevent the supreme court from decreeing a sale of part of the land in question to satisfy the lien created by its decree. The Holladay Case (C. C. 1886) 29 Fed. 226.

It is too late to question the jurisdiction of the circuit court after the return of a mandate from the circuit court of appeals, and the circuit court has no discretion, but must enter a decree pursuant to the directions of the mandate, and carry it into effect. Billings v. Aspen Mining & Smelting Co. (C. C. 1893) 53 Fed. 561, appeal dismissed Aspen Mining & Smelting Co. v. Billings (1893) 14 Sup. Ct. 4, 150 U. S. 31, 37 L. Ed. 986.

Where a decree dismissing a bill for infringement of a patent is reversed, with directions for further proceedings in accordance with the opinion, and on the coming down of the mandate a decree is entered awarding an injunction and an accounting, the lower court is not thereby precluded from afterwards allowing amendments to the pleadings, and granting a rehearing for the introduction of newly-discovered evidence, for the decree entered pursuant to the mandate is interlocutory only. C. & A. Potts & Co. v. Creager (C. C. 1896) 71 Fed. 574.

In an action at law in a federal court in Missouri, the defendant, in an answer entitled a "plea to the jurisdiction," set up, besides the want of jurisdiction, certain defenses on the merits. The court, without considering these defenses, dismissed the suit for lack of jurisdiction. This judgment was reversed by the supreme court, and the case remanded "for further proceedings in conformity to law." Held that, under the Missouri Code, it was thereafter in the discretion of the court below to permit the filing of an amended answer responsive to the issues tendered by the petition, and embracing, in substance, matters contained in the original answer, minus the plea to the jurisdiction. Edwards v. Bates County (C. C. 1897) 79 Fed. 56.

Where a decree of the Circuit Court adjudging the invalidity of a patent in a suit for its infringement has been reversed by the appellate court, and the case remanded with express direction to enter a decree "declaring the validity of the patent, and adjudging that claim 1 of said patent has been infringed by the defendant," the Circuit Court has no discretion to vary from such mandate by adjudging only that claim 1 of the patent is valid and infringed. Keasbey & Mattison Co. v. American Magnesia & Covering Co. (C. C. 1906) 148 Fed. 91.

Where the Circuit Court of Appeals had ordered the issuance of a mandate directing the dismissal of a bill, with costs, the Circuit Court had no jurisdiction to grant leave to file a supplemental bill in the nature of a bill of review, without leave first obtained by complainant from the Circuit Court of Appeals. Fellows v. Borden's Condensed Milk Co. (C. C. 1911) 188 Fed. 863.

Where the circuit court of appeals on an appeal in bankruptcy proceedings directed costs and disbursements to be taxed against the respondents, such decision is not reviewable by the district court on a subsequent motion to amend the order directing the entry of judgment. In re Henschel (D. C. 1902) 114 Fed. 968.

Where a judgment for plaintiff is reversed by the Circuit Court of Appeals for error in denying defendant's motion for a nonsuit, on the ground that the evidence showed no negligence of defendant, and the case was remanded for a new trial, it was the duty of the trial court to grant a new trial in all respects, and plaintiff might be granted leave to file amendments to the complaint, not inconsistent with the decision of the Court of Appeals, which was the law of the case. Farmer v. Atlantic Coast Line R. Co. (D. C. 1913) 205 Fed. 319.

A district court, after reversal of its decrees enjoining enforcement of state statutes fixing railroad rates, and receipt of mandates from the Supreme Court directing dismissal of the bills, held to have power on such dismissal to retain the cases on the docket for the purpose of adjudicating the claims of shippers and passengers to recover excess payments exacted while the injunctions were in force with the consent of complainants. St. Louis & S. F. R. Co. v. Barker (D. C. 1914) 210 Fed. 902.

The powers of a court of equity under a mandate of an appellate court reversing its decree and directing a dismissal of the bill considered. Id.

Where a judgment sentencing a defendant in a criminal case, and certain proceedings after verdict, are vacated on appeal because of error occurring after the verdict, and the cause returned to the trial court to proceed de novo on the verdict, it is within the discretion of the trial court to overrule a motion for a new trial and to impose the same sentence as before. Raymond v. U. S. (1905) 26 App. D. C. 250.

82. —— **Proceedings after remand.**— It is not necessary to recite in the mandate every step in the various stages of the cause. Andrews v. Thum (1896) 72 Fed. 290, 18 C. C. A. 566, denying motion to stay issuing of mandate (1895) 70 Fed. 65, 16 C. C. A. 677, and certiorari denied (1896) 16 Sup. Ct. 1198, 163 U. S. 676, 41 L. Ed. 313.

Where a mandate from the circuit court of appeals to the circuit court directs the latter to vacate an order ratifying a sale by a receiver on the ground that the court was without jurisdiction in the suit, and directs that

the purchase price in the registry of the court be repaid to the purchaser, the circuit court has jurisdiction to entertain a petition of intervention by the sureties of the receiver, who paid such money into the court registry upon the embezzlement by the receiver of the original payment, and to direct instead that the money be returned to them on the ground that, since the appointment of the receiver was void, they were not liable on the bond. Baltimore Building & Loan Ass'n v. Alderson (1900) 99 Fed. 489, 39 C. C. A. 609.

In a suit in equity brought in a federal court for the cancellation of deeds to certain undivided interests in a mining claim on the ground of fraud and to establish complainant's title to such interests, held, that the circuit court was not justified in refusing to proceed to a final decree establishing such rights of complainant in accordance with the mandate of the appellate court, and in conformity to the issues joined and litigated, because of the pendency of a new suit brought by defendants asserting their sole ownership of such ore on the ground that the vein in which it was found had its apex in other property owned by them, such claim, if true, being one which they were bound to assert in the prior suit. Hanley v. Beatty (1902) 117 Fed. 59, 54 C. C. A. 445.

Under the mandate of a Circuit Court of Appeals directing a new trial the entry of judgment upon the pleadings without taking testimony may properly be directed by the trial court. If the pleadings present such a state of conceded facts as to entitle either party to a judgment, the action of the trial court in making proper disposition of the case, after hearing the argument, is itself a trial. Dodge v. U. S. (1904) 131 Fed. 849, 65 C. C. A. 603, writ of certiorari denied (1904) 25 S. Ct. 790, 195 U. S. 632, 49 L. Ed. 353.

The reversal of a judgment of conviction in a criminal case and the remanding of the case for a new trial generally leaves the trial court free to proceed as though the cause had never been tried, and it may consolidate other indictments for trial with those upon which the first trial was had. Booth v. U. S. (1907) 154 Fed. 836, 83 C. C. A. 552.

A procedendo is a writ from a higher to a lower court, directing that the case be proceeded with. It does not undertake to say what the decision shall be, but merely that there shall be one, and where there is a reversal the case is thereupon taken up in the court below at the point where the erroneous judgment was rendered. Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co. (1910) 185 Fed. 487, [illegible] C. C. A. 587, denying motion to [illegible] mandate Exchange Mut. Fire Ins. Co. v. Same (1910) 181 Fed. 330, 104 C. C. A. 518.

Where the mandate has gone to the Circuit Court, an application for a stay to allow plaintiff in error to apply for certiorari should be made there, and not to the Circuit Court of Appeals. Oceanic Steam Navigation Co. v. Watkins (1911) 188 Fed. 909, 110 C. C. A. 543, writ of certiorari denied (1911) 32 S. Ct. 524, 223 U. S. 723, 56 L. Ed. 631.

If there is any error in a decree dismissing a bill on mandate from the supreme court, it can only be corrected at that term, or by proceedings for review under the rules or on appeal, not by motion at a subsequent term. Campbell v. James (C. C. 1887) 31 Fed. 525.

A mandate of the United States supreme court to the circuit court, directing the dismissal of the bill, includes the whole bill upon which plaintiff's case rests, and a decree of the circuit court dismissing not only the original, but also the amended, bill of complaint, does not go beyond the mandate. Id.

Where an appeal to the supreme court from a decree of the circuit court is dismissed, and a mandate issued directing the court to proceed according to right and justice, the court may procede as if no appeal had been taken, and the time for so doing, specified in the decree, had expired. Providence Washington Ins. Co. v. The Sydney and The William Worden (C. C. 1891) 47 Fed. 260.

In a suit on municipal aid bonds the answer set up their invalidity. A demurrer to the answer was sustained, but this decision was reversed by the supreme court on the ground that the act authorizing the issue was unconstitutional. Thereafter, in the trial court, the demurrer was overruled pursuant to the mandate, and the plaintiff filed a reply. Held, that the defendant could offer evidence to prove the facts which had been taken judicial notice of by the supreme court, on demurrer, and deemed sufficient to establish the unconstitutionality of the act. Ætna Life Ins. Co. v. Pleasant Tp. (C. C. 1893) 53 Fed. 214, judgment affirmed (1894) 62 Fed. 718, 10 C. C. A. 611.

Leave from the supreme court is not necessary to authorize a circuit court to entertain a bill to restrain the enforcement of its own judgment against the complainant, though such judgment was rendered on a mandate of the supreme court, where the ground alleged is that the complainant, though nominally a party to the action in which the judgment was rendered, was not in fact a party, and is not bound by the judgment; the purpose of such bill not being to review any question determined by the supreme court. Brown v. Walker (C. C. 1898) 84 Fed. 532.

The affirmance of a railroad foreclosure decree, which expressly leaves open for future determination the question of title to certain rolling stock, is an affirmation by the supreme court that the court below has jurisdiction to determine that question after receiving the mandate. Central Trust Co. v. Ohio Cent. Ry. Co. (C. C. 1898) 85 Fed. 342.

After the circuit court of appeals has affirmed a decree of the circuit court on appeal, and has issued its mandate, the circuit court cannot entertain a petition to modify or expunge such decree. Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co. (C. C. 1900) 99 Fed. 171.

Where judgment was reversed because of an unauthorized sentence, and the cause remanded to the lower court with instructions to proceed, the trial court may resentence the defendant, and impose the penalty provided by law, though part of the void sentence was executed. U. S. v. Harman (D. C. 1895) 68 Fed. 472.

83. —— **Enforcement of judgment or order affirmed.**—On affirmance of a conviction on a writ of error by the Circuit Court of Appeals, it is the duty of the trial court after it has received the mandates of the Circuit Court of Appeals, in the absence of permission given by the latter to hear an application for a new trial, to see that the judgment is carried into execution. Angle v. U. S. (1908) 162 Fed. 264, 89 C. C. A. 244.

Where a defendant was sentenced to imprisonment in a county jail for 24 hours as a part of the punishment imposed, and on affirmance of the judgment a mandate from the appellate court required him to surrender himself in execution of the judgment within 30 days after it was filed, and his offer to surrender himself within that time was not accepted by the marshal and he was not imprisoned, he was not entitled to have the judgment of imprisonment satisfied. Morris v. U. S. (1911) 185 Fed. 73, 107 C. C. A. 293.

A decree was rendered upon a bond against the principal and against two sureties for certain limited amounts in which they were bound. The sureties compromised their liability, but the principal afterwards appealed to the supreme court, where the decree was affirmed in all respects. Held, that the circuit court was not bound by the mandate, so as to allow execution to go against the sureties, either for the whole of the decree against them or for the excess over the sums paid in satisfaction of the whole. The Sabine (C. C. 1881) 50 Fed. 215.

When a judgment of the district court is affirmed in the circuit court, the judgment does not remain in the district court as the judgment of that court, to be enforced by its process, but becomes the judgment of the circuit court. U. S. v. Reid (C. C. 1883) 17 Fed. 497.

The Circuit Court of Appeals has jurisdiction to enter a final judgment where jurisdiction is dependent on diversity of citizenship, and the judge of the lower court, on remand, cannot open the case, and has no judicial function to exercise in the matter, and can only execute the judgment of the Circuit Court of Appeals, which is merely a ministerial act. Moore v. Chattanooga Electric Ry. Co. (1908) 109 S. W. 497, 119 Tenn. 710.

84. —— **Interest on judgment.**—When a judgment for money which does not award interest is affirmed without reference to the question of interest, such a decree is to be taken by the lower court as a declaration that no interest is to be allowed. Green v. Chicago, S. & C. R. Co. (1892) 49 Fed. 907, 1 C. C. A. 478.

The court made findings, from which the amount due plaintiff could be computed, but gave judgment for defendant; and on error the judgment was reversed, directing judgment for plaintiff on the findings. A statute of the state allowed interest on a verdict until entry of judgment. Held, that plaintiff should have interest computed to the time of the entry of judgment on the mandate of the supreme court, on the principal and interest due him at the date of the findings. Metcalf v. City of Watertown (1895) 68 Fed. 859, 16 C. C. A. 37.

The allowance of interest on a judgment affirmed by the circuit court of appeals under rule 30 is within the power of that court alone, and, when a decree making no provision for interest is affirmed by a mandate which is also silent on the point, the lower court has no power to allow interest. Hagerman v. Moran (1896) 75 Fed. 97, 21 C. C. A. 242.

85. —— **Rendition of judgment as directed.**—A District Court under a mandate of the Supreme Court remanding cause for entry of a decree for reorganization of railway terminal facilities so as to escape condemnation of Anti-Trust Act July 2, 1890, should not insert in such decree a provision controlling for the future the charges which the terminal company may make. U. S. v. Terminal R. Ass'n of St. Louis (1915) 35 S. Ct. 408, 236 U. S. 194, 59 L. Ed. 535.

Where judgment was reversed, with costs to plaintiff, the judgment for costs on the writ of error, made the judgment of the trial court on remand, was beyond the subsequent control of that court, regardless of the final result. Scatcherd v. Love (1908) 166 Fed. 53, 91 C. C. A. 639.

Costs taxed in the Circuit Court of Appeals without objection cannot be objected to for the first time in the Cir-

cuit Court after remand. Fidelity & Deposit Co. of Maryland v. Expanded Metal Co. (1910) 183 Fed. 568, 106 C. C. A. 114, affirming judgment Expanded Metal Co. v. Bradford (C. C. 1910) 177 Fed. 604.

Where, on a new trial to determine the title and right of possession of land, under a state statute giving a right to a new trial in such cases, the material facts, as disclosed by the evidence, are substantially the same as the facts on the former trial, and substantially as the facts before the circuit court of appeals on the review of such former trial, the case will be disposed of as indicated by the appellate court. Thatcher v. Gottlieb (C. C. 1893) 54 Fed. 312.

Provisions of a mandate from the supreme court, in relation to the costs of a case, do not affect the right of a party to tax costs made on a reference, in accordance with a stipulation entered into between the parties before the hearing. Clark v. Chicago, M. & St. P. Ry. Co. (C. C. 1900) 105 Fed. 552.

86. —— **Making or compelling restitution.**—Voluntary consent to execution, pending an appeal, of a part of the decree, which directed payment of special master's costs, and a solicitor's fee for complainant, binds the consenting party, though the decree is afterwards wholly reversed, and the allowances were erroneous. Groves v. Sentell (1895) 66 Fed. 179, 13 C. C. A. 388, judgment affirmed (1895) 69 Fed. 223, 16 C. C. A. 217.

Where a deed was canceled for fraud by decree entered on a mandate of the Circuit Court of Appeals, which also directed an accounting by the defendants with respect to the property conveyed, each of defendants was precluded by such adjudication from claiming on the accounting that he was an innocent purchaser for value. Snow v. Hazlewood (1910) 179 Fed. 182, 102 C. C. A. 448, decree amended and rehearing denied (1910) 181 Fed. 966, 104 C. C. A. 430.

Where a decree for costs entered by a trial court has been collected pending an appeal, on which the decree is reversed and costs awarded to appellant, the court may properly decree restitution on receipt of the mandate. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

As to the question of title where property was sold on attachment and the judgment in the action was afterwards reversed, see Biggs v. Blue (C. C. 1850) Fed. Cas. No. 1,403.

Where a judgment has been enforced and subsequently reversed on appeal, the party is entitled to a right of action for a money equivalent of that which was lost by the erroneous judgment. South Fork Canal Co. v. Gordon (C. C. 1868) Fed. Cas. No. 13,189.

The title acquired by a stranger through a sale of lands regularly made under a judgment of a court of record, valid upon its face, cannot be defeated by a subsequent reversal of the judgment on appeal. Galpin v. Page (C. C. 1870) Fed. Cas. No. 5,205.

An appeal from a decree of the circuit court dismissing a bill on the merits was dismissed by the supreme court on the ground that the amount involved was only $900, and hence beneath its jurisdiction. This decision being decisive also against the jurisdiction of the circuit court, on a bill of review in the latter court the original decree was reversed, and the bill dismissed for want of jurisdiction without prejudice. Held that, on thus reversing its decree and dismissing the bill, the circuit court had no power to order restitution of the costs of the appeal, which had been paid by plaintiff in pursuance of the mandate of the supreme court. Miller v. Clark (C. C. 1892) 52 Fed. 900, appeal dismissed Clark v. Miller (1892) 13 Sup. Ct. 1045, 149 U. S. 770, 37 L. Ed. 960.

Nor would the circuit court order restitution of costs paid by plaintiff under the original decree dismissing the bill on the merits, as plaintiff was in fault in invoking a jurisdiction to which she had no right to resort; and for the same reason the costs of the bill of review should not be taxed in her favor. Id.

87. —— **New trial.**—A mandate which, after ordering a reversal, contains a direction "to grant a new trial, to sustain the plea of * * * limitations, * * * and to enter judgment for the defendant," does not make a new trial compulsory, but merely allows plaintiff one if he desires it, the further directions as to the plea and entry of judgment to govern only in case he elects to take a new trial; so that after the trial court, on reception of the mandate has entered an order setting aside the judgment theretofore entered and granting a new trial, plaintiff may take a voluntary nonsuit. Atlanta, K. & N. Ry. Co. v. Hooper (1900) 105 Fed. 550, 44 C. C. A. 586.

Where the decision left for trial an issue of fact as to the truth of the facts pleaded in avoidance in the replication, it was error to render judgment for plaintiff on the pleadings after the cause was remanded. Board of Com'rs of Ouray County v. Geer (1901) 108 Fed. 478, 47 C. C. A. 450.

A decision of the circuit court of appeals on the record before it that the case should have been submitted to the jury is not controlling upon the trial court in a second trial, where the evidence is different. Patton v. Southern Ry. Co. (1901) 111 Fed. 712, 49 C. C. A. 569, writ of certiorari denied (1902) 22 Sup. Ct. 944, 186 U. S. 484, 46 L. Ed. 1261.

The reversal of a judgment by an ap-

pellate court, on the ground that the trial court erred in refusing defendant's motion to direct a verdict in its favor does not entitle defendant to a directed verdict on a second trial, unless the evidence is substantially the same. Denver & R. G. R. Co. v. Arrighi (1905) 141 Fed. 67, 72 C. C. A. 400.

Plaintiff recovered a judgment against a street railroad company for an injury received by being thrown down by the starting of a car as she was passing from the vestibule through the doorway, which judgment was reversed by the appellate court; one of its holdings being that the evidence was insufficient to show that the car started with an unusually violent jerk as alleged. Plaintiff had testified that, as the car started, she tried to catch hold of the door, but could not. On the second trial she testified that, when thrown, she was holding to the door, and leaning heavily against it, which testimony was uncorroborated. Held, that her testimony was so inconsistent with that given on the former trial as to discredit her, and to justify the court in directing a verdict for defendant; the other testimony being no more favorable to her than on the first trial. Smith v. Boston Elevated Ry. Co. (1911) 184 Fed. 387, 106 C. C. A. 497, 37 L. R. A. (N. S.) 429.

Where the Circuit Court of Appeals decided that the trial court should have submitted an issue to the jury, the trial court on a subsequent trial on substantially the same facts must submit the issue. St. Louis & S. F. R. Co. v. Herr (1912) 193 Fed. 950, 113 C. C. A. 578, writ of certiorari denied (1912) 32 S. Ct. 837, 225 U. S. 705, 56 L. Ed. 1265.

Where, in a suit to recover the proceeds of personal property sold under a chattel mortgage, the Circuit Court of Appeals reversed a decree of dismissal and remanded the case for further proceedings, it was proper for the trial court to hear evidence of value and to enter a new finding on such evidence. Mattley v. Giesler (1912) 202 Fed. 738, 121 C. C. A. 207.

Where the evidence on a second trial is the same as on the first, which on appeal was held sufficient to go to the jury, it is proper to leave such evidence to the jury on the second trial. City of Philadelphia v. Atlantic & P. Telegraph Co. (C. C. 1904) 127 Fed. 370, denying new trial (C. C. 1901) 109 Fed. 55.

Evidence held not to differ so materially from that on a former trial as to justify entering a judgment notwithstanding verdict under the Pennsylvania statute; the appellate court having held, in reversing a former judgment on a directed verdict, that there was an issue of fact for submission to the jury. Collins v. Edward B. Smith & Co. (C. C. 1909) 170 Fed. 367.

Where the mandate was consistent either with the granting of a new trial after correction of the complaint, or the granting of judgment for defendant on the verdict, the court would look to the opinion, and, this indicating that a new trial was intended, defendant's motion for judgment on the verdict should be denied. Newcomb v. Burbank (1910) 182 Fed. 954.

Where, in an action for the price of blue grass seed, the issue was restricted by the Circuit Court of Appeals to the question whether the contract called for blue grass seed at 14 pounds per bushel, or 21 pounds, the action of the trial court on a subsequent trial in ruling that there could be no recovery on quantum meruit was proper. Brent v. Chas. H. Lilly Co. (D. C. 1913) 202 Fed. 335.

88. Jurisdiction and proceedings of appellate court after remand—Transfer of jurisdiction.—A federal appellate court may entertain an original petition for leave to file, in the court below, a bill of review, even after the going down of the mandate, and after the term at which the judgment was entered. In re Gamewell Fire-Alarm Tel. Co. (1896) 73 Fed. 908, 20 C. C. A. 111, granting rehearing and modifying petition for rehearing Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co. (1894) 61 Fed. 948, 10 C. C. A. 184.

Where a case has been reversed, and the mandate sent down, on petition to the appellate court for leave to file a bill of review below on newly-discovered evidence the appellate court will only decide on the materiality of the new evidence, leaving to the court below to determine the question of laches in producing it. Id.

An application for leave to file a bill of review after the decree has been affirmed is properly made to the appellate court. Society of Shakers v. Watson (1896) 77 Fed. 512, 23 C. C. A. 263, denying motion to file bill of review (1895) 68 Fed. 730, 15 C. C. A. 632.

A motion to modify an order of affirmance will be denied, when the motion is filed long after the term at which the order was entered. Minnesota Tribune Co. v. Associated Press (1898) 84 Fed. 921, 28 C. C. A. 566, denying motion to modify decree (1897) 83 Fed. 350, 27 C. C. A. 542.

There is no fixed rule governing the exercise by the circuit court of appeals of its equitable power to reserve leave to the court below to hear a motion by a defeated complainant to amend his pleading, but such leave will not be reserved where the complainant was defeated below on the merits, and made no application to amend before appeal, nor merely to permit the continuance of litigation, where there are no apparent equities sufficiently strong to justify it. Post v. Beacon Vacuum Pump & Electrical Co. (1898) 89 Fed.

1, 32 C. C. A. 151, reversing judgment on rehearing (1898) 84 Fed. 371, 28 C. C. A. 431.

On a petition to the circuit court of appeals, after a decision of that court affirming a judgment of the circuit court, for leave to file in the lower court a bill in the nature of a bill of review, it is deemed the better practice to grant such leave as a matter of course, unless there are special reasons to the contrary, without considering the merits of the proposed bill. Seymour v. White County (1899) 92 Fed. 115, 34 C. C. A. 240.

Where a petition is filed in the circuit court of appeals for permission to file a bill in the circuit court to review a decree which has been affirmed on appeal, and the issues raised are such as, if sustained necessarily require a reversal of such decree, but are of such a character that they cannot properly be determined on affidavits, permission will be given to file the bill in the lower court, provided the petitioner shows himself free from laches, and entitled to raise the issue. Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co. (1899) 98 Fed. 121, 38 C. C. A. 661.

An application made to the circuit court of appeals after its affirmance of a decree for leave to file a supplemental bill in the nature of a bill of review will be referred to the circuit court, with permission to that court to entertain it. Bliss v. Reed (1901) 106 Fed. 314, 45 C. C. A. 304, affirming decree (C. C. 1900) 102 Fed. 903.

Where a decree has been entered on the mandate of an appellate court which left no question to be determined by the lower court, the sufficiency of the reasons alleged in support of a proffered bill of review should be determined by the appellate court, although, where material matters are involved, which have transpired in the court below since the decision of the cause, or for other sufficient reasons, the appellate court may remit the inquiry, in whole or in part, to the lower court, and authorize it to settle the matter. Keith v. Alger (1903) 124 Fed. 32, 59 C. C. A. 552.

In the case at bar the petitioner asks leave to proceed further in the District Court after the term at which sentence was pronounced, and relies on a local statute of Massachusetts; so that, notwithstanding the general rule, the Court of Appeals deems it suitable in this particular instance to grant the petion and to remit all questions either as to the jurisdiction or the merits to be first investigated by the District Court, without any implication from the Court of Appeals pro or con with reference to either the jurisdiction or the merits. Trafton v. U. S. (1906) 147 Fed. 513, 78 C. C. A. 79.

A motion in a Circuit Court of Appeals, after an affirmance in a suit to enjoin proceedings in a state court, in which the court below held that it was without jurisdiction, to enjoin appellees from availing themselves of rights given them by the decree of the state court until appellants could apply to the Supreme Court for a writ of certiorari, denied. Hall v. Ames (1911) 190 Fed. 138, 111 C. C. A. 178, affirming decree (C. C. 1910) 182 Fed. 1008.

The Circuit Court of Appeals, having affirmed a judgment for complainant in a suit for patent infringement and remanded the case for an accounting, had jurisdiction to grant a writ of mandamus requiring the trial judge to set aside an order quashing a master's summons requiring defendant to render a sworn statement of account under Equity Rule 79 (New Rule 63, notes under § 1536, ante). In re Beckwith (1913) 203 Fed. 45, 121 C. C. A. 381.

Where a petition to revise has been determined by the Circuit Court of Appeals, and mandate transmitted to the District Court, which has acted thereon, the cause is no longer in the Circuit Court of Appeals, and an application there to intervene would be denied. In re Nevada-Utah Mines & Smelters Corporation (1913) 204 Fed. 982, 123 C. C. A. 304, denying rehearing (1913) 202 Fed. 126, 120 C. C. A. 440.

Where, pending a writ of error from the Supreme Court to determine the constitutionality of a municipal ordinance, another case involving the same question was taken to that court, the cases consolidated and the ordinance held unconstitutional, the court, having dismissed the writ of error in the first case, reinvested the Circuit Court of Appeals with jurisdiction, which court would enter a new judgment in conformity with the determination of the Supreme Court. Boise City, Idaho, v. Boise Artesian Hot & Cold Water Co. (1913) 208 Fed. 546, 125 C. C. A. 548.

By an order staying its mandate pending an appeal to the Supreme Court from its decision, a Circuit Court of Appeals retains its jurisdiction, so that a dismissal of the appeal leaves the cause still pending in that court, which may revise or change its decree, although the term at which it was entered has passed. Omaha Electric Light & Power Co. v. City of Omaha (C. C. A. 1914) 216 Fed. 848, on bill of review reversing decree (1910) 179 Fed. 455, 102 C. C. A. 601, which affirmed (C. C. 1909) 172 Fed. 494.

Where an application to the supreme court of the United States for permission to apply to a circuit court for leave to file a bill of review for the reconsideration of a decree of that court which the supreme court had affirmed was granted formally without passing on objections made to the granting of such permission going to the right of the applicant to file a bill of review, the

circuit court is not precluded from considering such objections on their merits when they are renewed before it on the application for leave to file such bill. Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort (C. C. 1902) 120 Fed. 165, order affirmed (1903) 124 Fed. 18, 59 C. C. A. 538.

89. —— Recall or return of cause from lower court.—After the affirmance by the circuit court of appeals of a judgment, and the going down of the mandate, a recall of the mandate is unnecessary to the taking of an appeal to the supreme court, as the transcript of record is never remitted to the court below, but remains in the appellate court. Ritter v. Mutual Life Ins. Co. of New York (1896) 72 Fed. 567, 19 C. C. A. 41, denying petition for recall of mandate (1895) 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583.

After the term at which an appeal was determined and the judgment reversed and the cause remanded, the Court of Appeals was without jurisdiction to recall the mandate and permit petitioners to intervene and assert their alleged rights. Miocene Ditch Co. v. Campion Mining & Trading Co. (1912) 197 Fed. 497, 117 C. C. A. 61.

90. —— Rehearing in appellate court.—A rehearing will not be granted to consider a point not raised at first hearing. U. S. v. Hall (1894) 63 Fed. 472, 11 C. C. A. 294; Merriman v. Chicago & E. I. R. Co. (1895) 66 Fed. 663, 14 C. C. A. 36, denying petition for rehearing (1894) 64 Fed. 535, 12 C. C. A. 275.

Where a standing order of the circuit court of appeals directs that mandates on decisions of that court shall be retained for 60 days before transmission to the lower court, a motion for reargument should be made within such 60 days, unless it appears that counsel were not notified of the decision, or could not, with reasonable diligence, have ascertained the facts on which the motion is based within that time. Crabtree v. McCurtain (1895) 66 Fed. 1, 13 C. C. A. 275.

Rehearings will not be granted by the circuit courts of appeal merely because a case is one of importance, when there is no suggestion that any consideration or authority entitled to weight has been overlooked; especially in cases which are subject to review by the supreme court. Camfield v. U. S. (1895) 67 Fed. 17, 14 C. C. A. 228, denying motion for rehearing (1895) 66 Fed. 101, 13 C. C. A. 359.

It is the intention of the court that the granting of a rehearing without restriction shall operate to vacate its judgment, so that thereafter the cause shall stand as if no judgment had been entered. Hook v. Mercantile Trust Co. of New York (1899) 95 Fed. 41, 36 C. C. A. 645.

The right of one who performed labor on a building after the appointment of a receiver for the property, to preferential payment therefor, cannot be considered on a motion for rehearing in the appellate court, where the question is then presented for the first time. A. F. Withrow Lumber Co. v. Glasgow Inv. Co. (1901) 106 Fed. 363, 45 C. C. A. 321.

The effect of an order of a Circuit Court of Appeals staying a mandate after judgment indefinitely is to retain jurisdiction of the cause in that court, and the power to grant a rehearing, even after the term, so long as the mandate has not issued. Burget v. Robinson (1903) 123 Fed. 262, 59 C. C. A. 260.

Where a decree was reversed on appeal, and the cause remanded, with directions for a specific discovery with respect to a certain invention made by defendant and the granting of such relief as might be warranted thereby, a rehearing was denied on an averment by appellee that the facts sufficiently appear from the record to enable the court to make a final adjudication, where no such claim was made on the hearing. Reece Folding Mach. Co. v. Fenwick (1905) 140 Fed. 287, 72 C. C. A. 39, 2 L. R. A. (N. S.) 1094.

Where a citation was mainly relied on at the oral argument and appeared prominently in the brief, rehearing should not be applied for, on the ground that the court had inadvertently overlooked the citation, but it should be assumed that the court had given the point due consideration. F. Rosenstern & Co. v. U. S. (1909) 171 Fed. 71, 96 C. C. A. 175.

Where no claim for general relief was presented by appellants to the District Court, nor to the Circuit Court of Appeals on the original hearing, but complainants demanded a decree quieting title by enjoining respondents from asserting an adverse claim to the property, a rehearing would not be granted on the ground that the trial court might have granted complainants substantial relief without an injunction, under the prayer for general relief in the bill. Hull v. Burr (1913) 207 Fed. 543, 125 C. C. A. 221, denying rehearing (1913) 206 Fed. 1, 124 C. C. A. 135.

Circuit court, on appeal, cannot rehear a cause or admit a claim at a term subsequent to that in which the cause was finally decided. The Avery (C. C. 1815) Fed. Cas. No. 672.

A rehearing will not be granted because the court in its opinion misquoted the testimony, where such misquotation does not change the opinion. Torrent v. Duluth Lumber Co. (C. C. 1887) 32 Fed. 229.

91. —— Allowing further appeal.—After the decision of an appeal it was made to appear by suggestion of counsel in open court, and by a verified petition supported by affidavits, that counsel for the defeated party con-

ceived himself entitled to make application for leave to file a bill of review. Held, that the circuit court of appeals would not of itself determine the right of such party to file the bill, but would, in its mandate, reserve to him liberty to file an application therefor in the circuit court, and to proceed thereon and on the bill of review, as the circuit court might determine. Watson v. Stevens (1892) 53 Fed. 31, 3 C. C. A. 411, granting leave to file bill of review (C. C. 1891) 47 Fed. 117, and (1892) 51 Fed. 757, 2 C. C. A. 500.

When the circuit court of appeals has no jurisdiction to review a cause before it on error, because the right of the jury upon trying the cause before a referee was only conditionally, instead of unconditionally, waived, it may affirm the judgment, reserving to plaintiff in error liberty to file in the court below an application for leave to file a bill of review. Smith v. Weeks (1893) 53 Fed. 758, 3 C. C. A. 644.

On an application to the Circuit Court of Appeals for leave to file a bill of review to review a decree sustaining the validity of a patent entered upon its mandate, on the ground of newly discovered evidence, the question of due diligence, as well as the materiality of the new evidence, is one for consideration by that court. Kissinger-Ison Co. v. Bradford Belting Co. (1903) 123 Fed. 91, 59 C. C. A. 221.

An application for leave to file a bill of review should be finally determined on the merits by the court which entered the decree sought to be reviewed; but, where such decree was entered by a Circuit Court pursuant to a mandate from the Circuit Court of Appeals, permission should be obtained from the latter court to present such application to the court below, and such permission will only be granted where on the case made the appellate court has a strong impression that the decree ought to be opened and reviewed by the Circuit Court. Novelty Tufting Mach. Co. v. Buser (1907) 158 Fed. 83, 85 C. C. A. 413, 14 Ann. Cas. 192.

Where, after dismissal of an original bill in accordance with the mandate of the Circuit Court of Appeals, complainant's petition to that court for leave to apply to the Circuit Court for leave to reopen the case was denied, complainant's petition for leave to file a bill of review, not preceded by an application to the Circuit Court of Appeals for permission to apply to the Circuit Court to file the same, would also be denied. McClintock v. City of Pawtucket (C. C. 1910) 180 Fed. 320.

92. —— **Amendment of judgment.**—An appellate court has no power, after the end of the term at which its decree is rendered, to modify the same on motion, in respect to the costs. Jourolman v. East Tennessee Land Co. (1898) 85 Fed. 251, 29 C. C. A. 140, denying motion to modify decree Jourolmon v. Ewing (1897) 80 Fed. 604, 26 C. C. A. 23.

93. —— **Amendment of mandate.**—Where a mandate sent down by a circuit court of appeals on reversal of a decree is in customary form, commanding "that such further proceedings be had in said cause as are not inconsistent with the opinion of this court," a motion to modify the mandate is, in effect, one to modify the opinion, which cannot be entertained after the time allowed for a petition for rehearing, or, at furthest, after the term, when such time expires before the close of the term. In case of dispute over the interpretation or application of the opinion, the remedy is by mandamus or by a second appeal. Hawkins v. Cleveland, C., C. & St. L. Ry. Co. (1900) 99 Fed. 322, 39 C. C. A. 538, denying mandate motion to modify (1898) 89 Fed. 266, 32 C. C. A. 198.

A circuit court of appeals has no power to entertain a motion to revoke a mandate issued, and to issue a new one directing the entry of a different decree below, where such motion is not made until after the expiration of the term at which the cause was determined and decree entered, and where such decree, and the mandate issued thereon, conform in all respects to the opinion of the court, notwithstanding equitable grounds are shown for the granting of different relief to the successful appellant, had timely application therefor been made. Reynolds v. Manhattan Trust Co. (1901) 109 Fed. 97, 48 C. C. A. 249.

94. **Dismissal or withdrawal of appeal or error.**—See Nashua & L. R. Corp. v. Boston & L. R. Corp. (1892) 51 Fed. 929, 2 C. C. A. 542 (denying motion to dismiss appeal [C. C. 1892] 49 Fed. 774); Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 19 C. C. A. 477 (overruling motion to dismiss appeal [C. C. 1895] 68 Fed. 412, and appeal dismissed [1897] 84 Fed. 1017, 28 C. C. A. 681); Donallan v. Tannage Patent Co. (1897) 79 Fed. 385, 24 C. C. A. 647, dismissing appeal Tannage Patent Co. v. Donallan (C. C. 1896) 75 Fed. 287; Benner v. Hayes (1897) 80 Fed. 953, 26 C. C. A. 271; Lansing & Co. v. Hesing (1897) 81 Fed. 242, 26 C. C. A. 382; Standard Oil Co. v. Bell (1897) 82 Fed. 113, 27 C. C. A. 72; Pike v. Gregory (1899) 94 Fed. 373, 36 C. C. A. 299; Hook v. Mercantile Trust Co. of New York (1899) 95 Fed. 41, 36 C. C. A. 645; Ayres v. Polsdorfer (1900) 105 Fed. 737, 45 C. C. A. 24 (writ of error dismissed [1903] 23 Sup. Ct. 196, 187 U. S. 585, 47 L. Ed. 314); Alaska United Gold Min. Co. v. Muset (1902) 114 Fed. 66, 52 C. C. A. 14; Thomson-Houston Electric Co. v. Nassau Electric R. Co., 119 Fed. 354, 56 C. C. A. 96; Goldstein v. Behrends (1903) 123 Fed. 399, 59 C. C. A. 203; Mossberg v. Nut-

ter (1903) 124 Fed. 966, 60 C. C. A. 98 (discussing Roemer v. Simon [1875] 91 U. S. 149, 23 L. Ed. 267); Bradley v. Eccles (1903) 126 Fed. 945, 61 C. C. A. 669 (affirming decree [C. C. 1903] 122 Fed. 867, and reversing decree [C. C. 1903] 122 Fed. 871); Carter County v. Schmalstig (1904) 127 Fed. 126, 62 C. C. A. 78; Equitable Life Assur. Soc. of United States v. Tolbert (1906) 145 Fed. 338, 76 C. C. A. 212; Missouri, K. & T. Ry. Co. v. Kidd (1906) 146 Fed. 499, 77 C. C. A. 13 (affirming order [Ind. T. 1904] 88 S. W. 308); Long v. Farmers' State Bank (1906) 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585; Sena v. U. S. (1906) 147 Fed. 485, 78 C. C. A. 27 (reversing judgment U. S. v. Sena [N. M. 1904] 78 P. 58); Chapin v. Friedberger-Aaron Mfg. Co. (1907) 158 Fed. 409, 85 C. C. A. 519; Keely v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 601, 95 C. C. A. 99; Hubbard v. Worcester Art Museum (1912) 196 Fed. 871, 116 C. C. A. 433 (dismissing writ of error [C. C. 1910] 179 Fed. 406); Westcot v. Bradford (C. C. 1824) Fed. Cas. No. 17,429; Ruddick v. Billings (C. C. 1868) Fed. Cas. No. 12,110; The Native (C. C. 1876) Fed. Cas. No. 10,054; The Josephine (D. C. 1849) Fed. Cas. No. 7,545; Ex parte Steele (D. C. 1908) 162 Fed. 694; Maxwell v. Williams (Super. Ct. Ark. 1832) Fed. Cas. No. 9,324a.

CITED WITHOUT DEFINITE APPLICATION

Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; The Benefactor (1880) 103 U. S. 239, 247, 26 L. Ed. 466; Lau Ow Bew v. U. S. (1892) 12 Sup. Ct. 517, 522, 144 U. S. 47, 36 L. Ed. 340; Northern Pac. R. Co. v. Amato (1892) 12 Sup. Ct. 740, 743, 144 U. S. 465, 36 L. Ed. 506; Whitney v. Dick (1906) 26 Sup. Ct. 584, 586, 202 U. S. 132, 50 L. Ed. 963; McClellan v. Carland (1910) 30 Sup. Ct. 501, 503, 217 U. S. 268, 54 L. Ed. 762; Providence Washington Ins. Co. v. Wager (C. C. 1888) 37 Fed. 59, 60; The Elmira (C. C. 1882) 16 Fed. 133, 134; Id. (D. C. 1877) Fed. Cas. No. 4,417; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co. (C. C. 1897) 78 Fed. 659, 661.

(R. S. §§ 1008, 1009. Transferred.)

These sections are set forth ante, §§ 1649, 1650.

§ 1671. (R. S. § 1010.) Damages and costs on affirmance in error. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion.

Act Sept. 24, 1789, c. 20, §§ 23, 25, 1 Stat. 85. Act March 2, 1803, c. 40, § 2, 2 Stat. 244. Act Feb. 5, 1867, c. 28, § 2, 14 Stat. 386. Rules 23, 24, 30, Supreme Court.

The application of the provisions of this section and of R. S. § 1011, next following, to circuit courts, was superseded by the taking away of the appellate jurisdiction of the circuit courts by the Circuit Courts of Appeals Act of March 3, 1891, cc. 5, 17, § 4, ante, § 1646, but said provisions were made applicable to the circuit courts of appeals by a provision of section 11 of that act, ante, § 1651.

The circuit courts were abolished, and their powers and duties were transferred to the district courts, by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

Repeal of statute.—This section is not repealed by section 1605, ante. Perkins v. Fourniquet (1852) 14 How. 328, 331, 14 L. Ed. 441.

Distinction between cases in equity and at law.—This section makes no distinction between cases in equity and at law, and in either of them the damages to be allowed is confided to the judicial discretion of the court. Perkins v. Fourniquet (1852) 14 How. 328, 331, 14 L. Ed. 441.

Frivolous writ of error in general.—The sole asserted error raised on a writ of error from the federal supreme court to the district court of the United States for Porto Rico cannot be said to be so wholly frivolous and unsubstantial as to require an affirmance of the judgment below on motion, where it is grounded upon the refusal of defendant's request to continue a cause set for trial on the fourth day after a mistrial, he basing such request upon the physical impossibility of bringing back in time to be heard the witnesses who, in reliance upon what is claimed to be a long-established practice to put such cases over the term, have been discharged and permitted to depart for their homes, since such assertion presents a substantial question of the abuse of the trial court's discretion. Guardian Assurance Co. of London v. Quintana (1913) 33 Sup. Ct. 236, 227 U. S. 100, 57 L. Ed. 437.

Exercise of power to prevent frivolous appeals or writs of error.—The supreme court will not hesitate to exercise the power hereby given to prevent

frivolous appeals and writs of error in all cases where it finds its jurisdiction has been invoked merely to gain time. Amory v. Amory (1875) 91 U. S. 356, 357, 23 L. Ed. 436.

Inference of frivolous writ.—The conclusion that a writ of error from the federal Supreme Court to a state court has been prosecuted for delay is the necessary inference from an order of dismissal because of the unsubstantial and frivolous character of the only asserted federal question. Deming v. Carlisle Packing Co. (1912) 33 Sup. Ct. 80, 226 U. S. 102, 57 L. Ed. 140.

Penalty or damages in general.—There can be no award of damages, on affirmance, except for delay. Cotton v. Wallace (1796) 3 Dall. 302, 304, 1 L. Ed. 612.

If a prize be sold by agreement, and the money be stopped in the marshal's hands by a third party, increased damages will not be allowed, but interest only. The Perseverance (1797) 3 Dall. 336, 338, 1 L. Ed. 625.

It is solely for the supreme court to determine whether any damages or interest as a part thereof shall be allowed in case of affirmance, and if on affirmance no allowance of interest or damages is made it is equivalent to a denial of any interest or damages. Boyce v. Grundy (1835) 9 Pet. 275, 289, 9 L. Ed. 127.

A judgment was affirmed with 10 per cent. damages, where parties, sued on a note, did not pretend to have any defense, entered a false plea, which was overruled on demurrer, and refused to plead in bar, and had judgment entered against them. Sutton v. Bancroft (1859) 23 How. 320, 321, 16 L. Ed. 454.

Judgment will be affirmed, with costs and 10 per cent. damages, where a case is brought up on writ of error which appears to have been sued out for delay. Jenkins v. Banning (1859) 23 How. 455, 456, 16 L. Ed. 580.

A judgment affirmed, with 10 per cent. damages, where a writ of error was sued out for delay. Prentice v. Pickersgill (1867) 6 Wall. 511, 513, 18 L. Ed. 790.

Where there was nothing in the record tending to show error in the judgment, or repel the conclusion that the writ of error was procured for delay, the judgment must be affirmed, with costs for damages. Walker v. Dreville (1870) 12 Wall. 440, 20 L. Ed. 429.

Damages awarded on affirmance in a case brought in disregard of former adjudication. Pennywit v. Eaton (1872) 15 Wall. 382, 384, 21 L. Ed. 114.

A supreme court rule as to the amount of damages construed as a limitation beyond which the court could not go, and as leaving it to its discretion to give less. West Wisconsin R. Co. v. Foley (1876) 94 U. S. 100, 24 L. Ed. 71.

The only way to discourage frivolous appeals and writs of error is by use of the power to award damages, and the rule will be enforced in proper cases both according to its title and spirit. Parties should not be subject to delay without reasonable cause, and the power to compensate for unwarranted delay ought not to be overlooked. Whitney v. Cook (1878) 99 U. S. 607, 25 L. Ed. 446.

Upon a motion to dismiss an appeal, the right of the Supreme Court to decide implies the right to adjudge as to all causes which are incident to the motion. Bradstreet Co. v. Higgins (1885) 5 Sup. Ct. 880, 114 U. S. 262, 29 L. Ed. 176.

Where a writ appears to have been sued out only for delay, the judgment will be affirmed, with damages at the rate of 10 per cent. Sire v. Ellithorpe Air-Brake Co. (1891) 11 Sup. Ct. 195, 197, 137 U. S. 579, 34 L. Ed. 801.

Where it appears that after judgment for plaintiff defendants sued out a writ of error for the purpose of delay only, plaintiff on affirmance will be allowed 10 per cent. damages in addition to interest. Wilson v. Everett (1891) 11 Sup. Ct. 664, 665, 139 U. S. 616, 35 L. Ed. 286.

Where, on writ of error in an action for the balance due on machinery sold defendant, it is undisputed that the mill was built and equipped by plaintiff and accepted by defendant, and that the rulings of the trial court on evidence and instructions assigned as error were proper, it is obvious that the writ was taken for delay, and the judgment for plaintiff will be affirmed, with 10 per cent. damages, under clause 2 of supreme court rule 23. Gregory Consol. Min. Co. v. Starr (1891) 11 Sup. Ct. 914, 141 U. S. 222, 35 L. Ed. 715.

The power to award damages for delay which this section confers in cases "where, upon a writ of error, judgment is affirmed in the Supreme Court," gives the authority to exert that power where in form there is no judgment of affirmance, but only an order for the dismissal of a writ of error to a state court because of the unsubstantial and frivolous character of the asserted federal right. Deming v. Carlisle Packing Co. (1912) 33 Sup. Ct. 80, 226 U. S. 102, 57 L. Ed. 140.

Quære, as to whether, under section 2 of rule 23, General Rules of the United States Supreme Court, which reads, "In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at the rate of 10 per cent. in addition to interest, shall be awarded upon the amount of the judgment," any damages may be awarded by the Supreme Court in any case where there is no direct appeal

from a money judgment. U. S. v. New Orleans (C. C. 1881) 8 Fed. 112, 114.

Interest.—See, also, note, ante.

A judgment was affirmed, with costs and interest at the rate of 10 per cent. per annum, where no question was raised for the consideration of the supreme court, and plaintiff in error made none in that court by counsel or otherwise. Kilbourne v. State Savings Institution (1859) 22 How. 503, 504, 16 L. Ed. 370.

Where, on writ of error brought by a collector of customs, to review a judgment recovered against him for money exacted and paid on entries, the judgment is affirmed, the supreme court will allow the respondent in error interest pending the writ as "just damages for his delay," under this section and under rule 23. Cochran v. Schell (1882) 2 Sup. Ct. 827, 829, 107 U. S. 625, 27 L. Ed. 543.

The rules of the Supreme Court regulate jurisdiction conferred by this section, and in case of affirmance, where the writ of error is for mere delay, damages may be awarded in addition to interest, and interest is given at the same rate that similar judgments bear interest in the courts of the state where the judgment was rendered. Washington & G. R. Co. v. Tobriner (1893) 13 Sup. Ct. 557, 563, 147 U. S. 571, 37 L. Ed. 284.

The question of interest on a judgment is solely for the court to determine under this section, unaffected by section 1605, ante. Id.

The allowance of interest as damages on a writ of error under this section and Supreme court rule 23, and the form of the mandate in affirming, with interest, a judgment against a collector of customs for duties wrongfully exacted, cannot affect the question of the liability, under section 1635, ante, of the government or collector for interest on the judgment. White v. Arthur (C. C. 1882) 10 Fed. 80, 91.

The allowance of interest as damages on a writ of error, under this section, and under supreme court rule 23, and the form of mandate affirming a judgment, with interest, belong solely to putting the judgment in shape. Id.

Costs or damages on dismissal of writ.—Costs will be allowed upon a dismission of a writ of error for want of jurisdiction, if the original defendant be also defendant in error. Winchester v. Jackson (1806) 3 Cranch, 514, 2 L. Ed. 516.

Where the writ of error is dismissed, no costs are allowed. McIver v. Wattles (1824) 9 Wheat. 650, 6 L. Ed. 182.

Since, under Act April 7, 1874, § 2, ante, § 1652, a case tried without a jury can only be brought to the supreme court by appeal, that court has no jurisdiction of a writ of error in such case, and can only dismiss it without damages, though it appears that the writ was taken merely for delay. Gregory Consol. Min. Co. v. Starr (1891) 11 Sup. Ct. 914, 141 U. S. 222, 35 L. Ed. 715, affirming Starr v. Gregory Consol. Min. Co. (1887) 13 Pac. 195, 198, 6 Mont. 485, 491.

Power to award damages for delay under this section, where on writ of error judgment is affirmed, gives the Supreme Court authority to exert the power where the writ of error is dismissed for its frivolous character. Deming v. Carlisle Packing Co. (1912) 33 Sup. Ct. 80, 226 U. S. 102, 57 L. Ed. 140, dismissing writ of error Carlisle Packing Co. v. Deming (1911) 114 Pac. 172, 62 Wash. 455.

On the dismissal of a writ of error, defendant in error is entitled to judgment for the costs arising on the motion to dismiss. Patten v. Cilley (1892) 50 Fed. 337, 1 C. C. A. 522, dismissing writ of error (C. C. 1891) 46 Fed. 892, and following Bradstreet Co. v. Higgins (1885) 5 Sup. Ct. 880, 114 U. S. 262, 29 L. Ed. 176.

Where an appeal from the disallowance of a claim by the district court is dismissed for want of jurisdiction, docket fees or other costs are not taxable. Mead v. Platt (C. C. 1883) 17 Fed. 836.

Affirmance by circuit courts of appeals.—Judgment of a Circuit Court of Appeals affirming a judgment of the trial court on the ground that the evidence, though conflicting, sustained a verdict for plaintiff, will be affirmed with 10 per cent. damages, where the Supreme Court concurs in such view. Texas & P. R. Co. v. Prater (1913) 33 Sup. Ct. 637, 229 U. S. 177, 57 L. Ed. 1139, affirming judgment (1910) 183 Fed. 574, 106 C. C. A. 120.

The judgment of a Circuit Court of Appeals, affirming a judgment of the trial court in a negligence action, on the ground that, though the evidence was conflicting, that for the plaintiff was sufficient to sustain the verdict in his favor, will be affirmed, with 10 per cent. damages, where the Supreme Court concurs in this view, and there is no question of law involved. Id.

Where it is apparent, from the fact that the record presents no question for decision by the appellate court, that a writ of error was sued out for delay, the Circuit Court of Appeals will award damages on affirmance, as authorized by rule 28 (notes under § 1114, ante). Chicago Terminal Transfer R. Co. v. Bomberger (1904) 130 Fed. 884, 65 C. C. A. 64.

A writ of error will not be held to have been sued out for delay, so as to authorize the imposition of the penalty of 10 per cent. on affirmance of a judgment provided for by rule 30 of the Circuit Court of Appeals (notes under § 1114, ante), where the question presented is one of statutory construc-

tion, which has not been passed on by the state court and is fairly in doubt under the authorities. Times-Democrat Pub. Co. v. Mozee (1905) 136 Fed. 761, 69 C. C. A. 418.

On affirmance of a judgment for personal injury, plaintiff is not entitled to 10 per cent. damages for delay, under Circuit Court of Appeals rule 30 (notes under § 1114, ante), where the Circuit Court of Appeals had construed a statute involved differently from that given by the Supreme Court of the state. Joplin & P. Ry. Co. v. Payne (1912) 194 Fed. 387, 114 C. C. A. 305.

Cited without definite application, Gridley v. Westbrook (1859) 23 How. 503, 504, 16 L. Ed. 412; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; White v. Arthur (C. C. 1882) 10 Fed. 80, 91; The Sydney (C. C. 1891) 47 Fed. 260, 263; People's Bank v. Ætna Ins. Co. (C. C. 1896) 76 Fed. 548, 550.

§ 1672. (R. S. § 1011, as amended, Act Feb. 18, 1875, c. 80, § 1.) Reversal on error limited.

There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

Act Sept. 24, 1789, c. 20, § 22, 1 Stat. 84. Act March 3, 1803, c. 40, § 2, 2 Stat. 244. Act Feb. 18, 1875, c. 80, 18 Stat. 318.

The amendment of this section by Act Feb. 18, 1875, c. 80, § 1, cited above, consisted in striking out, after the words "error in ruling," the word "and," and inserting instead thereof the word "any."

See notes to preceding section.

Notes of Decisions

1. Application to circuit court of appeals.
2. Pleas in abatement.
3. Review of questions of law or fact in general.
4. Issue of nul tiel record.
5. Review of question of fact in a bigamy case.
6. Weight and sufficiency of evidence to sustain verdict in general.
7. Demurrer to evidence and motion to direct a verdict.
8. Conflicting evidence.
9. Preponderance of evidence.
10. Amount of damages.
11. Findings of fact by trial court.
12. Referee's findings.
13. Allowance of attorney fee.

1. Application to circuit court of appeals.—See, also, notes, post.

This section applies to the Circuit Court of Appeals. Hall v. Houghton & Upp Mercantile Co. (1894) 60 Fed. 350, 8 C. C. A. 661; United States Fidelity & G. Co. v. Woodson (1906) 145 Fed. 144, 76 C. C. A. 114; Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

2. Pleas in abatement.—The power of the Supreme Court, upon a writ of error to a state court, to review its ruling on a plea in abatement, is not affected by this section; but this enactment was intended to embrace only writs of error to the federal Circuit and District Courts. Buck Stove & Range Co. v. Vickers (1912) 33 Sup. Ct. 41, 226 U. S. 205, 57 L. Ed. 189, reversing judgment (1909) 101 P. 668, 80 Kan. 29.

The plea of another action pending is a plea in abatement, and by this section, which expressly so provides, a ruling thereon is not subject to revision by the appellate court. Piquinot v. Pennsylvania R. Co. (1853) 57 U. S. (16 How.) 104, 14 L. Ed. 863; Stephens v. Monongahela Nat. Bank (1884) 4 Sup. Ct. 336, 337, 111 U. S. 197, 28 L. Ed. 399; Green v. Underwood (1898) 86 Fed. 427, 430, 30 C. C. A. 162.

Proceedings for the trial of an issue in attachment held to be in their nature proceedings in abatement, and therefore could not be reviewed on writ of error. Leitensdorfer v. Webb (1857) 20 How. 176, 186, 15 L. Ed. 891.

This section preserves to the supreme court the right and duty to pass on the jurisdiction of the lower court unaffected by the regulation and control of state legislation. Mexican Cent. Ry. Co. v. Pinkney (1893) 13 Sup. Ct. 859, 865, 149 U. S. 194, 37 L. Ed. 699.

This section does not prevent review of a decision, even on plea in abatement, of any question of jurisdiction to render judgment against defendant, though depending on the sufficiency of the service of the writ. Goldey v. Morning News (1895) 15 Sup. Ct. 559, 560, 156 U. S. 518, 39 L. Ed. 517, affirming judgment Golden v. Same (C. C. 1890) 42 Fed. 112.

In view of this statute, pleas in abatement are not to be favored. Hinds v. Keith (1893) 57 Fed. 10, 13, 6 C. C. A. 231.

A ruling on a plea in abatement is not reviewable by writ of error in the federal court. Barnsdall v. Waltemeyer (1905) 142 Fed. 415, 73 C. C. A. 515, writ of certiorari denied (1906) 26 Sup. Ct. 759, 201 U. S. 643, 50 L. Ed. 902.

This section manifestly indicates that jurisdictional questions may properly be raised by plea in abatement. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

A judgment overruling a demurrer to

a plea in abatement without further order or judgment, in the cause, is not subject to review under this section. Cunningham v. Rodgers (1909) 171 Fed. 835, 96 C. C. A. 507.

An answer in an action on a judgment in a federal court, setting up a parol agreement between the parties that in consideration of defendant's consent to the taking of the judgment, plaintiff should take no steps for its enforcement until the termination of another suit which is still pending, is in effect a plea in abatement under the Wisconsin practice, and under this section, a judgment sustaining such defense and dismissing the action is not reviewable by the Circuit Court of Appeals. Marinette Sawmill Co. v. Scofield (1909) 174 Fed. 562, 98 C. C. A. 344.

3. Review of questions of law or fact in general.—In cases coming to the circuit court of appeals on writ of error, only questions of law are to be examined. Hume v. U. S. (1902) 118 Fed. 689, 55 C. C. A. 407, writ of certiorari denied (1903) 23 Sup. Ct. 850, 189 U. S. 510, 47 L. Ed. 923.

On a writ of error the Circuit Court of Appeals can only consider errors of law committed by the trial court. Wichita R. & Light Co. v. Dulaney (1908) 159 Fed. 417, 86 C. C. A. 397.

The fact that the question of the sufficiency of the evidence to support the verdict was passed upon by the court below on a motion for a new trial will not authorize a review. City of Lincoln v. Sun Vapor Street-Light Co. of Canton (1894) 59 Fed. 756, 8 C. C. A. 253.

Where, in an action for personal injury, the question of negligence is submitted to the jury, without objection, as one of fact, it is not reviewable on appeal. Terre Haute & I. R. Co. v. Mansberger (1895) 65 Fed. 196, 12 C. C. A. 574, petition for rehearing overruled (1895) 67 Fed. 67, 14 C. C. A. 306.

Where the question of boundaries of land in ejectment was passed on by the jury, an affidavit presenting a claim that the verdict and judgment take from defendant land not described in the declaration and in the controversy presents no question for review in the appellate court. Robinson v. Dewhurst (1895) 68 Fed. 336, 15 C. C. A. 466.

The right of review is limited in the federal appellate court to questions of law appearing on the face of the record, and does not extend to matters of fact or discretion. Duncan v. Atchison, T. & S. F. R. Co. (1896) 72 Fed. 808, 19 C. C. A. 202.

Assignments of error involving questions of fact will not be considered on error in law actions, and particularly where the bill of exceptions does not purport to contain all of the evidence. Crawford v. Foster (1897) 83 Fed. 975, 28 C. C. A. 242, petition for rehearing denied (1898) 84 Fed. 939, 28 C. C. A. 576, and affirming judgment Foster v. Crawford (C. C. 1897) 80 Fed. 991.

That the appellate court may be inclined to a conclusion different from that expressed by the jury in their verdict is no ground for disturbing it, if there is evidence sufficient to warrant the court in sending the case to the jury. Commercial Travelers' Mut. Acc. Ass'n of America v. Fulton (1899) 93 Fed. 621, 35 C. C. A. 493.

As to the issues of fact submitted to a jury on the trial of a cause in the circuit court, the verdict of the jury is conclusive on writ of error. St. Louis Paper-Box Co. v. J. C. Hubinger Bros. Co. (1900) 100 Fed. 595, 40 C. C. A. 577.

The question of contributory negligence having been properly submitted to the jury, their conclusion will not be disturbed on writ of error. Kansas City S. Ry. Co. v. Billingslea (1902) 116 Fed. 335, 54 C. C. A. 109.

Where no objection was made in the trial court to the admission of evidence introduced to prove a fact, the proof of such fact cannot be denied on writ of error on the ground that the evidence was incompetent. Board of Sup'rs of Riverside County, Cal., v. Thompson (1903) 122 Fed. 860, 59 C. C. A. 70, writ of error dismissed (1905) 25 Sup. Ct. 795, 196 U. S. 637, 49 L. Ed. 630.

Exceptions to a refusal to set aside the verdict present no question reviewable in the Circuit Court of Appeals. Foster v. Murphy & Co. (1905) 135 Fed. 47, 67 C. C. A. 521.

On a writ of error, the appellate court cannot review questions of fact, or determine the weight to be given to evidence which was properly admitted. J. W. Bishop Co. v. Shelhorse (1905) 141 Fed. 643, 72 C. C. A. 337.

Where a verdict has been returned for plaintiff based on disputed questions of fact, and has been approved by the trial judge, the Court of Appeals will not disturb the judgment entered thereon, particularly on review of an order denying a motion to withdraw the case from the jury, or to set aside the judgment rendered on the verdict of the jury, where the view of the testimony most favorable to the plaintiff must be taken. Atlantic Coast Line R. Co. v. Linstedt (1910) 184 Fed. 36, 106 C. C. A. 238.

In an action at law for infringement of a patent, where the jury has decided the questions of invention and infringement in one way, and no error is found in the conduct of the trial, the appellate court will not set aside their verdict merely because it might have reached a different conclusion on the same record. Heide v. Panoulias (1911) 188 Fed. 914, 110 C. C. A. 656,

writ of certiorari denied (1911) 32 S. Ct. 524, 223 U. S. 722, 56 L. Ed. 630.

The Circuit Court of Appeals, in an action at law for alleged wrongful death, will not review the weight of the evidence. Devine v. Chicago, M. & St. P. Ry. Co. (1912) 194 Fed. 861, 114 C. C. A. 607.

In the federal courts questions of fact, determined by the jury, properly instructed, are not reviewable. Transit Development Co. v. Cheatham Electric Switching Device Co. (1912) 194 Fed. 963, 114 C. C. A. 599.

Where a party's knowledge of certain facts is the question at issue, and he testifies that he has no knowledge, an appellate court cannot, as a matter of law, reject such testimony altogether and accept only inconsistent statements. U. S. v. Two Baskets (1913) 205 Fed. 37, 123 C. C. A. 310.

Questions of fact cannot be re-examined on a writ of error. Ruddick v. Billings (C. C. 1868) Fed. Cas. No. 12,-110.

A finding of fact by the federal district court is not a subject of review by a writ of error when the record does not show that any rules of law were violated, or that any erroneous construction of statute was applied to the facts proved. U. S. v. Sixty ⅝ Carats Brilliants (C. C. 1872) Fed. Cas. No. 16,305.

A ruling by the court that plaintiff, by calling to the stand a witness who had been summoned, sworn, and tendered by defendant to plaintiff at the close of defendant's evidence, did not thereby make the witness his own witness, so as to preclude him from exercising the liberal privileges of cross-examination, or from impeaching the credibility of such witness, is subject to review; and defendant is entitled to have his exceptions thereto, duly noted at the time, incorporated in the bill of exceptions. Hudson v. Charleston, C. & C. R. Co. (C. C. 1893) 55 Fed. 252.

Where the questions whether the injury of a plaintiff while working in defendant's mine was due to his own negligence, or to a condition of the mine resulting from the progress of the work, and if the latter, whether it was the duty of defendant to take reasonable precautions against the danger, for the protection of its miners, were both open to doubt, under the evidence, the finding of the jury thereon is conclusive. Jones v. Bunker Hill & S. Mining & Concentrating Co. (C. C. 1903) 124 Fed. 675, judgment affirmed Bunker Hill & Sullivan Mining & Concentrating Co. v. Jones (1904) 130 Fed. 813, 65 C. C. A. 363, writ of certiorari denied (1904) 25 Sup. Ct. 787, 195 U. S. 629, 49 L. Ed. 352.

A general verdict which may include mixed questions of law and fact is conclusive as to both, except so far as they may be saved by some exceptions which the party has taken to the ruling of the court on questions of law. Paul v. Delaware, L. & W. R. Co. (C. C. 1904) 130 Fed. 951.

4. Issue of nul tiel record.—The issue of nul tiel record is an issue of fact, and, as such, no writ of error lies from the judgment of the federal district court on that fact to the circuit court. U. S. v. Cook (C. C. 1819) Fed. Cas. No. 14,851.

5. Review of question of fact in a bigamy case.—In view of this section, it was held that the supreme court could not re-examine a question of fact on a writ of error in a bigamy case under R. S. § 5352, post, § 10486. Miles v. U. S. (1880) 103 U. S. 304, 312, 313, 26 L. Ed. 481.

6. Weight and sufficiency of evidence to sustain verdict in general.—That a verdict is against the weight of the evidence cannot be assigned as error. Myers v. Brown (1900) 102 Fed. 250, 42 C. C. A. 320; Union Pressed Brick Co. v. Fultonham Brick & Drain Tile Co. (1902) 112 Fed. 920, 50 C. C. A. 615; Sun Pub. Co. v. Lake Erie Asphalt Block Co. (1907) 157 Fed. 80, 84 C. C. A. 584; E. I. Du Pont Co. v. Waddell (1910) 178 Fed. 407, 101 C. C. A. 335; Toledo, St. L. & W. R. Co. v. Howe (1911) 191 Fed. 776, 112 C. C. A. 262.

The sufficiency of the evidence to sustain the verdict is not reviewable, unless defendant ask a peremptory instruction for a verdict in his favor at the close of the whole evidence. German Ins. Co. v. Frederick (1893) 58 Fed. 144, 7 C. C. A. 122; Pacific Mut. Life Ins. Co. v. Snowden (1893) 58 Fed. 342, 7 C. C. A. 264; Western Coal & Mining Co. v. Ingraham (1895) 70 Fed. 219, 17 C. C. A. 71; Drexel v. True (1896) 74 Fed. 12, 20 C. C. A. 265.

Whether there was credible evidence to sustain a verdict was for the jury and not for the appellate court. Southwestern Brewery & Ice Co. v. Schmidt (1912) 33 Sup. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment Schmidt v. Southwestern Brewery & Ice Co. (1910) 107 Pac. 677, 15 N. M. 232.

The sufficiency of the evidence to support the verdict cannot be considered by the reviewing court where the complaining party not only neglected to ask a peremptory instruction for a verdict at the close of the whole evidence, but, without objection, permitted the court to charge the jury, upon the assumption that the case was one proper to be thus submitted. Village of Alexandria v. Stabler (1892) 50 Fed. 689, 1 C. C. A. 616, following Columbia & P. S. R. Co. v. Hawthorne (1892) 12 Sup. Ct. 591, 144 U. S. 202, 36 L. Ed. 405, and Hartford Life & Annuity Ins. Co. v. Unsell (1892) 12 Sup. Ct. 671, 144 U. S. 439, 36 L. Ed. 496.

In an action for damages for the infringement of a patent the reviewing court will not consider the objection that a verdict for plaintiff was unwarranted because the evidence showed that the patent had been anticipated, where there was some evidence of novelty, and defendant did not, at the trial, ask that the jury be instructed to find for him. Harper & Reynolds Co. v. Wilgus (1893) 56 Fed. 587, 6 C. C. A. 45.

On a writ of error a proposition that the jury, by awarding a recovery, violated an instruction that plaintiff could not recover unless the claim was presented in a certain time is a contention that the evidence was insufficient to support the verdict, and cannot be considered in a federal appellate court, in the absence of a request for a peremptory charge. City of Lincoln v. Sun Vapor Street-Light Co. of Canton (1894) 59 Fed. 756, 8 C. C. A. 253.

The sufficiency of the evidence cannot be questioned for the first time on writ of error. Chisholm v. Radford Brick Co. (1895) 65 Fed. 1, 12 C. C. A. 490.

An assignment of error by one defendant which states that the verdict is contrary to law, and not supported by the evidence, will not be noticed unless such defendant asked at the close of the whole evidence for a peremptory instruction for a verdict in his behalf. Oswego Tp. v. Travelers' Ins. Co. (1895) 70 Fed. 225, 17 C. C. A. 77, affirming judgment Travelers' Ins. Co. v. Township of Oswego (1893) 59 Fed. 58, 7 C. C. A. 669, and (C. C. 1893) 55 Fed. 361.

A court of error cannot review evidence to determine the correctness of a verdict. Great Northern Ry. Co. v. McLaughlin (1895) 70 Fed. 669, 17 C. C. A. 330.

If there is any substantial evidence upon which the jury could reasonably have based their verdict, it will not be disturbed on writ of error, though there may have been a motion for a verdict or a motion for a new trial which was overruled. Carter-Crume Co. v. Peurrung (1898) 86 Fed. 439, 30 C. C. A. 174, judgment affirmed (1900) 99 Fed. 888, 40 C. C. A. 150.

Where in the opinion of the trial judge a verdict is not supported by the evidence, he should set it aside and grant a new trial. It is not for the appellate court to impeach the findings of the jury upon questions clearly and distinctly submitted to it, and to order a new trial, when a judgment has been entered upon such findings which that court finds should have been in favor of the other party. McClain v. Provident Sav. Life Assur. Soc. of New York (1901) 110 Fed. 80, 49 C. C. A. 31, reversing judgment Same v. Provident Savings & Life Assur. Soc. of New York (C. C. 1901) 105 Fed. 834, and denying writ of certiorari Provident Sav. Assur. Soc. of New York v. McClain (1902) 22 Sup. Ct. 938, 184 U. S. 699, 46 L. Ed. 765.

A verdict supported by the evidence is conclusive on writ of error. Metropolitan St. Ry. Co. v. Beattie (1901) 111 Fed. 945, 50 C C. A. 472.

In determining whether the evidence in a case warranted a verdict for the plaintiff, an appellate court is not required to weigh the evidence, but only to ascertain the facts most favorable to the plaintiff which the jury were justified in finding from the evidence as the basis of their verdict, and to apply legal principles to such facts to determine whether a verdict thereon could be rendered for the plaintiff. Pennsylvania Steel Co. v Jacobsen (1907) 157 Fed. 656, 85 C. C. A. 118.

Where there is competent evidence to sustain the verdict, it will not be disturbed on writ of error. Wichita R. & Light Co. v. Dulaney (1908) 159 Fed. 417, 86 C. C. A. 397.

Where there is some evidence to support a verdict that plaintiff was not guilty of negligence contributing to his injury, the finding will not be disturbed on writ of error. Pittsburgh Rys. Co. v. Sullivan (1909) 166 Fed. 749, 92 C. C. A. 429.

A federal appellate court cannot review the action of a trial court in denying a motion for new trial based on the ground that the verdict was against the weight of the evidence. O'Donnell v. New York Transp. Co. (1911) 187 Fed. 109, 109 C. C. A. 29.

If there is any substantial evidence to support the verdict of a jury, it cannot be set aside as unsupported on a writ of error. Montana Tonopah Mining Co. v. Dunlap (1912) 196 Fed. 612, 116 C. C. A. 286, affirming judgment Dunlap v. Montana-Tonopah Mining Co. (C. C. 1911) 192 Fed. 714.

A verdict on an issue of fact, based on sufficient evidence, is conclusive on writ of error. C. W. Hull Co. v. Marquette Cement Mfg. Co. (1913) 208 Fed. 260, 125 C. C. A. 460.

A verdict is not reviewable, unless there is entire absence of substantial evidence to sustain it. Pennsylvania Casualty Co. v. Whiteway (1914) 210 Fed. 782, 127 C. C. A. 332.

Where the finding of the jury is supported by the testimony of seven witnesses, the verdict will not be disturbed, though the testimony of the single witness opposed to the majority seems more probable to the court. Hardman v. Firemen's Ins. Co. (C. C. 1884) 20 Fed. 594.

Where the evidence is equally balanced, or nearly so, and would warrant a verdict for either party, the verdict given will not be disturbed. Pim v. Wait (C. C. 1887) 32 Fed. 741.

7. Demurrer to evidence and motion to direct a verdict.—See, also, note, ante.

Where the evidence as to a contract consists of letters and telegrams, and by agreement of counsel all questions

as to the construction thereof are submitted to the court, which instructs the jury to return a verdict, such instruction must be treated as based entirely on the construction of the contract as a question of law, and as such is subject to review. W. & H. M. Goulding v. Hammond (1893) 54 Fed. 639, 4 C. C. A. 533, reversing judgment (C. C. 1892) 49 Fed. 443.

The refusal of a trial judge to direct a verdict for defendant on the ground that a part of the plaintiff's testimony was improbable is not a ground for reversal of the judgment by an appellate court, the matter being one going to the credibility of the witness, primarily for the jury, and subject to review only by the trial court on a motion for new trial. Texas & P. Ry. Co. v. Gardner (1902) 114 Fed. 186, 52 C. C. A. 142.

The effect of motions by both parties for direction of a verdict is to submit all issues of fact to the court, and the law impresses upon its finding so made all the incidents of a general finding by the court in a case submitted to it after waiver of a jury by the parties. In such case the only questions reviewable by an appellate court, besides the sufficiency of the pleadings to support the judgment, are whether there is any substantial evidence to support the finding and whether there was reversible error committed in the admission or rejection of evidence. Michigan Home Colony Co. v. Tabor (1905) 141 Fed. 332, 72 C. C. A. 480.

Where both parties moved for a directed verdict, the finding cannot be disturbed, if there is any substantial evidence to support the several issues on which it depended. Bankers' Mut. Casualty Co. v. State Bank of Goffs (1906) 150 Fed. 78, 80 C. C. A. 32.

Where both parties in an action at law request an instruction directing a verdict, the finding of the court upon the facts is conclusive, and the only question for review by an appellate court is the correctness of the court's finding on the law. City of Defiance v. McGonigale (1907) 150 Fed. 689, 80 C. C. A. 425, writ of certiorari denied (1907) 28 S. Ct. 254, 207 U. S. 585, 52 L. Ed. 352, and affirming judgment McGonigale v. City of Defiance (C. C. 1905) 140 Fed. 621.

Where both parties to an action at law request the direction of a verdict, the finding of the court in favor of one party is conclusive as to the facts, unless unsupported by any evidence. Mead v. Chesbrough Bldg. Co. (1907) 151 Fed. 998, 81 C. C. A. 184; Same v. Gallatin (1907) 151 Fed. 1006, 81 C. C. A. 192.

Before the Circuit Court of Appeals, on writ of error in a personal injury action, can reverse a judgment for plaintiff on the ground that a verdict should have been directed for defendant on the theory that plaintiff's contributory negligence caused the injury, it must clearly appear that the evidence as to plaintiff's negligence was such that no verdict in his favor could have been sustained. Wichita R. & Light Co. v. Dulaney (1908) 159 Fed. 417, 86 C. C. A. 397.

On writ of error from a judgment for plaintiff in a personal injury action, a statement in defendant's brief showing that the Circuit Court of Appeals is asked to pass upon the weight and credibility of testimony upon an issue as to plaintiff's contributory negligence precludes a reversal on the theory that a verdict should have been directed for defendant on the ground of such negligence, since it was the jury's province to pass upon the weight and credibility of the evidence, and not the trial judge's. Id.

Where each party requests the trial judge to direct a verdict, such procedure being tantamount to a request that the trial judge find the facts, the finding will be upheld, if there is any evidence to support it. Mead v. Darling (1908) 159 Fed. 684, 86 C. C. A. 552.

In reviewing the ruling of the trial court on a motion for dismissal or nonsuit, for a directed verdict or on a demurrer to the evidence the reviewing court will view the evidence in the aspect most favorable to the cause of action asserted or to the party against whom the motion was directed. Excelsior Coal Co. v. Gildersleeve (1908) 160 Fed. 47, 87 C. C. A. 202; Pennsylvania R. Co. v. Forstall (1908) 159 Fed. 893, 87 C. C. A. 73.

Where both parties request a directed verdict, the defeated party is estopped to claim that any question of fact should have been submitted to the jury, and the only questions reviewable on a writ of error are (1) whether there was any substantial evidence to support the court's finding upon the facts, and (2) whether there was any error in the application of the law. Rainy Lake River Boom Corp. v. Rainy River Lumber Co. (1908) 162 Fed. 287, 89 C. C. A. 267, writ of certiorari denied (1908) 29 Sup. Ct. 683, 212 U. S. 574, 53 L. Ed. 657; Roth v. Mutual Reserve Life Ins. Co. (1908) 162 Fed. 282, 89 C. C. A. 262.

The effect of motions by both parties for the direction of a verdict is to withdraw the case from the consideration of the jury and submit it to the court to find the facts; and an appellate court in reviewing the action of the lower court is limited to a consideration of the correctness of its finding on the law, if there is any evidence in support of the finding of fact. Interstate Life Assur. Co. v. Dalton (1908) 165 Fed. 176, 91 C. C. A. 210, 23 L. R. A. (N. S.) 722.

Where the evidence in an action for injuries was sufficient to require submission of the case to the jury, an assignment that the court erred in deny-

ing defendant's request for a directed verdict was unsustainable. Chicago, M. & St. P. Ry. Co. v. Newsome (1909) 174 Fed. 394, 98 C. C. A. 1.

8. Conflicting evidence.—See note, post.

See, also, notes, ante.

Where there is a dispute as to a fact, and evidence on both sides, and it was a fair exercise of the court's judgment to make the finding of fact, an erroneous finding of fact cannot be held to be an error of law, and this section prohibits a reversal therefor. Jeffries v. Mutual Life Ins. Co. (1884) 110 U. S. 305, 4 Sup. Ct. 8, 10, 28 L. Ed. 156, affirming orders Same v. Union Mutual Life Ins. Co. (C. C. 1880) 1 Fed. 450.

The supreme court cannot review findings of fact; there being evidence on both sides, and the error, if any, not being an error of law. Id.

A verdict on conflicting evidence will not be disturbed. Ætna Life Ins. Co. v. Ward (1891) 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371; New York, L. E. & W. R. Co. v. Winter (1892) 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Western Coal & Mining Co. v. Berberich (1899) 94 Fed. 329, 36 C. C. A. 364; Cooke v. Navarro (C. C. 1886) 29 Fed. 346.

Conflicting testimony will not be weighed by the Supreme Court, and it will only determine whether there is evidence adequate to sustain the verdict. Troxell v. Delaware, L. & W. R. Co. (1913) 33 S. Ct. 274, 227 U. S. 434, 57 L. Ed. 586, reversing judgment Delaware, L. & W. R. Co. v. Troxell (1912) 200 Fed. 44, 118 C. C. A. 272.

When an appellate court is asked to set aside the verdict of a jury, all conflicts in evidence must be resolved in favor of the verdict. Chicago, R. I. & P. Ry. Co. v. Sharp (1894) 63 Fed. 532, 11 C. C. A. 337.

An appellate court will not weigh conflicting evidence, or pass on the credibility of witnesses, in an action for personal injuries. Id.

The proximate cause of an injury is the primary moving cause, without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the interposition of any new or independent cause, produces the injury; but what constituted the primary cause of an injury, within such definition, in a particular case, is ordinarily a question for the jury, and when they have determined it from evidence which is either conflicting, or from which reasonable men might draw different conclusions, an appellate court cannot reverse their finding because it might draw a different conclusion from the same evidence. Chicago, G. W. Ry. Co. v. Price (1899) 97 Fed. 423, 38 C. C. A. 239.

A verdict on conflicting evidence, approved by the trial court, will not be disturbed on appeal. Southern Pac. Co. v. Covey (1901) 109 Fed. 416, 48 C. C. A. 460.

Where, upon the question of fact whether an insured committed suicide, while the evidence was quite conclusive that he shot himself, there was a conflict in the evidence directed to the question whether the shooting was intentional or accidental, the action of the trial court in refusing to direct a verdict for defendant on the issue will not be reversed by an appellate court. Fidelity & Casualty Co. of New York v. Love (1901) 111 Fed. 773, 49 C. C. A. 602.

A verdict based on conflicting evidence will not be disturbed in the absence of legal error. Union Cent. Life Ins. Co. v. Skipper (1902) 115 Fed. 69, 52 C. C. A. 663; Gilmore v. McBride (1907) 156 Fed. 464, 84 C. C. A. 274; Eastern & Western Lumber Co. v. Rayley (1907) 157 Fed. 532, 85 C. C. A. 296; Texas & P. Ry. Co. v. Lacey (1911) 185 Fed. 225, 107 C. C. A. 331; Gartland v. Pennsylvania R. Co. (C. C. 1901) 112 Fed. 488.

Where the evidence is conflicting, and there is substantial proof in support of the verdict, the denial of defendant's motion for a directed verdict will not be reversed, though the preponderance of the evidence favors defendant's contention. Chicago, M. & St. P. Ry. Co. v. Anderson (1909) 168 Fed. 901, 94 C. C. A. 241.

Where the question whether a foreign corporation was doing business in a state, so as to render it subject to suit therein, was submitted to the jury, its decision on conflicting evidence will not be set aside by an appellate court, unless clearly against the weight of evidence. O. J. Lewis Mercantile Co. v. Klepner (1910) 176 Fed. 343, 100 C. C. A. 285, writ of certiorari denied (1910) 30 Sup. Ct. 575, 216 U. S. 620, 54 L. Ed. 641.

A verdict finding that a running board on the top of a car, from which plaintiff fell and was injured, was so tilted as not to be reasonably safe for its purpose, based on conflicting evidence, will not be reversed on appeal. New York, N. H. & H. R. Co. v. Bransteeter (1912) 200 Fed. 255, 118 C. C. A. 441.

Where there is evidence sustaining a verdict for plaintiff, the Circuit Court of Appeals cannot weigh conflicting accounts of witnesses, and determine the case on what it might conceive to be the weight or preponderance of the evidence. Canadian Northern Ry. Co. v. Akre (1912) 200 Fed. 955, 119 C. C. A. 250.

A verdict based on conflicting evidence will not be set aside on writ of error, as against the weight of evidence on an issue properly submitted to the jury. American Mfg. Co. v. Maslanka (1913) 203 Fed. 465, 121 C. C. A. 589.

When evidence is conflicting, and the witnesses are of good character, the verdict, if not manifestly wrong, or im-

properly obtained, ought not to be set aside. Nonce v. Richmond & D. R. Co. (C. C. 1887) 33 Fed. 429.

The verdict of a jury, involving questions of "intent," upon circumstantial and conflicting evidence, should not be disturbed. French v. Foley (D. C. 1882) 11 Fed. 801.

9. Preponderance of evidence.—See, also, notes, ante.

The Circuit Court of Appeals will not review the evidence, to settle a debate between counsel as to the side on which the preponderance of the evidence lay with reference to a certain issue. Brazil Block Coal Co. v. Hotel (1911) 192 Fed. 108, 112 C. C. A. 448.

A verdict or finding by the jury will not be disturbed as against the evidence because of a mere preponderance of evidence against it, but will be set aside only when it is palpably against the weight of evidence, or clearly shows that the jury were mistaken, or were influenced by passion, prejudice, or corruption. Robinson v. New York Cent. & H. R. R. Co. (C. C. 1882) 9 Fed. 877; William Cramp & Sons Ship & Engine Bldg. Co. v. Sloan (C. C. 1884) 21 Fed. 561; Kelley v. Pennsylvania R. Co. (C. C. 1888) 33 Fed. 856.

A verdict will not be set aside because of a preponderance of testimony against it, if there is some substantial testimony on which the verdict may be based. Kirkpatrick v. Adams (C. C. 1884) 20 Fed. 287.

A verdict rendered on conflicting evidence will not be disturbed because the appellate court would have found otherwise, or may be of the opinion that it is against the preponderance of the evidence. Muskegon Nat. Bank v. Northwestern Mut. Life Ins. Co. (C. C. 1884) 19 Fed. 405; Sargent v. Home Benefit Ass'n (C. C. 1888) 35 Fed. 711; Hardy v. Minneapolis & St. L. Ry. Co. (C. C. 1888) 36 Fed. 657.

10. Amount of damages.—That a verdict or judgment is excessive cannot be assigned for error. Metropolitan St. Ry. Co. v. Beattie (1901) 111 Fed. 945, 50 C. C. A. 472; Tamblyn v. Johnston (1903) 126 Fed. 267, 62 C. C. A. 601; Walker Mfg. Co. v. Knox (1905) 136 Fed. 334, 69 C. C. A. 160; Southern Pac. Co. v. Calvin (1906) 144 Fed. 348, 75 C. C. A. 350; Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co. (1907) 154 Fed. 545, 83 C. C. A. 431, writ of certiorari denied (1907) 28 S. Ct. 256, 207 U. S. 589, 52 L. Ed. 354; Nelson v. Bank of Fergus County (1907) 157 Fed. 161, 84 C. C. A. 609, 13 Ann. Cas. 811; Chicago, B. & Q. R. Co. v. Upton (1912) 194 Fed. 371, 115 C. C. A. 379; Suravitz v. Pristasz (1912) 201 Fed. 335, 119 C. C. A. 573; Duke v. St. Louis & S. F. R. Co. (C. C. 1909) 172 Fed. 684.

The verdict is conclusive on writ of error as to the amount of damages. Wabash Ry. Co. v. McDaniels (1883) 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; City of Lincoln v. Power (1894) 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; St. Louis, I. M. & S. Ry. Co. v. Spencer (1895) 71 Fed. 93, 18 C. C. A. 114; Omaha Water Co. v. Schamel (1906) 147 Fed. 502, 78 C. C. A. 68; Arizona & N. M. Ry. Co. v. Clark (1913) 207 Fed. 817, 125 C. C. A. 305; Wunderlich v. City of New York (C. C. 1888) 33 Fed. 854.

The correction of an excessive verdict is a question for the trial court on a motion for a new trial, the granting or refusing of which will not be reviewed by the federal appellate courts. Northern Pac. R. Co. v. Charless (1892) 51 Fed. 562, 2 C. C. A. 380, judgment reversed (1896) 16 Sup. Ct. 848, 162 U. S. 359, 40 L. Ed. 999.

It is not a ground of exception that a verdict is excessive. St. Louis, I. M. & S. Ry. Co. v. Spencer (1895) 71 Fed. 93, 18 C. C. A. 114.

In an action for a personal injury, which caused the plaintiff severe physical and mental suffering, and probably permanently affected his health and constitution, the question of damages is one to be left to the judgment of the jury; and, unless their verdict clearly indicates that they were influenced by passion or prejudice, it will not be disturbed. Western Gas Const. Co. v. Danner (1899) 97 Fed. 882, 38 C. C. A. 528.

The amount of damages or the denial by the trial court of motion for new trial on the ground of excessive damages cannot be reviewed by the circuit court of appeals. Sun Printing & Publishing Ass'n v. Schenck (1900) 98 Fed. 925, 40 C. C. A. 163.

A verdict will not be set aside for excessive damages where they are not so excessive as to induce the belief that the jury acted from partiality, prejudice, corruption or other improper motive. Southern Ry. Co. v. Craig (1902) 113 Fed. 76, 51 C. C. A. 63, writ of certiorari denied (1902) 23 S. Ct. 842, 187 U. S. 641, 47 L. Ed. 345.

Where, in an action for personal injuries, a verdict in favor of plaintiff for $5,000 was cut down to $2,000 by the trial judge as a condition to denying motion for a new trial, on the ground that the injury was not permanent, and plaintiff accepted such reduced amount, the judgment would not be reversed on appeal because such amount was still excessive. Kern v. Snider (1906) 145 Fed. 327, 76 C. C. A. 201.

An assignment that the verdict awarded excessive damages through passion and prejudice could not be reviewed on appeal to the Circuit Court of Appeals, such question being within the exclusive jurisdiction of the trial court, determinable on a motion for a new trial. Illinois Cent. R. Co. v. Davies (1906) 146 Fed. 247, 76 C. C. A. 613.

Where the contention that the dam-

ages are excessive depends on the facts, it cannot be reviewed. Mason City & Ft. D. R. Co. v. Boynton (1907) 158 Fed. 599, 85 C. C. A. 421.

Objections that the damages are excessive, and that the verdict is against the law and the evidence, are for the determination of the trial court on a motion for a new trial, and cannot be reviewed by the Circuit Court of Appeals. Toledo, St. L. & W. R. Co. v. Kountz (1909) 168 Fed. 832, 94 C. C. A. 244.

An assignment of error that the verdict was excessive, and against the weight of the evidence, cannot be considered by an appellate federal court. Beaver Hill Coal Co. v. Lassilla (1910) 176 Fed. 725, 100 C. C. A. 283.

The size of a verdict for plaintiff in libel is not reviewable in a Circuit Court of Appeals. Mann v. Dempster (1910) 181 Fed. 76, 104 C. C. A. 110.

The question of the amount of damages recoverable for the death of plaintiff's intestate, where it has been determined by a jury in a federal court and the trial court has held their verdict not excessive, is not reviewable by an appellate court. Chicago & E. R. Co. v. Ponn (1911) 191 Fed. 682, 112 C. C. A. 228.

On review of a judgment for plaintiff in a personal injury action, the Circuit Court of Appeals cannot determine whether the verdict was excessive. Joplin & P. Ry. Co. v. Payne (1912) 194 Fed. 387, 114 C. C. A. 305.

Verdicts, especially in actions in tort, will be set aside as excessive only when they are so extravagant as to show prejudice, passion, or corruption. Brown v. Memphis & C. R. Co. (C. C. 1881) 7 Fed. 51.

11. Findings of fact by trial court.—See, also, section 1668, and notes thereunder.

Where the finding of the Circuit Court is general, and there is no authorized statement of facts in the record, a review by the Supreme Court of other questions than those arising from the rulings of the court in the progress of the trial would violate this section. Crews v. Brewer (1873) 19 Wall. 70, 72, 22 L. Ed. 63.

Under this section the sufficiency of the evidence to sustain the findings of the court can only be presented for review by a request for a peremptory holding that on the undisputed facts the finding must be otherwise. Citizens' Bank of Wichita v. Farwell (1894) 63 Fed. 117, 11 C. C. A. 108, affirming judgment (1893) 56 Fed. 539, 6 C. C. A. 30.

In view of this section and sections 1587 and 1687, ante, it was held that, when an action at law has been tried by the court without a jury, its findings may not be reversed for any error of fact. Chicago G. W. Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co. (1910) 176 Fed. 237, 100 C. C. A. 41, 20 Ann. Cas. 1200.

Findings of fact by the trial court in an action at law cannot, under this section, be reversed by the appellate court as contrary to the weight of the evidence. Wear v. Imperial Window Glass Co. (1915) 224 Fed. 60, 139 C. C. A. 622.

12. Referee's findings.—Findings of fact by a consent referee are not reviewable on a writ of error further than to ascertain if they are sufficient to warrant the judgment of the court. United States Fidelity & Guaranty Co. v. Hampton (1905) 134 Fed. 734, 67 C. C. A. 638.

Where an action at law is referred to a referee to hear and determine, the referee's findings are conclusive on appeal on review of the referee's determination. Alder v. Edenborn (D. C. 1912) 198 Fed. 928.

13. Allowance of attorney fee.—Quære whether the amount of allowance of an attorney fee under a statute can be re-examined by the Supreme Court. Meeker v. Lehigh Valley R. Co. (1915) 35 Sup. Ct. 328, 336, 236 U. S. 412, 59 L. Ed. 644. Ann. Cas. 1916E, 691

Cited without definite application, Farmers' & M. Nat. Bank v. Dearing (1875) 91 U. S. 29, 36, 23 L. Ed. 196; Capital Traction Co. v. Hof (1899) 19 Sup. Ct. 580, 584, 174 U. S. 1, 43 L. Ed. 873; Cocke v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Barnsdall v. Waltemeyer (1905) 142 Fed. 415, 418, 73 C. C. A. 515 (certiorari denied [1906] 26 Sup. Ct. 759, 201 U. S. 643, 50 L. Ed. 902); Leo Lung On v. U. S. (1908) 159 Fed. 125, 86 C. C. A. 513; Hughes v. Dundee Mortgage & Trust Inv. Co. (C. C. 1886) 28 Fed. 40, 45; The Sydney (C. C. 1891) 47 Fed. 260, 263.

§ 1673. (R. S. § 1012.) Appeals subject to same rules, regulations, etc., as writs of error.

Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.

Act March 3, 1803, c. 40, § 2, 2 Stat. 244. Act June 30, 1864, c. 174, § 13, 13 Stat. 310.

The provisions of this section applying to appeals from circuit courts became inoperative on the abolition of those courts, by Jud. Code, § 289, ante,

§ 1266, but were made applicable to appeals from district courts by the transfer of the powers and duties of the circuit courts to the district courts, by Jud. Code, § 291, ante, § 1268.

Notes of Decisions

See, also, notes under § 1653, ante.

Filing transcript and docketing cause.—Though an appeal will be dismissed if the transcript is not filed in time, yet the appellant may prosecute another appeal. The Virginia v. West (1856) 19 How. 182, 183, 15 L. Ed. 594.

Under this and section 1653, ante, if a transcript is not filed and the cause docketed during the term to which it was made returnable, or sufficient excuse given for the delay, the appeal becomes inoperative, and the cause may on that account be dismissed. Grigsby v. Purcell (1878) 99 U. S. 505, 506, 25 L. Ed. 354.

Assignment of error.—This section and section 1653, ante, do not require the filing of an assignment of error before the allowance of an appeal, but that requirement rests on a rule of court. Simpson v. First Nat Bank (1904) 129 Fed. 257, 63 C. C. A. 371.

Citation.—See, also, section 1659, and notes thereunder.

Where a citation is required in a case of appeal, it must, as in the writ of error, be issued and served on the opposite party before the term of the appellate court next after the appeal is entered. The entry of the appeal in the clerk's office is analogous to the issuing of the writ of error, and it is returnable to the next term of the appellate court. Villabolos v. U. S. (1848) 6 How. 81, 90, 12 L. Ed. 352.

In case of an appeal from the supreme court of the District of Columbia, it was held, under R. S. § 705, section 999 (ante, § 1659), and this section, a justice of that court might sign the citation. Richards v. Mackall (1885) 5 Sup. Ct. 535, 536, 113 U. S. 539, 28 L. Ed. 1132.

Bond or security on appeal.—See, also, § 1660, ante, and notes thereunder.

An appeal in chancery must be perfected by giving security, in order to operate as a supersedeas. Adams v. Law (1853) 16 How. 144, 147, 14 L. Ed. 880; Stafford v. New Orleans Canal & Banking Co. (1854) 17 How. 283, 284, 15 L. Ed. 102.

The Supreme Court will issue mandamus to compel the execution of a decree on appellant's failure to give security. Stafford v. Union Bank (1854) 17 How. 275, 279, 15 L. Ed. 101.

An appeal is not perfected until bond is given as required by this section and section 1660, ante; and while the omission of the bond does not necessarily avoid an appeal, and the appellate court may, in proper cases, permit the bond to be supplied, yet this permission could not properly be accorded after a lapse of nearly four years from the date of the decree; and, under such circumstances, where such permission is not even applied for, the appeal may properly be dismissed. Beardsley v. Arkansas & L. Ry. Co. (1895) 15 Sup. Ct. 786, 158 U. S. 123, 39 L. Ed. 919.

This section applies the same rules, regulations, and restrictions to appeals as section 1660, ante, applies to writs of error. Fidelity & Deposit Co. of Maryland v. Expanded Metal Co. (1910) 183 Fed. 568, 106 C. C. A. 114.

Joinder of parties in appeal.—Under the Judiciary Act of 1789, where by decrees in chancery in a Circuit Court could be brought before the Supreme Court only by writ of error, and Act March 3, 1803, § 2 (this section), an appeal was dismissed because all the parties to the decree below had not joined in the appeal. Owings v. Kincannon (1833) 7 Pet. 399, 402, 8 L. Ed. 727.

Defect of title of parties.—A defect of the title of the parties in the appeal held ground for dismissal. Freeborn v. The Protector (1870) 11 Wall. 82, 86, 20 L. Ed. 47.

Conclusiveness of finding and statement of facts in equity cases.—See, also, notes under § 1536, ante.

This section does not have the effect of making a finding and statement of facts by a Circuit Court in an equity cause conclusive on the appellate court. Hendryx v. Perkins (1903) 123 Fed. 268, 59 C. C A. 266.

Orders to preserve property pending appeal.—A circuit court of the United States may pass orders to preserve property in litigation pending an appeal to the supreme court. May v. Printup (1877) 59 Ga. 128.

Appeals from territorial courts.—Under this section and R. S. § 1007, ante. § 1666, providing that, to stay process on the judgment, appellant may give security required by law, within 60 days after the rendition of the judgment, and R. S. § 1909, providing that appeals from final decisions of the Supreme Court of Arizona shall be allowed to the Supreme Court of the United States, in the same manner, and under the same regulations, as from Circuit Courts of the United States, it was held, that appellants from a decision in the Supreme Court of Arizona had 60 days after the judgment was rendered, exclusive of Sundays, to give security and suspend judgment upon an appeal to the Supreme Court of the United States. Sandoval v. United States Fidelity & Guaranty Co. (Ariz. 1909) 100 Pac. 816.

Cited without definite application, U. S. v. Curry (1848) 6 How. 106, 112.

12 L. Ed. 363; Jerome v. McCarter (1874) 21 Wall. 17, 18, 22 L. Ed. 515; Kitchen v. Randolph (1876) 93 U. S. 86, 90, 23 L. Ed. 810; Moses v. Wooster (1885) 6 Sup. Ct. 38, 115 U. S. 285, 29 L. Ed. 391; Farrar v. Churchill (1890) 10 Sup. Ct. 771, 772, 135 U. S. 609, 34 L. Ed. 246; Kingman & Co. v. Western Mfg. Co. (1893) 18 Sup. Ct. 786, 788, 170 U. S. 675, 42 L. Ed. 1192; Columbia Heights Realty Co. v. Rudolph (1910) 30 Sup. Ct. 581, 217 U. S. 547, 54 L. Ed. 877; Dufour v. Lang (1892) 54 Fed. 913, 917, 4 C. C. A. 663; Gunn v. Black (1894) 60 Fed. 159, 160, 8 C. C. A. 542; Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (1896) 73 Fed. 314, 316, 19 C. C. A. 477; Louisville, N. A. C. Ry. Co. v. Pope (1896) 74 Fed. 1, 7, 20 C. C. A. 253; Lloyd v. Chapman (1899) 93 Fed. 599, 600, 35 C. C. A. 474; Odbert v. Marquet (1909) 175 Fed. 44, 99 C. C. A. 60 (affirming [C. C. 1908] 163 Fed. 892); Coche v. Copenhaver (1903) 126 Fed. 145, 147, 61 C. C. A. 211; Munson S. S. Line v. Miramar S. S. Co. (1909) 167 Fed. 960, 93 C. C. A. 360 (certiorari denied [1909] 29 Sup. Ct. 704, 214 U. S. 526, 53 L. Ed. 1068); Sutherland v. Pearce (1911) 186 Fed. 787, 108 C. C. A. 653; Sanborn v. Bay (1911) 194 Fed. 37, 114 C. C. A. 57; Bernard v. Lea (1913) 210 Fed. 583, 127 C. C. A. 219; Brown v. Evans (C. C. 1883) 18 Fed. 56, 61; Ferguson v. Dent (C. C. 1886) 29 Fed. 1, 5; The Sydney (C. C. 1891) 47 Fed. 260, 263; Gay v. Hudson River Electric Power Co. (C. C. 1911) 190 Fed. 812; The Brantford City (D. C. 1887) 32 Fed. 324, 325.

(R. S. § 1013. Transferred.)

This section is set forth ante, § 1655.

CRIMINAL PROCEDURE

§ 1674. (R. S. § 1014.) Offenders against the United States, how arrested and removed for trial.

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

Act Sept. 24, 1789, c. 20, § 33, 1 Stat. 91. Act March 2, 1793, c. 22, § 4, 1 Stat. 334. Act Aug. 23, 1842, c. 188, § 1, 5 Stat. 516.

The provisions of this section were made to apply for the removal of fugitives charged with crime against the United States, to or from the Philippine Islands, by Act Feb. 9, 1903, c. 529, post, § 1675.

Annual appropriations for fees of United States commissioners and justices of the peace acting under this section are made in the sundry civil appropriation acts. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

The office of commissioner of the circuit court was abolished, the office of United States commissioner was created in place thereof, and the powers and duties theretofore vested in circuit court commissioners were vested in United States commissioners, by Act May 28, 1896, c. 252, § 19, as amended by Act March 2, 1901, c. 514, § 1, ante, § 1333.

Judges or officers who are authorized to arrest and imprison or bail persons charged with any crime or offense against the United States are authorized to require witnesses to give recognizances for their appearance, by R. S. § 879, ante, § 1490.

The trial of offenses punishable with death was required to be in the county where the offense was committed, if it could be done without great inconvenience, by R. S. § 729, incorporated in Jud. Code, § 40, ante, § 1022.

The trial of offenses committed on the high seas or elsewhere out of the

jurisdiction of any particular state or district is to be in the district where the offender is found, or into which he is first brought, under R. S. § 730, incorporated in Jud. Code, § 41, ante, § 1023.

Offenses begun in one district and completed in another may be tried in either district, under R. S. § 731, incorporated in Jud. Code, § 42, ante, § 1024.

The removal of a bankrupt, for whose apprehension a warrant has been issued, from one district to another, was provided for by the Bankruptcy Act of July 1, 1898, c. 541, § 10, post, § 9594.

The commissioner for the Mount Rainier National Park was authorized to hold to arrest and to take bail in criminal cases, by Act June 30, 1916, c. 197, § 7, set forth post, under Title XXXII B, "The National Parks, Reservations, and Monuments."

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I. VALIDITY, CONSTRUCTION, AND OPERATION IN GENERAL

1. Constitutionality.—Congress may enact laws for the arrest and commitment of those accused of any offense against the United States and for holding them in safe custody until indictment and trial, and persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process of execution warrant of any state. Ableman v. Booth (1858) 21 How. 506, 16 L. Ed. 169; Tarble's Case (1871) 13 Wall. 397; 20 L. Ed. 597; Robb v. Connally (1884) 4 Sup. Ct. 544, 111 U. S. 624, 28 L. Ed. 542; Logan v. U. S. (1892) 12 Sup. Ct. 617, 144 U. S. 263, 36 L. Ed. 429. See In re Booth (1854) 3 Wis. 145, holding that every court has the right to decide all questions in regard to its own jurisdiction. The alleged unconstitutionality of the act by which jurisdiction in any case has been obtained is no excuse for the interference of any other court, by habeas corpus or otherwise, to decide such question. But otherwise as to a United States commissioner, who has no judicial power to decide on his own jurisdiction. And see Bagnall v. Ableman (1855) 4 Wis. 163, holding that the functions of the state courts and the federal courts are concurrent, for the purpose of arresting offenders who are to be tried in another district, and a subsequent arrest by a United States court is unauthorized after the offender has once been released by the state court.

The provision which empowers justices of the peace to arrest and commit, or bail as the case may require, persons charged with a violation of the criminal law of the United States, is not unconstitutional, as conferring a part of the judicial power of the United States on state tribunals, in violation of Const. art. 3, § 1. The exercise by a justice of the peace of the power conferred does not make him a federal officer within Const. art. 2, § 2, cl. 2. Ex parte Gist (1855) 26 Ala. 156. See Henry v. Henkel (1914) 35 Sup. Ct. 54, 235 U. S. 219, 59 L. Ed. 203.

2. Construction and operation in general.—This section applies to proceedings before the civil courts only, and does not authorize a police officer of a state, or a private citizen, without any warrant or military order, to arrest and detain a deserter from the army of the United States. Kurtz v. Moffitt (1885) 6 Sup. Ct. 148, 152, 115 U. S. 487, 29 L. Ed. 458. It relates to preliminary examinations and has no application to prosecutions by information. U. S. v. Baumert (D. C. 1910) 179 Fed. 735.

3. —— "Offense" within statute.—Contempt of a federal court is an offense. Castner v. Pocahontas Collieries Co. (C. C. 1902) 117 Fed. 184; U. S. v. Jacobi (D. C. 1871) Fed. Cas. No. 15,460. But see In re Graves (D. C. 1886) 29 Fed. 60, holding that the judges of the district courts have no power under this section, or under any other law or statute, to cause the arrest of a citizen of the state and district in which the judge resides, and to order his removal to another state, in order that he may be there imprisoned until he obeys an order made in a civil case pending in the United States court in that state.

The offense of criminal libel, under the local common law of the District of Columbia, is not an offense against the United States. U. S. v. Dana (D. C. 1895) 68 Fed. 886.

A conspiracy to violate the "bucket shop" law of the District of Columbia, Act March 1, 1909, c. 233, is an offense. U. S. v. Campbell (D. C. 1910) 179 Fed. 762.

A writ or order for the punishment of an officer of the court for contempt cannot run to the marshal of another district. The accused, if in another district, can only be reached through a proceeding for his arrest there, as for a criminal offense, and then must be transferred by order of the court there,

under this section. In re Manning (D. C. 1890) 44 Fed. 275, following U. S. v. Case (C. C. 1871) Fed. Cas. No. 14,-742.

4. —— **"Or any state where he may be found" construed.**—The clause "or any state where he may be found" applies to the magistrate previously named in the section. In re Manning (D. C. 1890) 44 Fed. 275, following U. S. v. Case (C. C. 1871) Fed. Cas. No. 14,742.

5. —— **"Mode of process" defined.**—The words "mode of process" are equivalent to mode of proceeding. Wayman v. Southard (1816) 10 Wheat. 1, 27, 6 L. Ed. 253; Cohen v. U. S. (1914) 214 Fed. 23, 130 C. C. A. 417; U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208; Marvin v. U. S. (C. C. 1890) 44 Fed. 405. And include the power to let to bail. U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208. See Duncan v. Darst (1843) 1 How. 301, 11 L. Ed. 139; Gwin v. Breedlove (1844) 2 How. 29, 11 L. Ed. 167.

6. —— **"Process" defined.**—The word "process" is not limited simply to the papers on which accused was arrested, but is used in the larger sense of "proceedings." Marvin v. U. S. (C. C. 1890) 44 Fed. 405, 411 (appeal dismissed [1893] 13 Sup. Ct. 1053, 149 U. S. 789, 37 L. Ed. 961). See Beers v. Houghton (1835) 9 Pet. 329, 9 L. Ed. 145; U. S. v. Knight (1840) 14 Pet. 301, 10 L. Ed. 465; U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208. See, also, McKinstry v. U. S. (C. C. 1888) 34 Fed. 211, holding that "process" signifies only the warrant or writ by which the accused was brought to answer the charge preferred against him.

7. —— **"Court of the United States" within statute.**—The Supreme Court of the District of Columbia is a "court of the United States" within this section, in view of Act June 22, 1874, c. 396, 18 Stat. 193, making applicable to the courts of the District the sections of the original judiciary act from which this section was taken, and of the powers given to that court as a court of the United States by Code D. C. § 61, and of the provision of section 1 of that Code. Benson v. Henkel (1905) 25 Sup. Ct. 569, 572, 198 U. S. 1, 49 L. Ed. 919, affirming judgment In re Benson (C. C. 1904) 130 Fed. 486.

Territorial courts are courts of the United States. U. S. v. Haskins (D. C. 1875) Fed. Cas. No. 15,322. See Douglass v. Stahl (1903) 72 S. W. 568, 71 Ark. 236, holding that the United States courts for the districts of the Indian Territory are courts of the United States within this section.

8. —— **Judge of the United States.**—The designation in this section of the judge in general terms as "a United States judge" is a sufficient description of a judge of the United States, and is equivalent to or synonymous with the designation in section 1280, ante, and this section, authorizing the issuance of habeas corpus or warrants to arrest persons accused of crime. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1028, 149 U. S. 698, 37 L. Ed. 905.

9. —— **"District" defined.**—The District of Columbia is a district of the United States within this section. Benson v. Henkel (1905) 25 Sup. Ct. 569, 572, 198 U. S. 1, 49 L. Ed. 919 (affirming In re Benson [C. C. 1904] 130 Fed. 486); Beavers v. Haubert (1905) 25 Sup. Ct. 573, 577, 198 U. S. 77, 49 L. Ed. 950.

10. —— **Corporations, applicability of statute to.**—This section does not apply to corporations. John Gund Brewing Co. v. U. S. (1913) 204 Fed. 17, 122 C. C. A. 331 (opinion modified [1913] 206 Fed. 386, 124 C. C. A. 268); U. S. v. Standard Oil Co. (D. C. 1907) 154 Fed. 728. It relates only to natural persons, but the court may obtain jurisdiction over a corporation by any appropriate writ. U. S. v. John Kelso Co. (D. C. 1898) 86 Fed. 304.

This section has no application to continuances before commissioners in extradition proceedings, first, since the section is confined to crimes or offenses against the United States, and, second, because it refers only to the usual mode of process against offenders in such state, and not to the incidents of the examination. Rice v. Ames (1901) 21 Sup. Ct. 406, 408, 180 U. S. 371, 45 L. Ed. 577. But see In re Rosdeitscher (D. C. 1888) 33 Fed. 657, 658, holding that this section was enacted to effectuate so far as it should lie in the province of the United States courts to do so, article 4, § 2, cl. 2, of the Constitution.

A commissioner appointed by a district court may examine and issue a warrant for commitment for an offense committed in a foreign country with which the United States has a treaty of extradition, even though he did not issue the warrant of arrest, but it was issued by the district judge, returnable before the commissioner. In re Grin (C. C. 1901) 112 Fed. 790, 793, affirmed (1902) 23 Sup. Ct. 98, 187 U. S. 181, 47 L. Ed. 130.

11. —— **Arrest and deportation of Chinese.**—The designation of judge by Act 1892, § 6, post, § 4320, as a United States judge is equivalent with the designation of the judges authorized by this section to issue warrants to arrest persons accused of crime. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1028, 149 U. S. 698, 37 L. Ed. 905.

12. —— **Expense of government.**—Detention by an officer is in effect an arrest, and a person under detention or arrest must be furnished subsistence at

the expense of the government making the arrest. (1898) 22 Op. Atty. Gen. 51.

13. —— Procedure in conformity to state law.—All proceedings for holding an accused person to answer to a criminal charge are assimilated to those under the laws of the state in which the proceedings take place. U. S. v. Patterson (1893) 14 Sup. Ct. 20, 150 U. S. 65, 37 L. Ed. 999; Same v. Ewing (1891) 11 Sup. Ct. 743, 140 U. S. 142, 35 L. Ed. 388; Same v. Rand (1892) 53 Fed. 348, 3 C. C. A. 556; Same v. Zarafonitis (1907) 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290; Same v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208; Same v. Case (C. C. 1871) Fed. Cas. No. 14,742; Same v. Horton (C. C. 1873) Fed. Cas. No. 15,-893; Same v. Evans (C. C. 1880) 2 Fed. 147; Same v. Smith (C. C. 1883) 17 Fed. 510; Same v. Tureaud (C. C. 1884) 20 Fed. 621, 624; Ex parte Perkins (C. C. 1887) 29 Fed. 900; Marvin v. U. S. (C. C. 1890) 44 Fed. 405; Clough v. Same (C. C. 1891) 47 Fed. 791; U. S. v. Keiver (C. C. 1893) 56 Fed. 422; Hallett v. U. S. (C. C. 1894) 63 Fed. 817; U. S. v. Harden (D. C. 1881) 10 Fed. 802; Same v. Martin (D. C. 1883) 17 Fed. 150; Van Buren v. U. S. (D. C. 1888) 36 Fed. 77; Hoyne v. Same (D. C. 1889) 38 Fed. 542; In re Mason (D. C. 1890) 43 Fed. 510, 514; Rand v. U. S. (D. C. 1891) 48 Fed. 357; U. S. v. Sauer (D. C. 1896) 73 Fed. 671; Same v. Greene (D. C. 1900) 100 Fed. 941; Same v. Ruroede (D. C.) 220 Fed. 210; (1798) 1 Op. Atty. Gen. 85.

It would appear from the language of this statute that it applied only to the officers named, and did not apply to United States marshals. In re Acker (C. C. 1894) 66 Fed. 290, 293.

All the regulations and steps incident to the proceeding before a commissioner are guided by state laws so far as applicable if no rule on the subject has been prescribed. U. S. v. Sauer (D. C. 1896) 73 Fed. 671.

The provisions allowing criminal proceedings "agreeably to the usual mode of process against offenders in each state" refers to process and procedure not expressly regulated by federal statutes. Turner v. U. S. (1884) 19 Ct. Cl. 629.

This section cannot include any usage expressly prohibited by the federal constitution. U. S. v. Tureaud (C. C. 1884) 20 Fed. 621.

Offenders against the United States may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in a state, but can be tried only before the court of the United States having cognizance of the offense. (1798) 1 Op. Atty. Gen. 85.

In the absence of constitutional and statutory provisions, the common law furnishes the rule as to the mode of procedure in criminal cases in the federal courts. U. S. v. Hammond (C. C. 1875) Fed. Cas. No. 15,294; Same v. Block (D. C. 1877) Fed. Cas. No. 14,-609.

See U. S. v. Kilpatrick (D. C. 1883) 16 Fed. 765, for a discussion of the methods by which a person may prosecute an offender.

14. Authority to arrest, hold to bail, or commit to jail in general.—United States commissioners have the power to cause the arrest of all persons charged with having violated the federal criminal statutes and to order them to be held for trial. Hoeffner v. U. S. (1898) 87 Fed. 185, 30 C. C. A. 610.

The authority to commit a seaman on the charge of deserting his ship is limited to a justice of the peace. Ex parte Sprout (C. C. 1807) Fed. Cas. No. 13,267.

The authority of a commissioner to arrest, hold to bail, or commit to jail, is limited to complaints or charges importing an offense against the laws of the United States. U. S. v. Hand (C. C. 1854) Fed. Cas. No. 15,296.

A person may be arrested for trial and imprisoned or bailed for violation of a statute, although the only punishment prescribed therein is a fine. In re Jackson (C. C. 1877) Fed. Cas. No. 7,124.

The district court will not issue a warrant of arrest for parties charged with murder on the high seas, on board a naval vessel, while the matter is under investigation by a court of inquiry instituted by the secretary of the navy. U. S. v. MacKenzie (D. C. 1843) Fed. Cas. No. 15,690.

Where an arrest is made on a commissioner's warrant, the officer making the arrest has no authority in law to take bail, and if he voluntarily allows the defendant to depart from custody before the case has been heard by the magistrate, it is a voluntary escape; the liability of the officer is absolute, and cannot be relieved by subsequent arrest of the defendant, but the warrant is not invalidated, and the defendant may be retaken under the same warrant by the same officer. U. S. v. Ebbs (D. C. 1881) 10 Fed. 369, 370.

A United States commissioner has no power to commit a defendant to prison, or to take him out of prison, except by a written warrant for that purpose. U. S. v. Harden (D. C. 1881) 10 Fed. 802, 809.

The president has no authority to cause an arrest to be made except upon probable cause, supported by oath or affirmation. (1818) 1 Op. Atty. Gen. 229.

The power to arrest for any offense against the United States is given by the act of Congress in general terms; and so far as respects a judge or justice of the United States, it is not con-

fined to his district or circuit, but his warrant will run throughout the United States. (1833) 2 Op. Atty. Gen. 564.

15. —— Authority to take verifications.—A commissioner of the United States may, as an officer under the state law, take the verification of all necessary papers in order to procure the arrest of defendant. Fulton v. Gilmore (C. C. 1878) Fed. Cas. No. 5,-154.

16. —— Authority to punish for contempt.—The provision that offenders against the United States may be arrested, imprisoned, or bailed by United States commissioners, "agreeably to the usual mode of process against offenders" in the particular state, does not confer on commissioners the power to punish for contempt possessed by state officers, and they have no power to punish for contempt. Ex parte Perkins (C. C. 1887) 29 Fed. 900. See, also, In re Mason (D. C. 1890) 43 Fed. 510.

17. —— United States commissioners, authority of in general.—See, ante, § 1333, and notes thereunder.

II. COMPLAINT, WARRANT, EXAMINATION, COMMITMENT, AND BAIL

(A) Preliminary complaint

18. Necessity and procedure for.—Before issuing the warrant, the magistrate should have before him the oath of the real accuser to the facts on which the charge is based, and on which the belief or suspicion of guilt is founded. In re Rule of Court (C. C. 1877) Fed. Cas. No. 12,126.

Criminal process will not be awarded on the mere motion and suggestion of the district attorney, unsupported by oath. U. S. v. Burr (C. C. 1806) Fed. Cas. No. 14,692.

See amendment 4, and notes thereunder.

Under the provision that offenders shall be arrested, etc., agreeably to the usual mode of process in the state, a commissioner of the circuit court, in conformity with the provisions of Code Ala. 1876, § 4648, must receive the complaint when presented, must examine the complainant and such witnesses as he may propose, on oath, take their depositions in writing, and cause them to be subscribed by the persons making them. McKinstry v. U. S. (C. C. 1889) 40 Fed. 813, 816.

19. —— Indictment without prior complaint, or arrest or preliminary examination.—A district attorney may, under certain circumstances, send in a bill to a grand jury without a prior arrest and binding over. U. S. v. Kilpatrick (D. C. 1883) 16 Fed. 765.

While criminal proceedings in a federal court are ordinarily before a commissioner, in which a preliminary hearing is afforded the defendant, such proceedings may be instituted by a United States attorney at his discretion by indictment, without previous arrest, binding over, or leave of court; the defendant not being entitled as of right to a preliminary hearing. U. S. v. Kerr (D. C. 1908) 159 Fed. 185.

An indictment may be found and presented by a grand jury without a preliminary formal complaint or prior arrest. U. S. v. Baumert (D. C. 1910) 179 Fed. 735.

See Goldsley v. U. S. (1895) 16 Sup. Ct. 217, 218, 160 U. S. 70, 40 L. Ed. 343, holding that absence of preliminary examination is not a deprivation of the right of accused to confront the witnesses.

See, also, U. S. v. Bollman (C. C. 1807) Fed. Cas. No. 14,622; Same v. Fuers (D. C. 1870) Fed. Cas. No. 15,-174, holding that an indictment will not be dismissed for the lack of a preliminary examination.

20. —— Information without preliminary hearing.—A preliminary examination, or an order to show cause and a hearing thereon, is not a necessary preliminary to a proceeding on information. U. S. v. Ronzone (C. C. 1876) Fed. Cas. No. 16,192.

21. Person who may make complaint.—See post, § 1677.

No instruction or official authorization is required for the institution of a criminal prosecution, and it is the duty of a judge to issue a warrant on the complaint of any citizen. U. S. v. Skinner (C. C. 1818) Fed. Cas. No. 16,309.

Where the evidence of fraud by a bankrupt is clear, the attorneys for the creditors will do nothing more than their duty, if they submit the facts to the district attorney for criminal prosecution. In re Simon & Sternberg (D. C. 1907) 151 Fed. 507.

22. Before whom made.—A person may be committed for a crime by one magistrate on an affidavit made before another. Ex parte Bollman (1807) 4 Cranch, 75, 129, 2 L. Ed. 554. But see U. S. v. Smith (C. C. 1883) 17 Fed. 510, holding that the oath to the complaint must be taken before the court, judge, or perhaps the clerk or before some commissioner, who, in the absence of the judge, may be applied to for a warrant, but one magistrate cannot commit on an affidavit taken before another.

A justice of the peace has jurisdiction to issue a warrant for, and to bind over, one charged with perjury committed against the laws of the United States. McIntosh v. Bullard, Earnheart & Magness (Ark. 1910) 129 S. W. 85.

A justice of the peace in a state has power, and it is his duty upon complaint being made to him of the commission of a crime in the Indian Ter-

ritory, to issue a warrant for the apprehension of the offender. Roberts v. Brown (Tex. Civ. App. 1906) 94 S. W. 388.

See Act Aug. 18, 1894, c. 301, § 1, post, § 1678, and notes thereunder.

23. Requisites and sufficiency of.—A prisoner is entitled at all times to be apprised of the crime of which he is accused and of the acts charged constituting the crime. U. S. v. Ruroede (D. C.) 220 Fed. 210.

The complaint should set forth the substance of the offense charged and the substantial and material features thereof. Ex parte Van Hoven (C. C. 1876) Fed. Cas. No. 16,858.

A United States commissioner has no jurisdiction to examine a person arrested and brought before him upon an affidavit alleging facts which are claimed to constitute an offense against the United States, but which in fact do not; it being admitted that there are no other facts in the case than those contained in the affidavit. Ex parte Perkins (C. C. 1887) 29 Fed. 900.

A citizen ought not to be deprived of his personal liberty on an allegation which may amount to nothing more than suspicion. The invalidity of one count in a complaint because the charges are made solely on information and belief without setting forth the grounds thereof does not invalidate another count made on affiant's own knowledge. Rice v. Ames (1901) 21 Sup. Ct. 406, 180 U. S. 371, 45 L. Ed. 577.

An affidavit for a complaint of a violation of a statute held not to show probable cause for issuing a warrant. In re Coleman (C. C. 1879) Fed. Cas. No. 2,980.

A complaint charging the crime of forgery in that one "willfully, etc., uttered and put in circulation forged or counterfeit papers or obligations or other titles or instruments of credit," without specifying the same, is not sufficient to authorize an arrest. Ex parte Van Hoven (C. C. 1876) Fed. Cas. No. 16,858.

Under this section and Code Cr. Proc. N. Y. § 149, a complaint for conspiracy to defraud the United States held defective for failure to state facts showing in what respect the overt act alleged constituted a violation of law. U. S. v. Ruroede (D. C. —) 220 Fed. 210.

24. Requisites and sufficiency in general—Information and belief.—An affidavit based solely upon information and belief, where the names of the informants are not given, is not sufficient. In re Rule of Court (C. C. 1877) Fed. Cas. No. 12,126.

Amendments of affidavits made as part of criminal informations cannot be allowed. U. S. v. Tureaud (C. C. 1884) 20 Fed. 621.

A warrant should issue only on probable cause, supported by an oath or affirmation. U. S. v. Tureaud (C. C. 1884) 20 Fed. 621, and cases cited.

A complaint purporting to be on information and belief, in which no grounds and sources of information are stated, but only certain grounds of belief not appearing to be based on deponent's personal knowledge, is insufficient in New York to confer jurisdiction to issue a warrant of arrest. U. S. v. Sapinkow (C. C. 1898) 90 Fed. 654.

Under the Penal Code of California, and, accordingly, by virtue of this section, in the courts of the United States sitting in that state, a complaint made to a committing magistrate, on information and belief only, is insufficient to give such magistrate jurisdiction to issue a warrant of arrest for the accused person, or to issue a subpœna for a witness. U. S. v. Collins (D. C. 1897) 79 Fed. 65.

A federal court may not issue a warrant on an information made on information and belief of the district attorney alone, but it must be supported by proof of probable cause. U. S. v. Baumert (D. C. 1910) 179 Fed. 735.

See amendment 4, and notes thereunder.

(B) Preliminary warrant and commitment

25. Character of and grounds for warrant.—Where the accused is already in court, an order of the court will supply the place of a capias. U. S. v. Burr (C. C. 1807) Fed. Cas No. 14,694.

A writ to bring a prisoner into court is not necessary. An order of the court or of the district attorney is sufficient. U. S. v. Harden (D. C. 1881) 10 Fed. 802.

R. S. § 1030, post, § 1696, does not apply to proceedings before commissioners acting under this section, and it is doubtful if a jailer having a prisoner in custody for trial in the circuit or district court is obliged to bring or send him into court, or deliver him to the marshal for that purpose, without a written order to that effect. U. S. v. Martin (D. C. 1883) 17 Fed. 150.

See post, § 1696, and notes thereunder.

A bench warrant will be issued upon ex parte affidavits against a person charged with treason, and he will be committed to prison without stating when or where he is to answer for the offense. On an application for a bench warrant on a charge for treason, as well as upon a motion to commit, messages from the president to congress may be read. U. S. v. Bollman (C. C. 1807) Fed. Cas. No. 14,622.

The probable cause referred to in Const. Amend. 4, as the basis of a warrant of arrest. must be submitted to the committing magistrate, who must judge of the sufficiency of the

grounds shown for believing the accused party guilty. In re Rule of Court (C. C. 1877) Fed. Cas. No. 12,126.

Where a district judge determines that the evidence before him is insufficient to authorize him to issue a warrant, mandamus will not lie to compel him to issue it. U. S. v. Lawrence (1795) 3 Dall. 42, 1 L. Ed. 502.

A certified copy of an information filed for an offense against the laws of the United States, without copies of some oath or affirmation to facts showing probable cause to believe defendant guilty, does not authorize issuing a warrant of arrest. U. S. v. Shepard (D. C. 1870) Fed. Cas. No. 16,273.

This section is necessarily subordinate to the declaration of the constitution that all warrants must particularly describe the persons to be seized. West v. Cabell (1894) 14 Sup. Ct. 752, 754, 153 U. S. 78, 38 L. Ed. 643.

A warrant must state probable cause, and limit the term of imprisonment. U. S. v. Johns (1806) 4 Dall. 412, 1 L. Ed. 888; Ex parte Burford (C. C. 1805) Fed. Cas. No. 2,148; Ex parte Sprout (C. C. 1807) Fed. Cas. No. 13,267. See In re Kaine (1852) 14 How. 103, 14 L. Ed. 345.

The day laid in the warrant for the offense is not material, so that the time actually proved be subsequent to a former prosecution, and before the issuing of the warrant, and within the time of limitation. Dixon v. Washington (C. C. 1830) Fed. Cas. No. 3,935.

A warrant charging the prisoner with forgery and uttering forged paper is not objectionable as charging two offenses, since both are comprehended within the crime of forgery at common law. In re Adutt (C. C. 1893) 55 Fed. 376.

See U. S. v. Mackenzie (D. C. 1843) Fed. Cas. No. 15,690, holding that finding an inquiry by a court of inquiry organized by the secretary of the navy the court will not grant a warrant to arrest persons charged with murder on the high seas.

26. —— Signature and seal.—A signature, in black lead pencil, of a warrant, by a justice of the place, is not a sufficient signature. U. S. v. Thompson (C. C. 1823) Fed. Cas. No. 16,484.

A warrant without a seal, issued by a United States commissioner having no seal of office, and not required by law to be under seal, is not void for the omission. Starr v. U. S. (1894) 14 Sup. Ct. 919, 920, 153 U. S. 614, 38 L. Ed. 841. But see U. S. v. Clough (1893) 55 Fed. 373, 374, 5 C. C. A. 140, holding that, where a state law makes the seal of the magistrate necessary to validate his warrant or mittimus, it is essential to the validity of a warrant of the United States commissioner, exercising jurisdiction in the state, that his writs shall have a seal affixed. And see Ex parte Sprout (C. C. 1807) Fed. Cas. No. 13,267, and Ex parte Bennett (C. C. 1825) Fed. Cas. No. 1,311, holding that a warrant of commitment must be under seal, and show a charge upon oath.

27. —— Direction for return.—The commissioner has no power to direct the warrant to be returned before another commissioner. In re Crittenden (C. C. 1878) Fed. Cas. No. 3,393.

28. Arrest under warrant.—When a warrant of arrest is put in the hands of an officer, it is his duty, as soon as he conveniently can, to proceed with secrecy and diligence to apprehend the defendant, and he must always be ready to perform the mandate of the warrant. Whether acts constitute an arrest depends upon the intent of the parties at the time, and an arrest may be made without touching the person of the defendant at the time, if he voluntarily submits to the process of the law in the hands of the officer. U. S. v. Ebbs (D. C. 1881) 10 Fed. 369. When a marshal or his deputies have arrested a person, and there is some urgent necessity for committing him to jail, they ought to furnish a copy of the warrant to the jailer, and a written statement of the causes which induce the necessity for such commitment. Where a United States marshal arrests accused on a capias, and commits him to a jailer for failure to give bail, it is not an adsolute commitment, but the marshal can take him from the custody of the jailer when it becomes necessary for him to complete the service of the capias by producing the body of the prisoner at the ensuing term of court. U. S. v. Harden (D. C. 1881) 10 Fed. 802. See post, § 1678, and notes thereunder.

29. Arrest without warrant.—Under the authority of the acts of congress a duly qualified supervisor of elections has the right, in the absence of the United States marshal and his deputies, to preserve order, and to arrest, without warrant or process, any person who interferes with him in the discharge of his duty as such supervisor. Ex parte Geissler (C. C. 1880) 4 Fed. 188.

See post, § 1676, and notes thereunder.

30. Commitment for preliminary examination in general.—In a proceeding in which it is necessary to commit defendant to await a hearing or pending examination, a writ of commitment is necessary, setting forth the cause of detention and why examination is postponed. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 2 L. R. A. 229.

A commitment for further examination is valid, as well as a commitment for trial. In re Bates (D. C. 1858) Fed. Cas. No. 1,099a.

A person arrested on a criminal

charge may be committed for a further examination, and held under such commitment for a reasonable time. U. S. v. Bates, Fed. Cas. No. 14,544.

No person can be detained upon a commitment which does not show sufficient cause upon its face. Ex parte Williams (C. C. 1833) Fed. Cas. No. 17,699.

The fact that the prosecutor has evidence to support an indictment, and the grand jury is in session, ready to receive it, is no ground for refusing to hear a motion to commit a person. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,692b.

31. —— Duration of detention.—A commitment by a commissioner on a preliminary warrant for examination should be for a definite time, and should not exceed 24 hours, except for special cause shown, or when requested by the prisoner. U. S. v. Worms (C. C. 1859) Fed. Cas. No. 16,765. See Wheeler v. Nesbit (1860) 24 How. 544, 16 L. Ed. 765; Horner v. U. S. (1892) 12 Sup. Ct. 407, 143 U. S. 207, 36 L. Ed. 126.

(C) Examination and commitment

32. Powers as examining magistrates.—The powers exercised by a United States commissioner in the examination of a person charged with an offense are those common to all examining magistrates. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488; Ex parte Jones (C. C. 1899) 96 Fed. 200.

The circuit court of the United States, sitting as a court, possesses the power to commit a person charged with an offense against the United States. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,692b.

The commissioner has power to adjourn to another time and place, as incident to the power to hear and determine, but he cannot adjourn in the absence of the accused. U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208.

It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation, and contumely of a trial for a criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him. U. S. v. Farrington (D. C. 1881) 5 Fed. 343.

As an examining and committing magistrate a commissioner has similar powers to those of a justice of the peace in the state where he acts, and his proceedings must be agreeable "to the usual mode of process against offenders in such states." U. S. v. Ebbs (D. C. 1881) 10 Fed. 369, 373.

The powers and duties of United States commissioners in criminal matters are not as extensive as those of justices of the peace, but are confined to those which they must necessarily exercise as examining and committing magistrates, in enforcing the criminal laws of the United States, and within this limit of jurisdiction they must conform as near as may be to the forms and modes of procedure required by law of justices of the peace. U. S. v. Harden (C. C. 1881) 10 Fed. 802, 806.

Where the examination of a person charged with the violation of a United States statute is transferred by the commissioner before whom the warrant is returnable to another commissioner in the same district, the latter has jurisdiction to take the examination and commit defendant, if the charge is sustained. In re Wahll (D. C. 1890) 42 Fed. 822.

United States commissioners have no judicial power, and, on a preliminary examination of one charged with crime, have only power to determine whether there is probable cause to believe that an offense was committed. A district judge, before whom a preliminary examination of one charged with crime is held, exercises only the powers of a United States commissioner. U. S. v. Hughes (D. C. 1895) 70 Fed. 972.

A commissioner in New York, sitting as a magistrate, has power to issue subpœnas for witnesses, criminal magistrates of the state being given such power by statute; but under Code Cr. Proc. N. Y. § 618, which in effect provides that no person shall be obliged to attend as a witness out of the county of his residence upon a subpœna issued by a magistrate, unless on an order indorsed thereon by a court or judge on a showing made, a commissioner has no power to compel the attendance of a witness by a subpœna issued by him at the instance of a defendant, and served outside of the county where the hearing takes place, unless an order therefor is obtained from a federal court or judge in conformity to the state practice. U. S. v. Beavers (D. C. 1903) 125 Fed. 778.

A commissioner has no jurisdiction to examine a person on an affidavit alleging no offense, and where there are no other facts. Ex parte Perkins (C. C. 1887) 29 Fed. 900.

The practice in the state courts in criminal cases to accord a person accused of an offense a preliminary hearing as of right is not authority in the federal courts sitting in such state. U. S. v. Kerr (D. C. 1908) 159 Fed. 185.

33. —— Powers of United States commissioners in general.—A commissioner is subject to the control of the court when acting as an examining magistrate, and the court can assume control of the proceedings whenever justice may require that it should be

done. U. S. v. Berry (D. C. 1880) 4 Fed. 779.

See ante, § 1333, and notes thereunder.

34. **Nature of preliminary hearing.**—This section has a tendency to show that a preliminary examination before a United States commissioner is not a proceeding in any court of the United States. Todd v. U. S. (1895) 15 Sup. Ct. 889, 890, 158 U. S. 278, 39 L. Ed. 982.

See U. S. v. Patterson (1893) 14 Sup. Ct. 20, 150 U. S. 65, 37 L. Ed. 999, defining preliminary examination. And see, also, Virginia v. Paul (1893) 13 Sup. Ct. 536, 148 U. S. 107, 37 L. Ed. 386, on the same subject.

The object of proceedings before the committing magistrate is to secure the attendance of accused to answer any indictment that may be found against him. U. S. v. Barber (1891) 11 Sup. Ct. 751, 140 U. S. 177, 35 L. Ed. 398.

35. **Conduct of examination.**—Rev. St. Ind. 1881, § 1628, making it the duty of a justice, in a criminal proceeding, to docket and hear the cause, and either acquit, convict and punish, or hold to bail the offender, section 1634, requiring a justice to recognize a defendant charged with felony, if on the hearing he is of opinion that he should be held, and section 1639, providing that a justice shall not discharge a defendant against whom the proper offense has not been charged, but shall cause the proper offense to be charged, and recognize him to answer it, and also recognize any witness deemed important, are by this section made applicable to United States commissioners' examinations held in Indiana, and contemplate a trial and hearing, and a commissioner is not bound to accept an offer of the accused to waive examination. Van Buren v. U. S. (D. C. 1888) 36 Fed. 77.

The judge may examine witnesses for accused to explain the testimony of the prosecution and the witnesses for the prosecution may be cross-examined. U. S. v. White (C. C. 1807) Fed. Cas. No. 16,685.

In the examination of a fugitive from justice the evidence must conform to the laws of this country and the laws of the state in which he was found. In re Ezeta (D. C. 1894) 62 Fed. 972, 980.

Where fraud, or a conspiracy to defraud, is charged, a somewhat wide latitude must be given in the introduction of evidence. U. S. v. Greene (D. C. 1901) 108 Fed. 816.

See Ex parte Bollman (1807) 4 Cranch 75, 2 L. Ed. 554, as to admissibility of evidence on preliminary examination.

Where a witness resides at a great distance, and there is no evidence that the materiality of his testimony was known to the prosecutors in time to have directed his attendance, the magistrate will act upon his affidavit. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,692c.

36. —— **What state laws govern.**—The preliminary examination of an alleged offender, arrested in another district, must be according to the usages of law in the state where the arrest is made; and, where the Tennessee Code requires that bail not taken in open court shall be to the next term of the court having cognizance, the district judge allowed the prisoner to appear at the next term of the United States district court for the Eastern district of Missouri, and declined to compel an immediate appearance to the current term. But quære whether, under special circumstances, this might not be done, notwithstanding the requirement that the proceedings should be in accordance with the state statute. U. S. v. Brawner (D. C. 1881) 7 Fed. 86.

37. —— **Continuance.**—A magistrate may, in his discretion, suspend the hearing where, in his judgment, a proper regard for the interests of justice requires it. U. S. v. Ewing (1891) 11 Sup. Ct. 743, 140 U. S. 142, 35 L. Ed. 388. See, in accord, U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208.

An unreasonable delay by the government to complete the examination justifies the discharge of accused. U. S. v. Worms (C. C. 1859) Fed. Cas. No. 16,765.

38. —— **Rights of accused.**—Upon a motion to commit for trial, the accused may be heard by counsel. U. S. v. Bollman (C. C. 1807) Fed. Cas. No. 14,622.

An accused has the right, before indictment found, to compel, by way of precaution, the production of letters containing statements of his conduct, written by the person who is declared to be the essential witness against him. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,692d.

The constitutional rights of the prisoner to be confronted by witnesses, and to be represented by counsel, have reference to the trial only, and not to proceedings on commitment. In re Bates (D. C. 1858) Fed. Cas. No. 1,099a.

39. —— **Competency of witnesses.**—This section does not make the state statutes relative to the competency of witnesses applicable in federal prosecutions. Cohen v. U. S. (1914) 214 Fed. 23, 130 C. C. A. 417.

40. —— **Suborning witness.**—An indictment for suborning a witness to testify falsely before a United States commissioner at a hearing on a complaint is not fatally defective because the words "trial" and "issue" were used in referring to the hearing before the commissioner. Cohen v. U. S. (1914) 214 Fed. 23, 130 C. C. A. 417.

41. —— **Evidence, sufficiency of.**—On preliminary examination, prima facie

evidence of guilt is sufficient to hold to bail until the offense may be examined by a grand jury. U. S. v. Cobb (D. C. 1857) Fed. Cas. No. 14,820.

Evidence showing probable cause to believe that the accused is guilty is sufficient to warrant his being committed for trial. U. S. v. Johns (1806) 4 Dall. 412, 1 L. Ed. 888; Same v. Burr (C. C. 1807) Fed. Cas. No. 14,692a; Same v. Lumsden (C. C. 1856) Fed. Cas. No. 15,641; Graham v. Dominguez (D. C. 1868) Fed. Cas. No. 5,664; In re Van Campen, Id. 16,835; U. S. v. Steffens (D. C. 1877) Fed. Cas. No. 16,384.

Accused's confession of the crime, without any proof of the corpus delicti, is sufficient to warrant his being held for trial. U. S. v. Bloomgart (D. C. 1868) Fed. Cas. No. 14,612.

Whether the facts proved before a commissioner on preliminary hearing constitute the offense charged is a mere question of law, the decision of which is in the first instance committed by this section to the jurisdiction of the commissioner; the offense charged being within the jurisdiction of the commissioner and the court. Ex parte Rickelt (C. C. 1894) 61 Fed. 203, 204.

To authorize a commissioner in the examination of an offender to commit he need not be convinced of the guilt of accused, but the proof should be such as to afford good reason to believe that the offense was committed, and by accused; otherwise, it is his duty to discharge. Ex parte Jones (C. C. 1899) 96 Fed. 200.

In a proceeding before a commissioner for the commitment of persons indicted in another district, the sole evidence of guilt introduced was a copy of the indictment, which charged a conspiracy to defraud the United States, and, as the overt act committed in execution of such conspiracy, the presenting by defendants to a disbursing officer of the government of "fraudulent" claims, which were set out; but it contained no statement showing in what respect such claims were fraudulent, or any evidential fact or circumstance from which fraud could be found. U. S. v. Greene (D. C. 1900) 100 Fed. 941.

See U. S. v. Greene (D. C. 1901) 108 Fed. 816, for a discussion on question of probable cause.

42. Discharge of accused, effect of.—A discharge by a United States commissioner is not equivalent to an acquittal. Williams v. State (1907) 82 N. E. 790, 169 Ind. 384.

43. Waiver of preliminary examination.—Accused, by waiving preliminary examination, did not waive his right to object that the complaint on which he was arrested failed to state an offense. U. S. v. Ruroede (D. C.) 220 Fed. 210.

44. Commitment.—A final writ of commitment is necessary, reciting the hearing, finding of probable cause, and that the prisoner is committed in default of bail to await trial. A writ of commitment should state the cause of detention. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 2 L. R. A. 229.

The commissioners have authority under the state statutes to commit defendants to county jails. They have similar powers in United States cases as justices of the peace have in state cases. Mittimus must be directed to the marshal, commanding him to convey the prisoner into the custody of the jailer, and directing the jailer to receive the prisoner and keep him in custody till discharged or taken from his custody by proper process of law. U. S. v. Harden (D. C. 1881) 10 Fed. 802.

A commitment to await the action of the grand jury on a charge of murder need not describe the offense as being a charge of killing a human being with malice aforethought, but it is sufficient if it states that accused is charged with the crime of "murder." U. S. v. Martin (D. C. 1883) 17 Fed. 150.

It is a sufficient designation in a commitment of the crime of inveigling a person, with the intent to cause him to be sent out of the state against his will, if it states that the party has been held to answer for "the crime of enticing and inveigling A. and W. to leave the state of Oregon against their will;" for from this statement it must be implied that the inveiglement was "with the intent" that they should so leave the state. In re Kelly (C. C. 1890) 46 Fed. 653.

A commitment in South Carolina may be valid without any examination of prisoner or state witnesses. In re Bates (D. C. 1858) Fed. Cas. No. 1,099a.

When there is an order of commitment to a county jail, and the marshal has executed the mittimus, he has no further control over the prisoner, and is not responsible for an escape from prison. U. S. v. Harden (D. C. 1881) 10 Fed. 802, 809.

45. Review.—Where a magistrate has jurisdiction, a superior court will not interfere by habeas corpus. Homer v. U. S. (1892) 12 Sup. Ct. 522, 143 U. S. 570, 36 L. Ed. 266, and cases cited.

Where there is evidence tending to show the commission of the offense, the sufficiency thereof will not be reviewed on habeas corpus. In re Byron (C. C. 1883) 18 Fed. 722.

The question whether the facts alleged and proved constitute in law the crime described is not reviewable on habeas corpus. Ex parte Rickelt (C. C. 1894) 61 Fed. 203.

The question upon review never is whether the proof was such as would be required to convict the accused up-

on a trial by jury, but only as to the existence of any legal evidence before the commissioner upon which he might find that there was reasonable cause to believe that the crime has been committed. U. S. v. Greene (D. C. 1901) 108 Fed. 816, and cases cited.

Where a committing magistrate, before whom a party was charged with attempting to defraud the United States by co-operating with a candidate for appointment in the civil service in making a false statement as to the eligibility of such candidate for appointment, held the prisoner to bail to await the action of the grand jury, a preliminary examination having been waived, an order of the lower court discharging the prisoner from custody on habeas corpus proceedings instituted by him held erroneous, on the ground that the showing made before the commissioner was of such a character as to justify his action. Palmer v. Colladay (1901) 18 App. D. C. 426.

46. **Restoration of papers taken from accused.**—Magistrate committing on charge of forgery ordered, on motion, to restore to the prisoner genuine notes taken from his possession. Ex parte Craig (C. C. 1827) Fed. Cas. No. 3,321.

(D) Admission to bail

47. **Application and construction in general.**—This section, when read in connection with R. S. § 1015, post, § 1679, is confined to offenses against the United States. Rice v. Ames (1901) 21 Sup. Ct. 406, 180 U. S. 371, 45 L. Ed. 577; Wright v. Henkel (1903) 23 Sup. Ct. 781, 786, 190 U. S. 40, 47 L. Ed. 948.

Under this section all proceedings for holding an accused person to answer to a criminal charge before a court of the United States are assimilated to those under the laws of the state in which the proceedings take place, and the sufficiency of a bail bond taken in such proceedings is to be determined by the law of the state. U. S. v. Zarafonitis (1907) 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290. See U. S. v. Hudson (D. C. 1894) 65 Fed. 68, 76, holding that, in view of the legislative intent expressed, the conclusion naturally follows that Congress did not intend that the right of bail could be granted in any other cases than those provided for by express enactment. See Ex parte Joyce (D. C. 1913) 212 Fed. 285, holding that where a writ of habeas corpus has been issued and served, and an alien denied admission by the immigration officers is in the custody of the court for rehearing of the case, she may be admitted to bail. See, also, Simon v. U. S. (1903) 76 S. W. 280, 4 Ind. T. 688, as to force of statute in Indian Territory.

48. **Right to release on bail in general.**—The right to bail must be secured by law. Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422; U. S. v. Horton (C. C. 1873) Fed. Cas. No. 15,393; Same v. Hudson (D. C. 1894) 65 Fed. 68.

Every person not committed for treason or felony is entitled to the benefit of the prison bounds upon giving security. U. S. v. Wise (C. C. 1809) Fed. Cas. No. 16,746.

See U. S. v. Jones (C. C. 1813) Fed. Cas. No. 15,495, as to physical and mental condition of prisoner affecting right to bail.

Where a prisoner is in the custody of the military power in a region subject to martial law, the judge of a civil court cannot hear an application to admit the prisoner to bail until the legality of the military custody has been inquired into, by means of an application for a writ of habeas corpus. Case of Davis (C. C. 1867–1871) Fed. Cas. No. 3,621a.

49. —— **Statutory right to bail.**—See post, §§ 1679, 1680, and notes thereunder.

50. —— **Chinese deportation proceedings.**—The constitutional and statutory provisions regulating the admission to bail in criminal cases have no application to Chinese exclusion proceedings. In re Chin Wah (D. C. 1910) 182 Fed. 256, order affirmed Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422.

51. —— **Discretion of court.**—The magistrate's discretion in taking bail in a criminal case is to be guided by a consideration of the ability of the prisoner to give bail, and the atrocity of the offense. U. S. v. Lawrence (C. C. 1835) Fed. Cas. No. 15,577.

It is in the discretion of the commissioner to take recognizances of defendants and witnesses recognized in previous cases for the same grand jury. Hallett v. U. S. (C. C. 1894) 63 Fed. 817.

52. —— **Pending examination.**—A person accused should be retained in custody, or required to give security for his appearance, while his examination is pending, but only on evidence sufficient to furnish probable cause. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,-693.

See U. S. v. Petit (C. C. 1882) 11 Fed. 58, for a case in which prisoner pending a certificate of division of opinion was released on bail to respond to any indictment that might be found.

53. —— **After indictment.**—See U. S. v. Hamilton (1795) 3 Dall. 17, 1 L. Ed. 490.

The announcement of readiness to proceed to trial at the close of the term before adjournment will not entitle the prisoner to be released on bail, where he had previously obtained a postponement on the ground of absence of witnesses. U. S. v. Stewart (C. C. 1795) Fed. Cas. No. 16,401.

That prosecuting officer continues case after indictment for want of witnesses does not entitle accused to bail. U. S. v. Jones (C. C. 1813) Fed. Cas. No. 15,495.

And see post, § 1679, and notes thereunder.

54. —— **During trial.**—See post, § 1679, and notes thereunder.

55. —— **After conviction.**—After verdict, defendant will be permitted to give security to abide the judgment. U. S. v. Greenwood (C. C. 1804) Fed. Cas. No. 15,260.

Pending the hearing of a motion for new trial on conviction as a common scold, defendant was required to give bail for appearance and for good behavior. U. S. v. Royall (C. C. 1829) Fed. Cas. No. 16,202.

Where, after conviction, time is granted to prepare a case and move in arrest of judgment, the court has no authority to take bail in the meantime. U. S. v. Devlin (C. C. 1868) Fed. Cas. No. 14,955.

See U. S. v. Louis (C. C. 1906) 149 Fed. 277; Same v. Hudson (D. C. 1894) 65 Fed. 68, as to discretion to grant bail after conviction. And see, also, McKnight v. U. S. (1902) 113 Fed. 451, 51 C. C. A. 285; U. S. v. Simmons (C. C. 1891) 47 Fed. 723, 14 L. R. A. 78.

There is no constitutional right to bail after a conviction; it being properly granted or denied as best effects justice, determined in the light of the common law, as affected by acts of Congress. Ex parte Harlan (C. C. 1909) 180 Fed. 119, decree affirmed Harlan v. McGourin (1910) 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 31 Ann. Cas. 849.

56. —— **Pending appeal or writ of error.**—A district judge, who has denied a writ of habeas corpus, has no power to admit the prisoner to bail pending an appeal. In re Iasigi (D. C. 1897) 79 Fed. 755.

See post, §§ 1679, 1681, and notes thereunder.

57. —— **After breach of prior bond.**—Flight while under bail during trial on indictment for one of a series of crimes held to forfeit the privilege of liberation on recommitment to answer other charges. Notwithstanding such flight, where it appears that the punishment could be but nominal, and the imprisonment pending trial would be unreasonable, held, that the prisoner should be admitted to bail. Lee's Case (C. C. 1865) Fed. Cas. No. 8,180.

58. **Purpose and effect of admission to bail.**—The acceptance by a United States commissioner of an appearance bond, tendered by friends of absent offender, supersedes a warrant of arrest previously issued. U. S. v. Ebbs (D. C. 1881) 49 Fed. 149.

See R. S. § 1018, post, § 1682.

59. **Jurisdiction to admit to bail—Courts and judicial officers in general.**—See U. S. v. Hamilton (1795) 3 Dall. 17, 1 L. Ed. 490, holding that the federal supreme court may admit to bail on charge of high treason.

In cases not capital, bail may be taken by any justice or judge of the United States or other magistrate named. The supreme court cannot, by rule, add to its powers; but, having the power to admit to bail in criminal cases pending proceedings in error, it may, by rule, regulate the manner of taking bail. Any justice of the supreme court, having power, by the acts of congress, to allow a writ of error, issue the citation, take the security required by law, and grant a supersedeas, has the authority, as incident thereto, to order plaintiff in error to be admitted to bail, independently of any rule of court. Hudson v. Parker (1895) 15 Sup. Ct. 450, 453, 454, 156 U. S. 227, 39 L. Ed. 424.

The Oregon statute declaring that, "after an indictment found and upon an appeal," a defendant cannot be admitted to bail, except by the judge or court where the action is pending, or in which the judgment appealed from is given (Hill's Ann. Laws Or. § 1463), does not impair the power of any officer designated by this section to admit a defendant to bail after indictment and before trial. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

Courts have inherent power to take a recognizance. U. S. v. Evans (C. C. 1880) 2 Fed. 147.

As to power to admit to bail as incidental to adjourn hearings, see Hallett v. U. S. (C. C. 1894) 63 Fed. 817.

Where appeal has been taken from decision of a federal court discharging writ of habeas corpus, and pending it the prisoner has been remanded to the custody of state officers, as authorized by Supreme Court rule 34, such federal court has no jurisdiction to entertain motion to admit to bail. In re Bissert (C. C. 1901) 113 Fed. 12.

The judge of the district to whom application is made for a warrant of removal to another district for trial may review, without a writ of habeas corpus, the action of the committing magistrate, and reduce the bail required by him, if it shall appear to be excessive. U. S. v. Brawner (D. C. 1881) 7 Fed. 86.

Bail taken by a court without authority of law is void. U. S. v. Hudson (D. C. 1894) 65 Fed. 68.

60. —— **President.**—The President has no power to direct a person, under prosecution for an offense against the United States, to be bailed, or to be discharged without bail, on his own bond; the question of bail being a judicial, not an executive, one. (1818) 1 Op. Atty. Gen. 213.

61. —— **United States commissioners.**—Authority to admit to bail is limited to offenses against federal laws. U. S. v. Hand (C. C. 1854) Fed. Cas. No. 15,296.

A commissioner in New York has no authority to take bail for the appearance of a party accused, for examination before himself at a future day. U. S. v. Case (C. C. 1871) Fed. Cas. No. 14,742.

A United States commissioner, as respects the taking of bail, has the same power as the state magistrate, and no greater. U. S. v. Horton (C. C. 1873) Fed. Cas. No. 15,393.

A United States commissioner has power to let to bail one brought before him on a criminal complaint, pending the proceeding, in those states where justices of the peace have a similar power. U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208.

A commissioner may take recognizances of defendants and witnesses in previous cases for the same grand jury. Hallett v. U. S. (C. C. 1894) 63 Fed. 817.

The authority of a United States commissioner to take bail for the appearance of an accused person to answer further before such commissioner to the charge against him is dependent upon the existence of such authority in examining magistrates under the laws of the state in which the proceedings before the commissioner are pending. Such magistrates have the power under the statute of Texas, and accordingly United States commissioners, sitting in that state have the same. U. S. v. Sauer (D. C. 1896) 73 Fed. 671.

A commissioner in taking bail in a criminal case in a state whose laws do not authorize justices of the peace to administer oaths for similar purposes cannot administer an oath on which perjury can be predicated. U. S. v. Garcelon (D. C. 1897) 82 Fed. 611, 613.

Any United States commissioner is empowered by this section to take bail for the appearance for trial before the proper court of one charged with any crime or offense against the United States. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

United States commissioners, under this section, have the same power to take bail upon an arrest made after an indictment as they have in cases of arrest before indictment. Hoeffner v. U. S. (1898) 87 Fed. 185, 30 C. C. A. 610.

Where bail on appeal had been fixed by the court or judge, a United States commissioner had jurisdiction to cause the proposed sureties to justify before him and accept bail tendered. U. S. v. Louis (C. C. 1906) 149 Fed. 277.

See U. S. v. Volz (C. C. 1876) Fed. Cas. No. 16,627; U. S. v. Garcelon (D. C. 1897) 82 Fed. 611. See, also, Ex parte Ronchi (D. C. 1908) 165 Fed. 558.

See U. S. v. Hom Hing (D. C. 1892) 48 Fed. 635, as to powers of commissioners. And see U. S. v. Louis (C. C. 1906) 149 Fed. 277, holding that the United States commissioners have the same power to admit to bail as the commissioners of the circuit courts possessed.

62. —— **Justices of the peace.**—A justice of the peace cannot discharge a prisoner committed for trial for a felony, nor take money in lieu of bail. U. S. v. Faw (C. C. 1808) Fed. Cas. No. 15,078.

On arresting one for misdemeanor, the marshal is not required to take the bail bond himself, but may take the prisoner to a justice, to give bail. U. S. v. Milburn (C. C. 1834) Fed. Cas. No. 15,765.

See U. S. v. Sauer (D. C. 1896) 73 Fed. 671.

63. —— **Clerks of court.**—Even without any statutory authority the clerk of a United States circuit court may take the acknowledgment and justify the obligors to a bail bond, when required by the court to do so. U. S. v. Evans (C. C. 1880) 2 Fed. 147.

Where a bail bond present in the record was executed before a clerk, who wrote at the foot of it, "Signed, sealed and acknowledged, and approved by," signing his name thereto, but it did not appear from the bond or otherwise that the defendant was brought before the clerk for examination and bail as a magistrate, and the court was in session that day, it would be presumed to have been taken by the clerk under the immediate direction of the court, though no mention be made in this section and section 1679, post, as to powers of clerks, but clerks have such power only by virtue of statute. Id.

Clerks of court have power to take a recognizance only by virtue of statute. Id.

64. —— **Marshals or deputies.**—See U. S. v. Milburn (C. C. 1834) Fed. Cas. No. 15,765.

Where a marshal or his deputy arrests a defendant on a capias from a court of record, he has power to take a recognizance of bail as sheriffs can do, and if the defendant fails to give bail he may commit him to a jail, but he ought to give the jailer a written statement of the authority under which he makes such commitment. U. S. v. Harden (C. C. 1881) 10 Fed. 802, 807.

65. —— **Sheriffs.**—See Roberts v. Brown (1906) 94 S. W. 388, 43 Tex. Civ. App. 206, holding that a sheriff is not bound to accept bail.

66. **Proceedings to admit to bail.**—Where an indictment has been found the court will not examine the evidence, for the purpose of taking bail. U. S. v. Jones (C. C. 1813) Fed. Cas. No. 15,495.

As to examination of evidence before indictment, see In re Martin (C. C. 1866) Fed. Cas. No. 9,151.

Where defendant was convicted of embezzling funds of a national bank, and the trial court refused to admit him to bail pending a writ of error, in the absence of some great urgency, a further application for admission to bail should be made to the appellate court. McKnight v. U. S. (1902) 113 Fed. 451, 51 C. C. A. 285.

An order by a justice of the supreme court: "Writ of error, to operate as a supersedeas, allowed, returnable according to law, the defendant to furnish a bond in the sum of $5,000, * * * subject to approval of district judge"—is a command to admit accused to bail. Hudson v. Parker (1895) 15 Sup. Ct. 450, 156 U. S. 277, 39 L. Ed. 424.

Bonds must be taken and executed in pursuance of an order of the proper court or officer. U. S. v. Goldstein (C. C. 1871) Fed. Cas. No. 15,226.

See U. S. v. Lawrence (C. C. 1835) 26 Fed. Cas. No. 15,577, as to discretion in granting or refusing bail.

67. Review.—Mandamus lies to compel the trial court to exercise its discretion. Hudson v. Parker (1895) 15 Sup. Ct. 450, 156 U. S. 277, 39 L. Ed. 424.

Denial of bail, supported by affidavit of petitioner's physician that he was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment, is not reversible error, though the refusal was put on the ground of the want of power. Wright v. Henkel (1903) 23 Sup. Ct. 781, 786, 190 U. S. 40, 47 L. Ed. 948.

On appeal from an order in habeas corpus proceedings discharging the petitioner, but requiring him to give bail for his appearance, as may be determined by any final order made on appeal, the portion of the order admitting appellee to bail will not be taken up for consideration on a motion in advance of the regular hearing, unless there are special reasons therefor. U. S. v. Lee Yen Tai (1901) 108 Fed. 950, 48 C. C. A. 157.

The judge may reduce bail fixed by the committing magistrate. U. S. v. Brawner (D. C. 1881) 7 Fed. 86.

See In re Humason (D. C. 1891) 46 Fed. 388.

See R. S. § 753, ante, § 1281, and notes thereunder.

68. Amount of bail.—The amount of bail should be determined by a consideration of the ability of the prisoner to give bail and the atrocity of the crime. To require larger bail than the prisoner can give is, in effect, to refuse bail. U. S. v. Lawrence (C. C. 1835) Fed. Cas. No. 15,577. See U. S. v. Petit (C. C. 1882) 11 Fed. 58, for amount of bail. See, also, U. S. v. Brawner (D. C. 1881) 7 Fed. 86, holding that a demand for excessive bail was a denial of bail. And see, also, Smith v. Lee (1882) 13 Fed. 28, for a case wherein a reduction of amount was ordered. See amendment 8, and notes thereunder.

69. —— Liability for taking insufficient bail.—Where the indictment does not describe an indictable offense, the magistrate has a discretion as to the amount of bail, and is not criminally liable for taking insufficient bail. U. S. v. Smith (C. C. 1836) Fed. Cas. No. 16,330.

70. Bond, undertaking, recognizance, and deposits—Requisites and validity in general.—The sufficiency of a bail bond is governed by the law of the state where taken. U. S. v. Zarafonitis (1907) 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290.

The form of a bail bond taken by a United States commissioner should conform, in all substantial particulars, to the requirements of the laws of the state in which the commissioner is sitting, so far as such laws are applicable. U. S. v. Sauer (D. C. 1896) 73 Fed. 671.

The material parts of the obligation and the condition in a recognizance should be set forth in the body, so as to admit of extension, consistently with its terms. Dillingham v. U. S. (C. C. 1810) Fed. Cas. No. 3,913.

The recognizance need not state the particular charge on which the party is under arrest and to which he is to appear. U. S. v. George (C. C. 1874) Fed. Cas. No. 15,199; Same v. De Grieff (C. C. 1880) Fed. Cas. No. 14,-935a; Same v. Atwill (D. C. 1846) Fed. Cas. No. 14,475.

In Tennessee every bond or recognizance that would be good at common law will be deemed good as a statutory bond. U. S. v. Evans (C. C. 1880) 2 Fed. 147.

A recognizance is an obligation of record. U. S. v. Insley (C. C. 1892) 49 Fed. 776, 778, reversed (1893) 54 Fed. 221, 4 C. C. A. 296.

Under this section, and Rev. St. Wis. § 4808, providing that a person giving bail shall enter into recognizance "for his appearance at the next term of the circuit court of the county," and section 4810 providing that he may, "at his option, give bail either for his appearance at the then pending or next regular term thereof, or for his appearance at such term, and from term to term thereafter," a bond for his appearance at a special term of the United States district court not then called, which is afterwards called at a different time from that named in the bond, and after two regular terms have elapsed at which he might have been tried, is

void. U. S. v. Keiver (C. C. 1893) 56 Fed. 422.

A bail bond, to be valid, must be taken by competent legal authority, and be in correct legal form. U. S. v. Hudson (D. C. 1894) 65 Fed. 68. See Bennett v. Pendleton (C. C. 1803) Fed. Cas. No. 1,322, holding that a recognizance of bail taken out of court is only de bene esse, and does not discharge the marshal.

An undertaking of bail, which sets forth in general terms the matters of the offense charged, but which fails to recite that accused had been indicted or ordered admitted to bail, and which omits the number of the section of the Revised Statutes violated and the date of the offense, is not invalid. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

A bond to secure the appearance of a person charged with two distinct offenses, taken for the aggregate amount, is invalid. U. S. v. Goldstein's Sureties (C. C. 1871) Fed. Cas. No. 15,226. But see U. S. v. Reese (C. C. 1866) Fed. Cas. No. 16,138, holding that a recognizance of bail is not objectionable because embracing the amounts required upon two separate indictments.

An invalid bail bond is not binding on either principal or sureties. U. S. v. Hudson (D. C. 1894) 65 Fed. 68. See U. S. v. Ah Fook (1910) 183 Fed. 33, 105 C. C. A. 325, holding that a Chinese seaman being authorized to land in the United States on giving bond to depart within 30 days, as required by commerce and labor rule 32, a bail bond given by such seaman, on being arrested in the United States for violating the customs revenue law, was valid.

See Hunt v. U. S. (1894) 63 Fed. 568, 11 C. C. A. 340, as to action of trial judge amounting to approval of bond.

71. —— **Defects in antecedent proceedings.**—Where a bail bond present in the record was executed before a clerk, who wrote at the foot of it, "Signed, sealed, and acknowledged, and approved by,"—signing his name thereto, and it did not appear, from the bond or otherwise, that the defendant was brought before the clerk for examination and bail as a magistrate, and the court was in session that day, it would be presumed to have been taken by the clerk under the immediate direction of the court. Where a recognizance was given for the appearance of a defendant to answer a "charge against him for passing counterfeit money," held, that the fact that the indictment was defective, could not be asserted as a defense to a scire facias upon such recognizance after forfeiture. U. S. v. Evans (C. C. 1880) 2 Fed. 147.

Where a person who has been arrested and has given bail for his appearance voluntarily appears before the commissioner at the preliminary hearing, and enters into recognizance for his appearance at court, the validity of such recognizance is not affected by any irregularities in the proceedings leading to his arrest, since he waived such irregularities by appearing. U. S. v. Wallace (D. C. 1891) 46 Fed. 569.

It is no defense to a recognizance that a warrant for removal of accused was not signed by the proper officer, where, without objection on that ground, accused applied for a reduction of bail, and gave bail for the reduced amount and was discharged. Hunt v. U. S. (1894) 61 Fed. 795, 10 C. C. A. 74.

When a commissioner, having jurisdiction, orders defendant to give bail, the bond taken in pursuance of such order is valid, though the information charge no offense. Hardy v. U. S. (1895) 71 Fed. 158, 18 C. C. A. 22.

72. —— **Acknowledgment.**—See U. S. v. Ricket (D. C. 1857) Fed. Cas. No. 16,043, and Heward v. U. S. (D. C. 1889) 37 Fed. 764, as to necessity and effect of acknowledgment.

An acknowledgment without the signatures of the parties certified by a justice of the peace is all that is required to make a recognizance valid and obligatory. U. S. v. Pickett (D. C. 1857) Fed. Cas. No. 16,043.

A bail bond in a criminal action must be acknowledged. Barber v. U. S. (D. C. 1887) 35 Fed. 886, judgment reversed on other grounds (1891) 11 Sup. Ct. 751, 140 U. S. 177, 35 L. Ed. 398, and U. S. v. Barber (1893) 14 Sup. Ct. 1154, 154 U. S. 522, 38 L. Ed. 1080.

73. —— **Statement of crime.**—A recognizance need not show on its face that the offense is within a federal statute. U. S. v. DeGrieff (C. C. 1880) Fed. Cas. No. 14,935a.

A recognizance is sufficiently certain if it sets out an act punishable by the statute, without any of the particulars. U. S. v. Dennis (C. C. 1850) Fed. Cas. No. 14,949.

A condition that defendant should appear "to answer to the charge of stealing from the mail of the U. S., contrary to the statute of the U. S. in such case made and provided," held sufficient. Id.

A recognizance which states that the principal shall appear, etc., to answer for unlawfully, falsely, and deceitfully uttering forged and counterfeit writings to defraud the United States, knowing the same to be false, forged, and counterfeited, is sufficient. U. S. v. George (C. C. 1874) Fed. Cas. No. 15,199.

A recognizance conditioned for the appearance of the principal to answer the charge of conspiracy to burn a steamboat on navigable waters, but which states no attempt to injure underwriters, is insufficient. U. S. v. Hand (C. C. 1854) Fed. Cas. No. 15,296.

In a bail recognizance taken under

this section, charging "conspiracy to defraud the United States," it is not essential to state the person or persons with whom defendant conspired, nor the acts done. Under Hill's Ann. Laws Or. § 1470, relating to bail, a charge, in an undertaking taken by a United States commissioner in Oregon, that the defendant "conspired to defraud the United States," is a sufficient statement of his crime. A charge in an undertaking, that defendant "unlawfully aided and abetted the landing of Chinese laborers in the United States," is a sufficient statement of his offense. The defects in an undertaking of bail, taken before a United States commissioner in Oregon, and setting forth in general terms the nature of the offense charged in the indictment, arising from a failure to recite that the defendant had been indicted or ordered admitted to bail, and omitting the number of the section of the Revised Statutes alleged to have been violated, and the date of alleged commission of the offense, are not fatal. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

Under the statute of Texas requiring a bail bond to name the offense of which defendant is accused, a bail bond taken by a commissioner which states that defendant is charged with concealing smuggled goods, but does not state that he did so knowing the same to be smuggled, is invalid. U. S. v. Sauer (D. C. 1896) 73 Fed. 671. Pen. Code Tex. 1895, art. 309, as amended by Acts 1899, p. 111, c. 74, providing that a bail bond shall be sufficient if it contains the following requisites: "(3) If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony; if the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor," does not require that the words "felony" or "misdemeanor" shall be used in a bond, but merely permits their use as sufficiently specific, and a bail bond taken by a United States commissioner sufficiently described the offense where it recited that the principal was "charged with the offense of concealing property from his trustee in bankruptcy belonging to his creditors, in violation of the bankruptcy act of the Revised Statutes of the United States." U. S. v. Zarafonitis (1907) 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290.

A bond conditioned that accused appear and answer such matters and things as have or shall be objected against him is valid. U. S. v. Graner (C. C. 1907) 155 Fed. 679. See, on same point, Kirk v. U. S. (1905) 137 Fed. 753, 70 C. C. A. 187, affirmed (1907) 27 Sup. Ct. 788, 204 U. S. 688, 51 L. Ed. 671. See Dillingham v. U. S. (C. C. 1810) 7 Fed. Cas. No. 3,913, as to effect of variance between offense stated in bond and the offense charged.

74. —— **Conditions and obligations.**—On a recognizance for the appearance of defendant in a case of misdemeanor, he is bound to appear on the first day of the term. U. S. v. Hodgkin (C. C. 1808) Fed. Cas. No. 15,375.

A person under recognizance to appear at a certain place at a certain hour is not in default before the expiration of that hour, and he is not bound to appear elsewhere. U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208.

A recognizance conditioned absolutely that the defendant appear cannot be modified by an oral agreement of the government's representative with the surety that the defendant need not appear, unless he be indicted for a certain offense. U. S. v. Graner (C. C. 1907) 155 Fed. 679.

A recognizance in a fixed penalty to appear at a federal court and answer matters, and not depart without leave of court, is binding on the sureties. U. S. v. Atwill (D. C. 1846) Fed. Cas. No. 14,475.

See U. S. v. Brawner (D. C. 1881) 7 Fed. 86, as to time for appearance.

75. —— **Sureties.**—A bond with one surety was accepted in a case where the judges were divided in opinion as to whether the crime of passing a counterfeit half dollar was an infamous crime, which could only be prosecuted by indictment, and certified a division of opinion on that point to the supreme court, the prosecution of the crime having been begun by information. U. S. v. Petit (C. C. 1882) 11 Fed. 58.

A bail bond given by a surety company as authorized by Act Aug. 13, 1894, post, § 3293 et seq., differs in no way, as far as its legal status is concerned, from the bond of an individual. Ex parte Marrin (D. C. 1908) 164 Fed. 631.

It is within discretion of a court or magistrate to refuse to accept a recognizance signed by a surety fully indemnified against loss by third parties, and it should not be accepted where it appears indemnitors are not acting in good faith, in that it is not their purpose to secure the appearance of accused, but to substitute the recognizance and indemnity for his person and enable him to flee. U. S. v. Lee (D. C. 1909) 170 Fed. 613. And see Leary v. U. S. (1912) 32 Sup. Ct. 599, 600, 224 U. S. 567, 56 L. Ed. 889, Ann. Cas. 1913D, 1029, holding that public policy does not forbid an agreement under which the surety on a bail bond became such upon condition that certain securities held in trust or on deposit by a third person should remain in the latter's hands as security and indemnity for signing the bond. But see U. S. v. Simmons (C. C. 1891) 47 Fed. 575, holding that a bail bond, pending appeal from a conviction in a criminal case, should not be accepted where the sureties thereon have indemnified them-

selves by taking bonds from the accused and others; and the fact that such bonds are against public policy, and could not be collected, is immaterial.

76. Deposit in lieu of bail.—Where defendant, charged with a criminal offense against the United States and held to bail, has, pursuant to an order of the court, deposited a sum of money in its registry to secure his appearance, it would seem to be against public policy to permit the United States to attach the deposit in a civil suit, and in any event the defendant is entitled to require the action to proceed to trial without delay. U. S. v. Neely (C. C. 1910) 178 Fed. 748. See U. S. v. Faw (C. C. 1808) Fed. Cas. No. 15,078, holding that a justice of the peace cannot take money in lieu of bail.

77. Liability of sureties.—Where a judgment by confession was at the term set aside for good cause, the original indictment is still pending, and a bail bond for the accused's appearance is valid, though he had already entered on the imprisonment ordered by the sentence. Bassett v. U. S. (1869) 9 Wall. 38, 41, 19 L. Ed. 548.

Act Nov. 3, 1903, c. 10, 28 Stat. 5, declared that the state of South Dakota should constitute one judicial district only, but for the purpose of holding terms of the District Court the district was divided into four divisions, and required court to be held at Aberdeen for the Northern Division, at Sioux Falls for the Southern, at Pierre for the Central, and at Deadwood for the Western, Division. Section 3, declared that the terms of the Circuit and District Courts of the United States for the state of South Dakota should be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October, at Aberdeen on the first Tuesday of May and the third Tuesday of November. Held, that such court was the same court, whether held in one division or the other, so that where a recognizance bound accused to appear at the next term of the court to be held at Sioux Falls on Tuesday, October 18, 1904, and from time to time and term to term, etc., thereafter, and he was subsequently ordered to appear for trial at the November, 1904, term, to be held in Aberdeen, his failure there to appear constituted a breach of his recognizance. Hollister v. U. S. (1906) 145 Fed. 773, 76 C. C. A. 337.

The death of the principal after default and forfeiture of his recognizance does not exonerate his sureties. U. S. v. Van Fossen (C. C. 1871) Fed. Cas. No. 16,607.

Where security was taken agreeable to the usual mode of process in Kansas, the rights of the parties became fixed thereby, and the liability of the sureties was determinable under the statutes in force in Kansas at that time. U. S. v. Insley (C. C. 1892) 49 Fed. 776, 778, reversed 54 Fed. 221, 4 C. C. A. 296.

The obligation of a surety on a bail bond is a continuing one, and binds his estate after his death. U. S. v. Keiver (C. C. 1893) 56 Fed. 422.

A bail bond bound the principal to appear at a certain term of court to be held on a date specified, and from day to day and from term to term to which the case should be continued, and then and there to answer such matters as should be objected against him, and to abide and perform the orders of the court, and not to depart without leave. An indictment having been returned at such term, to which defendant pleaded not guilty, the case was set for trial on March 17, 1902, defendant, however, being informed that another indictment would probably be returned against him. Such indictment, having been presented, defendant was directed to appear to answer the same on March 6th, and, failing to appear, his recognizance was duly forfeited on the succeeding day, and, he again failing to appear on March 17th, the former forfeiture was confirmed. Held that, all of such dates being within the same term, it was the duty of defendant's surety to produce him, as ordered by the court, on March 6th, notwithstanding a later date had been fixed for the trial on the indictment first presented, and hence the confirmation of the forfeiture on March 17th was proper. Kirk v. U. S. (C. C. 1904) 131 Fed. 331, decree affirmed (1905) 137 Fed. 753, 70 C. C. A. 187, and U. S. v. Kirk (1907) 27 Sup. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

Where accused was prevented from appearing to answer an indictment for a federal offense in a certain district by reason of his having been removed by the court for trial under an indictment in another district, such removal operated to exonerate the bail for his appearance. In re Beavers (C. C. 1904) 131 Fed. 366.

Under a recognizance conditioned that defendant, held on a charge of having deserted the mails, appear at a certain time and answer all such matters as shall be objected against him, the surety is liable for the nonappearance of defendant, though he be not indicted for deserting the mail, but for stealing the mail, and the government could therefore have arrested him at any time, instead of relying on the bond. U. S. v. Graner (C. C. 1907) 155 Fed. 679.

Subsequent detention for additional security, and subsequent arrest to compel the prisoner to keep the securities good, will not release the sureties. U. S. v. Atwill (D. C. 1846) Fed. Cas. No. 14,475.

Where accused, indicted in the Southern District of New York, was arrested in Washington, D. C., and gave bond to appear in New York on a specified day, which he failed to do, that before

such date the surety surrendered accused in Washington and received an exoneratur, whereupon habeas corpus proceedings were instituted, was no defense to a forfeiture of the bond. U. S. v. Lamar (D. C. 1913) 210 Fed. 685.

78. —— Joint liability.—A bond signed by a third person, whose name did not appear in the body thereof after its execution by defendant and another, does not import a joint liability, and a joint action cannot be sustained thereon. U. S. v. Pickett (D. C. 1857) Fed. Cas. No. 16,043.

79. —— Subrogation.—Subrogating a surety is against public policy. U. S. v. Ryder (1884) 4 Sup. Ct. 196, 110 U. S. 729, 28 L. Ed. 308.

80. Proceedings for fixing liability.—Where sureties on an undertaking of bail are thereby required to produce the defendant "whenever requested to do so," no request or notice is required to bind them, except that duly given in open court at the time regularly set for his trial. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

The cognizor must be called at the time and place when and where he was bound to answer, and an entry made of his default on the minutes of the commissioner, which he returns to the court, to show a breach of the condition of the recognizance. U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208.

Where a recognizance was given by a nonresident defendant to appear and answer an indictment against him in the District Court of the Southern District of Georgia, on which a resident of New York was surety, the court in which the indictment was pending had jurisdiction to forfeit the recognizance on the defendant's failure to appear. Kirk v. U. S. (C. C. 1903) 124 Fed. 324, order affirmed (1904) 130 Fed. 112, 64 C. C. A. 446.

A surety on a bail bond obligating the defendant to appear from day to day during a particular term and from term to term cannot object that a forfeiture of such recognizance was not entered on the precise day of the term when the principal was obliged to appear. Kirk v. U. S. (C. C. 1904) 131 Fed. 331, decree affirmed (1905) 137 Fed. 753, 70 C. C. A. 187, and U. S. v. Kirk (1907) 27 Sup. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

A court will not exercise its discretion to refuse to forfeit a criminal recognizance to enable a creditor of the principal to recover a deposit by him with his surety as indemnity. U. S. v. Marrin (D. C. 1909) 170 Fed. 476.

81. Discharge of sureties.—See U. S. v. French (C. C. 1812) Fed. Cas. No. 15,165.

A recognizance to appear to answer to a certain indictment, and not to depart without the leave of the court, is not discharged by the quashing of the indictment, and if a new indictment is found the bail remain liable for his principal's appearance to answer such new indictment. U. S. v. White (C. C. 1837) Fed. Cas. No. 16,678.

The removal of a prisoner by a court of competent jurisdiction beyond the control of his bondsmen, thus rendering them unable to produce the prisoner at the time and place set for trial, as undertaken by the conditions of the bond, is, in the language of the authorities, "an act of the law," and can be set up in defense to a suit on the bond. In re James (C. C. 1884) 18 Fed. 853.

The surety on a recognizance conditioned that defendant shall personally appear before the circuit court in April, 1887, to answer, etc., and not to depart the court without license, is discharged where defendant appears, and the court takes no action in the case, though an agreement is made between defendant and the commissioner, for the benefit of the former, without the consent of the surety, that the case shall not be sent up until the April term, 1888. U. S. v. Backland (C. C. 1887) 33 Fed. 156.

Where accused was prevented from appearing to answer an indictment for a federal offense in a certain district by reason of his having been removed by the court for trial under an indictment in another district, such removal operated to exonerate the bail for his appearance. In re Beavers (C. C. 1904) 131 Fed. 366.

Arrest, trial, conviction, and imprisonment of one at large on bail in a case in a federal court by courts of another state where he voluntarily went knowing prior indictments were there pending against him do not exonerate his bail. U. S. v. Marrin (D. C. 1909) 170 Fed. 476.

82. Relief from liability or forfeiture.—See post, § 1684, and notes thereunder.

83. —— Surrender of principal.—See post, § 1682, and notes thereunder.

84. Action or scire facias on bond, undertaking, or recognizance—Remedy.—In enforcing a forfeited bond taken in a criminal case, the United States is not restricted to the remedies provided by the laws of the state, but may proceed according to the common law; and a forfeited bond may be proceeded on by scire facias in Kansas, though by the Kansas law an independent action is necessary. U. S. v. Insley (C. C. 1892) 49 Fed. 776, reversed (1893) 54 Fed. 221, 4 C. C. A. 296, decree affirmed Insley v. U. S. (1893) 14 Sup. Ct. 158, 150 U. S. 512, 37 L. Ed. 1163.

A scire facias on a recognizance taken under this section to answer a charge of crime is a case arising "under the criminal laws," within Act March 3, 1891, § 6, ante, § 1120. Hunt v. U. S. (1897) 17 Sup. Ct. 609, 610, 166 U. S. 424, 41 L. Ed. 1063, dismissing writ of

error (1894) 61 Fed. 795, 10 C. C. A. 74, and (1894) 63 Fed. 568, 11 C. C. A. 340.

When a bond becomes due the conditions making it a valid indebtedness, which can be enforced by a writ of scire facias, are fulfilled, if defendant is not produced at the time specified in the bond. U. S. v. Evans (C. C. 1880) 2 Fed. 147; Same v. Graner (C. C. 1907) 155 Fed. 679.

A recognizance in a criminal case is in the nature of a judgment confessed of record, and a proceeding thereon by sci. fa. after forfeiture is merely to confirm such judgment. U. S. v. Taylor (D. C. 1907) 157 Fed. 718.

Where a defendant indicted for conspiracy to defraud the United States executed a bond conditioned that he would appear on a specified day, and from day to day and from term to term should the case be continued, and answer to such things as should be objected against him, etc., and on his failure to appear as required the bond was duly estreated, the United States thereby acquired a perfect cause of action against the surety, enforceable in a proper forum after due notice. Decree (C. C. 1904) 131 Fed. 331, affirmed. Kirk v. U. S. (1905) 137 Fed. 753, 70 C. C. A. 187, decree affirmed U. S. v. Kirk (1907) 27 Sup. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

An action to recover penalty in a forfeited recognizance given in a criminal case is not a criminal proceeding, and the United States may bring error to review an adverse judgment. U. S. v. Zarafonitis (1907) 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290.

85. —— **Defenses.**—Sureties cannot defend on the ground that the indictment against their principal was bad. Hardy v. U. S. (1895) 71 Fed. 158, 18 C. C. A. 22; U. S. v. Reese (C. C. 1866) Fed. Cas. No. 16,138; Same v. Evans (C. C. 1880) 2 Fed. 147; Same v. Graner (C. C. 1907) 155 Fed. 679.

It is no defense that a warrant for removal of the accused from the district in which he was arrested was not signed by the proper judicial officer, where, without objection on that ground, the accused applied for a reduction of the bail originally fixed, gave such recognizance for the reduced amount, and was discharged thereon. Hunt v. U. S. (1894) 61 Fed. 795, 10 C. C. A. 74.

It is no defense to a recognizance that it was taken before the clerk of the district court, where this was done by order of the district judge, at the request of the accused, to secure his speedy discharge. Hunt v. U. S. (1894) 63 Fed. 568, 11 C. C. A. 340, affirming (1894) 61 Fed. 795, 10 C. C. A. 74.

The obligation of the sureties is in no way affected by the question whether the prosecution of the offense was barred by the lapse of time. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

In an action in a federal court against a surety in a recognizance given in another district and there duly estreated, that the record pleaded and introduced to show such fact also shows a judgment was there entered against the surety, void for want of jurisdiction over his person, is immaterial; the action not being based on the judgment, but on the recognizance, which was not merged therein. Leary v. U. S. (1909) 170 Fed. 941, 96 C. C. A. 151.

On scire facias on a forfeited recognizance, it was no defense that the statute under which accused was indicted was unconstitutional. U. S. v. Du Faur (1911) 187 Fed. 812, 109 C. C. A. 572, writ of certiorari denied Dufaur v. U. S. (1912) 32 Sup. Ct. 528, 223 U. S. 732, 56 L. Ed. 634.

Where the accused is admitted to bail pending consideration of objections to the indictment, the recognizance is a binding obligation, though the indictment be eventually adjudged void. U. S. v. Reese (C. C. 1866) Fed. Cas. No. 16,138.

The subsequent arrest, conviction, and imprisonment of the principal on process from a state court, out of the jurisdiction of the district, is no defense to sureties on a recognizance given to the United States. U. S. v. Van Fossen (C. C. 1871) Fed. Cas. No. 16,607.

Where a United States commissioner adjourns the examination of a prisoner for a longer time than that allowed by the local law, a recognizance taken for his appearance is invalid, and the prisoner and his sureties are not estopped from setting up the want of jurisdiction. U. S. v. Horton (C. C. 1873) Fed. Cas. No. 15,393.

Evidence that defendant was not called, nor his surety required to produce his body, is incompetent to contradict the record of the court showing that all necessary steps were taken to secure a forfeiture. U. S. v. Ambrose (C. C. 1881) 7 Fed. 554.

It is no defense that the defendant was misled or misinformed as to the contents and effect of the same, unless it also appears that, by reason of some disability, he was incapable of reading and comprehending the writing for himself, or that he was imposed on by some fraudulent device, as the substitution of one writing for another. Taylor v. Fleckenstein (C. C. 1887) 30 Fed. 99.

Where a person, under bail to answer an indictment in a federal court, is arrested for a crime against the state, his confinement does not violate any federal law, and he is not entitled, at the instance of his sureties, to be released on habeas corpus. If the federal authorities do not insist upon the prior jurisdiction of the federal court, the accused and his sureties cannot com-

plain. In re Fox (C. C. 1892) 51 Fed. 427, 429.

The fact that there was an appearance or discontinuance after forfeiture is not a legal defense. U. S. v. McGlashen (C. C. 1895) 66 Fed. 537, judgment reversed McGlashan v. U. S. (1896) 71 Fed. 434, 18 C. C. A. 172.

A parol agreement that accused need not appear unless an indictment is filed cannot modify the bond. U. S. v. Graner (C. C. 1907) 155 Fed. 679.

Where a defendant in a case in a federal court is arrested, tried, convicted, and imprisoned while at large on bail by the court of a state where he voluntarily went knowing prior indictments were there pending against him, it is not the duty of the United States district attorney to go into the foreign jurisdiction and institute or join in proceedings for his release or discharge from custody of the state, and failure to do so affords no defense to a proceeding to forfeit bail. U. S. v. Marrin (D. C. 1909) 170 Fed. 476.

86. —— **Jurisdiction and venue.**—The forfeiture of a bail bond, under the laws of the United States, by scire facias in the district court, being a matter within the jurisdiction thereof, is not subject to collateral attack on the ground that by this section it is necessary to follow the state statutes, which require bail bonds to be proceeded on by formal suit, for the error, if any, in selecting the remedy, does not go to the jurisdiction. Insley v. U. S. (1893) 14 Sup. Ct. 158, 159, 150 U. S. 512, 37 L. Ed. 1163.

Where a surety on a bail bond resided in another district from that in which the bond was filed, and remained in the district of his domicile, his personal liability on the bond could not be established in any other district than that where he resided. Kirk v. U. S. (1905) 137 Fed. 753, 70 C. C. A. 187, affirming decree (C. C. 1904) 131 Fed. 331, and decree affirmed U. S. v. Kirk (1907) 27 Sup. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

87. —— **Process and appearance.**—Scire facias on a forfeited recognizance being in the nature of an original action, unless the surety has voluntarily submitted himself to the jurisdiction of the court out of which the writ issued, he must be personally served in the district of the court issuing the writ. In scire facias on a forfeited recognizance two returns nihil on successive writs are equivalent to personal service on the defendant only where the defendant in scire facias is domiciled or found within the jurisdiction of the court where the writ issues. Where the surety on a bail bond filed in a federal court sitting in Georgia continued openly to reside in New York during all the time proceedings were pending in Georgia on the bond, two returns nihil in Georgia to a writ of certiorari after forfeiture of the bond in the district in which the bond was filed were not equivalent to personal service, so as to authorize a personal judgment against such a surety. Kirk v. U. S. (1905) 137 Fed. 753, 70 C. C. A. 187, affirming decree (C. C. 1904) 131 Fed. 331, and decree affirmed (1907) U. S. v. Kirk (1907) 27 Sup. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

In scire facias on a forfeited appearance bond in a criminal case, a separate notice must issue to each obligor. This is in the nature of a writ, and to be paid for by the United States. Jones v. U. S. (D. C. 1889) 39 Fed. 410. judgment reversed U. S. v. Jones (1893) 13 Sup. Ct. 437, 147 U. S. 672, 37 L. Ed. 325.

88. —— **Pleading.**—A scire facias on a forfeited recognizance takes the place of the declaration in an original suit, and its sufficiency must be determined by its averments alone, apart from the record on which the writ issues. Where a scire facias alleged that W., as principal, and defendants, as sureties, entered into a recognizance on a given date before the trial court, binding themselves to pay the United States $1,000 if the principal should fail to appear in that court at a term and time specified to answer a charge of the United States exhibited against him, and that he failed to so appear and after such failure a default and forfeiture were duly adjudged by the court, it was not demurrable for failure to allege the nature of the charge against W., that the same was pending against him at the time the recognizance was forfeited, and that the recognizance was made a matter of record, etc. Hollister v. U. S. (1906) 145 Fed. 773, 76 C. C. A. 337.

It is not sufficient to aver and prove aliunde that the cognizor had in fact absconded, and did not intend to appear, and could not have appeared if he had been called. U. S. v. Rundlett (C. C. 1854) Fed. Cas. No. 16,208.

In a declaration on a recognizance, where the officer taking it has jurisdiction over cases of the general description named therein, it is not necessary to aver the existence of the particular facts showing the authority of the officer to take it. U. S. v. George (C. C. 1874) Fed. Cas. No. 15,199.

A declaration upon a forfeited recognizance given in a criminal proceeding may be amended in the discretion of the court. Id.

In an action on a bail bond, a complaint which fails to allege that criminal proceedings had been commenced against the principal, or that an examination was had before a qualified officer, whereupon reasonable cause appeared for believing him guilty, or that he was held to bail, or required to put in bail by anybody, is fatally defective. U. S. v. Keiver (C. C. 1893) 56 Fed. 422.

A declaration on a recognizance should

state that the recognizance was filed in court. U. S. v. Atwill (D. C. 1846) Fed. Cas. No. 14,475.

89. —— Evidence.—In a proceeding by scire facias on a forfeited recognizance, the record on which the writ issued is admissible in evidence to establish plaintiff's cause of action. Hollister v. U. S. (1906) 145 Fed. 773, 76 C. C. A. 337.

In an action on the recognizance, it must be clearly proved that the party was called and warned, and neglected to appear. Dillingham v. U. S. (C. C. 1810) Fed. Cas. No. 3,913.

90. —— Variance.—Where, in a scire facias on a forfeited recognizance, the writ declared that defendants appeared before United States District Court and entered into the recognizance in question on July 6, 1904, and that the recognizance was conditioned that the principal should appear before "our District Court of the United States, at the next term of United States District Court to be held in the federal building at Sioux Falls, South Dakota, to wit, on Tuesday, October 18, 1904," and the recognizance offered in evidence bore date as having been approved and filed July 6, 1904, but the notary before whom the sureties acknowledged the same certified that they appeared before him on "July 6, 1894," and the recognizance was conditioned that the said principal should be and appear at the next term of court of United States, to be holden at Sioux Falls, S. D., in and for the judicial district of South Dakota, the variances were not material. Hollister v. U. S. (1906) 145 Fed. 773, 76 C. C. A. 337.

A material variance between the warrant and the recognizance set forth in the declaration and those given in evidence is fatal. Dillingham v. U. S. (C. C. 1810) Fed. Cas. No. 3,913.

91. —— Judgment and enforcement.—It is a proper exercise of discretion for a court to enjoin, on bond filed, pendente lite, the collection of an execution against the surety on a criminal recognizance, on a bill alleging facts which, if true, render the execution void. Kirk v. U. S. (1904) 130 Fed. 112, 64 C. C. A. 446, affirming order (C. C. 1903) 124 Fed. 324.

G., a resident of New York, was indicted in the federal District Court for the Southern District of Georgia for conspiracy against the United States. On being arrested in New York, proceedings were had by which bail was given before a United States commissioner in New York for G.'s appearance, on which complainant, also a resident of New York, was surety. Thereafter, on G.'s alleged failure to appear and answer the indictment, scire facias was issued on the bail bond by the Georgia court, which was never personally served on complainant, and after two returns of nihil the bail was forfeited, and an execution issued to the United States marshal in New York, who levied the same on complainant's property. Held that, since scire facias on a forfeited recognizance is to be regarded as an original process in a special proceeding, the validity of the proceedings for forfeiture was sufficiently doubtful to justify the court in issuing an injunction pendente lite restraining the marshal from enforcing the execution. Kirk v. U. S. (C. C. 1903) 124 Fed. 324, order affirmed (1904) 130 Fed. 112, 64 C. C. A. 446.

Where scire facias is issued against bail, an execution cannot be awarded against the defendant who has not been personally served with process until there have been two returns of nihil to the writ. Kirk v. U S. (C. C. 1904) 131 Fed. 331, decree affirmed (1905) 137 Fed. 753, 70 C. C. A. 187, and U. S. v. Kirk (1907) 27 S. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

A judgment upon a forfeited recognizance of bail is absolute, and is not a judgment nisi. U. S. v. Winstead (D. C. 1882) 12 Fed. 50.

92. Disposition of proceeds.—Money voluntarily paid to a marshal in satisfaction of forfeited recognizances is not within the custody or summary jurisdiction of the court. In re Corlies (C. C. 1841) Fed. Cas. No. 3,232.

The proceeds of a forfeited bail bond given to the United States to secure the appearance of a person discharged from custody by a District Court on a writ of habeas corpus, pursuant to an order made by such court on the allowance of an appeal, belong to the United States; and, in the absence of any statute authorizing it, the court has no power to apply the same to the payment of the costs awarded to the adverse parties to the proceeding by the appellate court. U. S. v. Alexandroff (D. C. 1906) 148 Fed. 652.

III. RETURN OF PROCESS AND RECOGNIZANCES OF WITNESSES AND FEES THEREFOR

93. Duty to make returns.—This section requires that bonds shall be returned to the court before whom accused is bound over to appear. McKinistry v. U. S. (C. C. 1888) 34 Fed. 211.

A commissioner is compelled to return copies of process to the court. Hoyne v. U. S. (D. C. 1889) 38 Fed. 542; Rand v. Same, Id. 665. But is not required to return copies of process when defendants are not held for trial, nor send copies when the original is required. Davies v. U. S. (1888) 23 Ct. Cl. 468.

This section requires that the original recognizances shall be sent up. Marvin v. U. S. (D. C. 1902) 114 Fed. 225.

See U. S. v. Jones (1893) 13 Sup. Ct. 437, 147 U. S. 672, 37 L Ed. 325, as to contents of record.

94. Filing of papers returned.—When the papers are returned to the clerk, they should be filed by him for identification and ready reference, for which he is entitled to his fees. Jones v. U. S. (D. C. 1889) 39 Fed. 410, 412, reversed (1893) 13 Sup. Ct. 437, 147 U. S. 672, 37 L. Ed. 325.

95. Fees of commissioners in general.—The law of a state will not justify the allowance of a per diem to a commissioner. Allen v. U. S. (1905) 40 Ct. Cl. 170. See Clough v. U. S. (C. C. 1891) 47 Fed. 791, decree modified U. S. v. Clough (1893) 55 Fed. 373, 5 C. C. A. 140, appeal dismissed (1892) 12 Sup. Ct. 989, 145 U. S. 658, 36 L. Ed. 858, holding that allowance of 20 cents applies only to those instruments for which specific provisions are not made, and a commissioner in Tennessee is not entitled to such fee for affixing his seal to warrants, writs of mittimus, etc., issued by him upon preliminary examinations, since such action is a necessary part of the issuance of the process, and is paid for by the fge for the process. See R. S. § 828, ante, § 1383, and notes thereunder, and ante, § 1451, and notes thereunder.

Since proceedings in criminal cases before United States commissioners are required to conform to the state practice, and in Connecticut the clerk of the state court is entitled to charge for copies of subpœnas, warrants of arrest, and complaints, a United States commissioner is entitled to charge for such items in his fee bill. Marvin v. U. S. (D. C. 1902) 114 Fed. 225.

96. —— Drawing complaints.—A commissioner is not entitled to a fee for drawing a complaint under this section, there being no provision therefor. Strong v. U. S. (D. C. 1888) 34 Fed. 17. See McDermott v. U. S. (C. C. 1889) 40 Fed. 217, 220, modified (1891) 11 Sup. Ct. 746, 140 U. S. 151, 35 L. Ed. 391. And see ante, § 1451, and notes thereunder.

97. —— Administering oaths.—A commissioner in Alabama, in view of this section, is entitled to a fee for administering the oath to every criminal complaint made before him. Strong v. U. S. (D. C. 1888) 34 Fed. 17, 19.

98. —— Preparing affidavits for complaints.—Commissioners, who perform their duty agreeably to the usual mode of process in the state where they act, are entitled to fees for preparing affidavits for complaints. Ravesies v. U. S. (1889) 24 Ct. Cl. 224.

99. —— Filing complaints.—The commissioner is entitled to a fee for filing a complaint pursuant to this section. Strong v. U. S. (D. C. 1888) 34 Fed. 17, 19.

100. —— Warrants for commitment. This section clothes the commissioner in each state with the general powers and authority given to committing magistrates thereof; and, as committing magistrates in Illinois are by Rev. St. Ill. c. 38, §§ 356, 358, 367, not only authorized but required to issue warrants for the commitment to jail of persons charged with crime pending adjournments of the examination, in default of bail, the circuit court commissioner in that state has the same power, and is entitled to $1 fee for such a warrant, as are also clerks of courts by R. S. § 828, ante, § 1383. Hoyne v. U. S. (D. C. 1889) 38 Fed. 542.

101. —— Drawing and filing bail bonds.—The commissioner is entitled to compensation for drawing bail bonds, but not to a fee for filing such bonds. McKinistry v. U. S. (C. C. 1888) 34 Fed. 211, 214. Under this section, and Rev. St. Me. c. 133, §§ 10, 11, providing for taking the recognizance of an offender on any adjournment of the examination, a commissioner examining offenders is entitled to fees for taking their recognizances from day to day. Rand v. U. S. (D. C. 1891) 48 Fed. 357, 358. But see ante, § 1451, and notes thereunder.

102. —— Entering returns of warrants and subpœnas.—A commissioner is entitled to a fee of 15 cents each for entering returns of such warrants and subpœnas for witnesses for the government. McDermott v. U. S. (C. C. 1889) 40 Fed. 217, judgment modified U. S. v. McDermott (1891) 11 Sup. Ct. 746, 140 U. S. 151, 35 L. Ed. 391. But see ante, § 1451, and notes thereunder.

103. —— Taking recognizances of witnesses.—The authority of a commissioner to charge for taking recognizances of witnesses to appear at an adjourned hearing before him depends on whether the laws of the state where the proceedings take place authorize a committing magistrate to take such recognizances. Hallett v. U. S. (C. C. 1894) 63 Fed. 817.

104. —— Copies of recognizances.—A commissioner is not entitled to charge in his fee bill for copies of recognizances. Marvin v. U. S. (D. C. 1902) 114 Fed. 225,

105. —— Transcript of proceedings.—A charge per folio for transcripts of proceedings is lawful, under this section, which provides that copies of the process issued by the commissioner shall be returned, as speedily as may be, into the clerk's office of the court, together with the recognizances of the witnesses for their appearance. U. S. v. Barber (1891) 11 Sup. Ct. 749, 140 U. S. 164, 35 L. Ed. 396.

Where proceedings are had under this section agreeably to the usual mode of proceedings against offenders in the state, and the offender is imprisoned or bailed for trial, the commissioner is entitled to fees for a transcript of proceedings returned into the

clerk's office of the court having cognizance of the case. U. S. v. Dundy (1896) 76 Fed. 355, 22 C. C. A. 219.

A commissioner is entitled to the fees for copies of the process returned by him to the clerk's office of the court as required by this section. McKinistry v. U. S. (C. C. 1888) 34 Fed. 211, 216.

A commissioner is entitled to fees for transcripts; and the accounting officers cannot assume arbitrarily that four folios are sufficient therefor. There being no specific provision by act of congress, he should receive the reasonable fees allowed by the state statutes. Hoyne v. U. S. (D. C. 1889) 38 Fed. 542.

Under this section the commissioner is compelled to return copies of process to the court; and the accounting officers of the treasury have no right to make an arbitrary rule limiting the length of such copies. Rand v. U. S. (D. C. 1889) 38 Fed. 665.

106. Fees of clerks.—See R. S. § 828, ante, § 1383, and notes thereunder.

The clerk is entitled to a filing fee for each separate paper, and not to one fee only in each case. Taylor v. U. S. (C. C. 1891) 45 Fed. 531, judgment reversed U. S. v. Taylor (1893) 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335.

The clerk is entitled to a docket fee for a hearing by the court on application for a warrant for the transportation of a defendant to another district. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 2 L. R. A. 229.

The clerk is entitled to a fee for entering an order overruling a motion to quash an indictment. Jones v. U. S. (D. C. 1889) 39 Fed. 410, 412, reversed (1893) 13 Sup. Ct. 437, 147 U. S. 672, 37 L. Ed. 325.

IV. REMOVAL OF OFFENDERS TO OTHER DISTRICT FOR TRIAL

(A) Validity and construction in general

107. Validity.—Persons are not held to answer for an infamous crime without presentment by a grand jury by an order removing them, under this section, on a sworn complaint and upon evidence under oath which has been adjudged to amount to probable cause, to a court in which they have been indicted for an offense against the United States, and where all defenses of the parties may be presented and judgment obtained thereon, on the theory that, by reason of illegality in drawing and organizing the grand jury, such indictment is void. Greene v. Henkel (1901) 22 Sup. Ct. 218, 223, 183 U. S. 249, 46 L. Ed. 177.

Prosecution of proceedings to remove to another federal district for trial a person there charged with an offense against the United States is not an unlawful interference with the jurisdiction of the federal court in whose custody the accused was then held to await the trial of indictments pending against him in that court, where such proceedings were had with the consent of that court. Constitutional rights of the accused to a speedy trial of the indictments pending against him in a federal circuit court are not violated by the prosecution, with the consent of that court, of proceedings to remove the accused to another federal district for the trial of an indictment there found against him. Beavers v. Haubert (1905) 25 Sup. Ct. 573, 575, 198 U. S. 77, 47 L. Ed. 950.

The prosecution of proceedings for the removal to another federal district for trial of a person there charged with an offense against the United States is not an unlawful interference with the jurisdiction of a federal circuit court for another district, in which an order for the removal of the accused to answer for similar, but distinct, offenses has been stayed pending the determination of an appeal from such order to a circuit court of appeals. Peckham v. Henkel (1910) 30 Sup. Ct. 255, 256, 216 U. S. 483, 54 L. Ed. 579.

A person indicted for the same offense in two federal districts, one of which is the district where he resides, may—at least, with the consent of the court of the latter district—be removed to the other district for the trial of the offense committed there. Price v. Henkel (1909) 30 Sup. Ct. 257, 258, 259, 216 U. S. 488, 54 L. Ed. 581; Haas v. Same (C. C. 1909) 166 Fed. 621, order affirmed (1910) 30 Sup. Ct. 249, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

108. Construction in general.—The provision for arrest and removal is a law in restraint of liberty, and, like all laws of this character, while the very substance of the law is not to be construed away, yet it is to be strictly construed and strictly pursued. In re Wolf (D. C. 1886) 27 Fed. 606.

The judges of the district courts of the United States have no power to cause the arrest of a citizen of the state and district in which the judge resides, and to order his removal to another state, in order that he may be there imprisoned until he obeys an order made in a civil case pending in the United States court in that state. In re Graves (D. C. 1886) 29 Fed. 60.

This section constitutes the only authority for the arrest and removal to another district for trial of a person there charged with an offense against the United States. U. S. v. Greene (D. C. 1900) 100 Fed. 941.

In the absence of an act of Congress conferring the power, a federal court in one district has no authority to issue its writ to the marshal or any officer of another federal district, commanding him to arrest a person within

his jurisdiction, but outside that of the court issuing the writ; and such power is not conferred by this section. Palmer v. Thompson (1902) 20 App. D. C. 273.

109. —— "Trial" defined.—The provision for arrest and removal for "trial" of a party found in another jurisdiction, covers an arrest and removal for the purpose of receiving the sentence imposed by the court, in a proceeding in which he has already been convicted, but not sentenced; a trial not being terminated by verdict, but by judgment. Palmer v. Thompson (1902) 20 App. D. C. 273.

110. Procedure.—The local practice under which one indicted for a crime is not entitled to a preliminary examination prior to the trial on the merits has no application to the proceedings for the arrest and removal to another federal district for trial of a person there charged with an offense against the United States. Tinsley v. Treat (1907) 27 Sup. Ct. 430, 431, 205 U. S. 20, 51 L. Ed. 689; Kessler v. Same (1907) 27 Sup. Ct. 434, 205 U. S. 33, 51 L. Ed. 695.

A judge, when acting on an application for a warrant for the removal of a person charged with crime from one district to another for trial, is to exercise a sound judicial discretion. He must look to the question of the jurisdiction of the court, sitting where he is asked to remove the prisoner, to try the case. To determine where the trial is to be had, he may look into the whole case, to see that the court where the party is to be removed has jurisdiction over the place, the person, and the subject-matter. In re Wolf (D. C. 1886) 27 Fed. 606, 608.

The procedure on an application for removal must conform to the usual mode of process against offenders in the state, and in the absence of a state statute on the subject the general rule of the federal court is that, if the indictment contains allegations sufficient to show that a crime has been committed by accused, it is sufficient as a prima facie showing to order a removal, where nothing else appears. In re Wood (D. C. 1899) 95 Fed. 288, 289.

A person found in one district, wanted for trial in another district for an offense against the United States, should, on a warrant issued in the district where he is found, be arrested (1) where an indictment has been found against him in the other district; (2) where on examining trial he has been held over by the committing magistrate in the other district to stand trial; (3) where a bench warrant has been issued for his arrest by a federal court of another district; (4) where a verified complaint of an offense committed by him in another district has been made before a judge or committing magistrate in such other district; and (5) where such verified complaint is made before such officer in the district where accused is found. U. S. v. Yarborough (D. C. 1903) 122 Fed. 293.

A proceeding before a commissioner for the removal of a person charged with crime against the United States to another district for trial in which accused is present, and witnesses are examined and cross-examined, is a judicial proceeding, and the testimony of a witness fully examined and cross-examined in the presence of accused on the issue of probable cause, taken and transcribed by a stenographer and duly authenticated, is admissible on the subsequent trial of accused, where the witness has died in the meantime. U. S. v. Greene (D. C. 1906) 146 Fed. 796, 798.

111. Removal in general.—Where a person, after an acquittal on an indictment for treason, is in the custody of the marshal, bound to answer an indictment for a misdemeanor, the court has no authority to send him to another district for trial for treason in the place where the crime was committed. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,694.

The federal circuit court will not surrender one charged with a capital crime for trial in another jurisdiction for a minor offense. U. S. v. Corrie (C. C. 1860) Fed. Cas. No. 14,869.

A prisoner discharged on habeas corpus in another district for invalidity of his sentence cannot be returned to the district of his trial for a new sentence, by proceedings under this section, but the proper proceeding is for the court of the latter district to issue its warrant of arrest, under R. S. § 716. ante, § 1239. In re Christian (C. C. 1897) 82 Fed. 885.

Persons held not removable to another federal district for trial for an alleged conspiracy to defraud the government of coal lands. Ireland v. Henkle (C. C. 1910) 179 Fed. 993.

There may be a want of subject-matter, either because there is no law making the act charged a crime, or because the act is not properly charged, or that the party charged has not done the act. In re Wolf (D. C. 1886) 27 Fed. 606, 609.

Removal of accused to another federal district for trial cannot be defeated because the proceedings for removal show acts which might have been prosecuted in the district where the proceedings are had, where it is also apparent that the place of indictment is a proper one in which he could be proceeded against. U. S. v. Wimsatt (D. C. 1908) 161 Fed. 586.

Persons charged as conspirators are properly removed to the state affording the most convenient place of trial from the standpoint of all the defendants, in the absence of a constitutional right to discharge from arrest. U.

S. v. Reddin (D. C. 1912) 193 Fed. 798.

112. United States commissioners, authority of.—A commissioner cannot order the removal of accused to another district for trial, but can only commit him to the custody of the marshal until removed on a warrant of the District Judge, or otherwise dealt with according to law. Hastings v. Murchie (1915) 219 Fed. 83, 134 C. C. A. 1.

113. —— Witnesses.—Where a federal court has ordered the arrest of a witness for failure to obey a subpœna duly served, and the witness has removed to another district, a judge of the United States court having jurisdiction in the district court to which the witness has removed on ordering his arrest cannot inquire into his guilt or innocence before ordering his removal to the original district. In re Ellerbe (C. C. 1882) 13 Fed. 530.

114. Alaska.—Person accused of kidnapping under Comp. Laws Alaska 1913, § 1907, held not removable to Alaska, under this section, especially in view of Comp. Laws Alaska 1913, § 410 (Act Aug. 24, 1912, § 3), and sections 2099, 2502. Ex parte Krause (D. C. 1915) 228 Fed. 547.

115. District of Columbia.—See Benson v. Henkel (1905) 25 Sup. Ct. 569, 198 U. S. 1, 49 L. Ed. 919, holding that the supreme court of the District of Columbia is a court of the United States and that the District of Columbia is a district of the United States.

A person indicted in the Supreme Court of the District of Columbia for an offense against the United States may be removed to that district for trial, under this section. Hyde v. Shine (1905) 25 Sup. Ct. 760, 199 U. S. 62, 50 L. Ed. 90, affirming judgment U. S. v. Hyde (D. C. 1904) 132 Fed. 545; Dimond v. Same (1905) 25 Sup. Ct. 766, 199 U. S. 88, 50 L. Ed. 99.

This section when construed in connection with Act Feb. 21, 1871, c. 62, 16 Stat. 426, providing that all laws not locally inapplicable shall have the same force and effect within the District of Columbia as elsewhere within the United States, confers authority for the removal of a federal prisoner from another judicial district to the District of Columbia for trial on an indictment there found. U. S. v. Hyde (D. C. 1904) 132 Fed. 545, judgment affirmed Hyde v. Shine (1905) 25 Sup. Ct. 760, 199 U. S. 62, 50 L. Ed. 90.

Removal of accused from a federal district to the District of Columbia for trial cannot be defeated because the acts charged in the indictment are common-law offenses; the District of Columbia being a part of the United States and the commission of a crime therein being an indictable offense against the United States. U. S. v. Wimsatt (D. C. 1908) 161 Fed. 586.

116. Territories.—For an offense against the United States committed in an organized territory, the offender may be arrested in any district of the United States, and removed to the territory for trial, if the territorial courts have cognizance of the offense. U. S. v. Haskins (D. C. 1875) Fed. Cas. No. 15,322. See Douglass v. Stahl (1903) 72 S. W. 568, 71 Ark. 236, holding that a commissioner, appointed for a district, could issue a warrant for the arrest of a person in such district for an offense committed in Indian Territory against the laws of the United States.

117. Conditions precedent to application.—The existence of an indictment is not a condition precedent to proceedings to remove to another district for trial persons there charged with an offense. Greene v. Henkel (1902) 22 Sup. Ct. 218, 183 U. S. 249, 46 L. Ed. 177. But see U. S. v. White (D. C. 1885) 25 Fed. 716, holding that it is the practice of the district court for the northern district of Texas not to entertain applications for removal until after indictment found, and to require a copy of the indictment to accompany application. And see U. S. v. Haskins (D. C. 1875) Fed. Cas. No. 15,322, holding that after indictment found in one district, offender may be arrested in any other district, and committed and removed or bailed, as the case may be, for trial in the district where the indictment was found.

No warrant for removal can be issued until accused has been arrested and imprisoned. If he offer satisfactory bail, he has a right to be discharged on bail. U. S. v. Jacobi (D. C. 1871) Fed. Cas. No. 15,460.

A warrant for removal will not be granted, in the absence of the original affidavit or information or indictment or duly certified copies thereof, or proof of the commission of the offense. U. S. v. Newcomer (D. C. 1864) Fed. Cas. No. 15,869.

A person arrested in one district cannot be removed to another until after examination and commitment, but is entitled to examination in the district in which arrested. U. S. v. Shepard (D. C. 1870) Fed. Cas. No. 16,273.

A prisoner will not be removed from one district to another for trial, except on the production, at the time the application for removal is made, if not before, of a copy of the indictment, information, or complaint, showing that criminal proceedings are pending, and that he is wanted for trial for the same offense for which he has been committed by the commissioner. U. S. v. Price (D. C. 1897) 84 Fed. 636.

There can be no removal from one district to another for trial where there has been neither an indictment nor an examination before a commissioner, in either district, involving an inquiry as to the fact of the alleged crime, and, if

the petition of the United States attorney for the removal alleges only an affidavit charging a crime, the prisoner will be released. U. S. v. Karlin (D. C. 1898) 85 Fed. 963.

A person arrested in one district for an offense committed in another, if not indicted nor committed by a commissioner, is entitled to an examination in the district in which he is arrested. In re Bailey (C. C. 1869) Fed. Cas. No. 730.

118. Sufficiency of indictment or complaint.—Existence of technical defects in an indictment with respect to the averments of time, place, or circumstances will not prevent removal to another district for trial, of persons there charged with an offense against the United States, if evidence be given on the hearing which supplies such defects and shows probable cause to believe the defendants guilty of the commission of the offense defectively stated in the indictment. Greene v. Henkel (1902) 22 Sup. Ct. 218, 183 U. S. 249, 46 L. Ed. 177.

Indictments for conspiracy to defraud the United States under section 10201, post, held sufficient for the purposes of a proceeding for the removal of the defendant from another district for trial. Green v. MacDougall (1905) 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328, affirming order U. S. v. Green (D. C. 1905) 136 Fed. 618.

One good count in an indictment, under which a trial might be had in the federal district to which a removal under this section is sought, is enough to support an order for such removal in a habeas corpus proceeding. Price v. Henkel (1909) 30 Sup. Ct. 257, 258, 259, 216 U. S. 488, 54 L. Ed. 581.

Allegations charging a conspiracy by which an employé in the Bureau of Statistics in the Department of Agriculture was to give his co-conspirators advance information of the official cotton crop reports, and a conspiracy to bribe such employé for the same purpose, sufficiently show, for the purposes of a removal to the District of Columbia for trial, the commission within the District of offenses against the United States. Haas v. Henkel (C. C. 1909) 166 Fed. 621, order affirmed (1910) 30 Sup. Ct. 249, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

A district judge will not issue a warrant for removal, where the indictment is fatally defective in averments essential to constitute an offense in such district. In re Buell (C. C. 1875) Fed. Cas. No. 2,102.

Where a district judge is applied to for a warrant of removal, and it appears from the indictment on which the warrant is asked that the act alleged does not constitute an offense against the United States, or that no trial can be had in the district to which the removal is sought, it is his duty to refuse the warrant. In re Doig (C. C. 1880) 4 Fed. 193.

One charged with issuing a free pass for railroad transportation will not be removed to a distant state and district for trial, where the indictment is fatally defective for failure to allege any use of the pass or transportation under it. In re Huntington (D. C. 1895) 68 Fed. 881.

An objection that the complaint upon which one was committed by a commissioner for an offense laid in the city of Washington did not show that that city is within the exclusive jurisdiction of the United States is without merit in a proceeding to remove him thither for trial, especially as the court will take judicial notice that the United States has exclusive jurisdiction there. One who has been committed by a commissioner on the charge of stealing United States notes and coin will not be removed to another district for trial on the production of an indictment for stealing United States "silver certificates." U. S. v. Price (D. C. 1897) 84 Fed. 636.

The fact that the indictments found in the district to which the prisoner is sought to be removed do not sufficiently or correctly, as to matters of form, allege the offense, does not make the warrant of removal unwarranted, or even erroneous; for these questions may properly be left to the disposition of the court by which the offender is to be tried. Price v. McCarty (1898) 89 Fed. 84, 32 C. C. A. 162.

A complaint on which a person is arrested for the purpose of having him removed to another district, to answer to a criminal charge, when made by a district attorney of the United States, is not insufficient because made on information and belief alone, without reference to an indictment or a statement of his means of information or grounds of belief. In re Richter (D. C. 1900) 100 Fed. 295.

A federal court will not order a person removed to another district for trial on an indictment which does not charge facts constituting an offense, although the prisoner does not resist the removal, or even if he consents thereto. U. S. v. Conners (D. C. 1901) 111 Fed. 734.

A federal judge, to whom an application is made for a warrant of removal, misconceives his duty, and fails to protect the liberty of a citizen, if he issues the warrant solely on the strength of the indictment found in the foreign district, which does not substantially state an offense under federal laws. Stewart v. U. S. (1902) 119 Fed. 89, 93, 55 C. C. A. 641.

Where, even upon a broad, liberal, and unartificial construction of the language of an indictment, it does not appear that any offense against the laws of the United States has been committed, this section does not apply, and the

prisoner should not be held for removal. In re Benson (C. C. 1904) 131 Fed. 968, 969.

An indictment for conspiracy under R. S. § 5440, which charged that petitioner conspired with others to obtain by means of fictitious applications and other false and fraudulent practices from the states of California and Oregon the title to large amounts of school lands owned by said several states, and lying within the boundaries of United States forest reservations, and then to exchange such lands, under the federal statutes providing therefor, for public lands of the United States subject to homestead entry outside of such reservations, does not sustain proceedings for removal of petitioner to the district of the indictment for trial. In re Benson (C. C. 1904) 131 Fed. 968.

In proceedings under this section for the removal of a defendant from a district where found to another district for trial on an indictment, a complaint or information which has the indictment attached as a part thereof is as broad as the indictment, and is sufficient if the indictment charges an offense, and it is immaterial what the offense may be designated in the complaint. U. S. v. Green (D. C. 1905) 136 Fed. 618, order affirmed Green v. MacDougall (1905) 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

In proceedings for the removal of accused to another federal district for trial, if the indictment produced as evidence of probable cause is framed in the language of the statute, with ordinary averments of time and place, and sets out the substance of the offense in language sufficient to apprise accused of the nature of the charge against him, it is sufficient to justify the removal, though it may be open to a motion to quash or in arrest of judgment in the court in which it was originally filed. U. S. v. Wimsatt (D. C. 1908) 161 Fed. 586.

On a complaint for the removal of a defendant to another federal district for trial, where the indictment is included as a part of the complaint, it is unnecessary to consider whether all of the counts would be sustained on demurrer; the sole question being whether there was probable cause shown that the defendant committed in the district to which the removal is sought the offense for which he is held. In re Quinn (D. C. 1909) 176 Fed. 1020.

An indictment charging a continuing conspiracy held sufficient to warrant removal of accused as co-conspirators, though they did not enter the conspiracy when it was originally formed. U. S. v. Reddin (D. C. 1912) 193 Fed. 798.

Removal of a party indicted in a United States court in another jurisdiction for violating R. S. § 5480, post, § 10385, by using the mails to defraud, from this jurisdiction to the jurisdiction where the indictment was found, can be refused only where, on a broad and liberal construction of the indictment, it clearly appears that no offense against the United States is charged in the indictment. Charges in an indictment for the fraudulent use of the mails in violation of R. S. § 5480, post, § 10385, in selling bogus degrees of a law college not a bona fide institution, held to justify removal of accused for trial in the jurisdiction where the indictment was found. Farr v. Palmer (1904) 24 App. D. C. 234.

To warrant removal the indictment is not required to charge an offense according to the standards required in a criminal pleading, and will not be judged by such standards; but it will be regarded as sufficient if it satisfactorily, though inartificially, charges the fugitive with the crime. Lamar v. Splain (1914) 42 App. D. C. 300.

An indictment charging embezzlement, which is a purely statutory crime, in a territory where there is no statutory offense by that name, is fatally defective, and will not afford a basis for an order for the removal of the accused to such territory for trial, although the acts charged constitute the offense of larceny under its statutes. In re Richter (D. C. 1900) 100 Fed. 295.

119. Conclusiveness and effect of indictment.—An indictment is prima facie evidence of existence of probable cause in proceedings for the removal to another federal district for trial of a person there charged with an offense against the United States. Beavers v. Henkel (1904) 24 Sup. Ct. 605, 607, 194 U. S. 73, 48 L. Ed. 882; Green v. MacDougall (1905) 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328; In re Runkle (C. C. 1903) 125 Fed. 996; U. S. v. Campbell (D. C. 1910) 179 Fed. 762. It is presumptive evidence of probable cause, if an offense within the statute is clearly stated therein, but is not conclusive, and, if doubt is raised in any material aspect of the charge, must be supported by proof aliunde. In re Richter (D. C. 1900) 100 Fed. 295. It is prima facie evidence of the commission of the offense. In re Benson (C. C. 1904) 130 Fed. 486, affirmed Benson v. Henkel (1905) 25 Sup. Ct. 569, 198 U. S. 1, 49 L. Ed. 919. It is a showing of probable cause to justify a warrant for removal of accused, and, so far as respects technical objections, the sufficiency of the indictment is to be determined by the trial court, and is not a subject of inquiry in the removal proceedings. Farr v. Palmer (1904) 24 App. D. C. 234. It is not conclusive, but entitled to weight only as an affidavit tending to establish the facts alleged. U. S. v. Greene (D. C. 1900) 100 Fed. 941.

A certified copy of an indictment containing allegations showing that a crime has been committed is sufficient, as a prima facie showing of probable cause,

to authorize removal; but it is not conclusive, and the court may, in its discretion, require further evidence. In re Wood (D. C. 1899) 95 Fed. 288. The filing of a properly certified copy of the indictment makes a prima facie case for the government, which is not overcome by a bare denial under oath by the accused that he committed the offense charged. Ex parte Ryan (C. C. 1907) 154 Fed. 217. Is sufficient to make out a prima facie case of probable cause. U. S. v. Barber (D. C. 1907) 157 Fed. 889; Lamar v. Splain (1914) 42 App. D. C. 300.

A certified copy of indictment from another judicial district will warrant transfer of person arrested on complaint. In re Alexander (D. C. 1871) Fed. Cas. No. 162; U. S. v. Haskins (D. C. 1875) Fed. Cas. No. 15,322.

If an indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the federal judges to take the same as a prima facie showing that a crime has been committed by the party charged, at the place alleged, and, if nothing else appears, to order a removal of the party charged. In re Wolf (D. C. 1886) 27 Fed. 606.

The effect of an indictment is not weakened by the fact that the government's additional evidence is insufficient provided the indictment is not contradicted thereby. Green v. MacDougall (1905) 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

120. Determination of validity of indictment.—Whether defendants, sought to be removed under this section to another district for trial for an offense for which they have there been indicted, have waived or can waive the right to question the validity and regularity of the grand jury which found the indictment, can only be raised before, and decided in the first instance by, the court in which they are to be tried. A magistrate is justified in treating a properly certified copy of an indictment valid on its face, and purporting to have been found by a grand jury acting in fact as such at a regular term of the district court of the United States, presided over by one of its judges and hearing testimony in the ordinary way, as an indictment found by a competent grand jury, irrespective of any irregularities in drawing and organizing the grand jury which found the indictment. Greene v. Henkel (1902) 22 Sup. Ct. 218, 183 U. S. 249, 46 L. Ed. 177.

So far as respects technical objections, the sufficiency of an indictment is not a matter of inquiry in proceedings for the removal to another federal district for trial of a person there charged with an offense against the United States, but is to be determined by the court in which the indictment was found. The sufficiency of the indictment as evidence of probable cause in proceedings for the removal to another federal district for trial, of a person there charged with an offense against the United States, cannot be impeached, if impeachable at all, by evidence tending to show that the grand jury did not have testimony before it sufficient to justify its action. Beavers v. Henkel (1904) 24 Sup. Ct. 605, 608, 194 U. S. 73, 48 L. Ed. 882.

Objections to an indictment charging a violation of R. S. § 5451, post, § 10203, in bribing two federal officers to reveal the contents of certain reports pertaining to an investigation then pending in the Land Department with respect to certain frauds used in obtaining public lands, are not available in proceedings for removal of accused to another district for trial, where such objections raise the questions whether the statute applied to reports which had not yet been filed and might never be filed, or whether the words of the statute, "which may at any time be pending, or which may by law be brought before him in his official capacity," apply to the pendency of the investigation or to the pendency of an obligation not to reveal the contents of a paper then in the officer's possession, or whether the revealing of the contents of such reports was forbidden by any lawful authority, there being no statute imposing such obligation; but such questions should be determined by the court in which the indictment was found. Benson v. Henkel (1905) 25 Sup. Ct. 569, 570, 198 U. S. 1, 49 L. Ed. 919.

Technical or formal objections to the sufficiency of an indictment will not be considered in proceedings for the removal of a federal prisoner to the district in which he is triable, but will be left for determination by the court in which it was found; but if, on a broad and liberal construction, the indictment does not appear to charge an offense, the prisoner should not be held for removal. In re Benson (C. C. 1904) 131 Fed. 968.

On an application for removal of a resident of the district to a distant state and district for trial, it is the duty of the court to scrutinize the indictment, disregarding technical defects, but to refuse the warrant if the crime alleged is not triable in the district to which a removal is sought, or if the indictment fails to charge any offense under the law. In re Corning (D. C. 1892) 51 Fed. 205.

A federal court will not hold the indictment void for irregularity in drawing the grand jury, where the question involved is a new one of statutory construction, which has never been adjudicated, but will leave the accused to raise the question in the trial, where the decision can be reviewed in the regular course of appeal. It is only where there can be no reasonable doubt of the alleged invalidity that removal

should be refused on such ground. U. S. v. Greene (D. C. 1901) 108 Fed. 816.

It is the duty of the removing judge to pass judicially on the validity of the indictment, and, if that is fatally defective, to deny the application for removal. Ex parte Black (D. C. 1906) 147 Fed. 832.

The magistrate should not refuse removal on technical or doubtful questions, which should properly be left to the court in which the indictment has been found; but, where an indictment appears to clearly charge no offense, the magistrate should not order a removal. U. S. v. Haas (D. C. 1906) 167 Fed. 211.

The court while bound to examine the indictment when an objection is made thereto to ascertain whether a crime is charged, will not consider mere technical objections or objections that go only to matters of form. U. S. v. Lyman (D. C. 1911) 190 Fed. 414.

The indictment cannot be attacked as a pleading, but may be as a piece of evidence. U. S. v. Reddin (D. C. 1912) 193 Fed. 798.

121. Evidence.—The finding of an indictment does not preclude the government from giving evidence of a certain and definite character concerning the commission of the offense by the defendants in regard to acts, times, and circumstances which are stated in the indictment itself with less minuteness and detail. Greene v. Henkel (1902) 22 Sup. Ct. 218, 183 U. S. 249, 46 L. Ed. 177.

Sources of information on which are based a complaint made on information and belief, in proceedings for the removal to another federal district for trial of a government official there charged with having received money for procuring a contract with the federal government, are sufficiently disclosed by the statements in the supporting affidavit that such sources are the official documents with reference to the making of the contract, the transactions on file in the government records, letters and communications from the contractor, the indictment and bench warrant, and personal conversations with the parties having the various transactions with the defendant, and that deponent's information as to the whereabouts of defendant is derived from a recent conversation with him, and from the certificate of the United States marshal, indorsed on the warrant. Beavers v. Henkel (1904) 24 Sup. Ct. 605, 608, 194 U. S. 73, 48 L. Ed. 882.

Evidence of probable cause in proceedings to remove a person to another federal district for trial, afforded by an indictment charging him with an offense against the United States, is not rebutted, even if subject to rebuttal, where the rebuttal testimony is negative and for the most part confined to general statements, and the accused claims his privilege under the state practice of exemption from cross-examination. Beavers v. Haubert (1905) 25 Sup. Ct. 573, 577, 198 U. S. 77, 49 L. Ed. 950.

Evidence tending to show that no offense, triable in the district court to which accused is sought to be removed, has been committed by him in that district, cannot be excluded in removal proceedings, on the theory that a certified copy of the indictment and proof of the identity of the party accused furnish conclusive evidence of probable cause. Tinsley v. Treat (1907) 27 Sup. Ct. 430, 431, 205 U. S. 20, 51 L. Ed. 689; Kessler v. Same (1907) 27 Sup. Ct. 434, 205 U. S. 33, 51 L. Ed. 695.

The rule is established under this section that there must be some testimony before the commissioner to support the accusation in order to lay the basis for an order of removal, otherwise the accused could be discharged upon habeas corpus, although the court would not weigh the evidence, where the record shows that some evidence was taken. A writ of habeas corpus cannot be made the basis of a review of a judgment of a court of competent jurisdiction, where proceedings were had under a constitutional statute giving the court authority to examine into the charge or acquit the accused, when the proceedings show no attempt to exert the jurisdiction of the court in excess of its authority. Harlan v. McGourin (1910) 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849.

A person arrested in Pennsylvania on the strength of an indictment found in a district court in Missouri for violation of the interstate commerce act can, on application for habeas corpus, and for a warrant of removal to such court, introduce evidence to prove that the alleged offense was completed in Pennsylvania, and is therefore not cognizable in the federal court in Missouri. U. S. v. Fowkes (1892) 53 Fed. 13, 3 C. C. A. 394, affirming (D. C. 1892) 49 Fed. 50.

The issuing of a warrant by a district judge for the removal of a prisoner to another district for trial is not a mere ministerial act, but one involving the exercise of judicial discretion. While the action of the committing magistrate is prima facie sufficient basis for the warrant, the judge may, if he deem best, hear further evidence on behalf of the prisoner, and also to prove his probable guilt and the pendency of an indictment against him in such other district. Price v. McCarty (1898) 89 Fed. 84, 32 C. C. A. 162.

On an application to remove persons to another federal district where they were charged with violating R. S. § 5440, post, § 10201, by conspiring to defraud the United States of public lands subject to entry under Timber and Stone Act of June 3, 1878, § 1,

post, § 4671, certified copies of general land office records showing that all the entries of public lands mentioned in the indictment were perfected and issued therefor prior to all the alleged overt acts under the alleged conspiracy, and more than three years before the indictment was filed, were admissible on the question of probable cause of the charge. U. S. v. Black (1908) 160 Fed. 431, 87 C. C. A. 383.

In removal proceedings the indictment is only prima facie evidence of probable cause, which may be overcome by proof. Id.

Under this section and the Massachusetts practice before committing magistrates, a person arrested for crime committed in another district held entitled to an opportunity to produce evidence of want of probable cause, notwithstanding Rev. Laws Mass. c. 217, §§ 28, 29. Hastings v. Murchie (1915) 219 Fed. 83, 134 C. C. A. 1.

The mere production of a bench warrant from the federal circuit court for one state by an officer thereof to a federal district court in another is sufficient to authorize the issue of such process. U. S. v. Harris (C. C. 1872) Fed. Cas. No. 15,313.

A complaint charging theft committed in the District of Columbia, testimony tending to prove such theft, and an indictment showing that the prisoner is wanted in that District, constitute a sufficient showing to warrant his removal there to answer the charge. In re Price (C. C. 1897) 83 Fed. 830.

The prima facie case for removal, made by the production of certified copies of indictments, is not overcome by the introduction of copies of indictments found by a court of the district where the accused resides, which lay the locus of the offense in that district. Haas v. Henkel (C. C. 1909) 166 Fed. 621, order affirmed (1910) 30 Sup. Ct. 249, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

Where a person is arrested, and brought up to be held to bail for trial in another district, a certified copy of the indictment found in such other district, if it be consistent and set forth an offense, is competent evidence against defendant. U. S. v. Pope (D. C. 1878) Fed. Cas. No. 16,069.

Where the indictment charges the defendant as principal of an offense within the jurisdiction of the United States court for the district where he has been indicted, an objection to the issuing of a writ of removal to such district because defendant was only an accomplice or accessory before the fact, and that whatever he did was done in the district from which it is sought to remove him, is in the nature of a plea in abatement to the jurisdiction of the court, and must be supported by evidence aliunde the record to justify the refusal of the writ. U. S. v. White (D. C. 1885) 25 Fed. 716.

Evidence which does not form the subject-matter of a defense, but merely tends to show that the indictment has been irregularly found, or that the offense charged could not have been committed by the prisoner, will be heard in his behalf in proceedings for a warrant of removal from the district in which the prisoner is arrested to the district in which the indictment was found. U. S. v. Fowkes (D. C. 1892) 49 Fed. 50.

The proceeding before a commissioner for the commitment of a person so arrested is the same as that prescribed by the laws of the state for proceedings before an examining magistrate; the only issue before the commissioner being as to whether there is probable cause to believe the defendant guilty of the offense charged. The evidence admissible upon that issue is determined by the state practice, and as, under the statute of New York, the defendant is entitled to produce the testimony of witnesses, or any other competent evidence in his behalf, the exclusion of such evidence by a commissioner in that state is unwarranted. U. S. v Greene (D. C. 1900) 100 Fed. 941.

The evidence receivable on a hearing before a commissioner in proceedings for the removal to another district of persons charged with the commission of a crime therein is not to be strictly limited by the technical rules applicable on a final trial. Where fraud is charged, or a conspiracy to defraud, a somewhat wide latitude must necessarily be given in the introduction of circumstantial evidence. U. S. v. Greene (D. C. 1901) 108 Fed. 816.

A commissioner on the preliminary examination of one arrested for removal to another district for trial may not require evidence of probable cause of guilt, where accused had been previously indicted in the district in which he is wanted, or has had a previous preliminary examination there or in the district from which he has fled, or a bench warrant without an indictment has issued for him; but, where there has been merely a complaint made against him before a committing magistrate, he, on offering evidence creating a substantial doubt as to the existence of probable cause to believe him guilty, is entitled to have the government required to furnish further evidence. U. S. v. Yarborough (D. C. 1903) 122 Fed. 293.

The probable cause for issue of a warrant of arrest of one for removal to another district for trial is supplied by an indictment, or by a bench warrant, or by a verified complaint made before a committing magistrate of another jurisdiction, or by a record showing that such other magistrate had held accused over to stand trial. Id.

In a proceeding for the removal of a defendant to another federal district for trial on an indictment charging him with a violation of R. S. § 5451, post,

§ 10203, by bribing an officer of the postal department to use his official position to promote the sale to the government of articles in which defendant was interested as agent, evidence that defendant and such officer were personally acquainted, that the sales were made by defendant, who in soliciting the same talked with such officer and his superiors, who in fact made the purchases, and that after receiving his commissions on the sales he paid a similar amount to such officer, without any explanation of the reason for such payment, or evidence showing that they had any connection with the sales, is not sufficient, aside from the indictment itself to show the commission of the crime charged, or to establish probable cause to believe the defendant guilty. U. S. v. Greene (D. C. 1905) 136 Fed. 618, order affirmed Green v. MacDougall (1905) 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

Defendants were indicted in the Southern district of New York for conspiracy to commit an offense against the United States, to wit, to effect and to aid in effecting the entry of goods, wares, and merchandise at less than the true weight thereof. Defendants were alleged to be fugitives from justice, found in the Eastern district of New York, and an application for their removal to the Southern district was made. The records contained no allegation of any act or conspiracy in the Eastern district of New York, but showed the whole charge to be one of conspiracy in the Southern district to commit the offense, without specification of the place where the crime was to be committed, other than at the port of New York. Held, that the application for removal should be allowed, under the rule that the court may not go outside the record in removal proceedings. U. S. v. McMahon (D. C. 1910) 175 Fed. 296.

On motion to remove one to the jurisdiction where he has been indicted, the indictment is prima facie evidence that the offense was committed there; but he may overcome the presumption by appropriate evidence, and show any other legal reason why removal should be denied. U. S. v. Campbell (D. C. 1910) 179 Fed. 762.

122. Application for removal and hearing thereon.—A decision granting a removal to another district for trial of persons there charged with an offense against the United States, where an indictment has been found, is not an adjudication of the sufficiency of the indictment in law as against any objection which may subsequently be made by the defendants. Greene v. Henkel (1902) 22 Sup. Ct. 218, 183 U. S. 249, 46 L. Ed. 177.

A statement in the opinion of a district judge, rendered on granting an application for the removal, under this section, to another district for trial of persons there charged with an offense against the United States, that upon the evidence before him it is a proper case to be submitted to the jury for trial, is equivalent to a finding that probable cause exists for believing defendants guilty of the crime charged, although he also states that he expresses no opinion upon the merits. Id.

Since proceedings before a United States Commissioner on the arrest of persons indicted in another district were preliminary only, for the apprehension of and to hold accused either for recognizance or pending application for removal, the commitment had completely served its purpose when such application was denied, and accused became entitled to their discharge, for which an order was needful. U. S. v. Black (1908) 160 Fed. 431, 87 C. C. A. 383.

Under this section the practice of hearing an application for removal without invoking the writ of habeas corpus is admissible and proper. In re James (C. C. 1884) 18 Fed. 853; U. S. v. Rogers (D. C. 1885) 23 Fed. 658.

Where prisoners have been held by a United States commissioner upon conflicting evidence, both as regards identity and the commission of the offense, for removal to another district for trial, and there is sufficient proof both of identity and criminality, aside from the evidence in behalf of the prisoners, the court should not examine the evidence as an original question, but is required to issue the warrant of removal. U. S. v. Lantry (C. C. 1887) 30 Fed. 232.

A person arrested in any state on a bench warrant issued by the supreme court of the District of Columbia, on an indictment there found, can only be removed to that District for trial by proceedings under this section, which requires an examination in accordance with the practice of the state where the arrest is made. In re Price (C. C. 1897) 83 Fed. 830.

Persons who had not been in Wyoming until after consummation of an alleged conspiracy to defraud the government by unlawfully obtaining public coal lands, and who had not been in direct or indirect communication with any one there, should not be removed to that state for trial on that charge, since any offense by them was committed elsewhere. Ireland v. Henkle (C. C. 1910) 179 Fed. 993.

A warrant will not be granted for the removal of a prisoner for trial in another jurisdiction on information for libel filed in a court in which trial is without a jury. In re Dana (D. C. 1873) Fed. Cas. No. 3,554.

Where a person accused of a statutory offense is arrested in another district, an application for his removal to the district in which the offense was committed, to be there tried by a police court without a jury, will be denied,

since the fact that the arrest was in another district, and not in the community where the offense was committed, is an almost conclusive presumption that the offense is one entitling accused to a trial by jury. In re Cross (D. C. 1884) 20 Fed. 824.

The judge of the United States district court is invested with plenary power to grant or refuse a warrant of removal of a party arrested and committed for crime, for trial in another district; and he is but exercising sound judicial discretion when he looks into the question of jurisdiction, and in looking into such question he may go behind the indictment. U. S. v. Rogers (D. C. 1885) 23 Fed. 658.

When a removal is sought of an accused person from the district where he is found to the district where the offense was committed, the judge is not required to decide absolutely the question of guilt or innocence; nor is he authorized to discharge the accused if there be some doubt of guilt. In re Burkhardt (D. C. 1887) 33 Fed. 25.

Where a removal is sought of an accused person from the district where he is found to the district where the alleged offense was committed, there should be a preliminary examination to establish the identity of the prisoner and his probable guilt, before a warrant for his removal is issued by the judge. Id.

Where removal is sought of an accused person from the district where he is found to that where the alleged crime was committed, if identity is shown, and a case of probable guilt made, it is incumbent upon the judge to issue a warrant for the removal of the prisoner to the proper district. Id.

Upon an application to a district judge for an order for the removal of a prisoner in the custody of the marshal to another district for trial, the prisoner is entitled to notice, and, if he desires it, to be brought before the judge for the purpose of presenting any objections he may have to the making of the order. In re Beshears (D. C. 1897) 79 Fed. 70.

On application for removal of a prisoner, where the only ground for the warrant is an indictment pending in the district court of the district to which the removal is sought, and it appears from said indictment that the court has no jurisdiction of the alleged offense, the defendant should be discharged. U. S. v. Lee (D. C. 1897) 84 Fed. 626.

The action of a commissioner in discharging a person in proceedings for his removal to another district for trial on a criminal charge, after a full hearing, should be conclusive on the government, especially where the testimony offered is that upon which the indictment was found. In re Wood (D. C. 1899) 95 Fed. 288.

On an application, under this section, for a warrant for removal to another district for trial of a person arrested on a commissioner's warrant based on an indictment found in such other district, or on the hearing on a writ of habeas corpus sued out by such person, the only question to be considered is whether the indictment on its face charges the commission of an offense within the jurisdiction of the court in which it was returned. In re Belknap (D. C. 1899) 96 Fed. 614.

On an application for a warrant for the removal of a defendant to another district, for trial on a criminal charge, the court is not restricted to questions of jurisdiction, but may inquire generally into the grounds of the charge, to ascertain the existence of probable cause. In re Richter (D. C. 1900) 100 Fed. 295.

Where the commissioner on the hearing in proceedings for the removal of persons charged with crime to another district for trial had before him any competent legal evidence upon which to exercise his judgment as to whether there was probable cause to believe the accused guilty, his finding upon that question cannot be reviewed by the court on an application for an order of removal. U. S. v. Greene (D. C. 1901) 108 Fed. 816.

Though numerous officers are given authority by this section to hold the preliminary hearing of one arrested for removal to another district for trial, it is preferable that he should be taken before the nearest United States commissioner, who should first be reasonably satisfied as to the identity of accused, and should then fix his bail, or if he is charged with a nonbailable offense, or cannot or refuses to give bail, should commit him to await the action of the judge of the district as to awarding a warrant of removal. U. S. v. Yarborough (D. C. 1903) 122 Fed. 293.

It is preferable that application for warrant of arrest of one for removal to another district for trial should be made to the nearest United States commissioner. Id.

The commissioner holding the preliminary examination of one arrested for removal to another district for trial should transmit to the judge hearing the application for warrant of removal a statement of the proceedings had before him certifying the fact, if it is a fact, that accused admitted his identity, otherwise giving in narrative form the evidence on that subject, certified with the rest of the record, which should include all evidence heard, all papers considered, and a statement of the decision of the commissioner. Id.

One arrested for removal to another district for trial should be given seasonable notice of the time and place when application will be made for the warrant of removal, and apprised of his right to be present before the judge and to resist the application, and with

the papers laid before the judge should be a return by the marshal showing when and how the notice was given. Id.

The commissioner holding the preliminary hearing of one arrested for removal to another district for trial should consider whether the indictment or complaint, in substance, alleges an offense against the United States, resolving doubts in favor of the government, but should leave to the judges of the district questions as to the jurisdiction of the tribunal to which removal is sought. Id.

In an examination before a commissioner of a person charged with an offense in another district, it is necessary to determine whether such an offense has been committed, and whether there is probable cause to believe the defendant guilty. An indictment is presumptive evidence of probable cause if sufficient in substance on its face to show that an offense against the United States has been committed; otherwise, the defendant should be discharged. Pereles v. Weil (D. C. 1907) 157 Fed. 419.

On an application for the removal of a defendant to another federal district for trial, the question whether there was probable cause shown that the defendant committed in the district to which the removal is sought the offense for which he was held must be determined by the court to which application for removal is made. In re Quinn (D. C. 1909) 176 Fed. 1020.

Probable cause for a finding that persons accused of conspiracy to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670), in the District of Columbia participated in the overt acts committed there warranted their removal. U. S. v. Campbell (D. C. 1910) 179 Fed. 762.

On application for a warrant of removal of a person to another state for trial for a federal offense, technical considerations should be avoided as far as possible. U. S. v. Reddin (D. C. 1912) 193 Fed. 798.

123. Second removal.—Where a federal prisoner was removed to a certain district for trial on an indictment pending against him in such district, he could not object to a second proceeding by the United States to remove him to another district for trial on an indictment pending against him in such district before he had been tried on the indictment in the district to which he was first removed; such removal not being prejudicial to his rights. Where, pending a hearing for the removal of an accused from one federal district to another, an application for removal to a third district was filed, the government, though not entitled to pursue both antagonistic proceedings for removal, was entitled to drop the one last commenced, and, after securing custody and arraignment of accused in the district to which removal was first asked, prosecute a new proceeding to remove him to the district to which a removal was desired to be effectuated by the second proceeding. In re Beavers (C. C. 1904) 131 Fed. 366.

124. Order of and warrants for removal.—The purpose in requiring the order of removal to be issued by the judge was to make it a judicial rather than a mere ministerial act, so as to give the defendant reasonable protection. Beavers v. Henkel (1904) 24 Sup. Ct. 605, 606, 194 U. S. 73, 48 L. Ed. 882. See In re Bailey (C. C. 1869) Fed. Cas. No. 730.

A warrant for removal may not be issued before commitment of accused. U. S. v. Yarborough (D. C. 1903) 122 Fed. 293. But see U. S. v. Harris (C. C. 1872) Fed. Cas. No. 15,313, holding that a warrant may be issued for the arrest and transportation of a fugitive from justice directly to the district where the offense is triable, without his being first committed in the district where arrested.

That the warrant of removal directs the prisoner to be delivered for trial for the larceny of a part only of the property which he was committed by the commissioner for stealing does not vitiate the warrant. Price v. McCarty (1898) 89 Fed. 84, 32 C. C. A. 162.

This section, in connection with R. S. § 1029, post, § 1695, makes it a duty to execute a warrant of removal when signed by the judge. Puleston v. U. S. (C. C. 1898) 85 Fed. 570, 573.

Offenders committed to prison in a district other than that in which the offense is to be tried may be removed to the latter to be tried by a warrant of the judge of the district where they are imprisoned. (1820) 1 Op. Atty. Gen. 404, See R. S. 1029, post, § 1695, and notes thereunder.

(B) Review

125 Habeas corpus.—A district judge, before issuing a warrant for the removal of a person to another district for trial, is entitled to determine whether the district court of such other district has jurisdiction of the offense with which the prisoner is charged, and his determination is reviewable in the circuit court by writ of habeas corpus. Horner v. U S. (1892) 12 Sup. Ct. 407, 410, 143 U. S. 207, 36 L. Ed. 126.

The question whether a judge who had jurisdiction to make an order for removal ought to have made such order on the merits is not one which can be reviewed by habeas corpus. Greene v. Henkel (1901) 22 Sup. Ct. 218, 223, 183 U. S. 249, 46 L. Ed. 177

The sufficiency of an indictment charging a conspiracy under section 10201, post, "to defraud the United States out of the possession and use of, and the title to, divers large tracts of public lands of the United States," as

against objections based on the lack of description of the lands, the uncertainty of the allegations as to the means to be used to carry out the alleged conspiracy, the failure to give the names of the fictitious or disqualified persons through whom the fraud was effected, the indefiniteness and inconsistency of the allegations, and the improper conclusion, will not be determined on habeas corpus to inquire into a detention to await a warrant for the removal of accused, under this section, to the federal district where the trial is to be had, but such objections are for the trial court to determine. Hyde v. Shine (1905) 25 Sup. Ct. 760, 764, 199 U. S. 62, 50 L Ed. 90 (affirming judgment U. S. v. Hyde [D. C. 1904] 132 Fed. 545); Dimond v. Shine (1905) 25 Sup. Ct. 766, 199 U. S. 88, 50 L. Ed. 99.

A federal court is not required to weigh the evidence of probable cause on habeas corpus to inquire into a detention to await the removal of the accused to another federal district for trial, though a prisoner may have the right, on habeas corpus, under the state practice, to have the state court consider that question. Id.

Matters in abatement and substantive defenses are not open on habeas corpus to test the validity of proceedings, under this section. Haas v. Henkel (1909) 30 Sup. Ct. 249, 251, 216 U. S. 462, 54 L. Ed. 569.

A finding of probable cause for the removal to the District of Columbia of a person there charged with an offense against the United States will not be disturbed on habeas corpus as being wholly without any evidence to support it, where certified copies of indictments for conspiring against the United States, found in the District of Columbia, were produced before the commissioner, although copies of indictments found by a federal court of the district where the accused resides, laying the focus of the conspiracy in that district, were also offered in evidence, together with testimony tending to show that the accused had not been in the District of Columbia at any of the times when the conspiracy was said to have been formed. Price v. Henkel (1909) 30 Sup. Ct. 257, 258, 259, 216 U. S. 488, 54 L. Ed. 581.

The error, if any, in prosecuting proceedings for the removal to another federal district for trial of a person there charged with an offense against the United States, while similar proceedings in a federal circuit court for another district are pending, cannot be corrected on a writ of habeas corpus. Peckham v. Henkel (1910) 30 Sup. Ct. 255, 256, 216 U. S. 483, 54 L. Ed. 579.

There must be some evidence before the commissioner to support the accusation to lay the basis for an order of removal; otherwise, accused could be discharged on habeas corpus though the court will not weigh the evidence. Harlan v. McGourin (1910) 31 Sup. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849.

Relief by habeas corpus will not be granted by federal courts to a person held in custody to await an order for removal to the District Court of Columbia for trial on the charge of refusing, contrary to R. S. §§ 101–104, ante, §§ 155, 157–159, to furnish information demanded by a congressional committee, though he asserts that the resolution under which the committee acted did not authorize inquiry into the matter about which he refused to testify, but such issues are for the trial court. Henry v. Henkel (1914) 35 Sup. Ct. 54, 235 U. S. 219, 59 L. Ed. 203, affirming decree (D. C. 1913) 207 Fed. 805.

Where an appeal in habeas corpus is perfected after the time allowed, and after the prisoner has been transferred to another district for trial, so as to be beyond reach of the court's process, the questions for decision on the appeal become mere moot questions, which the court will not decide. U. S. v. Arnold (1897) 82 Fed. 769, 27 C. C. A. 342.

On a writ of habeas corpus in behalf of one held under a warrant for removal to another district for trial, the court can only consider questions going to the authority and jurisdiction of the district judge to issue the warrant of removal. If there was a proper case for removal, the prisoner should be remanded, notwithstanding irregularities or errors of procedure in his arrest, examination, or commitment. Price v. McCarty (1898) 89 Fed. 84, 32 C. C. A. 162.

Where a prisoner arrested under a warrant based on an indictment in a foreign district is committed for removal to the foreign district solely on the strength of the indictment, the circuit or district court of the district in which he is arrested has authority on habeas corpus to examine the indictment, and to release the prisoner in case it is fundamentally defective. Stewart v. U. S. (1902) 119 Fed. 89, 55 C. C. A. 641.

Where a prisoner, arrested under warrant based upon an indictment in a distant state and district, is held pending an application to the district court for a warrant of removal for trial, the circuit court of the district in which he is held has authority on habeas corpus to examine such indictment, and to release the prisoner, if in its judgment the indictment should be quashed on demurrer. In re Terrell (C. C. 1892) 51 Fed. 213.

On habeas corpus to review the acts of a commissioner in holding petitioners to answer an indictment found against them in another district, the issue was limited to the question whether the indictment charged any offense whatever within the jurisdiction of the court issuing it. Ex parte Hyde (C. C. 1904) 194 Fed. 207.

Where a prisoner has been arrested

on a warrant founded on an indictment found by a federal grand jury of a district in which he did not reside and was not found, which presumably had not been instructed by the court as to the constituents of the crime charged, and where there had been no previous arrest, hearing, or binding over, the court of the district in which the arrest is made will discharge him on habeas corpus. U. S. v. Fowkes (D. C. 1892) 49 Fed. 50, judgment affirmed (1892) 53 Fed. 13, 3 C. C. A. 394.

On the hearing of an application for a warrant for the removal to another district for trial of a person there charged with crime, the judge acts judicially; and, where the warrant recites that the requisite facts appear to his satisfaction from the evidence and record, there is an implication that he examined the testimony taken before the commissioner, and the judge of the district to which the prisoner is returned will not re-examine it on a writ of habeas corpus for the discharge of the prisoner on the ground that there is no legal and competent evidence to support the charge made against him. U. S. v. Robinson (D. C. 1903) 126 Fed. 1016.

A person arrested in one federal district for removal to another for trial on a criminal charge who, after a partial examination before a commissioner waived further examination and on a finding by the commissioner that the offense charged was committed and that there was probable ground for believing defendant guilty thereof gave bail for his appearance before the court in the other district, cannot obtain a review of the commissioner's decision by a writ of habeas corpus on his subsequent surrender by his bail, since if such surrender was valid and legal he is lawfully in custody and that is the only question which can be inquired into on such writ. U. S. v. Peckham (D. C. 1906) 143 Fed. 625.

On application for an order for removal of a defendant from one federal district to another for trial on a criminal charge if the decision of the commissioner holding him for removal is valid and regular on its face it is binding on the judge, as such, to whom the application for the order of removal is made, and its correctness cannot be reviewed by the judge. Id.

A United States commissioner's decision refusing to commit a prisoner for removal to another district for trial does not render the question of right to such removal res judicata, but ordinarily, in absence of special circumstances, it should be held conclusive on the same facts. U. S. v. Haas (D. C. 1906) 167 Fed. 211.

In a habeas corpus proceeding for the discharge of a prisoner committed by a commissioner, to be held for trial for an offense against the United States, the court will not review the finding of the commissioner where the evidence is conflicting, but if it finds that all the evidence taken together does not support a finding of probable cause the commissioner's ruling may be disregarded and the defendant discharged. Pereles v. Weil (D. C. 1907) 157 Fed. 419.

Under rule 33 of the Circuit Court of Appeals (150 Fed. xxxvi) which provides that on an appeal from a decision of the court discharging a writ of habeas corpus the prisoner may, for good cause shown, be detained in the custody of the court or be enlarged upon recognizance, a prisoner indicted for crime in one district and apprehended in another, who after a full hearing before a commissioner has been ordered returned for trial and whose application for discharge on habeas corpus has been denied, is not entitled as a matter of right to a stay pending an appeal, and unless probable cause for an appeal is shown. Ex parte Green (D. C. 1908) 165 Fed. 557.

The decision of the court, to which an application for removal of a defendant to another federal district for trial is made, that probable cause is shown, is not reviewable, so far as the correctness of the decision is concerned, by habeas corpus. In re Quinn (D. C. 1909) 176 Fed. 1020.

A federal court of a district to which a prisoner has been removed for trial from another district will not review the order of removal in habeas corpus proceedings, if regular on its face. Horn v. Mitchell (D. C. 1915) 223 Fed. 549.

126. Res judicata.—Where one convicted of crime, but not sentenced, in a federal court of another jurisdiction, is arrested in the District of Columbia for removal to such other jurisdiction, and on habeas corpus proceedings here is discharged on the ground that the removal is only removal for trial, and not removal after trial, such discharge, though erroneous, is an adjudication, and, on a second arrest, is conclusive in his favor as res judicata, in the absence of a showing of some fact for holding him not existing at the time of his discharge. Palmer v. Thompson (1902) 20 App. D. C. 273.

127. District attorneys, fees of.—In an application for the removal of a defendant to another state under this section, the district attorney is entitled only to an assimilated fee of $5 a day. Hillborn v. U. S. (1892) 27 Ct. Cl. 547.

A district attorney is not entitled to fees for obtaining warrants for the removal of prisoners arrested in one district and triable in another. Bird v. U. S. (D. C. 1891) 45 Fed. 110. See R. S. § 824, ante, § 1378.

CITED WITHOUT DEFINITE APPLICATION

In re Metzger (1847) 5 How. 176, 189, 12 L. Ed. 104; U. S. v. Jones (1890) 10

Sup. Ct. 615, 134 U. S. 483, 33 L. Ed. 1007; Same v. Ewing (1891) 11 S. Ct. 743, 140 U. S. 142, 35 L. Ed. 388; Same v. Van Duzee (1891) 11 Sup. Ct. 758, 760, 140 U. S. 169, 35 L. Ed. 399; Logan v. U. S. (1892) 12 Sup. Ct. 617, 623, 144 U. S. 263, 36 L. Ed. 429; U. S. v. Fletcher (1893) 13 Sup. Ct. 434, 435, 147 U. S. 664, 37 L. Ed. 322; Same v. King (1893) 13 Sup. Ct. 439, 441, 147 U. S. 676, 37 L. Ed. 328; Same v. Patterson (1893) 14 Sup. Ct. 20, 21, 150 U. S. 65, 37 L. Ed. 999; Same v. Allred (1895) 15 Sup. Ct. 231, 233, 155 U. S. 591, 39 L. Ed. 273; John Bad Elk v. U. S. (1900) 20 Sup. Ct. 729, 731, 177 U. S. 529, 44 L. Ed. 874; Champion v. Ames (1903) 23 Sup. Ct. 321, 322, 188 U. S. 321, 47 L. Ed. 492; Thomas v. U. S. (1907) 156 Fed. 897, 901, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; Tiberg v. Warren (1911) 192 Fed. 458, 112 C. C. A. 596; U. S. v. Smith (C. C. 1883) 17 Fed. 510, 511; In re Byron (C. C. 1883) 18 Fed. 722, 723; McKinistry v. U. S. (C. C. 1888) 34 Fed. 211, 215; McDermott v. Same (C. C. 1889) 40 Fed. 217, 220 (modified [1891] 11 Sup. Ct. 746, 140 U. S. 151, 35 L. Ed. 391); U. S. v. Sandrey (C. C. 1891) 48 Fed. 550; Same v. Greenhut (C. C. 1892) 51 Fed. 213, 214; Clough v. U. S. (C. C. 1893) 55 Fed. 921, 924; Ex parte Hyde (C. C. 1904) 194 Fed. 207; U. S. v. Brawner (D. C. 1881) 7 Fed. 86, 90; In re Cross (D. C. 1884) 20 Fed. 824, 825; Barber v. U. S. (D. C. 1887) 35 Fed. 886, 888 (reversed [1891] 11 Sup. Ct. 751, 140 U. S. 177, 35 L. Ed. 398); Strong v. Same (D. C. 1888) 34 Fed. 17, 19, 20; Rand v. Same (D. C. 1888) 36 Fed. 671, 672 (affirmed [1892] 53 Fed. 348, 3 C. C. A. 556); In re Gourdin (D. C. 1891) 45 Fed. 842; U. S. v. Hom Hing (D. C. 1892) 48 Fed. 635, 638, In re Ezeta (D. C. 1894) 62 Fed. 972; U. S. v. Hughes (D. C. 1895) 70 Fed. 972, 976; In re Wong Fock (D. C. 1897) 81 Fed. 558, 561; Nixon v. U. S. (D. C. 1897) 82 Fed. 23, 29; In re Kopel (D. C. 1906) 148 Fed. 505; U. S. v. Stern (D. C. 1910) 177 Fed. 479; In re Chin K. Shue (D. C. 1912) 199 Fed. 282; Henry v. Henkel (D. C. 1913) 207 Fed. 805, 806; Dubois v. U. S. (1890) 25 Ct. Cl. 195.

§ 1675. (Act Feb. 9, 1903, c. 529, § 1.) Offenders against the United States, how arrested and removed to or from the Philippine Islands.

The provisions of section ten hundred and fourteen of the Revised Statutes, so far as applicable, shall apply throughout the United States for the arrest and removal therefrom to the Philippine Islands of any fugitive from justice charged with the commission of any crime or offense against the United States within the Philippine Islands, and shall apply within the Philippine Islands for the arrest and removal therefrom to the United States of any fugitive from justice charged with the commission of any crime or offense against the United States. Such fugitive may, by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process against offenders therein, be arrested and imprisoned, or bailed, as the case may be, pending the issuance of a warrant for his removal to the United States, which warrant it shall be the duty of a judge of the court of first instance seasonably to issue, and of the officer or agent of the United States designated for the purpose to execute. Such officer or agent, when engaged in executing such warrant without the Philippine Islands, shall have all the powers of a marshal of the United States so far as such powers are requisite for the prisoner's safe-keeping and the execution of the warrant. (32 Stat. 806.)

This was the first section of an act entitled "An act to provide for the removal of persons accused of crime to and from the Philippine Islands for trial," cited above.

Section 2 of this act, making the provisions of R. S. §§ 5278, 5279, post, §§ 10126, 10127, which relate to extradition of fugitives from justice of a State or Territory, applicable to the Philippine Islands, is set forth post, § 10128.

R. S. § 1014, mentioned in this section, is set forth ante, § 1674.

The provisions of R. S. §§ 5409, 5410, which made punishable voluntarily suffering a prisoner, in custody by virtue of process under the laws of the United States, to escape, were made applicable to proceedings under this act by Act Feb. 6, 1905, c. 454, § 2, post, § 10125. Said sections 5409 and 5410 were incorporated in the Criminal Code, in sections 138, 139 thereof, post, §§ 10308, 10309, and were repealed by section 341 thereof, post, § 10515.

§ 1676. (Act March 1, 1879, c. 125, § 9.) Persons found operating illicit distillery; arrest; bail.

Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes. (20 Stat. 341.)

This section was part of an act entitled "An act to amend the laws relating to internal revenue," cited above.

Notes of Decisions

Arrest of operator of illicit distillery.—A United States deputy marshal may arrest any person within his district found operating an illegal distillery. In re Quarles (1895) 15 Sup. Ct. 959, 961, 158 U. S. 532, 39 L. Ed. 1080.

Revenue officers, when attacked while searching for illicit stills, may arrest their assailants without a warrant. Georgia v. Port (C. C. 1880) 3 Fed. 124, 132.

§ 1677. (Act May 28, 1896, c. 252, § 19.) Violations of internal-revenue laws; warrants of arrest.

Warrants of arrest for violations of internal-revenue laws may be issued by United States commissioners upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, or deputy collector of internal-revenue or revenue agent or private citizen, but no such warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney. (29 Stat. 184.)

This provision was part of section 19 of the legislative, executive, and judicial appropriation act for the fiscal year 1897, cited above. The preceding provisions, and a further provision of the section, relating to the abolition of the office of circuit court commissioner and the creation of the office of United States commissioner, are set forth ante, §§ 1333, 1337.

§ 1678. (Act Aug. 18, 1894, c. 301, § 1.) Persons arrested to be taken before nearest officer for hearing; complaint to be attached to warrant.

It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof. (28 Stat. 416.)

This was a proviso annexed to an appropriation for fees of United States commissioners, etc., in the sundry civil appropriation act for the fiscal year 1895, cited above. A substantially similar proviso was contained in the sundry civil appropriation act for the preceding year, Act March 3, 1893, c. 208, 27 Stat. 609.

See note to R. S. § 1014, ante, § 1674, as to change in office of circuit court commissioner.

Notes of Decisions

Construction in general.—The provision of Act 1893, c. 208, is absolute, and the courts are not authorized to ingraft exceptions on it. U. S. v. Puleston (1901) 106 Fed. 294, 45 C. C. A. 297.

Duty and jurisdiction of magistrates.—All officers or magistrates issuing warrants must attach thereto a certified copy of the complaint. McGourin v. U. S. (D. C. 1900) 102 Fed. 553.

Under Act March 3, 1903, no magistrate other than the one who issued the warrant has jurisdiction to hear the case unless a certified copy of the complaint is annexed to the warrant. U. S. v. Donahower (1898) 85 Fed. 547, 29 C. C. A. 342; U. S. v. Puleston (1901) 106 Fed. 294, 45 C. C. A. 297. See U. S. v. Ebbs (D. C. 1881) 10 Fed. 369, 376, holding that a commissioner has no power to commit a prisoner brought before him for examination until a cause of commitment judicially appears, and when any commitment is ordered a written mittimus, setting forth the cause, must be directed to the marshal or his deputy, commanding him to deliver the prisoner to the keeper of the common jail, and when the mandate of the warrant is obeyed the marshal is relieved from the responsibility of custody. And see, on same point, U. S. v. Berry (D. C. 1880) 4 Fed. 779.

—— **Hearing and subornation of perjury of witnesses.**—An indictment for suborning a witness to testify falsely before a United States commissioner at a hearing on a complaint under R. S. § 1014, ante, § 1674, as amended by this section, held not fatally defective because the words "trial" and "issue" were used in reference to the hearing before the commissioner. Cohen v. U. S. (1914) 214 Fed. 23, 130 C. C. A. 417.

Duty of marshals or deputies in general.—A marshal arresting a prisoner must take him before the nearest commissioner or other judicial officer for examination. U. S. v. Puleston (1901) 106 Fed. 294, 45 C. C. A. 297; Saunders v. U. S. (C. C. 1896) 73 Fed. 782. See U. S. v. Ebbs (D. C. 1881) 10 Fed. 369, 375, holding that, when the marshal or his deputy arrests a person under a warrant, the law requires him to carry the alleged offender before some examining magistrate as soon as the circumstances will permit, and he may lodge the prisoner in the common jail or resort to other modes of confinement, if any necessity or serious emergency should require such a course, but nothing but obvious necessity will authorize an officer to lodge a prisoner in jail before an examination and regular commitment by a magistrate. The law fixes no time and place for the session of a commissioner's court, and the marshal and his deputies are not required to be present at such court, except where they have process to return and defendants to bring in and guard. And see, also, U. S. v. Nix (1903) 23 Sup. Ct. 495, 498, 189 U. S. 199, 47 L. Ed. 775.

—— **Foreign extradition.**—This section requires a person arrested as a fugitive from a foreign country to be taken before the nearest commissioner notwithstanding R. S. § 5270, post, § 10110. Pettit v. Walshe (1904) 24 Sup. Ct. 657, 662, 194 U. S. 205, 48 L. Ed. 938.

§ 1679. (R. S. § 1015.) Bail shall be admitted in cases not capital; by whom.

Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders.

Act Sept. 24, 1789, c. 20, § 33, 1 Stat. 91. Act March 2, 1793, c. 22, § 4, 1 Stat. 334. Act April 10, 1869, c. 22, § 2, 16 Stat. 44.

The "preceding section" of the Revised Statutes, referred to in this section, was R. S. § 1014, ante, § 1674.

Notes of Decisions

Right to bail in general.—See R. S. § 1014, ante, § 1674, and notes thereunder.

This section authorizes admission to bail at any stage of the proceedings before or after hearing, indictment, or conviction, and pending appeal. Hoeffner v. U. S. (1898) 87 Fed. 185, 30 C. C. A. 610; U. S. v. Louis (C. C. 1906) 149 Fed. 277. But see U. S. v. Hudson (D. C. 1894) 65 Fed. 68, holding that there is no statute authorizing bail after conviction.

—— **During trial.**—Under this section a defendant accused of a noncapital felony is not entitled as a matter of right to bail during his trial. U. S. v. Rice (C. C. 1911) 192 Fed. 720.

—— **Pending appeal or writ of error.**—Bail, in cases of crimes not capital, may be taken on writ of error by order of the proper court, justice, or judge. Hudson v. Parker (1895) 15 Sup. Ct. 450, 156 U. S. 277, 39 L. Ed. 424.

That defendant has been tried and convicted three times on the same indictment for embezzling funds of a national bank is not sufficient ground for denying bail pending a third writ of error. Where one convicted of crime is admitted to bail pending a writ of error, the bail should be allowed for a time only sufficient to insure the filing of the transcript in the court of appeals within a reasonable time, reserving the question of further bail until the lapse of the time thus fixed. McKnight v. U. S. (1902) 113 Fed. 451, 51 C. C. A. 285.

A defendant convicted of a criminal offense, and whose conviction has been

affirmed by the Circuit Court of Appeals while he was at large on bail, will not be remanded to custody pending a motion for rehearing unless some unusual reason is shown why he is not likely to remain within the jurisdiction. Walsh v. U. S. (1909) 174 Fed. 621, 99 C. C. A. 134.

The affirmance by the Circuit Court of Appeals of a judgment of conviction in a criminal case is the end of the proceedings in error, and that court has no power to continue defendant's bail, nor to admit him to new bail pending his application to the Supreme Court for a writ of certiorari; but the court may, for good cause shown, defer the beginning of his sentence for a reasonable time. Walsh v. U. S. (1910) 177 Fed. 208, 101 C. C. A. 378.

While a writ of error to review a conviction for a noncapital crime, and a supersedeas to stay the execution of the sentence is a matter of right, an appearance or bail bond is required to entitle the accused to go at large pending the writ of error. Hardesty v. U. S. (1911) 184 Fed. 269, 106 C. C. A. 411.

Where defendant, convicted of embezzlement and sentenced to six years' imprisonment, appealed to the supreme court, and an order was made admitting him to bail, but bail was not procured for four months, and, when it was finally offered, the supreme court was in session, the bail should be refused until an application for advancing the cause has been made, as the public interest requires a speedy disposition of the cause. U. S. v. Simmons (C. C. 1891) 47 Fed. 723, 14 L. R. A. 78.

—— Foreign extradition proceedings.—This section must be read in connection with R. S. § 1014, ante, § 1674, which is confined to crimes or offenses against the United States, and there is no statute providing for admission to bail in cases of foreign extradition. Wright v. Henkel (1903) 23 Sup. Ct. 781, 786, 190 U. S. 40, 47 L. Ed. 948. See, in accord, Rice v. Ames (1901) 21 Sup. Ct. 406, 180 U. S. 371, 45 L. Ed. 577. See, also, In re Mitchell (D. C. 1909) 171 Fed. 289, as to court's power to admit to bail in case of foreign extradition.

Jurisdiction of courts and judicial officers.—See R. S. § 1014, ante, § 1674, and notes thereunder.

United States commissioners have the same power to take bail on an arrest made after indictment as in cases of arrest before indictment. Hoeffner v. U. S. (1898) 87 Fed. 185, 30 C. C. A. 610.

Where bail on appeal had been fixed by the court or judge, a United States commissioner had jurisdiction to cause the proposed sureties to justify before him and accept bail tendered. U. S. v. Louis (1906) 149 Fed. 277.

Under this section bail may be allowed by the commissioner or other judicial officer having jurisdiction to hear the complaint. Roberts v. Brown (1906) 94 S. W. 388, 43 Tex. Civ. App. 306.

Proceedings to admit to bail.—See R. S. § 1014, ante, § 1674, and notes thereunder.

—— Sureties.—See R. S. § 1014, ante, § 1674, and notes thereunder.

When the circumstances point to bad faith of the indemnitors of the sureties, the right to bail guaranteed by this section does not prevent the court, in the exercise of a sound discretion, from rejecting sureties who, however honorable, become sureties for business reasons, and apparently without assuming any responsibility. U. S. v. Lee (D. C. 1909) 170 Fed. 613.

Cited without definite application, Farrington v. Tennessee (1877) 95 U. S. 679, 688, 24 L. Ed. 558; U. S. v. Jones (1890) 10 Sup. Ct. 615, 134 U. S. 483, 33 L. Ed. 1007; Diaz v. U. S. (1912) 32 Sup. Ct. 250, 255, 223 U. S. 442, 56 L. Ed. 500, Ann. Cas. 1913C, 1138.

§ 1680. (R. S. § 1016.) Bail may be admitted in capital cases; by whom.

Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law.

Act Sept. 24, 1789, c. 20, § 33, 1 Stat. 91. Act March 2, 1793, c. 22, § 4, 1 Stat. 334. Act April 10, 1869, c. 22, § 2, 16 Stat. 44.

The provisions of this section, so far as applicable to the circuit courts, became inoperative on the abolition of those courts by Jud. Code, § 289, ante, § 1266, but were made applicable to the district courts by the transfer of the powers and duties of the circuit courts to the district courts, by Jud. Code, § 291, ante, § 1268.

Notes of Decisions

Jurisdiction to admit to bail.—See R. S. § 1014, ante, § 1674, and notes thereunder.

Bail in capital cases may be taken by the supreme court or a justice thereof, or by a district judge. Hudson v. Par-

ker (1895) 15 Sup. Ct. 450, 156 U. S. 277, 39 L. Ed. 424.

Bailable offenses in general.—A defendant, charged with crime punishable by death, is not entitled to bail during his trial. U. S. v. Rice (C. C. 1911) 192 Fed. 720.

—— **Murder.**—On testimony on return of a writ of habeas corpus, if it is clear to the judge that a conviction for murder should not take place, he will order the prisoner to give bail. U. S. v. District of Columbia (Cr. C. D. C. 1856) Fed. Cas. No. 15,726a.

—— **Piracy.**—Prisoners, even when charged with piracy, will be admitted to bail if suffering under a disease which may be ultimately dangerous from continued confinement. U. S. v. Jones (C. C. 1813) Fed. Cas. No. 15,-495.

—— **Treason.**—A defendant, committed on a charge of treason, is bailable. U. S. v. Hamilton (1795) 3 Dall. 17, 18, 1 L. Ed. 490.

Act July 17, 1862, giving the courts authority, in their discretion, to impose fines and imprisonment, instead of death, as punishment for treason, makes the offense bailable. Case of Davis (C. C. 1867-1871) Fed. Cas. No. 3,621a.

Where defendants, on trial for treason, procured a postponement of trial to give time for the investigation of the characters and conduct of witnesses whose names were furnished them, and such postponement necessitated the continuance of the case until the next term, they are not entitled to be admitted to bail. U. S. v. Stewart (C. C. 1795) Fed. Cas. No. 16,401, 2 Dall. 343, 345, 1 L. Ed. 408.

Cited without definite application, In re Quarles (1895) 15 Sup. Ct. 959, 961, 158 U. S. 532, 39 L. Ed. 1080.

§ 1681. (R. S. § 1017.) Bail in criminal cases removed by writ of error from State courts.

When a writ of error is issued for the revision of the judgment of a State court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the Constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such State, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the State court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error.

Act Sept. 24, 1789, c. 20, § 25, 1 Stat. 85. Act July 13, 1866, c. 184, § 69, 14 Stat. 172. Act Feb. 5, 1867, c. 28, § 2, 14 Stat. 386.

Writs of error from the Supreme Court to State courts were authorized by R. S. § 709, which was incorporated in the Judicial Code, in section 237 thereof, ante, § 1214, and was repealed by section 297 of said Code, ante, § 1274.

Notes of Decisions

Bail on writ of error from state courts.—A plaintiff in error, chargeable with an offense bailable by the laws of the state, shall not be released until final judgment or until a bond shall be given. Hudson v. Parker (1895) 15 Sup. Ct. 450, 453, 156 U. S. 277, 39 L. Ed. 424.

See Cohens v. Virginia (1821) 6 Wheat. 264, 5 L. Ed. 257, and Worcester v. Georgia (1832) 6 Pet. 515, 8 L. Ed. 483, as to jurisdiction of federal supreme court.

See McKane v. Durston (1894) 14 Sup. Ct. 913, 153 U. S. 684, 38 L. Ed. 867, as to necessity to perform the conditions of the laws of the state.

See Bryan v. Bates (1866) 94 Mass. (12 Allen) 201, as to bail to abide final judgment.

Cited without definite application, U. S. v. Hudson (D. C. 1894) 65 Fed. 68, 76.

§ 1682. (R. S. § 1018.) Surrender of criminals by their bail.

Any party charged with a criminal offense and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party

so committed shall therefrom be held in custody until discharged by due course of law.

Act Aug. 8, 1846, c. 98, § 4, 9 Stat. 73.

Notes of Decisions

Purpose of bail.—A recognizance of bail in a criminal case is taken to secure the attendance of accused, and is not designed as a satisfaction for the offense when it is forfeited and paid. Ex parte Milburn (1835) 9 Pet. 704, 709, 9 L. Ed. 280.

See Leary v. U. S. (1912) 32 Sup. Ct. 599, 600, 224 U. S. 567, 56 L. Ed. 889, as to nature of bail and measure of liability.

Surrender of offender by bail, right to.—The principal is regarded as delivered to the custody of the sureties, who may seize him and deliver him up, and if that cannot be done at once, they may arrest him until it can be done. Taylor v. Taintor (1872) 16 Wall. 366, 371, 21 L. Ed. 287; Cosgrove v. Winney (1899) 19 Sup. Ct. 598, 174 U. S. 64, 43 L. Ed. 897; U. S. v. Stevens (C. C. 1883) 16 Fed. 101.

When a defendant is admitted to bail, he is placed in the custody of his sureties, who have power to arrest him at any time they may desire; and they must have him before the court at the time and place designated in the bond, and they are not freed from this responsibility until the defendant is discharged, admitted again to bail, or placed in the custody of an officer of the law. U. S. v. Ebbs (D. C. 1881) 10 Fed. 369, 375; Same v. Peckham (D. C. 1906) 143 Tex. 625; Same v. Lee (D. C. 1909) 170 Fed. 613.

See Ex parte Marrin (D. C. 1908) 164 Fed. 631, as to right of surety company becoming bail.

The intention of the statute is to enable sureties to protect themselves at a time when they cannot procure relief by application to the court. Allen v. U. S. (1901) 36 Ct. Cl. 44.

—— **Arrest of offender.**—The sureties may personally or through an agent arrest the offender to surrender him. They may pursue him into another state, arrest him on Sunday, break and enter his house for that purpose, and the seizure is not made by virtue of new process. Taylor v. Taintor (1872) 16 Wall. 366, 21 L. Ed. 287; Cosgrove v. Winney (1899) 19 Sup. Ct. 598, 174 U. S. 64, 43 L. Ed. 897; U. S. v. Keiver (C. C. 1893) 56 Fed. 422. See Ex parte Milburn (1835) 9 Pet. 704, 9 L. Ed. 280.

This power of arrest can only be exercised within the United States. Reese v U. S. (1869) 9 Wall. 13, 21, 19 L. Ed. 541.

—— **Jurisdiction of courts or judicial officers.**—As to whether a United States commissioner who has admitted a prisoner to bail for appearance in a federal District Court in which the indictment was returned may entertain proceedings for the prisoner's surrender by his surety, or whether such proceedings should be before the district court which has jurisdiction of the offense—quære. Lamar v. Splain (1914) 42 App. D. C. 300.

—— **Time to surrender.**—This statute excludes the power of the bail to voluntarily surrender their principal during the progress of the trial and be exonerated, and contemplates that accused may then be taken into the custody of the court and remain subject to its order and control. U. S. v. Rice (C. C. 1911) 192 Fed. 720.

—— **Mode of surrender.**—Indorsement on recognizance of the exoneretur of the bail is essential to a valid discharge of bail who are chargeable with the duty of seeing that the indorsement is properly made. On a trial on a scire facias on a bail bond, where an exoneretur was not indorsed on the bond, the court will enter the exoneretur then and there, according to the statute, if the party is in actual custody, or, after such surrender, has been released, on giving other security. U. S. v. Stevens (C. C. 1883) 16 Fed. 101.

At the request of bail surrendering the principal, the judge or committing officer must enter on the recognizance, or a certified copy thereof, the exoneration of the bail. Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643.

Clerk's fees.—The clerk is not entitled to a fee from the government for making a certified copy of a recognizance to enter exoneration thereon, as the sureties themselves should pay him for the same. U. S. v Van Duzee (1892) 52 Fed. 930, 3 C C. A. 361; Van Duzee v. U. S. (D. C 1891) 48 Fed. 643.

Marshal's fees and expenses.—If the surrender before a magistrate is without authority of law, the marshal cannot recover for his fees and transportation of the prisoner. Allen v. U. S. (1901) 36 Ct. Cl. 44.

Cited without definite application, Logan v. U. S. (1892) 12 Sup. Ct. 617, 623, 144 U. S. 263, 36 L. Ed. 429; Peckham v. Henkel (1909) 30 Sup. Ct. 255, 256, 216 U. S. 483, 54 L. Ed. 579. U. S. v. Wells (1912) 192 Fed. 870, 113 C. C. A. 194, certiorari denied (1912) 32 Sup. Ct. 842, 225 U. S. 714, 56 L. Ed. 1269.

§ 1683. (R. S. § 1019.) New bail to be given in certain cases.

When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.

Act Aug. 8, 1846, c. 98, § 6, 9 Stat. 73.

Notes of Decisions

New bail.—If a bond accepted by a commissioner was irregular or insufficient, he ought to have proceeded to have the defendant arrested in the manner provided by this section, and a verbal direction to arrest was without legal force and authority; an examining and committing magistrate having no power verbally to command an arrest, except for a felony or breach of the peace committed in his presence, or for contempt in open court, or so near as to disturb his official proceedings. U. S. v. Ebbs (D. C. 1881) 10 Fed. 369, 371.

Cited without definite application, U. S. v. Ebbs (D. C. 1881) 49 Fed. 149, 151.

§ 1684. (R. S. § 1020.) When penalty of recognizances may be remitted.

When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced.

Act Feb. 28, 1839, c. 36, § 6, 5 Stat. 322.

Notes of Decisions

Authority of president.—The president cannot remit the forfeiture of a bail bond. (1843) 4 Op. Atty. Gen. 144.

Construction in general.—This section is remedial, and the court must, if possible, construe it so as to give full force and effect to the legislative intent, and thereby afford the relief contemplated therein. U. S. v. Jenkins (1909) 176 Fed. 672, 100 C. C. A. 224, 20 Ann. Cas. 1255. It is merely declaratory of the common law. U. S. v. Von Jenny (1912) 39 App. D. C. 377; Same v. Allen, Id. 383.

A remission is not a matter of right, but is discretionary with the court. Hunter v. U. S. (1912) 195 Fed. 253, 115 C. C. A. 225. See, in accord, U. S. v. Robinson (1908) 158 Fed. 410, 85 C. C. A. 520; Same v. Marrin (D. C. 1909) 170 Fed. 476; Same v. Traynor (D. C. 1909) 173 Fed. 114.

The subsequent production of defendant, who has failed to appear according to his bond, will not of itself relieve the surety from liability, unless the forfeiture is relieved by the court. U. S. v. McGlashen (C. C. 1895) 66 Fed. 537; Same v. Graner (C. C. 1907) 155 Fed. 679.

—— **"Willful default" defined.**—The limitation, "whenever it appears to the court that there has been no willful default of the party," refers to the willful default of the party charged with the offense. U. S. v. Von Jenny (1912) 39 App. D. C. 377; Same v. Allen, Id. 383.

—— **Territorial courts.**—This section governs in prosecutions for an offense against the United States in a territorial court, and authorizes the court to make such remission at a subsequent term in its discretion. Hunter v. U. S. (1912) 195 Fed. 253, 115 C. C. A. 225.

—— **Costs.**—This section does not in terms apply to a remission by the court of costs, and costs accruing with no fault whatever on behalf of the United States on the forfeiture of a bail bond, filed in the usual way on its return day, with nothing thereon or in the record to show any surrender of the principal, should not be remitted. U. S. v. Stevens (C. C. 1883) 16 Fed. 101, 108.

Application for remission of penalty.—An application to a federal court which has entered judgment on a forfeited recognizance in favor of the United States, for a remission of the penalty for which such judgment was rendered, is not a motion to vacate the judgment, and may be entertained after the term at which the judgment was entered. U. S. v. Jenkins (1909) 176

Fed. 672, 100 C. C. A. 224, 20 Ann. Cas. 1255.

Affidavit on motion for remission.—An affidavit of facts filed on a motion by the surety for the remission of a forfeited recognizance given by one who had become a fugitive from justice must set out in detail the facts upon which the court is asked to act, and not a conclusion therefrom. And if the surety is a bonding company, engaged in the business of acting as surety for a premium, it should affirmatively appear in the affidavit that the company has not taken collateral security from the accused for its own indemnification; otherwise the relief of the surety might ultimately inure to the benefit of the principal. U. S. v. Von Jenny (1912) 39 App. D. C. 377; Same v. Allen, Id. 383.

Time to make remission.—A remission may be made at a term subsequent to the term when the forfeiture is entered. Hunter v. U. S. (1912) 195 Fed. 253, 115 C. C. A. 225. And may be made though the term has expired at which final judgment was taken on the recognizance under a writ of scire facias. U. S. v. Traynor (D. C. 1909) 173 Fed. 114.

The federal courts have power, even after judgment on a recognizance, to relieve the surety, where he is without fault in the escape of the prisoner. U. S. v. Duncan (D. C. 1863) Fed. Cas. No. 15,004. See U. S. v. Winstead (D. C. 1882) 12 Fed. 50, for a case wherein the court said that, where scire facias has been served or returned, it will hear evidence and consider question of remitting or modifying forfeiture. See U. S. v. Barger (D. C. 1884) 20 Fed. 500, holding that during the term at which a recognizance in a criminal case is forfeited, the court will take off the forfeiture where substantial justice is thereby subserved, though the case may not be strictly within the letter of this section. And see U. S. v. Von Jenny (1912) 39 App. D. C. 377, as to whether the power to remit a forfeited recognizance, may be exercised after the expiration of the term at which the judgment of forfeiture was made final.

See, also, U. S. v. Cookendorfer (C. C. 1837) Fed. Cas. No. 14,856, holding that the court cannot remit the forfeiture of a recognizance in a criminal case after the term in which it was entered. And see (1854) 6 Op. Atty. Gen. 408.

Code Civ. Proc. S. C. § 195, which permits a court at any time within a year to relieve a party from a judgment taken against him through mistake, has no application to a judgment of forfeiture on a recognizance in the federal court, where the defendant was represented by an attorney, and the only mistake alleged is that his attorney failed to make defense. U. S. v. Wallace (D. C. 1891) 46 Fed. 569.

Grounds for remission.—Where a recognizance to appear for trial is forfeited, but the accused appears at a subsequent term, the court may suspend the recognizance, for good cause shown by the accused why he did not comply with its condition. U. S. v. Feely (C. C. 1813) Fed. Cas. No. 15,-082.

Where defendant absconded, and the trial proceeded in his absence, and he was acquitted, held, that the estreat would be set aside on application of the bail. U. S. v. Santos (C. C. 1862) Fed. Cas. No. 16,222.

The sureties are entitled to a remission of a part of the penalty for which judgment was taken against them on a breach where the defendant was afterward rearrested, convicted, and served his sentence. U. S. v. Traynor (D. C. 1909) 173 Fed. 114.

Where, on breach of an appearance bond, the court found that the party had made willful default, and final judgment was rendered at the succeeding term, the court had no power to remit any portion of the judgment against one of the sureties on his apprehending the principal and delivering him into custody at the term at which final judgment was entered, no answer having been filed to the scire facias issued and served at the previous term. U. S. v. Robinson (1908) 158 Fed. 410, 85 C. C. A. 520.

Where the recognizance of one indicted for smuggling was forfeited, but afterwards defendant appeared and was tried, and the jury were discharged as unable to agree, the forfeiture would not be remitted, the court deeming the defendant guilty and the punishment deserved. U. S. v. Mercer (D. C. 1868) Fed. Cas. No. 15,758.

A motion to set aside a forfeiture of a recognizance given for appearance to answer an indictment, on the ground of irregularities, will be denied, where defendant is a fugitive from justice. U. S. v. Stien (C. C. 1875) Fed. Cas. No. 16,403.

A motion to remit forfeiture of a recognizance on the ground that the party, when called, was in the custody of a state officer, under warrant issued out of the state court, will be denied on the ground that the question can be best determined on the trial of the action on the forfeited recognizance. U. S. v. Stricker (C. C. 1874) Fed. Cas. No. 16,410.

A certificate held not to warrant remission of a penalty under this section. U. S. v. Murphy (D. C. 1897) 82 Fed. 893, 896.

Where one charged with crime becomes and continues a fugitive from justice, thereby willfully defaulting in his recognizance, the Supreme Court of the District of Columbia, in which such

recognizance is entered, is without power to relieve against the forfeiture of the same, even though the surety therein, who is seeking relief, has made every effort to produce his principal for trial. U. S. v. Von Jenny (1912) 39 App. D. C. 377; Same v. Allen, Id. 383.

The Supreme Court of the District of Columbia has no discretionary power, on motion of the surety on a recognizance in a criminal case, to remit the penalty of a forfeited recognizance, on a showing by the surety that he had surrendered the accused into the custody of the United States marshal, where it appears that there was willful default of the accused. U. S. v. Walter (1915) 43 App. D. C. 468.

Cited without definite application, Hunt v. U. S. (1897) 17 Sup. Ct. 609, 610, 166 U. S. 424, 41 L. Ed. 1063.

§ 1685. (R. S. § 1021.) Indictments and presentments to be by at least twelve grand jurors.

No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors.

Act March 3, 1865, c. 86, § 1, 13 Stat. 500.

Notes of Decisions

See, also, notes under § 1691, post.

Presentation of indictment and record thereof in general.—To constitute a valid indictment for an infamous crime in a federal court, it must have been publicly presented in open court, all the grand jurors being present and answering to their names, the indictment then being delivered by the foreman to the clerk of the court, and the fact entered of record. Renigar v. U. S. (1909) 172 Fed. 646, 97 C. C. A. 172, 26 L. R. A. (N. S.) 683, 19 Ann. Cas. 1117; Angle v. Same (1909) 172 Fed. 658, 97 C. C. A. 184.

A paper purporting to be an indictment, indorsed as a true bill by the foreman of a federal grand jury, and delivered by him alone to the clerk of the court in the courtroom when court was not in session, is not an indictment, and confers no jurisdiction on the court to try the accused. Id.

Where it is conceded that an indictment was found by a vote of the requisite number of grand jurors, and, after being properly indorsed as a true bill by the foreman, was taken by him into the courtroom, which opened from the grand jury room, and presented to the judge on the bench, when the court was in session, and by him handed to the clerk, such indictment is not invalidated by the fact that the other grand jurors did not accompany the foreman into the courtroom. U. S. v. Breese (D. C. 1909) 172 Fed. 765.

Record of concurrence of jurors.—Where the record shows that the grand jury found the indictment on their oaths, the intendment and legal effect and presumption is that it was found on proper evidence, with due deliberation, and by the concurrence of 12 of their number. U. S. v. Wilson (C. C. 1855) Fed. Cas. No. 16,737.

Presence of disqualified person on panel.—See, also, note under § 1691, post, as to "Selecting, summoning, and impaneling grand jury."

The presence of one disqualified person upon the panel of a grand jury vitiates the indictment found by it. U. S. v. Hammond (C. C. 1875) Fed. Cas. No. 15,294.

Absence of juror.—The absence of one or more federal grand jurors by reason of a failure to notify them of a meeting at which an indictment was found, was not sufficient to invalidate the indictment; there being present a sufficient number to find the indictment. Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied (1908) 29 S. Ct. 685, 212 U. S. 576, 53 L. Ed. 657.

Where a grand jury consists of 15 jurors, a finding by 12 cannot be invalidated by the fact that 1 of the 15 was absent. U. S. v. Wilson (C. C. 1855) Fed. Cas. No. 16,737.

Discharge of juror.—The improper discharge of a grand juror will not vitiate an indictment, if the number necessary to find the indictment remained. Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied (1908) 29 S. Ct. 685, 212 U. S. 576, 53 L. Ed. 657.

Collateral attack on judgment of conviction based on defect in number of jurors.—A judgment of conviction of murder cannot be collaterally attacked on petition for a writ of habeas corpus, on the ground that there was a defect in the number of grand jurors. Ex parte Wilson (1891) 11 Sup. Ct. 870, 872, 140 U. S. 575, 35 L. Ed. 513.

§ 1686. (R. S. § 1022.) Offenses against the elective franchise, how prosecuted.

All crimes and offenses committed against the provisions of chapter seven, Title "Crimes," which are not infamous, may be pros-

ecuted either by indictment or by information filed by a district attorney.

Act May 31, 1870, c. 114, § 8, 16 Stat. 142.

Notes of Decisions

See, also, Const. Amend. 5, and notes thereunder.

Prosecution by indictment or information in general.—An offense against the laws of the United States, which is not capital or infamous, but is merely a misdemeanor, may be prosecuted by an information. U. S. v. Waller (C. C. 1871) Fed. Cas. No. 16,634; Same v. Maxwell (C. C. 1875) Fed. Cas. No. 15,750; Same v. Shepard (D. C. 1870) Fed. Cas. No. 16,273; Same v. Ebert (D. C. 1874) Fed. Cas. No. 15,019.

The provision of this section authorizing certain offenses to be prosecuted either by indictment or by information does not preclude the prosecution by information of such other offenses as may be so prosecuted consistently with the constitution and laws of the United States. Ex parte Wilson (1885) 5 Sup. Ct. 935, 937, 114 U. S. 417, 29 L. Ed. 89, granting writ of habeas corpus In re Wilson (D. C. 1883) 18 Fed. 33.

An offense which is not treason, and is not expressly declared by act of Congress to be a felony, is a misdemeanor, and may be tried on information, unless it is of that class designated as crimen falsi, the test for determining which is whether the party convicted is rendered incompetent to testify. U. S. v. Baugh (C. C. 1880) 1 Fed. 784, 787.

Offenses which are not infamous may be tried on information. Id.

The right to file an information is not a prerogative of the prosecutor's office. The district attorney must first have leave of court; and the court may require him, before granting leave, to bring the accused before the court to show cause, if cause there be, against the filing of the information. U. S. v. Smith (C. C. 1889) 40 Fed. 755.

The proceeding by criminal information being comparatively unknown in the federal courts, the court declines to issue a warrant of arrest on an information for the offense of selling spirituous liquor to an Indian. U. S. v. Joe (D. C. 1871) Fed. Cas. No. 15,478.

Under this section, providing that certain offenses may be prosecuted either by indictment or information filed by the district attorney, and Const. Amend. 4, declaring that no warrant shall be issued but on probable cause supported by oath or affirmation, it was held that the constitutional provision does not require that the oaths or affirmations of the supporting witnesses be taken in open court or before the judge issuing the warrant or directing its issuance, but that the information is so supported where it is accompanied by the evidence of witnesses sworn before a United States commissioner on a preliminary examination, properly taken and certified, or when accompanied by the affidavits made on oath of witness sworn before any officer authorized by law to take and subscribe such oaths or affirmations. U. S. v. Baumert (D. C. 1910) 179 Fed. 735.

Voting without lawful right.—A charge, under R. S. § 5511, of voting without lawful right, might have been prosecuted by information under this section. U. S. v. Watkinds (C. C. 1881) 6 Fed. 152, 155, citing Same v. Block (D. C. 1877) Fed. Cas. No. 14,609.

Infamous crimes in general.—This section does not undertake to define the crimes which are infamous, and therefore not to be prosecuted by information, but leaves that to be regulated by the paramount authority of the constitution. Mackin v. U. S. (1886) 6 Sup. Ct. 777, 779, 117 U. S. 348, 29 L. Ed. 909.

Offenses against the United States, punishable by fine and imprisonment, not in a state prison or penitentiary, are not infamous, and properly prosecuted by information. U. S. v. Camden Iron Works (D. C. 1907) 150 Fed. 214, reversed (1908) 158 Fed. 561, 85 C. C. A. 585.

An "infamous crime" is one the punishment for which may be confinement in the penitentiary, with or without hard labor. U. S. v. J. Lindsay Wells Co. (D. C. 1910) 186 Fed. 248.

Larceny.—Act March 1, 1895 (28 Stat. 696; Ind. T. Ann. St. 1899, § 45), provides that the provisions of Mansfield's Digest of Arkansas entitled "Criminal Law" shall be applicable to the Indian Territory, but that, where the laws of the United States have provided for the punishment of an offense, the latter shall govern. Const. Ark. § 8, provides that no person shall be held to answer a crime charged unless on presentment or indictment of a grand jury, and cases which the general assembly shall make cognizable by justices of the peace and similar courts. Mansf. Dig. § 1963 (Ind. T. Ann. St. 1899, § 1306), provides that all offenses may be prosecuted by indictment save those of public officers, those arising in the militia, and those exclusively within the jurisdiction of police courts. Section 1964 (section 1307) provides that offenses within the jurisdiction of a justice or of a city or police court may be prosecuted by a summons or warrant of arrest. Mansf. Dig. § 2859 (Ind. T. Ann. St. 1899, § 1974), provides that persons convicted of larceny shall be incompetent to testify. Held,

that larceny being an infamous crime, and it appearing also that congress intended to adopt as to larcenies of a general nature the mode of procedure provided in Mansfield's Digest, a prosecution for larceny may not be by information. Williams v. U. S. (1902) 69 S. W. 849, 4 Ind. T. 204.

Embezzlement of letter.—The embezzlement of a letter by a postal employé in violation of R. S. § 5467, post, § 10365, is not an infamous offense, particularly where the information does not state facts showing a breach of trust. U. S. v. Baugh (C. C. 1880) 1 Fed. 784, 787.

Passing counterfeit.—Passing counterfeit money of the United States may be prosecuted by information under this section. U. S. v. Field (C. C. 1883) 16 Fed. 778.

The question whether a person accused of passing a counterfeited obligation of the United States may be prosecuted by information is not affected by this section. In re Wilson (D. C. 1883) 18 Fed. 33, 34.

Violation of pure food and drug act.—The notice and preliminary hearing by the Department of Agriculture which must be given under Pure Food and Drug Act June 30, 1906, post, § 8720, to the person from whom the sample was obtained, when on examination an article is found to be adulterated, would not obviate the duty of the district attorney to prosecute the offense under this section and R. S. § 771, ante, § 1296, requiring him to prosecute all delinquents for offenses cognizable under federal authority. U. S. v. Morgan (1911) 32 Sup. Ct. 81, 82, 222 U. S. 274, 56 L. Ed. 198.

Food and Drugs Act June 30, 1906, § 2, post, § 8718, prohibits the shipping of adulterated food in interstate commerce, and provides on conviction a fine not exceeding $200 for the first offense, and for each subsequent offense a fine not exceeding $300, or imprisonment not exceeding one year, or both, in the discretion of the court. Held that, since a defendant may not be imprisoned in the penitentiary unless sentenced to confinement for more than a year, no imprisonment in the penitentiary can be imposed for violation of such act; and hence the institution of proceedings thereunder by information of the district attorney was not a violation of Const. Amend. 5, providing that no person shall be held to answer for an infamous crime, except on presentment or indictment of a grand jury. U. S. v. J. Lindsay Wells Co. (D. C. 1910) 186 Fed. 248.

Cited without definite application, U. S. v. Tiernay (C. C. 1881) 16 Fed. 513.

§ 1687. (R. S. § 5396.) Form of indictment for perjury.

In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

Act April 30, 1790, c. 9, § 19, 1 Stat. 116.

The provisions of chapter 7 of the Title "Crimes" of the Revised Statutes, mentioned in this section, relating to crimes against the elective franchise and civil rights of citizens, constituted sections 5506–5532 of the Revised Statutes. R. S. §§ 5506, 5511–5515, 5520–5523, were repealed by Act Feb. 8, 1894, c. 25, § 1, 28 Stat. 36, and all the other sections which remained in force, except section 5517, were incorporated in the Criminal Code, in chapter 3 thereof, post, §§ 10183–10190, and those sections were repealed by section 341 of said Code, post, § 10515.

Notes of Decisions

1. Statute as founded on or copied from English statute.
2. Requisites and sufficiency of indictment in general.
3. Setting forth substance of charge or offense.
4. Setting out affidavit.
5. Time of offense.
6. Authority to administer oath.
7. Setting out name and title of officer.
8. Designation of court and oath made before it.
9. Materiality of oath or testimony.
10. Assignment of perjury.
11. Perjury in election contest.
12. Perjury in pension affidavit or statement.
13. False statement or affidavit under timber and stone act.
14. Issues, proof, and variance.

1. Statute as founded on or copied from English statute.—This section was evidently founded on or copied from

the statute of 23 George II, c. 11, § 1, as the material parts of it are in the same words. U. S. v. Walsh (C. C. 1884) 22 Fed. 644, 645.

This section is in substance the same as the enactment of 23 Geo. II, c. 11, which was designed to do away with the needless prolixity and precision required by the statute of 5 Eliz. c. 9, which oftentimes resulted in the escape of those guilty of the crime of perjury. U. S. v. Cuddy (D. C. 1889) 39 Fed. 696, 697.

2. Requisites and sufficiency of indictment in general.—An indictment conforming in every substantial particular with this section is sufficient. Bucklin v. U. S. (1895) 16 Sup. Ct. 182, 184, 159 U. S. 682, 40 L. Ed. 305.

The rigors of the ancient common law in exacting much particularization in the description of the offense of perjury and subornation of perjury have been greatly modified by this section. Nurnberger v. U. S. (1907) 156 Fed. 721, 725, 84 C. C. A. 377.

Since, as before, the enactment of this section and of section 1691, post, providing that no indictment shall be held insufficient for defects in matter of form only, every indictment for perjury in a federal court must contain allegations showing (a) judicial proceeding or course of justice; (b) that the defendant was sworn to give evidence therein; (c) the testimony given by him; (d) its falsity; and (e) its materiality to the issue or inquiry. Hogue v. U. S. (1910) 184 Fed. 245, 106 C. C. A. 387.

An indictment for perjury held not vitiated by an obvious clerical mistake in using the word "clerk," instead of "court." Hogue v. U. S. (1912) 192 Fed. 918, 114 C. C. A. 11.

The rule that the facts material to be charged in an indictment must be stated clearly and explicitly governs an indictment for perjury. Kovoloff v. U. S. (1912) 202 Fed. 475, 120 C. C. A. 605.

The judgment will be arrested where the indictment fails to state the day upon which the trial took place, and on which defendant was sworn in the case in which the perjury was alleged to have been committed. U. S. v. Bowman (C. C. 1808) Fed. Cas. No. 14,631.

An indictment for perjury alleged to have been committed on an examination before C., "a commissioner of the United States, newly appointed," but not stating how, or by whom, or under what statute, or for what purpose such commissioner was appointed, is bad on demurrer. U. S. v. Wilcox (C. C. 1859) Fed. Cas. No. 16,692.

An indictment for perjury alleged to have been committed on an examination of a person charged with a crime against a law of the United States should show what the particular crime was. Id.

In a prosecution under R. S. § 5392, post, § 10,295, an averment in the indictment "that a report was made to the comptroller of the currency, and verified, as aforesaid, as by law required," is sufficiently certain to sustain the indictment. U. S. v. Bartow (C. C. 1882) 10 Fed. 873.

In an indictment for perjury in swearing to an affidavit, it is not necessary that it should appear that the officer before whom the oath was taken wrote a jurat or memorandum of the transaction on the instrument, but it is sufficient, after setting out the affidavit, to allege that the defendant, being duly sworn, did depose and say that the same was true: and the fact may be proved by parol. U. S. v. Hearing (C. C. 1886) 26 Fed. 744.

In an indictment for perjury, it must distinctly appear that the defendant was duly sworn. Id.

An indictment for perjury under R. S. § 5392, post, § 10,295, must allege, among other things, that the false oath was taken willfully; and an allegation that it was corruptly taken does not embrace the element of willfulness. U. S. v. Edwards (C. C. 1890) 43 Fed. 67.

"Willfully" means with design; with some degree of deliberation; and to say that false testimony was willfully given is to aver that it was given with some degree of deliberation, and not due to surprise, inadvertence, or mistake, but to design. Id.

After stating facts which constituted perjury, it was not necessary that the indictment should charge, in terms, that defendant did commit perjury. U. S. v. Wood (C. C. 1891) 44 Fed. 753.

Under R. S. § 5392, post, § 10,295, it is sufficient, in an indictment for perjury, to charge that the crime was "willfully" committed, without also using the word "knowingly." U. S. v. Pettus (C. C. 1897) 84 Fed. 791, 792.

R. S. § 5392 et seq., post, § 10295 et seq., is one of the simplest and most liberal of modern statutes relating to the offense of perjury; but it has preserved to the fullest extent the essential elements of the old crime, and the forms of indictment under it must still conform to the demands of the offense as defined in the statute. Id.

An allegation that defendant did "depose and swear" to a deposition set forth is not sufficient. U. S. v. McConaughy (D. C. 1887) 33 Fed. 168, 170.

In a prosecution for perjury in violation of R. S. § 5392, post, § 10,295, providing that every person who, having taken an oath before a competent officer, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, willfully states any material matter which he does not believe to be true, is guilty of perjury, an indictment failing to charge that defendant took an oath, alleged to be false, "willfully,"

was fatally defective. U. S. v. Lake (D. C. 1904) 129 Fed. 499.

3. Setting forth substance of charge or offense.—R. S. § 1025, post, § 1691, providing that no indictment in a federal court shall be deemed insufficient, nor the proceedings thereon be affected, by any defect in matter of form only, which shall not tend to the prejudice of defendant, does not dispense with the requirement of this section that an indictment for perjury shall set forth the substance of the offense charged. Markham v. U. S. (1895) 16 Sup. Ct. 288, 160 U. S. 319, 40 L. Ed. 441.

A count for perjury gave the name of the special examiner of the pension office before whom the alleged false oath was taken, averred that he was competent to administer an oath, and set forth the very words of his statement alleged to have been willfully and corruptly used by the accused, which was, in effect that defendant had never received any injury to the forefinger of his right hand since his discharge from the army. It further charged that such false statement was part of a deposition given and subscribed by the accused before that officer, and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions. Held, that the accused was sufficiently informed of the matter for which he was indicted, so as to meet the requirement of this section, that the substance of the charge should be set forth. Id.

This section enacts the substance of the common-law rule by requiring that an indictment for perjury must set forth the substance of the offense charged, together with the proper averment to falsify the matter wherein the perjury is assigned, and an indictment for perjury that does not set forth the substance of the offense does not authorize judgment on a verdict of guilty. Bartlett v. U. S. (1901) 106 Fed. 884, 46 C. C. A. 19.

This section does not require an indictment for perjury to show what oath was taken, but "the substance of the offense charged," "with proper averments to falsify the matter wherein the perjury is assigned." U. S. v. Walsh (C. C. 1884) 22 Fed. 644.

An indictment for perjury which charges that defendant took an oath before Judge R. in the United States district court, in open court, which oath was administered by the duly-authorized clerk, who had authority to administer the oath, in a matter then pending, that he would tell the truth, and that he did willfully and corruptly swear to material matter which is set out in the indictment, is sufficient under R. S. § 5392, post, § 10295, declaring such a person swearing to any material matter which he does not believe to be true to be guilty of perjury, and this section, providing that it shall be sufficient to set forth the substance of the offense charged, and by what court, and before whom the oath was taken, with proper averments to falsify the matter wherein the perjury is assigned. U. S. v. Cuddy (D. C. 1889) 39 Fed. 696.

4. Setting out affidavit.—In an indictment for perjury, in making an affidavit, it is unnecessary, under this section, to set out the affidavit in hæc verba. U. S. v. Law (D. C. 1892) 50 Fed. 915.

5. Time of offense.—In an indictment for perjury, the day on which the perjury was committed must be truly laid, and to lay it on the "——— day of September, 1891," is insufficient. U. S. v. Law (D. C. 1892) 50 Fed. 915.

6. Authority to administer oath.—R. S. § 2294, as amended by Act March 4, 1904 (post, § 4546), authorizes proof of homestead claims to be made before United States commissioners in the land and district in which the lands are situated. An indictment for perjury in support of a homestead claim, sworn to before a United States commissioner, alleged that the commissioner was an officer who was authorized by the laws of the United States to administer an oath and take testimony in such proceeding, and was then and there engaged in taking testimony on the application of W. to make final homestead proof, etc.; that it thereupon became material that the commissioner should be informed by the testimony whether W. had settled and resided on the land in good faith; and that, to prevent the commissioner from knowing the true facts, defendant willfully, corruptly, and falsely testified to facts specified which he did not believe to be true. Held that, under such allegations the court would take judicial notice that the commissioner had competent authority to administer the oath to defendant in the particular proceeding, and that the indictment was not, therefore, defective for failure to allege the commissioner's authority to administer the oath on which the perjury was based. Barnard v. U. S. (1908) 162 Fed. 618, 89 C. C. A. 376.

An indictment alleging the presentation of a false affidavit need not aver that the officer before whom it was taken was authorized to administer oaths. The word "affidavit," as used in the statute, relates to the form of the false paper, and not its legal character. U. S. v. Ingraham (C. C. 1892) 49 Fed. 155, judgment affirmed Ingraham v. U. S. (1894) 15 Sup. Ct. 148, 155 U. S. 434, 39 L. Ed. 213.

While averments disclosing a foundation for the commission of the offense, commonly called inducement, may be in general terms, those which charge the offense itself must be direct and specific; but the allegations of inducement must be sufficient to show that the oath was taken before a competent

tribunal, officer, or person, and in a case in which the laws of the United States authorize the oath to be taken. U. S. v. Cuddy (D. C. 1889) 39 Fed. 696, 697.

7. Setting out name and title of officer.—The indictment should set out the name and official title of the officer before whom the oath was administered. U. S. v. Wilcox (C. C. 1859) Fed. Cas. No. 16,692.

Act April 30, 1790, §§ 19, 20 (this and the following section as originally enacted), did not dispense with the necessity of such averment. Id.

8. Designation of court and oath made before it.—This section does not require that, when the false swearing is to a written instrument, it should be so stated, or that, when the court before whom the perjury was committed was properly, distinctly, and correctly set forth, the person holding the court should be named. The word "and" in this section should be construed "or." U. S. v. Walsh (C. C. 1884) 22 Fed. 644.

Where the indictment distinctly states that the application of respondent to become a citizen was before "the district court of the said United States then and there holden for the said district of Massachusetts," and that the said respondent "did then and there, in the said matter and proceeding, knowingly swear falsely and make oath before said court," it is a sufficient designation of the court, and a distinct averment that the oath was made before it. Id.

9. Materiality of oath or testimony.—Where an indictment for perjury in the execution of a pension affidavit to secure a pension for a widow averred that the affidavit stated that defendants did not think the veteran was ever married until he married the applicant, who was his surviving widow; that they were married about 1889; and that affiants were both present at the wedding—it sufficiently showed that the averments of the affidavit were material. Noah v. U. S. (1904) 128 Fed. 270, 62 C. C. A. 618.

An indictment for perjury in support of a homestead claim, sworn to before a United States commissioner, alleging that it became and was material that the commissioner should be informed by the testimony whether one W. had settled and resided on the land in good faith, sufficiently alleged that defendant's testimony so given before the commissioner was material. Barnard v. U. S. (1908) 162 Fed. 618, 89 C. C. A. 376.

In a prosecution for perjury, it must be alleged in the indictment that the matter sworn to was material, or the facts set forth as falsely or corruptly sworn to must be sufficient in themselves to show such materiality. Ammerman v. U. S. (1911) 185 Fed. 1, 108 C. C. A. 1, reversing judgment U. S. v. Ammerman (D. C. 1910) 176 Fed. 635.

An indictment for perjury, alleging that on the trial of a criminal case it was a material inquiry whether the defendants were in a certain town "during the day or night of the 28th and early in the morning of the 29th" of a certain month, and that defendant corruptly and falsely testified on said trial that two of said defendants were in another state up to 8 or 9 o'clock on the morning of the 28th, sufficiently showed that such testimony was material, although it did not specifically so allege, nor that, if true, it would exclue the guilt of the defendants on trial to whom it related; it being sufficient that such testimony was competent and its exclusion would have been error. Id.

It is unnecessary in an indictment for perjury to set forth the various circumstances which render the testimony material. Baskin v. U. S. (1913) 209 Fed. 740, 126 C. C. A. 464; Offner v. Same (1913) 209 Fed. 749, 126 C. C. A. 473.

The materiality of the facts sworn to must appear in the indictment either by averment or by a statement of facts which show their materiality. U. S. v. Cowing (C. C. 1835) Fed. Cas. No. 14,880; Same v. McHenry (C. C. 1869) Fed. Cas. No. 15,681.

A demurrer will lie to a count of an indictment for perjury when it appears that the testimony alleged to be false could not be material in the action in which it was given, under the statement of the issues as contained in such count. U. S. v. Pettus (C. C. 1897) 84 Fed. 791.

An indictment for perjury charging that defendant, in giving her testimony and making final proof of her pre-emption entry of land, falsely swore that the entry was made for her own interest and benefit, and not for any other person's benefit; that she had made actual settlement, and cultivated the land; that she had resided thereon continuously for a certain time; and that her improvements thereon were of a certain value—is demurrable, because "final" proof is not required of a pre-emption claimant; and further, because the false statements alleged are immaterial, the affidavit not having contained the matter required by statute. U. S. v. Bedgwood (D. C. 1891) 49 Fed. 54.

An indictment, alleging the false oath to have been made in final homestead proof in stating the beginning of a party's residence to have been in a certain year, without averring also that this year was the beginning of the entry, does not show the statement to be material, and is demurrable. U. S. v. Singleton (D. C. 1892) 54 Fed. 488.

An indictment for perjury must aver the facts showing the materiality of the oath in the proceeding in which it was taken. Id.

An indictment for perjury may properly allege the materiality of a false statement either by direct averment, or by an allegation of the facts from which the materiality appears as a matter of law. U. S. v. Nelson (D. C. 1912) 199 Fed. 464.

An indictment for perjury must allege that the false oath was made in evidence or testimony as to matters or facts material to the issue involved in the proceeding in which it was made, and, if the matters alleged as sworn to appear to the court not to be material, the indictment is insufficient, though it alleges that they are material. U. S. v. Rhodes (D. C. 1913) 212 Fed. 518.

An indictment for perjury committed before a referee in bankruptcy, charging that the answers to the questions put were material as to the bankrupt's financial condition and its assets and liabilities, held to sufficiently allege materiality. U. S. v. Rosenstein (D. C. 1914) 211 Fed. 738.

In common-law prosecutions the indictment must allege that the perjurious statement was material to the inquiry, which may be done by a simple allegation, or by pleading the facts from which the court may determine its materiality. U. S. v. Salen (D. C. 1914) 216 Fed. 420.

10. Assignment of perjury.—An indictment for perjury under Pen. Code, § 125, post, § 10295, held sufficient, where, after reciting the testimony given by accused, stated, "All of which statement the said (defendant) did not believe to be true." Daniels v. U. S. (1912) 196 Fed. 459, 116 C. C. A. 233.

An indictment for perjury held to charge with sufficient definiteness that the testimony of the accused, on which the indictment was predicated, was untrue. Baskin v. U. S. (1913) 209 Fed. 740, 126 C. C. A. 464; Offner v. Same (1913) 209 Fed. 749, 126 C. C. A. 473.

The indictment should charge that the oath was false, and known to be so by the witness, and that the motive was corrupt. U. S. v. Babcock (C. C. 1846) Fed. Cas. No. 14,488.

It is not necessary in an indictment under R. S. § 5392, post, § 10295, defining the crime of perjury, to allege that the oath of the defendant was "corruptly" false, but it is sufficient to describe the offense in the language of the statute. U. S. v. Hearing (C. C. 1886) 26 Fed. 744.

An indictment which charges perjury with respect to several facts sworn to by accused, and sets forth his testimony thereupon, followed by allegations that such testimony is untrue, and that accused, at the time of his testimony, did not believe such statements to be true, is insufficient, as it does not set forth the truth of the facts in respect to which he is charged with false swearing. U. S. v. Pettus (C. C. 1897) 84 Fed. 791.

It is sufficient that an indictment for perjury allege that defendant's testimony was false, and that he believed it to be false, without alleging the actual facts. U. S. v. Freed (C. C. 1910) 179 Fed. 236.

An indictment for perjury must aver the facts showing the falseness of the oath. U. S. v. Singleton (D. C. 1892) 54 Fed. 488.

Indictment alleging making of a willfully false statement, without expressly indicating it, held sufficient where preceding allegations made perfectly clear what the statement was. U. S. v. Salen (D. C. 1914) 216 Fed. 420.

11. Perjury in election contest.—A count of an indictment charging perjury, and setting forth several alleged false statements of accused as to several distinct alleged fraudulent transactions occurring at an election, is insufficient if it does not point out the particular fraudulent transaction in regard to which the accused is charged with false swearing. U. S. v. Pettus (C. C. 1897) 84 Fed. 791.

In a demurrer to an indictment for perjury committed in an election contest, counts which treat the indictment as charging fraud at the election, instead of perjury in the contest proceedings, will be overruled. Id.

12. Perjury in pension affidavit or statement.—A count for perjury gave the name of the special examiner of the pension office before whom the alleged false oath was taken, averred that he was competent to administer an oath, and set forth the very words of his statement alleged to have been willfully and corruptly used by the accused, which was, in effect, that defendant had never received any injury to the forefinger of his right hand since his discharge from the army. It further charged that such false statement was part of a deposition given and subscribed by the accused before that officer, and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions. Held that the accused was sufficiently informed of the matter for which he was indicted, so as to meet the requirement of this section, that the substance of the charge should be set forth. Markham v. U. S. (1895) 16 Sup. Ct. 288, 290, 160 U. S. 319, 40 L. Ed. 441.

R. S. § 5392, post, § 10295, declares that every person who, having taken an oath before a competent officer, and, contrary to such oath, subscribes any material matter which he does not believe to be true, is guilty of perjury. Held, in view of this section, that an indictment for perjury contained in a pension affidavit was not objectionable for failure to set out that the affidavit

was ever used by or on behalf of the applicant for whom it was made. Noah v. U. S. (1904) 128 Fed. 270, 62 C. C. A. 618.

Where an indictment for perjury, consisting in false testimony contained in a pension affidavit, charged that on a certain day there was filed in the pension office, at the instance and on behalf of Frances A. Moon, her application to be placed on the pension roll as the widow of P. R. Moon, and that defendants, while such application was pending, for the purpose and with intent to deceive the pension officers, and of fraudulently obtaining the allowance of a pension to the said Frances A. Moon, did made the affidavit set out, the indictment sufficiently showed the purpose for which the affidavit was made, though by inadvertence the affidavit was entitled as though P. R. Moon was the applicant, and the name Frances A. Moon was not found therein as the surviving widow of P. R. Moon, she being named therein as Mrs. Moon. Id.

An indictment for perjury alleged that defendant, "in a case then pending before the commissioner of pensions of the United States, being a special examiner into the merits of the pension claim of one Edwin Brackett," did falsely swear, etc. Held, that the indictment was sufficient, although it failed to allege that the B. mentioned was the same B. who in his pension claim alleged himself to have been a member of Company F, 2d R. I. volunteers. U. S. v. Wood (1891) 44 Fed. 753.

An allegation in an indictment under R. S. § 5392, post, § 10295, charging perjury in an affidavit to support a pension taken before a justice of the peace, sufficiently avers, under this section, the official character of the officer taking the affidavit, by alleging that said officer "was then and there a person having competent authority to administer said oath." The officer's special authority need not be set forth. U. S. v. Boggs (D. C. 1887) 31 Fed. 337.

13. False statement or affidavit under timber and stone act.—Indictment for making false affidavit under Timber and Stone Act June 3, 1878, c. 151, § 2, held bad. London v. U. S. (1909) 171 Fed. 82, 96 C. C. A. 186.

It is essential to the sufficiency of an indictment for perjury under Timber and Stone Act June 3, 1878, § 2, post, § 4672, providing that if any person, taking the oath prescribed, shall swear falsely in the premises, he shall be subject to all the penalties of perjury, etc., that it should allege that the act of false swearing was "willfully" done. U. S. v. Eddy (C. C. 1905) 134 Fed. 114.

An indictment for perjury, consisting of an alleged false statement sworn to by defendant for the purpose of purchasing lands as required by Timber and Stone Act June 3, 1878, § 2, post, § 4672, set out an exact copy of the statement, including the oath, and after directly alleging that the application was made to purchase the land for speculation, and not for defendant's exclusive use and benefit, as testified by him, and directly alleging the existence of a contract to transfer the title, and that defendant's sole purpose was to procure the title for the benefit of another, charged that defendant on the date specified, etc., in and by said statement in writing, verified upon his oath, before the receiver of the land office, "willfully, corruptly, feloniously, and contrary to the same oath of him," the said defendant, etc., subscribed material matters contained in the statement, which he did not then believe to be true, and which he knew were not true, in a case where a law of the United States authorized an oath to be administered, etc. Held, that such allegation of "willfulness" should be construed as a part of the charge in the indictment, and not merely as a conclusion of the pleader, within R. S. § 1025, post, § 1691, providing that no indictment, etc., shall be found insufficient by reason of a defect in matter of form only, the indictment further concluding with an allegation that defendant did willfully commit perjury, against the peace and dignity of the United States, etc. Id.

Under Timber and Stone Act June 3, 1878, § 2, post, § 4672, requiring entry statements to be verified by oath of the applicant before the register or receiver of the land office within the district where the land is situated, and section 2246, R. S., section 4494, post, authorizing such receiver or register to administer any oath required by law in connection with the entry or purchase of any tract of public lands, the courts will take judicial notice of the qualification of the receiver of the land office to administer an oath, and hence an averment of the fact is not essential to the validity of an indictment for perjury committed by false swearing in an entry statement verified before him. Id.

14. Issues, proof, and variance.—An averment in an indictment that the oath taken "was required under and by virtue of an act approved July 29, 1813, and in a matter and proceeding required by law, in order to obtain the allowance aforesaid, for said fishing vessel, it being material, and required by the act aforesaid, and by force of statutes of the said United States therein provided, etc., that the owner of said fishing vessel should swear," etc., did not restrict the testimony to evidence of an oath required by the act of 1813. U. S. v. Nickerson (1854) 58 U. S. (17 How.) 204, 15 L. Ed. 219.

On a prosecution for perjury, committed on the trial of an action, where

the indictment accurately describes the trial, the parties to it, the court in which it took place, and the term and the time at which it was tried, a variance of one day in respect to the time of commission of the offense is not material, the charge not being based on any matter of record or other written document. Matthews v. U. S. (1896) 16 Sup. Ct. 640, 161 U. S. 500, 40 L. Ed. 786.

Where an indictment for perjury charged that defendant testified that a check given by him a short time before bankruptcy for more than $1,700 was in payment of an indebtedness, whereas he did not in fact owe the payee to exceed $50, and the testimony tended to show that defendant owed the payee $200, held, that the variance was not fatal. Daniels v. U. S. (1912) 196 Fed. 459, 116 C. C. A. 233.

The sufficiency of the evidence in support of an indictment for perjury considered, under R. S. § 5392 (post, § 10295), and section 5396 (this section), with respect to the authority of the referee in bankruptcy before whom the false testimony was charged to have been given. Baskin v. U. S. (1913) 209 Fed. 740, 126 C. C. A. 464; Offner v. Same (1913) 209 Fed. 749, 126 C. C. A. 473.

Evidence considered, in a prosecution for perjury, and held not to create a material variance between the allegations of the indictment and the proof. Id.

Where an indictment charges perjury at the circuit court held on the 19th day of May, and the record shows that the court was held on the 20th of May, the variance is fatal. U. S. v. McNeal (C. C. 1813) Fed. Cas. No. 15,700.

It is only necessary to plead and prove that the alleged perjurious statement was consciously false, and it is not necessary to plead or prove the true facts to which the false statement referred. U. S. v. Salen (D. C. 1914) 216 Fed. 420.

Cited without definite application, U. S. v. Shinn (C. C. 1882) 14 Fed. 447, 451; Same v. Rhodes (C. C. 1887) 30 Fed. 431, 432; Same v. Howard (D. C. 1904) 132 Fed. 325.

§ 1688. (R. S. § 5397.) Indictment for subornation of perjury.

In every presentment or indictment for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, or any affidavit, deposition, or certificate, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed.

Act April 30, 1790, c. 9, § 20, 1 Stat. 116.

Notes of Decisions

See, also, notes under the preceding section.

Requisites and sufficiency in general. —The rigors of the ancient common law in exacting much particularization in the description of the offense of perjury and subornation of perjury have been greatly modified by this section. Nurnberger v. U. S. (1907) 156 Fed. 721, 725, 84 C. C. A. 377.

An indictment for suborning a witness to testify falsely before a United States commissioner at a hearing on a complaint under R. S. § 1014, as amended by Act Aug. 18, 1894 (ante, §§ 1674, 1678), held not fatally defective because the words "trial" and "issue" were used in referring to the hearing before the commissioner. Cohen v. U. S. (1914) 214 Fed. 23, 130 C. C. A. 417.

The crime of perjury, as defined in R. S. § 5392, post, § 10295, consists in a witness willfully stating contrary to his oath any material matter which he does not believe to be true; and while, in an indictment for subornation of perjury, under section 5393, R. S. section 10296, post, the omission of the identical word "willful" in charging the false swearing by the witness may not be fatal, the indictment must in such case contain equivalent words, themselves free from ambiguity or equivocation. Such requirement is not met by an averment that the defendant knew at the time of the subornation that the testimony to be given by the witness was "false, willful, and contrary to the oath" to be taken by the witness, which relates to the knowledge of defendant, and not to the state of mind of the witness. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

Under the settled rule that an indictment for subornation of perjury must contain all the averments necessary in one charging the crime of perjury against the witness suborned, such an indictment with respect to perjury committed in court must, by direct averment or equivalent words, show that the suborned witness was sworn to speak the truth, the whole truth, and nothing but the truth. It is not sufficient to charge that defendant procured the witness falsely upon oath to depose, etc., since such averment relates to the acts of defendant, and not of the witness; nor is the defect cured

by further expressions which assume, without stating, that the witness was sworn—such as that "when he was so sworn," or "when he so swore," he did not believe the things to which he testified to be true. Id.

Time of offense.—An indictment for subornation of perjury, which charges that the offense was committed "on the —— day of December, 1893," is defective, but, the date not being of the essence of the offense, the defect is one of form only, and is cured by section 1691, post, which provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

Designation of court wherein perjury was committed.—An indictment for subornation of perjury must designate the court in which the perjury occurred by specific averment or equivalent words. Where the caption and commencement show the court in which the indictment was found, further averments with reference to the proceedings in which the alleged perjury was committed, reciting them to have been in "said court," are not sufficient. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

Stating name of defendant.—Indictment charging subornation of perjury before federal grand jury need not state name of specified defendant under examination. Hendricks v. U. S. (1912) 32 Sup. Ct. 313, 223 U. S. 178, 56 L. Ed. 394.

Materiality of testimony.—Indictment charging subornation of perjury before federal grand jury held not too indefinite for failing to specify in what way perjured testimony became material. Hendricks v. U. S. (1912) 32 Sup. Ct. 313, 223 U. S. 178, 56 L. Ed. 394.

An indictment for subornation of perjury must show that the testimony of which the perjury is predicated was material, either by an averment in terms that it was material or by stating facts showing its materiality. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

Falsity of testimony and knowledge thereof.—An indictment for subornation of perjury (Act March 3, 1825, § 13), averring that defendant did feloniously, knowingly, and willingly procure B. to swear falsely in the taking of an oath, etc., but not averring that B. knowingly and willingly swore falsely, is bad on demurrer. U. S. v. Wilcox (C. C. 1859) Fed. Cas. No. 16,693.

An indictment for subornation of perjury must aver that defendant knew that the testimony which he instigated the suborned witness to give was false, and that, in giving such testimony, the witness would commit the crime of perjury. U. S. v. Dennee (C. C. 1877) Fed. Cas. No. 14,947.

Indictments for subornation of perjury, in procuring witnesses to testify falsely with respect to the identity of a defendant with persons conducting business under different names, construed, and held to sufficiently negative the truthfulness of the testimony given, although they did not affirmatively aver what the truth was. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

Perjury in relation to public lands.—Any doubt as to whether the allegations of an indictment charging a conspiracy to suborn the commission of perjury in proceedings to purchase public land under the timber and stone act embrace a conspiracy to suborn perjury in respect to the making of final proofs, as well as in making the original applications, must be resolved in favor of the accused. Williamson v. U. S. (1908) 28 Sup. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

An indictment for subornation of perjury in procuring another to make a false oath or affidavit before the receiver of a land office to secure an entry of land, which avers that such oath or affidavit was made in support of "a certain application in writing to enter under the homestead laws of the United States, subject to entry at said land office," certain land described, is sufficient after verdict as showing that the land described was at the time public land of the United States subject to homestead entry at such land office. Nurnberger v. U. S. (1907) 156 Fed. 721, 84 C. C. A. 377.

Where an indictment for conspiracy to induce certain persons to commit perjury in the making of public land entries alleged that the acts were knowingly done, and that defendants knew that the entrymen were applying to purchase the lands on speculation, and not in good faith, to appropriate the same to their exclusive use and benefit, the indictment was not fatally defective for failure in terms to allege that such acts were "willfully" committed under R. S. § 1025, post, § 1691, providing that no indictment found or presented by a grand jury in any District or Circuit Court of the United States shall be deemed insufficient for any defect in matter of form not tending to defendant's prejudice. Nickell v. U. S. (1908) 161 Fed. 702, 88 C. C. A. 562, judgment affirmed on rehearing (1909) 167 Fed. 741, 93 C. C. A. 229, and writ of certiorari denied (1909) 29 S. Ct. 699, 214 U. S. 517, 53 L. Ed. 1064.

The defendant was indicted for procuring S. to commit perjury in taking an oath in support of an application for land under the timber-culture act, and it was alleged in the indictment that the defendant knew that S. did not make the application for his own use and benefit, but for that of the defend-

ant, and did not intend to cultivate the land, or in anywise comply with said act. Held, on motion in arrest of judgment, that such allegation was the legal equivalent of the allegation that the defendant knew that S. would and did swear willfully and falsely in taking said oath, and would and did thereby commit perjury. U. S. v. Thompson (C. C. 1887) 31 Fed. 331.

The indictment charged that defendant did solicit, suborn, and procure an unknown person assuming and pretending to be M., who then and there took an oath administered by the register of local land office, she, the said person, not believing the same to be true, as defendant then and there well knew, and that she did take the oath, signed and subscribed the affidavit, not believing it to be true, all of which defendant well knew. It also set out the substance of the affidavit, and alleged wherein it was false. Held clearly sufficient. Babcock v. U. S. (C. C. 1888) 34 Fed. 873.

An indictment for subornation in procuring false affidavits to be subscribed before the register and receiver of a local land office need not aver that such officers were competent to administer an oath, as the court will take judicial notice that they are, under the statute, so authorized. Id.

Where an indictment for subornation of perjury alleged that M., the person alleged to have been suborned, falsely, feloniously, and willfully swore to matters set forth in an application to purchase public lands, and alleged that he did not make the application in good faith, but on speculation, under a contract with defendant respecting title, and that defendant knew that M. had made a contract by which the title he might acquire should inure to defendant's benefit, and that he did not believe to be true the matters he procured M. to swear to, but knew them to be false and untrue, it sufficiently charged that M. knew the statements made by him were false, and that defendant knew that M. had knowledge of the falsity thereof. U. S. v. Cobban (C. C. 1905) 134 Fed. 290.

Where an indictment charged that defendant corruptly suborned and procured M. to appear before R., receiver of the United States land office within the district where certain timber land applied for was situated, and to make and subscribe before him a certain oath to a certain statement in writing, and the statement included in the indictment appeared to have been made at the land office in M., Mont., June 26, 1899, and the receiver's certificate appended to the statement was subscribed and sworn to before him June 26, 1899, the indictment was not demurrable for failure to state the time or place of the commission of the offense. Id.

Where an indictment for subornation of perjury with reference to a sworn application to purchase public lands alleged that the person suborned appeared before R., who was then and there a receiver of the United States land office within the district where the land was situated, which appeared by the statement, which was a part of the indictment, to be M., Mont., the indictment sufficiently alleged the office held by R. Id.

R. S. §§ 5392, 5393, post, §§ 10,295, 10,296, declares that every person who, having taken an oath before a competent officer, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, willfully and contrary to the oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and every person who procures another to commit any perjury is guilty of subornation of perjury. Held that, where an indictment charged that defendant induced C to make application for the purchase of timber lands, as authorized by Act June 3, 1878, post, § 4671 et seq. and in the furtherance of such application to make a false oath at the time of final entry with reference to the good faith of the application, which the register of the land office was authorized to administer by R. S. § 2246, post, § 4494, and by the regulations of the land department, it sufficiently charged the offense of subornation of perjury. U. S. v. Brace (D. C. 1907) 149 Fed. 869.

§ 1689. (R. S. § 1023.) Matters set forth in prosecutions for perjury before a naval court-martial.

In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court.

Act July 17, 1862, c. 204, § 1, art. 13, 12 Stat. 604.

§ 1690. (R. S. § 1024.) Charges which may be joined in one indictment shall be so joined.

When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same

class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162.

A similar provision, relating to the offenses of bigamy and polygamy, made by Act March 22, 1882, c. 47, § 4, 22 Stat. 31, was incorporated in Crim. Code, § 315, post, § 10488.

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See, also, notes under §§ 1691 and 10,385, post.

1. Joinder of counts on offenses in general.—See Blitz v. U. S. (1894) 14 Sup. Ct. 924, 926, 153 U. S. 308, 38 L. Ed. 725.

Crimes against the United States committed in Alaska, and not included in offenses contained in the Alaskan Penal Code, such as violations of R. S. § 5209, post, § 9772, relating to national banks, are governed by Code Cr. Proc. Alaska, § 43, relating to indictments rather than by this section permitting joinder in one indictment of separate charges arising out of the same transaction or offense. Summers v. U. S. (1913) 34 S. Ct. 38, 231 U. S. 92, 58 L. Ed. 137, reversing judgment (1913) 202 Fed. 457, 120 C. C. A. 563.

A retrospective operation which would validate indictments found before its enactment, will not be given to Alaska Act of April 26, 1913, amending Code Cr. Proc. Alaska, § 43, so as to permit joinder of two or more crimes of the same class in one indictment in separate counts. Id.

Where numerous counts are all based on transactions of the same class, their joinder is proper. Gardes v. U. S. (1898) 87 Fed. 172, 30 C. C. A. 596, certiorari denied (1898) 19 S. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179.

Where two or more criminal acts are connected together or are transactions of the same class of crime, they may be joined in one indictment in separate counts; but, when this is done, the court, where it sees that the defense of accused may be embarrassed, may require the government to elect on which of the counts it will proceed. Chadwick v. U. S. (1905) 141 Fed. 225, 72 C. C. A. 343.

The joinder of several offenses in one indictment is a matter resting largely in the discretion of the trial court, but the multiplication of offenses must not be so great as to tend to confound accused in his defense, or to prejudice him as to his challenges in the matter of being held out to be habitually criminal, to the distraction of the attention of the jury. Morris v. U. S. (1908) 161 Fed. 672, 88 C. C. A. 532.

Where several acts denounced as a statutory crime are charged conjunctively, the indictment is not duplicitous, and a conviction may be had on proof of either act. Ackley v. U. S. (1912) 200 Fed. 217, 118 C. C. A. 403.

If several things are denounced by a statute creating an offense, connected with the disjunctive "or," they must be connected in the indictment by the conjunctive "and." Id.

Two or more counts for misdemeanor may be joined in one indictment. U. S. v. Porter (C. C. 1812) Fed. Cas. No. 16,072.

A count for a misdemeanor and one for a felony cannot be joined in the same indictment. U. S. v. Sharp (C. C. 1815) Fed. Cas. No. 16,265.

It is not a misjoinder of offenses in different counts unless they belong to different families, or the judgments and punishments are inconsistent with each other. U. S. v. Peterson (C. C. 1846) Fed. Cas. No. 16,037.

Offenses of the same class may be included in the same indictment. U. S. v. O'Callahan (C. C. 1855) Fed. Cas. No. 15,910; Same v. Fox (C. C. 1868) Fed. Cas. No. 15,156.

Several offenses of the same class or kind, growing out of the same transaction, though committed at different times, may be joined in the same indictment against the same person, in separate counts, and such joinder is no ground for demurrer or arrest of judg-

ment. U. S. v. Nye (C. C. 1880) 4 Fed. 888; Same v. Wentworth (C. C. 1882) 11 Fed. 52.

Separate offenses of the same class and growing out of the same transactions may be joined in one indictment in separate counts, provided they are such as may be "properly joined." Ex parte Peters (C. C. 1880) 12 Fed. 461.

Where two distinct offenses are each set out in adequate terms, an indictment is bad for duplicity, and neither allegation can be rejected as surplusage. U. S. v. Patty (D. C. 1880) 2 Fed. 664.

Recognizing the general rule that two distinct independent offenses cannot be alleged in one count in an indictment, nevertheless it may occur in a given case that the two supposed offenses may be so regarded as successive acts in one transaction as to constitute really but one offense. U. S. v. Fero (D. C. 1883) 18 Fed. 901.

When two or more distinct offenses are joined in one indictment, under this section, or two or more indictments therefor are consolidated, the jury may find the defendant guilty of one charge and not of another, and may find a verdict as to one or more of the charges and be discharged from the consideration of the remainder, on which the defendant may be thereafter tried as if a jury had not been impaneled in the case; and the defendant may be sentenced to receive the maximum punishment for each offense. Ex parte Hibbs (D. C. 1886) 26 Fed. 421.

The words "several charges against any person for the same act or transaction," are a legislative recognition, in the courts of the United States, of the practice of incorporating several counts in an indictment for the same offense, to meet the evidence as it may transpire. U. S. v. Howell (D. C. 1895) 65 Fed. 402, 405.

Successive sentences may be imposed on one convicted of several offenses included in the indictment. Ex parte Sternaman (D. C. 1896) 77 Fed. 595, affirmed (1897) 80 Fed. 883, 26 C. C. A. 214.

A count of an indictment charging one person with the commission of an offense as principal, and another as aiding and abetting its commission, is not open to the objection that it constitutes two separate counts, one against each defendant, because the formal closing, "contrary to the form of the statute," etc., is used at the close of each charge. The charges in such case are properly joined in one count, and the use of the formula at the close of the charge against the principal is surplusage, and will be disregarded. U. S. v. Berry (D. C. 1899) 96 Fed. 842.

Where a sentence did not exceed the punishment authorized on the conviction on one of the counts of the indictment which was clearly sufficient, it was not erroneous because defendant was convicted on two counts, one of which was unsustainable, though the judgment record recited that the sentence imposed was for both offenses. Ex parte Gouyet (D. C. 1909) 175 Fed. 230.

This statute permits separate offenses of the same class and growing out of the same transactions to be joined in one indictment in separate counts. Anderson v. Moyer (D. C. 1912) 193 Fed. 499.

Offense growing out of the same transactions and of the same class may be joined in separate counts in one indictment. U. S. v. Patterson (D. C. 1912) 201 Fed. 697.

An indictment under Harrison Anti-Narcotic Act (section 6287h, post), charging physician with failure to preserve duplicate of order for drugs specified and failure to keep record of the amount dispensed held not duplicitous. U. S. v. Charter (D. C. 1915) 227 Fed. 831.

Where a general demurrer is interposed to an indictment containing two counts, the demurrer is properly overruled if one of the counts only is sufficient. Miller v. U. S. (1895) 6 App. D. C. 6.

2. Common-law rule and alteration thereof.—In this section, which authorizes the joinder in one indictment of charges, and the consolidation of indictments, against the same person for the same act or transaction, or for two or more acts or transactions connected together, or of the same class of crimes or offenses "which may be properly joined," it is not intended by the latter phrase to limit the joinder or consolidation to charges which might have been joined at common law, but merely to vest the trial court with discretion to refuse to permit a joinder or consolidation where it would prevent a fair trial or be unjust to the defendant. Dolan v. U. S. (1904) 133 Fed. 440, 69 C. C. A. 274.

At common law, and by this section, several distinct misdemeanors may be joined in the same indictment. Any objection to such misjoinder, as matter of form merely, is disposed of by section 1691, post. U. S. v. Nye (C. C. 1880) 4 Fed. 888.

At common law, while separate and distinct felonies could not be joined, yet a misjoinder did not destroy the validity of the indictment. The prosecutor might nolle, or the court would compel him to elect which of the felonies he would proceed upon. Id.

This section does not alter the common-law rule that the accused shall not be tried at the same time for different offenses; and an indictment charging the accused in one count with carrying on the business of a retail liquor dealer without having paid the special tax, and in another with dealing in manufactured tobacco without pay-

ment of the special tax, will be quashed. U. S. v. Gaston (D. C. 1886) 28 Fed. 848.

It is not only such offenses as could have been joined in a single indictment at common law as may be joined in one indictment under this section. Kidwell v. U. S. (1912) 38 App. D. C. 566.

3. Arson.—Under this section, two counts, each charging the same defendants with the burning of a different building, may be joined in an indictment for arson. U. S. v. Cardish (D. C. 1906) 145 Fed. 242.

Counts charging a defendant with attempting to burn another person's house, and with setting fire to his own property with intent to defraud an insurance company, are properly joined in the same indictment, where such offenses grow out of the same act, and it is no objection that the penalties for the two offenses are not the same. Posey v. U. S. (1906) 26 App. Div. 302.

4. Offenses against the operations of the government in general.—Under this section it is proper to join in one indictment a count for willfully and unlawfully presenting a fraudulent claim against the United States, and a second count for willfully and unlawfully using a false affidavit in the presentation of the fraudulent claim against the United States. Ingraham v. U. S. (1894) 15 Sup. Ct. 148, 149, 155 U. S. 434, 39 L. Ed. 213, affirming judgment U. S. v. Ingraham (C. C. 1892) 49 Fed. 155.

A count based on R. S. § 5421, post, § 10193, is not bad for duplicity because it charges that defendant did "make, counterfeit, forge, and cause to be made, counterfeited, and forged, a certain false affidavit," etc., for the purpose of defrauding the United States by obtaining pension money, etc. Crain v. U. S. (1896) 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

Separate indictments against the same persons under R. S. § 5427, post, § 10506, each charging them with having aided and abetted a different person in using a false certificate of citizenship as evidence of a right to vote, the acts charged being the furnishing of such false certificates for the use of such persons by the defendants, all of which were made by them at the same time, charge acts or transactions connected together, and may properly be consolidated. Dolan v. U. S. (1904) 133 Fed. 440, 69 C. C. A. 274.

An indictment under R. S. § 5438, post, § 10199, is not bad for duplicity because it charges in the same count both the making and the presenting of a false claim against the United States; the gist of the offense being the obtaining, or attempting to obtain, money from the United States by means of a fraudulent claim, and the acts charged being but different steps in the commission of such offense, although either alone is made punishable. Bridgeman v. U. S. (1905) 140 Fed. 577, 72 C. C. A. 145.

Under Act Feb. 26, 1853 (this section as originally enacted), an indictment may join several counts for offenses under Act March 3, 1823, post, § 10193, for transmitting false papers for the purpose of obtaining bounty land warrants. U. S. v. Bickford (C. C. 1859) Fed. Cas. No. 14,591.

An indictment under R. S. § 5438, post, § 10199, which makes it a criminal offense to knowingly make or present for approval to any officer of the United States any false, fictitious or fraudulent claim against the government of the United States or any department thereof, is not bad for duplicity because it charges that the accused "made and presented" such a claim. U. S. v. Franklin (C. C. 1909) 174 Fed. 161.

As the offense defined in R. S. § 5395, post, § 10248, i. e., the taking of a false oath in naturalization proceedings, is a felony, counts under that section are properly joined with counts under R. S. §§ 5425, 5427, post, §§ 10245, 10506. U. S. v. Lehman (D. C. 1889) 39 Fed. 768.

Act April 18, 1884, post, § 10196, declares that any person who, with intent to defraud either the United States or any person, falsely assumes or pretends to be an officer or employé acting under the authority of the United States, or any officer of the government thereof, and who shall take unto himself to act as such, or who shall, in such pretended character, demand or obtain from any person, or from the United States, or any department or any officer of the government thereof, any money or other valuable thing, shall be deemed guilty, etc. Held, that such statute created two offenses; the first of which included as an essential element the use of such assumed position to extort money or property by wrongfully asserting a pretended claim of the United States, and the second comprehending the extortion of money not under the guise of asserting a claim due to the United States, but including the holding out of the offender as an officer for the purpose of giving him such credit as will entitle him to successfully demand money from another for his private use, with intent to defraud; and hence an indictment charging that defendant feloniously, and with intent to defraud H., did falsely assume and pretend to be an officer acting under the authority of the United States treasury department, and did then and there feloniously, and with intent to defraud said H., take upon himself to act as such officer, and as a part of the same sentence including the charge, "and did then and there, in such assumed and pretended character as such officer, demand and receive the sum of $10," was demurrable for duplicity. U. S. v. Taylor (D. C. 1900) 108 Fed. 621.

5. Offenses against the currency, coinage, etc.—An indictment under R. S. § 5414, post, § 10318, for the forgery of an obligation of the United States with intent to defraud, is not bad for duplicity because it charges in a single count an intent to defraud both the United States and a soldier in the army, where the instrument charged to have been forged purported to be a certificate of deposit issued by the United States to the soldier. It being impossible in such case to aver or prove with certainty a specific intent to defraud either one rather than the other, the law will impute to the act an intent to defraud all who might have been thereby defrauded. Neall v. U. S. (1902) 118 Fed. 699, 56 C. C. A. 31.

Two offenses cannot be created out of the same criminal act by charging the defendant in one count with having forged a national bank note, and in another count with having forged the signatures to the same note. Logan v. U. S. (1903) 123 Fed. 291, 59 C. C. A. 476.

Where an indictment for counterfeiting alleged in one count the passing of counterfeit 5-cent pieces, and, in another count, charged defendant with possessing molds for counterfeiting 25-cent pieces, the dismissal of the latter count did not operate to withdraw from the jury evidence introduced thereunder, where such evidence was admissible to show criminal intent under the former count. Bryan v. U. S. (1904) 133 Fed. 495, 66 C. C. A. 369.

Different offenses under R. S. §§ 5431, 5434, post, §§ 10321, 10324, for which different punishments are prescribed, held properly charged in different counts, and joined in the same indictment, under this section. U. S. v. Bennett (C. C. 1879) Fed. Cas. No. 14,572.

Whether such offenses are properly joined can be determined only on a motion to quash or to compel an election. Id.

6. Offenses against the postal service in general.—See note, post, as to "Consolidation of indictments."

See, also, notes under § 10385, post.

R. S. § 5480, post, § 10385, providing that the indictment for using the mails to defraud may charge offenses to the number of three when committed in the same six calendar months, etc, is in its general effect not materially different from that of this section. Ex parte Henry (1887) 8 Sup. Ct. 142, 143, 123 U. S. 372, 31 L. Ed. 174.

In a prosecution for using the United States mails to further a scheme to defraud, in violation of R. S. § 5480, post, § 10385, an indictment charging that the scheme was to be effected by opening correspondence or communication with those persons by means of the post office, "and" by inciting them to open correspondence with a certain concern, was not objectionable for duplicity. Kellogg v. U. S. (1903) 126 Fed. 323, 61 C. C. A. 229.

R. S. § 5480, post, § 10385, prohibiting the use of mails to defraud, provides that an indictment for its violation may severally charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence. Held, that where three indictments, each charging a single offense under section 5480, post, § 10385, were consolidated as authorized by this section, and defendant was convicted of the three offenses committed within the same six calendar months, the court was entitled to sentence the defendant, in its discretion, to the full extent of the penalty provided for each offense. Hanley v. U. S. (1903) 126 Fed. 944, 61 C. C. A. 668, judgment reversed on rehearing (1904) 127 Fed. 929, 62 C. C. A. 561, and writ of certiorari denied (1904) 24 Sup. Ct. 858, 194 U. S. 634, 48 L. Ed. 1160.

A count for mailing a single copy of a circular declared by R. S. § 3893, post, § 10381, to be nonmailable, is not double merely because it alleges two reasons why the circular was nonmailable, viz., that it gave information where an obscene book might be obtained and was in itself obscene. Burton v. U. S. (1906) 142 Fed. 57, 73 C. C. A. 243.

Averments in an indictment that artifices used in furtherance of a scheme to defraud, to be carried on through the use of the mails, were intended to give one understanding of the scheme to one class of investors and another and different understanding to a different class, both being deceived and defrauded by the same artifices, do not make out two separate schemes so as to render the indictment bad for duplicity. Gourdain v. U. S. (1907) 154 Fed. 453, 83 C. C. A. 309.

An indictment under R. S. § 3893, as amended by Act Sept. 26, 1888, § 2 (post, § 10381), charging the defendant with having mailed a letter giving information where and how, and of whom and by what means, articles and things designed and intended "for the prevention of conception and for the procuring of abortion" might be obtained, does not charge two offenses. Lee v. U. S. (1907) 156 Fed. 948, 84 C. C. A. 448.

Under this section, acts of defendants mailing matter concerning a lottery or in furtherance thereof may be joined in one indictment in separate counts. Glass v. U. S. (1915) 222 Fed. 773, 138 C. C. A. 321.

R. S. § 5480, post, § 10385, imposes no stricter rule; and where an indictment under that section charges, in different counts, the commission of five separate and distinct offenses, the court may, in its discretion, permit the district attorney to nolle two of the counts, and proceed upon those remain-

ing. U. S. v. Nye (C. C. 1880) 4 Fed. 888.

Counts in an indictment under sections 3922, 3924, R. S., section 10375, post, may be properly joined, under this section, though the former be a misdemeanor and the latter a felony. U. S. v. Spintz (C. C. 1883) 18 Fed. 377.

An indictment under R. S. § 5480. post, § 10385, is not bad for duplicity for alleging that the scheme to defraud was to be effected "by opening correspondence, etc., and by inciting the person addressed to open correspondence," though the statute reads "or" inciting, etc. U. S. v. Bernard (C. C. 1898) 84 Fed. 634.

Where an indictment in several counts purported to charge in each a separate and different scheme to defraud by selling stocks on false representations, by using the post office in the mailing of a particular letter in executing each scheme, whether the scheme would prove to be one and the same for the different offenses, on which more than one of the counts were based, could not be considered on demurrer. U. S. v. Palmieri (C. C. 1909) 169 Fed. 490.

An indictment for receiving, concealing, and aiding in concealing, gold dust stolen from the mails, charges but one crime, and proof of either warrants a conviction. U. S. v. Montgomery (D. C. 1875) Fed. Cas. No. 15,800.

An indictment is bad for duplicity which charges that on a certain day, and on each secular day between that day and another day named, and on each secular day between that time and another subsequent time mentioned, there were deposited in the post office a certain number of circulars concerning a certain lottery, for the purpose of being sent by mail. U. S. v. Patty (D. C. 1880) 2 Fed. 664.

An indictment is not bad for duplicity which charges that on a certain day a certain number of circulars concerning a certain lottery were deposited at the post office to be sent by mail. Id.

An allegation that defendant "did deposit, and cause to be deposited," obscene matter in the mails, is not such duplicity as vitiates an indictment. U. S. v. Janes (D. C. 1896) 74 Fed. 545.

An indictment charging a violation of Pen. Code, § 213, post, § 10383, relating to lotteries, alleging that accused "deposited or caused to be deposited in the post office," a letter set out, held not bad for duplicity. U. S. v. Purvis (D. C. 1912) 195 Fed. 618.

Charges of misuse of the mails in furtherance of a lottery or similar scheme held properly joined in the same indictment under this section, in separate counts, though some of the counts charged a misdemeanor and others a felony. U. S. v. Ridgway (D. C. 1912) 199 Fed. 286.

It is error to consolidate two criminal prosecutions under R. S. § 5480, post, § 10385, where the several counts of the indictments present three offenses not committed within the same six calendar months, as such consolidation will, under the statute, put all of the counts contained in the two indictments in the same category as if they were separate counts of one indictment. Bass v. U. S. (1902) 20 App. D. C. 232.

7. Robbery and other offenses.—One indicted in one count for violation of R. S. § 5478, post, § 10362, and in another count for a violation of R. S. §§ 5456, 5475, post, §§ 10213, 10360, may be convicted of the offense charged in the first count without a conviction of the offense charged in the second count, or may be convicted of the offense charged in the second count without a conviction of the offense charged in the first count, and sentence may be imposed accordingly. Munson v. McClaughry (1912) 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302.

An indictment under Cr. Code, § 197, charging that defendant attempted to rob a mail clerk having mail matter in his custody, and that in the course of such attempt put the life of the clerk in jeopardy by the use of a dangerous weapon, held not bad for duplicity. Price v. U. S. (1914) 218 Fed. 149, 132 C. C. A. 1.

8. Larceny and embezzlement.—See note, post, as to "Violation of national bank act."

The embezzlement of the letters and stealing bank notes therefrom may be charged in the same count of the indictment. U. S. v. Golding (C. C. 1820) Fed. Cas. No 15,224.

A count for stealing and a count for receiving stolen goods may be contained in the same indictment. U. S. v. Prior (C. C. 1837) Fed. Cas. No. 16,092.

On an indictment in several counts against an employé of a post office for embezzling letters, if the proof conforms to the averments in one of the counts in respect of the description of the letters and of the capacity in which defendant was intrusted with them, a motion to acquit on all the counts is properly overruled, though the proof varies from the allegations in the other counts as to those particulars. Walster v. U. S. (C. C. 1890) 42 Fed. 891.

The embezzlement of several letters from a post office may be charged in separate counts of the same indictment or separate indictments therefor may be consolidated. U. S. v. Brent (D. C. 1873) Fed. Cas. No. 14,640.

Under this section, providing that, when there are several charges against a person for the same act, or for two or more acts connected together, or of the same class of crimes, which may be properly joined, the whole may be

joined in one indictment in separate counts, an indictment may contain a count under section 10213, post, relating to the felonious taking away by any one of anything belonging to the United States, and a count under section 10336, post, referring to the felonious taking and embezzlement of metals at the United States mint, though one offense be classed as larceny and the other as embezzlement, and the punishments are different. U. S. v. Jones (D. C. 1895) 69 Fed. 973.

An indictment in which a count for theft is joined with a count for embezzlement will not be held defective on appeal, where the same evidence was relied on to establish each, and the defendant could not, therefore, have been misled or prejudiced in the preparation of his defense, especially where, at the trial, the count for embezzlement was abandoned by the prosecution. Davis v. U. S. (1901) 18 App. D. C. 468.

9. Riot and assault and battery.—Riot and assault and battery may be joined in the same indictment. U. S. v. McFarlane (C. C. 1804) Fed. Cas. No. 15,675.

10. Bribery.—Under this section, where an indictment for bribery of a government officer contained eight counts, the first seven of which alleged the offer of money by the defendant to the same person in the same official relation to induce the same violation of official duty in respect to the same matter, and the other count alleges the giving of money to another official under like conditions, such counts may be properly joined. Benson v. U. S. (1906) 27 App. D. C. 331.

11. Conspiracy.—See, also, notes, post, as to "Joint indictment for same offense" and "Consolidation of indictments."

Counts charging separate conspiracies with officers of a national bank for the violation by such officers of section 9770, post, by certifying checks when the drawer did not have sufficient funds on deposit to pay the same, may be joined in the same indictment under this section, and, unless it appears that substantial rights of the defendant will be prejudiced by their trial together, the court may properly refuse to compel the government to elect between them. Chadwick v. U. S. (1905) 141 Fed. 225, 72 C. C. A. 343.

That an indictment under R. S. § 5440, post, § 10201, for conspiracy to commit an offense against the United States, shows in charging overt acts that the completed offense charged as the object of the conspiracy was committed, does not render it bad for duplicity. Stanley v. U. S. (1912) 195 Fed. 896, 115 C. C. A. 584.

The charging in a single count of an indictment under R. S. § 5440, post, § 10201, for conspiracy to commit an offense against the United States, of more than one distinct and separate overt act, is not charging separate and distinct offenses, and does not render the indictment bad for duplicity. Id.

An indictment which charges a single conspiracy to commit distinct offenses is not duplicitous. John Gund Brewing Co. v. U. S. (1913) 206 Fed. 386, 124 C. C. A. 268, modifying opinion (1913) 204 Fed. 17, 122 C. C. A. 331.

The crime of conspiracy to defraud the United States, within R. S. § 5440 post, § 10201, is not necessarily complete when the first overt act is committed; but, where it contemplates a series of acts, it is a continuing offense as to all conspirators who have not withdrawn therefrom as long as any act or acts are committed by one or more of them in furtherance of the object thereof; and such acts are not separate and distinct offenses, but a part of the substantive offense, and may be charged in the same count of an indictment, without rendering it bad for duplicity. U. S. v. Eccles (C. C. 1910) 181 Fed. 906.

There is no impropriety in joining in one indictment, under R. S. § 5440, post, § 10201, a charge of conspiracy against a private individual, and against a member of a board of examining surgeons appointed by the commissioner of pensions. U. S. v. Van Leuven (D. C. 1894) 62 Fed. 62, distinguishing Same v. McDonald (C. C. 1876) Fed. Cas. No. 15,670.

A conspiracy to defraud the United States is punishable under the statute, notwithstanding the fact that the scheme to defraud was originally devised and entered into at a time so remote that a prosecution for acts then done would be barred by limitation, when it was continuous in its operation, and overt acts have been committed thereunder within the period of limitation; and an indictment, which after reciting the original scheme, charges a conspiracy at a later date to apply it, in pursuance of which overt acts were committed, is not objectionable on the ground of duplicity. U. S. v. Greene (D. C. 1902) 115 Fed. 343.

An indictment for conspiracy, which charges a single combination or conspiracy to commit several different crimes, is not duplicitous. U. S. v. Aczel (D. C. 1915) 219 Fed. 917.

Quære whether, on a judgment of conviction of conspiracy under R. S. § 5440, post, § 10201, defining and punishing conspiracy to defraud the United States, on an indictment containing 12 counts, where the sentence on each was not greater than warranted by the conviction under the first count, the judgment of the lower court might not be sustained, even if the insufficiency of the remaining counts be conceded. Lorenz v. U. S. (1904) 24 App. D. C. 337.

Where an indictment for conspiracy to defraud the United States out of

public lands joins numerous and independent charges of conspiracy, under this section, it is within the discretion of the trial court to determine whether the defendants would be embarrassed if required to defend all the charges in one trial, and, if so, to require the prosecution to elect on which counts to proceed. Hyde v. U. S. (1906) 27 App. D. C. 362.

An indictment for conspiracy to defraud the United States out of public lands is not necessarily demurrable because it joins 42 different and independent charges of conspiracy; this section sanctioning the joinder of several charges for the same act, or two or more acts of the same class, in one indictment, not limiting the discretion of the pleader or grand jury to any number of counts. Id.

12. Conspiracy and other offenses.—See, also, note, post, as to "Consolidation of indictments."

Charges against the same defendants for conspiracy to defraud the United States, based on R. S. § 5440, post, § 10201, and for receiving money from their alleged co-conspirator for aiding to procure a contract from the government, and for services rendered in relation to the same, based on R. S. §§ 1781, 1782, post, §§ 10282, 10283, defendants being clerks in a department, and such charges all relating to the same transaction, may properly be joined in different counts in the same indictment under this section. McGregor v. U. S. (1904) 134 Fed. 187, 69 C. C. A. 477.

An indictment charging in a single count a conspiracy to evade payment of a special tax on wholesale liquor dealers imposed by R. S. § 3242, post, § 5965, and also to violate Pen. Code, § 239, post, § 10409, prohibiting C. O. D. shipments, held duplicitous. John Gund Brewing Co. v. U. S. (1913) 204 Fed. 17, 122 C. C. A. 331, opinion modified (1913) 206 Fed. 386, 124 C. C. A. 268.

The doctrine of merger does not apply to misdemeanors; and an indictment for conspiracy to defraud the revenue is good, though it charge a complete offense, in addition to the conspiracy to commit it. U. S. v. McDonald (C. C. 1876) Fed. Cas. No. 15,670.

Hindering voters at an election is a misdemeanor only, and charges for hindering, and for conspiring to hinder, at the same time and place, may be joined in the same indictment. U. S. v. Belvin (C. C. 1891) 46 Fed. 381.

Under R. S. 5508, post, § 10183, providing for the punishment of conspiracy to injure or intimidate citizens in the exercise of their civil rights, an indictment charging one with having conspired to injure, oppress, threaten, and intimidate a United States marshal and his posse, and to deprive them of their constitutional right to arrest him on legal process, and resulting in the killing of the deputy marshal, is not objectionable as charging defendant with both conspiracy and murder. U. S. v. Davis (C. C. 1900) 103 Fed. 457.

Counts for conspiracy cannot be joined with counts for murder. U. S. v. Scott (D. C. 1865) Fed. Cas. No. 16,241.

Two offenses—the conspiracy to defraud, and a knowledge of a violation of law without reporting the same—may be committed by a revenue officer, and may be joined in the same indictment. R. S. § 3169, post, § 5889. Ex parte Joyce (D. C. 1877) Fed. Cas. No. 7,556.

Under this section, counts for using the mails to defraud, in violation of R. S. § 5480, post, § 10385, and for conspiracy to commit such offense under R. S. § 5440, post, § 10201, where based upon the same transaction, may be joined in one indictment. U. S. v. Clark (D. C. 1903) 125 Fed. 92.

13. Introducing liquors into Indian country.—Where an indictment for introducing liquors into the Indian country charged defendant in the first count with aiding and abetting another, and in another count with being a principal, the counts were properly joined under this section. Rooney v. U. S. (1913) 203 Fed. 928, 122 C. C. A. 230.

14. Offenses under Sherman anti-trust law.—An indictment under Anti-Trust Law July 2, 1890, post, § 8821, charging in separate counts a combination and a conspiracy in restraint of interstate trade and an attempt to monopolize a portion of such trade, all based in the same transactions, is not bad for duplicity as to either count, on the theory that each alleged overt act set out to support the charge of conspiracy is charged as a separate offense. U. S. v. MacAndrews & Forbes Co. (C. C. 1906) 149 Fed. 823.

Under Sherman Anti-Trust Act July 2, 1890, § 2, post, § 8821, which makes it a misdemeanor to "monopolize or attempt to monopolize * * * any part of the trade or commerce among the several states or with foreign nations," monopolizing and attempting to monopolize such commerce are separate offenses and cannot be included in one count of an indictment. U. S. v. American Naval Stores Co. (C. C. 1909) 186 Fed. 592.

An indictment charging a combination in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, § 1, post, § 8820, is not bad for duplicity because it charges and enumerates different means adopted or different things done to accomplish the object of the combination. U. S. v. Swift (D. C. 1911) 188 Fed. 92.

In an indictment under the Sherman Anti-Trust Act, counts for conspiracy in restraint of interstate commerce, for conspiracy to monopolize a part of such

commerce, and for monopolizing a part of such commerce may be joined. U. S. v. Patterson (D. C. 1912) 201 Fed. 697.

Sherman Anti-Trust Law (Act July 2, 1890, c. 647) § 3, 26 Stat. 209, post, § 8822, declares that every contract, combination, and form of trust or otherwise, and conspiracy in restraint of trade or commerce in any territory of the United States, or in restraint of trade or commerce between any such territory and another, etc., are declared illegal, and that every person who shall make any such contract or engage in any such "combination or conspiracy" shall be deemed guilty of a misdemeanor. Held, that the words "combination or conspiracy" as so used were synonymous, and hence an indictment alleging that defendants entered into a "combination or conspiracy" in restraint of trade was not duplicitous as alleging two distinct offenses. Tribolet v. U. S. (Ariz. 1908) 95 P. 85.

15. Violation of internal revenue laws in general.—See note, ante, as to "Conspiracy and other offenses."

Offenses under R. S. § 3397, post, § 6207, which arise out of the same transaction, though some of them are designated as felonies and some not, may be charged in different counts of the same indictment, under this section. U. S. v. Jacoby (C. C. 1875) Fed. Cas. No. 15,462.

An indictment averring the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, "and" the concealment thereof, is not bad for duplicity, under R. S. § 3296, post, § 6038. U. S. v. Nunnemacher (C. C. 1876) Fed. Cas. No. 15,903.

16. Offenses created by oleomargarine act.—The offenses created by Oleomargarine Act Aug. 2, 1886, c. 840, 24 Stat. 209, were unknown to the common law, and are all merely statutory misdemeanors and of the same class regardless of the various penalties prescribed, and charges under its different provisions may be joined in the same indictment under this section. Morris v. U. S. (1908) 161 Fed. 672, 88 C. C. A. 532, judgment reversed on rehearing (1909) 168 Fed. 682, 94 C. C. A. 168, and writ of certiorari denied (1909) 29 S. Ct. 704, 214 U. S. 527, 53 L. Ed. 1068.

An indictment for violating Oleomargarine Act, § 17, post, § 6229, held not objectionable for duplicity in joining a charge of defrauding and a charge of attempting to defraud. May v. U. S. (1912) 199 Fed. 53, 117 C C. A. 431.

17. Extortion by informer.—The defendant was indicted and convicted for violation of section 5484, R. S., section 10315, post, providing that "every person who shall receive any money or other valuable thing under a threat of informing, or as a consideration for not informing, against any violation of any internal revenue law, shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year," etc. On a motion for arrest of judgment on the ground that the information charging the violation of the statute is bad for duplicity, in that it alleges that the defendant received money "under a threat of informing, and as a consideration for not informing," against a party who had violated the revenue law, it being argued that two independent offenses are charged, that of receiving money "under a threat of informing," and also receiving money as a consideration for not informing, held that, in this case, the two offenses as alleged should be regarded as successive acts in one transaction, thus making really but one offense, and that hence the pleading was good. Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense. U. S. v. Fero (D. C. 1883) 18 Fed. 901.

18. Violation of national bank act.—See, also, note, post, as to "Consolidation of indictments."

Crimes against the United States committed within the district of Alaska, though not included in the enumeration of offenses contained in the Alaska Penal Code, such as violations of section 9772, post, relating to national banks, are governed by the requirement of Alaska Code Cr. Proc. § 43, that the indictment must charge but one crime and in one form only, rather than by the provisions of this section, which permit the joinder in one indictment in separate counts of charges arising out of the same or connected acts or transactions, or of offenses or crimes of the same class. Summers v. U. S. (1913) 34 Sup. Ct. 38, 231 U. S. 92, 58 L. Ed. 137.

Where accused, a national bank clerk, was indicted under several counts for making false entries in the bank's books, in violation of section 9772, post, and on conviction on several counts was sentenced to imprisonment for a term less than the maximum provided for a single offense, and at least one of the counts in the indictment was sufficient, the sentence would be applied to such count, and the validity of the remaining counts regarded as immaterial. Harvey v. U. S. (1908) 159 Fed. 419, 86 C. C. A. 399.

R. S. § 5209, post, § 9772, provides that every president, director, cashier, teller, clerk, or agent of any national

banking association who willfully misapplies any of its funds with intent to injure or defraud the association, and every person who with like intent aids or abets any officer, clerk, or agent in any violation of the section shall be deemed guilty of a misdemeanor. Held, that under such section it is proper to join in a single count of the indictment a charge of willful misapplication of the bank's funds by its officers and a charge that the other defendants aided and abetted them therein, and that such joinder did not render the indictment demurrable for duplicity. Prettyman v. U. S. (1910) 180 Fed. 30, 103 C. C. A. 384.

A count in an indictment against a national bank president, charging misappropriation of a draft valued at $27,-125, was not duplicitous because of an allegation of the substitution of three worthless notes of the same amount therefor. Norton v. U. S. (1913) 205 Fed. 593, 123 C. C. A. 609.

A count in an indictment against a national bank president for misapplication of funds in the form of exchange, by paying a state bank check for $9,000 by the issuance of four drafts therefor, held, to charge a completed offense at the time the drafts were issued in payment of the check, and was therefore not duplicitous. Id.

Under this section, an indictment under R. S. § 5209, post, § 9772, charging a defendant, in different counts, with offenses against two different national banks, of each of which he was an officer, is not necessarily demurrable; but the propriety of such joinder in a given case is left to the discretion of the court, which may compel an election between the counts or direct separate trials. U. S. v. Eastman (C. C. 1904) 132 Fed. 551.

Where counts in an indictment against national bank officers in violation of R. S. § 5209, post, § 9772, in alleging the transaction claimed to have been falsely entered, described two different entries or sets of words written down in different parts of the same book or report, each count revealing a false record by double entry, such counts were double, as it does not follow that, because the debit entry of a transaction is false, the credit entry of the same transaction was also false. U. S. v. Morse (C. C. 1908) 161 Fed. 429.

Embezzlement, abstraction, and willful misapplication of the moneys, funds, etc., of a national bank, as described in section 9772, post, constitute three separate crimes or offenses, which, under this section, may be joined in one indictment, but must be stated in separate counts. U. S. v. Cadwallader (D. C. 1893) 59 Fed. 677.

Where an officer of a national bank is charged with several offenses under section 9772, post, in making at different times false entries in the books, reports, or statements of the association, such offenses may be charged in different counts of the same indictment, as provided in this section, as "acts or transactions of the same class of crimes or offenses." U. S. v. Berry (D. C. 1899) 96 Fed. 842.

An indictment under R. S. § 5209, post, § 9772, is bad, for duplicity where it charges the embezzlement, as well as the misapplication, of the "funds and credits" of a national bank by defendant as president, without setting forth any particular description of either, and without any separate statement as to the amount, either of "funds" or of "credits," so embezzled or misapplied. U. S. v. Smith (D. C. 1907) 152 Fed. 542.

Under R. S. § 5209, post, § 9772, which makes it a criminal offense for any officer or agent of a national bank to make any false entry in any book, report, or statement of the association, with intent "to injure or defraud the association, * * * or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association," a count of an indictment which charges that such a false entry was made with intent to injure or defraud, and also with intent to deceive, charges two offenses, and is bad for duplicity. U. S. v. Norton (D. C. 1911) 188 Fed. 256.

19. Violation of Elkins act.—An indictment under Elkins Act Feb. 19, 1903, post, § 8597, declaring it unlawful for a carrier to offer, grant, or give a rebate, alleging that defendant offered, granted, and gave a rebate, is not duplicitous, but charges but one offense. U. S. v. Delaware, L. & W. R. Co. (C. C. 1907) 152 Fed. 269.

Under the provision of Elkins Act Feb. 19, 1903, § 1, post, § 8597, making it an offense for an interstate carrier to "offer, grant, or give" rebates, where the transaction is completed, the substantive offense is the payment and receipt of the rebate; and an indictment therefore is not bad for duplicity because it also avers the offer or agreement pursuant to which the payment was made. U. S. v. Great Northern R. Co. (C. C. 1907) 157 Fed. 288.

An indictment charging a railroad company with the giving of rebates in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847, is not demurrable because it avers in separate counts different agreements for the granting of rebates to the same shipper and the payment of all of such rebates on the same day; it not appearing therefrom that there was but a single payment. U. S. v. Central Vermont Ry. (C. C. 1907) 157 Fed. 291.

20. Violation of white slave act.—See, also, note, post, as to "Election between counts and offenses."

A count in an indictment under Act June 25, 1910, post, § 8813, for transporting women from one state into an-

other for immoral purposes, is not bad for duplicity, because it charges the transportation of two women at the same time for the same purposes. U. S. v. Westman (D. C. 1910) 182 Fed. 1017.

21. Quashing indictment for misjoinder of counts.—It is not error for a court to deny a motion to quash an indictment because of a misjoinder of counts, where the district attorney elects to proceed on one count and enters a nolle prosequi as to the others. Rumble v. U. S. (1906) 143 Fed. 772, 75 C. C. A. 30.

Where an indictment contained two counts charging the accused with carnal knowledge of different females, the offense charged in the first count being alleged to have been committed more than six months before that charged in the second count, it is error to refuse to quash the indictment for an improper joinder of counts. Kidwell v. U. S. (1912) 38 App. D. C. 566.

22. Review of objection to joinder.—Objection to joinder of trial on two indictments held not reviewable on appeal. Myers v. U. S. (1915) 223 Fed. 919, 139 C. C. A. 399.

23. Election between counts or offenses.—The joinder, in separate counts of the same indictment, of different felonies of the same grade and class, and subject to the same punishment, does not of itself compel the court to require an election between them, but the matter rests in the court's discretion, provided the accused be not actually embarrassed in his defense by a multiplicity of charges to be tried by one jury, and there is no error in refusing to compel an election between two murders as charged when it appears that they were so closely connected in respect of time, place, and occasion that it is difficult, if not impossible, to separate the proof of one from the proof of the other. Pointer v. U. S. (1894) 14 Sup. Ct. 410, 412, 151 U. S. 396, 38 L. Ed. 208.

Where one count charges the murder to have been committed with a gun, and another charges it to have been committed "with a certain blunt instrument," and there is evidence that deceased was shot in the forehead, and also hit on the head with a hammer, the question whether the prosecution shall be compelled to elect between the counts is a matter purely within the court's discretion. Pierce v. U. S. (1896) 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454.

Where numerous counts are all based on transactions of the same class, their joinder is proper, and the refusal of the court to require the government to elect among them is not an abuse of discretion. Gardes v. U. S. (1898) 87 Fed. 172, 30 C. C. A. 596, certiorari denied (1898) 19 Sup. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179.

The general rule is that the prosecution will not be required to elect between the several counts of an indictment when they have been inserted in good faith for the purpose of meeting the evidence as it may transpire, and where the offenses charged, although technically different, are of the same general nature and substantially the same, arising out of the same transaction, and concerning which the same testimony must be relied on for a conviction. Terry v. U. S. (1903) 120 Fed. 483, 56 C. C. A. 633.

Where the different counts of an indictment, while charging different offenses, all relate to the same transaction, so that the evidence offered to sustain one is also admissible under the others, the court may properly refuse to require the government to elect between them. McGregor v. U. S. (1904) 134 Fed. 187, 69 C. C. A. 477.

A motion to require the government to elect between the counts in an indictment is addressed to the discretion of the court, and the ruling thereon is not reviewable on a writ of error in the federal courts. Id.

The government cannot be required to elect between counts which charge misdemeanors of the same class, although under some of the counts the punishment may be imprisonment in the penitentiary; but under this section such counts may be joined and tried together. Hartman v. U. S. (1909) 168 Fed. 30, 94 C. C. A. 124.

In a prosecution for violation of Food and Drugs Act June 30, 1906, post, § 8717 et seq., by misbranding, the government cannot be required to elect between counts, one of which describes the article as a drug, and the other as a food or drink, where the question is in controversy. Steinhardt Bros. & Co. v. U. S. (1911) 191 Fed. 798, 112 C. C. A. 284.

A motion to compel the government to elect between counts of an indictment is addressed to the discretion of the trial court. Rooney v. U. S. (1913) 203 Fed. 928, 122 C. C. A. 230.

Where two indictments were returned against accused for violating the White Slave Act, but he was arraigned and pleaded only as to one of them, which was handed to the jury, it was not error to require him to go to trial without an election by the district attorney as to which indictment he would move for trial, or an order of consolidation. Fullerton v. U. S. (1914) 213 Fed. 631, 130 C. C. A. 295.

In an indictment for a misdemeanor, several offenses may be joined in different counts, and the prosecution cannot be compelled to elect between them. U. S. v. Dickinson (C. C. 1840) Fed. Cas. No. 14,958; Same v. Devlin (C. C. 1868) Fed. Cas. No. 14,953.

At common law, while separate and

distinct felonies could not be joined, yet a misjoinder did not destroy the validity of the indictment. The prosecutor might nolle, or the court would compel him to elect which of the felonies he would proceed upon. U. S. v. Nye (C. C. 1880) 4 Fed. 888.

A person who breaks into a house with intent to steal therefrom, and actually steals, may be punished under separate indictments for two offenses or one, at the election of the power prosecuting him. Ex parte Peters (C. C. 1880) 12 Fed. 461.

Where indictments are found under Act June 30, 1864, both for making false returns (section 15) and for perjury (section 42), the prosecution must elect between them. U. S. v. Rumsey (D. C. 1867) Fed. Cas. No. 16,207.

Where an indictment for mailing a newspaper containing an obscene article includes a number of counts, charging as a separate offense the mailing of a copy of that issue to each of a number of persons, the objection that all the counts are for the same offense should be made by motion to require the prosecution to elect, and not by motion to quash the indictment. U. S. v. Harman (D. C. 1889) 38 Fed. 827.

Semble, that an objection that an indictment is duplicitous should be made by a motion to elect, and not by demurrer. U. S. v. Louisville & N. R. Co. (D. C. 1908) 165 Fed. 936.

Where an indictment contains several counts stating the commission of the offense in different ways, the prosecution may not be required to elect on which particular court it will proceed to trial. U. S. v. Neverson (D. C. 1880) 1 Mackey, 152.

The court may, in its discretion, direct the prosecution to elect upon which count of an indictment it will proceed, but a refusal so to do is not error. U. S. v. McBride (D. C. 1889) 7 Mackey, 371.

Whether a request by the accused in a criminal prosecution to require the government to elect on which one of several counts of the indictment the defendants should be tried should be granted depends on the special circumstances of the case, and rests in the sound discretion of the trial court. Lorenz v. U. S. (1904) 24 App. D. C. 337.

Where there are two separate offenses charged, the court is not required at the commencement of the trial to put the prosecutor to election, but should do so only when it is disclosed during the trial that the substantial rights of the accused may be prejudiced by the submission to the same jury of more than one distinct charge of crime among two or more of the same class. Lee v. U. S. (1911) 37 App. D. C. 442.

Upon the trial of an indictment charging the accused in one count with unlawful entry into the dwelling house of a named person, with intent to commit larceny, and in another count charging the accused with larceny of personal property of the same person of the value of more than $35 at the same time and place, it is not error for the trial court to deny a motion by the accused to require the prosecutor to elect upon which count of the indictment he will rely for conviction under this section. Id.

Where an indictment contained two counts charging the accused with carnal knowledge of different females, the offense charged in the first count being alleged to have been committed more than six months before that charged in the second count, it is error for the trial court to refuse to compel the government to elect upon which count it will proceed. Kidwell v. U. S. (1912) 38 App. D. C. 566.

24. Charging single offense in single count.—By the great weight of authority the prosecutor is at liberty to charge, in a single count, as a single offense, a single act or transaction in violation of law, although that act or transaction involves several similar violations of law with respect to several different persons. The application of this rule to indictments in the federal courts is not affected by the provisions of this section in relation to the joinder of several offenses in different counts of the same indictment. U. S. v. Scott (C. C. 1895) 74 Fed. 213.

25. Charging different acts as one offense.—Where deceased was first shot, and afterwards thrown into the sea, by defendant, an indictment which charges both acts in the same count, and that death resulted from both shooting and drowning, is not objectionable on the ground of duplicity. Andersen v. U. S. (1898) 18 Sup. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

Where a statute makes the commission of different acts stated disjunctively an offense, two or more or all of such acts may be embraced in a single count in an indictment, but they should be set forth conjunctively. Tiberg v. Warren (1911) 192 Fed. 458, 112 C. C. A. 596.

Where a statute makes one or more distinct acts, connected with the same transaction, indictable, they may be charged as one act. U. S. v. Sander (C. C. 1855) Fed. Cas. No. 16,219.

Where a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable as separate and distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one action as constituting one offense. U. S. v. Heinze (C. C. 1908) 161 Fed. 425.

26. Joint indictment for same offense.—Both the corporation and its agents may be joined in an indictment for violating the provisions of Elkins Act Feb. 19, 1903, post, § 8597, against rebates, under which the commission by corporate officers or agents, acting within the scope of their employment, of criminal violations of the provisions of that act, is imputed to the corporation, and the corporation subjected to criminal prosecution therefor. New York Cent. & H. R. R. Co. v. U. S. (1909) 29 S. Ct. 304, 212 U. S. 481, 53 L. Ed. 613, affirming judgment U. S. v. New York Cent. & H. R. R. Co. (C. C. 1906) 146 Fed. 298.

In an indictment, based on section 12 of Act July 7, 1838 (5 Stat. 304), against officers and employés of a steamboat for misconduct, negligence, or inattention to duties, several defendants occupying different stations of employment may be joined without showing that their acts were jointly destructive of the lives of those on board, or were joint in their commission. U. S. v. Collyer (C. C. 1855) Fed. Cas. No. 14,838.

An internal revenue officer, named as such in the indictment, cannot be jointly indicted with a private person for conspiracy to defraud the revenue. U. S. v. McDonald (C. C. 1876) Fed. Cas. No. 15,670.

To sustain a joint indictment for the same offense, it must appear that the offense wholly arose from the joint acts of all the defendants. U. S. v. McDonald (C. C. 1879) Fed. Cas. No. 15,667.

Where the nature of the offense charged is such that a joinder of offenders is permissible, the indictment is not bad because it joins two defendants. U. S. v. Bayaud (C. C. 1883) 16 Fed. 376.

Two or more persons charged with an offense in its nature several are not indictable jointly. U. S. v. Kazinski (D. C. 1855) Fed. Cas. No. 15,508.

Two persons composing a partnership, who make and sign, in their partnership names, a false return to the assessor, may be jointly indicted. U. S. v. McGinnis (D. C. 1866) Fed. Cas. No. 15,678.

In Missouri, the duties of judges and clerks of election are several and not joint duties, and a joint indictment for neglect of duty is bad. U. S. v. Davis (D. C. 1887) 33 Fed. 621.

27. Separate indictments.—Separate indictments will lie for the larceny of several cows from the same place at the same time. U. S. v. Goddard (C. C. 1834) Fed. Cas. No. 15,220.

28. Consolidation of indictments.—See, also, notes, ante, as to "Joinder of counts or offenses in general," "Alteration of common-law rule," and "Election between counts or offenses."

Defendant by failing to object at the trial to the consolidation of indictments against others for an unlawful conspiracy with indictments against himself for the same crime, waived the point. Logan v. U. S. (1892) 12 Sup. Ct. 617, 627, 144 U. S. 263, 36 L. Ed. 429.

This section does not authorize the consolidation of indictments in such a way that some defendants may be tried at the same time with other defendants charged with an additional crime different from that for which all are tried. McElroy v. U. S. (1896) 17 Sup. Ct. 31, 164 U. S. 76, 41 L. Ed. 355.

Two indictments against the same person, charging him with extorting money on different occasions from two different persons, under color of his office, may be consolidated, under this section. Williams v. U. S. (1897) 18 Sup. Ct. 92, 95, 168 U. S. 382, 42 L. Ed. 509.

Two indictments for cutting government timber, in each of which two persons are jointly charged, may be consolidated under this section, allowing the consolidation of indictments where all the counts in all the indictments might have been included in one indictment in the first instance. Turner v. U. S. (1895) 66 Fed. 280, 13 C. C. A. 436.

Where indictments against two persons for cutting timber from government land contrary to R. S. § 2461, post, § 4980, are consolidated, and the jury returns a single verdict fixing the amount of damages, the court is justified in assessing against each separately the triple damages authorized by the statute, and is not required to impose a joint penalty. Id.

The action of the court in consolidating indictments is not open to attack on a habeas corpus proceeding. Howard v. U. S. (1896) 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

Where several indictments are consolidated for the purpose of trial, they are to be considered as one indictment containing several counts, and a general verdict of guilty will be sustained, if any one of the indictments is good, provided the sentence does not exceed the punishment which could be imposed on such indictment. Porter v. U. S. (1898) 91 Fed. 494, 33 C. C. A. 652.

Error in the consolidation of indictments cannot be inquired into in habeas corpus proceedings, since such writ cannot serve as a writ of error, where a court has acted within its jurisdiction. De Bara v. U. S. (1900) 99 Fed. 942, 40 C. C. A. 194.

Where two indictments of the same defendants are based on cognate statutes and relate to the same transaction, they may properly be consolidated. Haynes v. U. S. (1900) 101 Fed. 817, 42 C. C. A. 34.

Defendants who interpose no objection to the consolidation of indictments

when made cannot object for the first time after judgment. Id.

This section does not provide for trying indictments given, but only that the court may order them to be consolidated. Betts v. U. S. (1904) 132 Fed. 228, 65 C. C. A. 452.

Indictments against the same person for conspiracy to defraud the United States by means of illegal entries of public lands by different persons are for the same class of offenses and may properly be consolidated for trial, under this section. Olson v. U. S. (1904) 133 Fed. 849, 67 C. C. A. 21.

Separate indictments against the same defendant may, in the discretion of the court, be tried together to avoid unnecessary delay and expense when the accused is not thereby confounded in his defense or otherwise prejudiced. Brown v. U. S. (1906) 143 Fed. 60, 74 C. C. A. 214, writ of certiorari denied (1906) 26 Sup. Ct. 765, 202 U. S. 620, 50 L. Ed. 1174.

Indictments charging offenses of the same nature and degree and based on the same statute may be consolidated for trial under this section. Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642.

This section authorizes the consolidation for trial of indictments for using the mails to defraud under R. S. § 5480, post, § 10385, notwithstanding the fact that such indictments charge offenses not committed within the same six months and which could not be joined in one indictment under the latter section, and in the aggregate more than the three offenses which may be so joined. Booth v. U. S. (1907) 154 Fed. 836, 83 C. C. A. 552.

The consolidation of indictments for trial is a matter within the sound discretion of the trial court, which will not be interfered with by an appellate court unless it has been abused or manifest injustice has been done. Lemon v. U. S. (1908) 164 Fed. 953, 90 C. C. A. 617.

Where the judgment and sentence under all the consolidated indictments on which accused was tried were the same and ran concurrently, the judgment would not be reversed on appeal if any of the indictments were good and sustained by the proof. Billingsley v. U. S. (1910) 178 Fed. 653, 101 C. C. A. 465.

Where indictments for misdemeanors were consolidated under this section, defendant is entitled to but three peremptory challenges under section 1264, ante. Kharas v. U. S. (1911) 192 Fed. 503, 113 C. C. A. 109.

This section held to authorize the consolidation for trial of indictments for using the mails to defraud under R. S. § 5480, post, § 10385, though the indictment charged offenses not committed within the same six months and in the aggregate charged more than three offenses. Emanuel v. U. S. (1912) 196 Fed. 317, 116 C. C. A. 137.

Under this section a provision providing for the consolidation of several indictments is not limited to charges against a single person, but also embraces charges against several defendants. Id.

This section authorizes the consolidation for trial of indictments under R. S. § 5480, post, § 10385, charging separate offenses by using the mails in carrying out the same scheme to defraud. Marshall v. U. S. (1912) 197 Fed. 511, 117 C. C. A. 65.

Where defendants accused of violating the National Bank Act applied for a consolidation of the indictments against them, they were only entitled thereafter to 10 peremptory challenges. Kettenbach v. U. S. (1913) 202 Fed. 377, 120 C. C. A. 505.

Certain defendants, having applied for a severance as to them and for a consolidation of their indictments under this section, held not entitled after conviction to object to such consolidation. Id.

Where indictments and all of the counts thereof charged accused as president of a national bank with acts of the same character and degree of offense, the court was authorized to order consolidation for trial by this section. Norton v. U. S. (1913) 205 Fed. 593, 123 C. C. A. 609.

Indictments containing in several counts charges of conspiracy to commit a crime against the United States, to wit, the transportation of dynamite and nitroglycerin in passenger trains and cars in interstate commerce, and transportation by defendants either as principals or aiders, or abettors, of dynamite and nitroglycerin in such cars and trains in interstate commerce, held to charge separate and not interdependent offenses, and hence were properly consolidated for trial. Ryan v. U. S. (1914) 216 Fed. 13, 132 C. C. A. 257.

Under Act Feb. 26, 1853, separate indictments against different persons could not be consolidated, although the offense was joint, and they might have been jointly indicted. U. S. v. Durkee (C. C. 1856) Fed. Cas. No. 15,008.

Separate indictments against the same defendants, charging severally conspiracy to defraud the United States, embezzlement from the United States, and presenting false claims against the United States, where the alleged object of all of the acts charged was the misappropriation of a fund appropriated by Congress to be expended in a specified river and harbor improvement, relate to the same transaction, within the meaning of this section, and may properly be consolidated for trial thereunder, where it will facilitate the trial and will not be to the prejudice of defendants. U. S. v. Greene (D. C. 1906) 146 Fed. 781.

The consolidation of indictments authorized by this section is only in cases where the offenses charged in separate indictments are such that they might

have been embraced in separate counts in one indictment. Miller v. U. S. (1912) 38 App. D. C. 361.

The appellate court will correct an abuse of the trial court's discretion while acting under this section, authorizing the trial court in a proper case to order indictments consolidated. Kidwell v. U. S. (1912) 38 App. D. C. 566.

Consolidation for trial under this section, providing for the joining of several charges in one indictment, and authorizing the trial court in a proper case to order indictment consolidated is within the discretion of the trial court. Id.

It is doubtful whether separate and distinct felonies, involving different parties, and not arising out of the same transaction, or dependent upon the same proof, should ever be consolidated; but, in any event, it should not be permitted where the crimes charged are of such a different nature that the jury might regard one as corroborative of the other, when in fact no corroboration exists. Id.

Under the provision for consolidation when there are several charges against one person for two or more of the same class of crimes in two or more indictments, four indictments containing counts charging a bank officer with making a false report to the comptroller of the currency, and in making false entries in the books of the bank, may be consolidated. U. S. v. Folsom (1894) 7 N. M. 532, 38 Pac. 70.

Cited without definite application, Ex parte De Bara (1900) 21 Sup. Ct. 110, 112, 179 U. S. 316, 45 L. Ed. 207; Hanley v. U. S. (1903) 126 Fed. 944, 945, 61 C. C. A. 668; Post v. U. S. (1905) 135 Fed. 1, 67 C. C. A. 569; Walker v. Same (1907) 152 Fed. 111, 81 C. C. A. 329; Greene v. Same (1907) 154 Fed. 401, 85 C. C. A. 251 (certiorari denied [1907] 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357); Brimie v. Same (1912) 200 Fed. 726, 119 C. C. A. 170; U. S. v. Aucarola (C. C. 1880) 1 Fed. 676, 677; Same v. Stone (C. C. 1881) 8 Fed. 232, 253; Same v. Malone (C. C. 1881) 9 Fed. 897, 900; Same v. Martin (D. C. 1886) 28 Fed. 812, 814; Same v. Kilsey (D. C. 1890) 42 Fed. 882, 889; Ex parte Peeke (D. C. 1906) 144 Fed. 1016 (affirmed [1907] 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. [N. S.] 314); U. S. v. Norton (D. C. 1911) 188 Fed. 256; Waters v. U. S. (1896) 31 Ct. Cl. 307.

§ 1691. (R. S. § 1025.) Indictments; defects of form.

No indictment found and presented by a grand jury in any district [or circuit] or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Act June 1, 1872, c. 255, § 8, 17 Stat. 198.

The words of this section inclosed in brackets, "or circuit," became inoperative on the abolition of the circuit courts and the transfer of their powers and duties to the district courts, by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

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See, also, notes under Const. Amend. 5. and title 69a, post.

I. Defects or imperfections in matters of form in general.—Objections that the indictment failed to show the organization of the court, or who were present as constituent parts thereof, when the indictment was returned, that there was no express recital that it was found by the concurrence of 12 jurors; and that it was signed by the assistant district attorney, instead of by the attorney himself, are immaterial, when the record shows that at the term of the district court the grand jurors of the United States in and for said district came into open court and through their foreman, presented the bill of indictment, indorsed "A true bill," with the signature of the foreman immediately thereunder. Caha v. U. S. (1894) 14 Sup. Ct. 513, 516, 152 U. S. 211, 38 L. Ed. 415.

Where there is a demurrer to a count in an indictment, which is overruled, the objection is not covered by this section or cured by the verdict. Moore v. U. S. (1895) 16 Sup. Ct. 294, 297, 160 U. S. 268, 40 L. Ed. 422.

Mere formal objections to the indictment, not affecting substantial rights of the accused, are too late when not specifically pointed out in the demurrer, or otherwise taken advantage of upon the trial. Holmgren v. U. S. (1910) 30 Sup. Ct. 588, 591, 217 U. S. 509, 54 L. Ed. 591, 19 Ann. Cas. 778, affirming judgment (1907) 156 Fed. 439, 84 C. C. A. 301.

Omission of any averment in indictment charging a conspiracy to introduce liquors into the Indian territory, that the conspiracy was to introduce such liquors from without the state, is not a defect in form to be ignored under this section. Joplin Mercantile Co. v. U. S. (1915) 35 Sup. Ct. 291, 236 U. S. 531, 59 L. Ed. 705, affirming judgment (1914) 213 Fed. 926, 131 C. C. A. 160.

This section has almost universally been construed to mean mere matters of form should not avail a criminal, if the bill charges the offense in such a way as to fully inform him of the violation of law with which he is charged, and protect him, in the event of acquittal or conviction, against a second trial for the same offense. MacDaniel v. U. S. (1898) 87 Fed. 324, 326, 30 C. C. A. 670, writ of certiorari denied (1898) 19 Sup. Ct. 885, 171 U. S. 689, 43 L. Ed. 1179.

In view of this section, it was held that an indictment is not to be deemed insufficient, though not entirely grammatical, where it contains a substantial accusation of crime, and its averments furnish the accused with such a description of the charge against him as would enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause. Hume v. U. S. (1902) 118 Fed. 689, 55 C. C. A. 407, writ of certiorari denied (1903) 23 Sup. Ct. 850, 189 U. S. 510, 47 L. Ed. 923.

A defect in matter of form only is immaterial. O'Hara v U. S. (1904) 129 Fed. 551, 64 C. C. A. 81.

While vital defects in an indictment are always available to accused, objections not affecting the real merits of the case will be overruled, under this section. Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied (1908) 29 S. Ct. 685, 212 U. S. 576, 53 L. Ed. 657.

By failure to demur to an indictment, or enter a motion to quash, the defendant waives the right to object after verdict to matters which go merely to the form in which the offense is stated; but if some element of the offense has been omitted, which is necessary to constitute the crime attempted to be charged, advantage may be taken of it, even after verdict. Hardesty v. U. S. (1909) 168 Fed. 25, 93 C. C. A. 417.

Under this section an objection to an indictment held not available to accused convicted thereunder. Hedderly v. U. S. (1912) 193 Fed. 561, 114 C. C. A. 227.

An indictment, without regard to rigid adherence to form, is good if it substantially charges the particular offense for which defendant is about to be or has been tried. Tapack v. U. S. 220 Fed. 445, 137 C. C. A. 39.

The informal averment of facts necessary to show the illegal quality of the writing in an indictment under R. S. § 3894, post, § 10383, providing that no letter or circular concerning lotteries, shall be carried in the mail, is cured by verdict, and will not sustain a motion in arrest of judgment. U. S. v. Noelke (C. C. 1880) 1 Fed. 426, 431.

The rule that where an averment,

which is necessary for the support of the pleading, is imperfectly stated, and the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused, then, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict, applies with full force to a case where, although there has been no verdict of guilty, there has been a plea of guilty. U. S. v. Bayaud (C. C. 1883) 16 Fed. 376.

Defects or imperfections in matters of form only, which do not tend to the prejudice of accused, are not matters on which an indictment may be held insufficient. U. S. v. Strobach (C. C. 1883) 48 Fed. 902, 907.

No defect or imperfection in matter of form only, and this includes the manner of stating a fact, which does not tend to prejudice accused, will vitiate the indictment. U. S. v. Rhodes (C. C. 1887) 30 Fed. 431, 434.

This statute declares that no mere irregularity or defect in the form of the proceeding shall be ground for new trial, and is not limited to defects in the indictment alone. U. S. v. Molloy (C. C. 1887) 31 Fed. 19, 23.

An indictment for an offense against the United States election laws, which is defective in not charging an offense cognizable by the United States courts, is not aided by this section, especially where it cannot be said that the defect has not operated to defendant's prejudice. U. S. v. Morrissey (C. C. 1887) 32 Fed. 147.

The omission of the signs for dollars and cents in the recitals of the alleged false entries in reports, and misnomer of the reports, are immaterial, where the reports are set out by their tenor in the indictment, so that these discrepancies are at the most mere "matter of form," within the meaning of this section, for which the indictment is not to "be deemed insufficient." U. S. v. Potter (C. C. 1892) 56 Fed. 83, judgment reversed Potter v. U. S. (1894) 15 Sup. Ct. 144, 155 U. S. 438, 39 L. Ed. 214.

Where it is plain that substantial justice will not be promoted, nor a manifest wrong to the defendant prevented, the indictment should not be set aside on grounds of technical errors, informalities, or irregularities. U. S. v. Terry (D. C. 1889) 39 Fed. 355, 364.

This section precludes the necessity that any one of the essential averments in an indictment shall be made in any particular form, no matter how that form may be sanctioned by precedent and long usage. If the averment appears in any form, or may by fair construction be found anywhere within the text of the indictment, it is sufficient. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

Where accused has not been misled or prejudiced by any defect of form or substance in the indictment, he cannot complain of defects. U. S. v. Ammerman (D. C. 1910) 176 Fed. 635, reversed (1911) 185 Fed. 1, 108 C. C. A. 1.

2. Preliminary proceedings in general.—An indictment will not be quashed because there was no previous information, hearing, and binding over. U. S. v. Thompkins (C. C. 1812) Fed. Cas. No. 16,483; Same v. Fuers (D. C. 1870) Fed. Cas. No. 15,174.

On a motion to quash an indictment on the ground that no evidence of defendant's guilt was adduced in support of an application for a warrant for his arrest, the court cannot inquire into the sufficiency of the evidence, but may quash the indictment, where none was given. U. S. v. Shepard (D. C. 1870) Fed. Cas. No. 16,273.

It is not the policy of our criminal jurisprudence that an accused shall be permitted to escape trial on the merits of the charge against him through a mere defect in the preliminary proceedings leading up to the trial. Benson v. Palmer (1908) 31 App. D. C. 561.

3. Invalid appointment of district attorney.—Where a United States district attorney was appointed by a court having authority to make a valid appointment, and he was in the undisturbed and unquestioned exercise of the powers of such office at the time an indictment was returned, he being a de facto officer, it was no objection to the indictment that the appointment was invalid on the ground that such attorney was not a permanent resident of the district. U. S. v. Mitchell (C. C. 1905) 136 Fed. 896.

4. Selecting, summoning, and impaneling grand jury.—See, also, notes, post, as to "Averments as to grand jury and proceedings thereof" and "When and how objections may be raised."

See, also, Const. Amend. 5, and notes thereunder.

See, also, notes under § 1685, ante.

An objection that neither in the indictment nor in the proof at the hearing of pleas in abatement did it affirmatively appear that a grand juror, who was permitted to affirm instead of making oath, had conscientious scruples against taking an oath, is without merit, in view of the curative provisions of this section, and in view of the fact that the mode of ascertaining the existence or nonexistence of such scruples is committed to the discretion of the officer who affirmed the juror. Bram v. U. S. (1897) 18 Sup. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

Statutory disqualification of grand jurors cannot be regarded as a mere defect or imperfection in form, within the meaning of this section. Crowley

v. U. S. (1903) 24 Sup. Ct. 731, 736, 194 U. S. 461, 48 L. Ed. 1075.

Objections to a grand jury, based on the ground merely of irregularity in its organization, from which fact defendant has suffered no prejudice, are not viewed with favor, and will not be sustained where only raised by a motion to quash, filed more than two months after the indictment is returned, although the defendant was placed under bond to await the action of such grand jury prior to the term at which it was drawn and impaneled. Wolfson v. U. S. (1900) 101 Fed. 430, 102 Fed. 134, 41 C. C. A. 422, writ of certiorari denied (1901) 21 Sup. Ct. 919, 180 U. S. 637, 45 L. Ed. 710.

By the practice prevailing in the federal courts in North Carolina, a motion to quash an indictment is recognized as a proper method of presenting matters outside of the record equally with a plea in abatement, and under such practice an order entered by consent on the entry of a plea of not guilty, reserving to the defendant the right to take advantage, on motion in arrest of judgment or for a new trial, of all matters which could be taken advantage of on motion to quash or demurrer, gave him the right at a subsequent term, and even after trial and conviction, to file a motion to quash, on the ground that the grand jury which returned the indictment was not legally constituted. Breese v. U. S. (1906) 143 Fed. 250, 74 C. C. A. 388, reversing judgment U. S. v. Breese (D. C. 1904) 131 Fed. 915.

The objection that the grand jury which returned an indictment was not selected as required by statute, can be availed of only by a motion to quash, or by a plea, and is waived by going to trial on the merits. In any event, if matter of record and ground of error, the right to make the objection is lost by the failure to assign it on the prosecution of a writ of error. McInerney v. U. S. (1906) 147 Fed. 183, 77 C. C. A. 411.

A grand jury venire was not illegal because the names of the jurors were attached thereto instead of being inserted in the body thereof. May v. U. S. (1912) 199 Fed. 53, 117 C. C. A. 431.

Where it did not appear that two sets of grand jurors were drawn for the District and Circuit Court sitting in the Western District of Missouri, a conviction based on an indictment found by grand jurors summoned for the district court, and not for the Circuit and District Courts, was not invalid under Act May 14, 1890, § 3. Id.

Where an order was made and entered, requiring the clerk and jury commissioner to draw jurors for the succeeding term, an indictment returned by a grand jury at such succeeding term was not invalid because of failure to enter an order directing the issuance of a writ of venire facias. Breese v. U. S. (1913) 203 Fed. 824, 122 C. C. A. 142, affirming order U. S. v. Breese (D. C. 1908) 172 Fed. 761.

A previously formed and expressed opinion of defendant's guilt by one of the grand jurors who found the indictment is no ground for a plea in abatement. U. S. v. White (C. C. 1838) Fed. Cas. No. 16,679.

The mere fact that the prosecutor was a member of the grand jury which found the bill, and participated in its proceedings, is not a good ground for a plea in abatement to the indictment. U. S. v. Williams (C. C. 1871) Fed. Cas. No. 16,716.

Quære, whether the fact that an interested person caused himself and others to be nominated and placed upon the grand jury which found the bill may be pleaded in abatement. Id.

Where the accused shows that he has been prejudiced by irregularity or fraud in designating, summoning, and returning the grand jury, he has a remedy by motion to the court for relief. U. S. v. Tallman (C. C. 1872) Fed. Cas. No. 16,429.

A plea in abatement to an indictment alleging irregularities in drawing and summoning grand jurors, and want of qualification, where no prejudice is averred, is bad on demurrer. U. S. v. Tuska (C. C. 1876) Fed. Cas. No. 16,550.

The validity of an indictment is not affected when the town meeting at which grand jurors were drawn was held at the prescribed time before the session of the court, though the notice of that meeting was posted less than the number of days required by statute. U. S. v. Richardson (C. C. 1886) 28 Fed. 61.

It was not sufficient to invalidate the indictment that the marshal is ordered to summon additional grand jurors after as many as 16 of the first venire have appeared, when it appears that the jurors irregularly chosen were competent and qualified. U. S. v. Eagan (C. C. 1887) 30 Fed. 608, 611. Or that the grand jurors were sworn and impaneled the day before the date on which they were ordered to appear. U. S. v. Lewis (D. C. 1911) 192 Fed. 633. Or that grand jurors were excused by the court of its own motion, where those substituted were not disqualified. U. S. v. Jones (D. C. 1895) 69 Fed. 973.

A plea in abatement to an indictment that the names of some of the grand jurors who found the indictment were not on the last assessment roll of their respective counties, without any averment that the defendant was prejudiced thereby, is insufficient. The defect in such case is cured under this section. U. S. v. Benson (C. C. 1887) 31 Fed. 896.

Although the law may require grand jurors to be registered electors, etc.,

the fact that one of the grand jurors was illegally registered is no ground for quashing an indictment, but is such a defect only as is contemplated by this section. U. S. v. Ewan (C. C. 1889) 40 Fed. 451.

The fact that more than 24 persons were summoned to appear as grand jurors is immaterial, and does not affect the validity of an indictment. U. S. v. Mitchell (C. C. 1905) 136 Fed. 896.

The provision of Civ. Code Or. § 918, as amended by Laws Or. 1882, p. 61, that no person shall be summoned as a juror more than once in one year, applies only to petit jurors, and the fact that several grand jurors on a panel have served as petit jurors within the year past will not disqualify them, or render the indictment insufficient. U. S. v. Clark (D. C. 1891) 46 Fed. 633.

Under Pen. Code Cal. § 897, providing for the setting aside of an indictment on a ground which would have been good for challenge to a grand juror, and section 896, declaring as ground for challenge to a grand juror a state of mind which will prevent him from acting impartially, an indictment against a striker for obstructing mails and commerce will not be set aside where a grand juror had indicated sympathy with him, but thereafter, on the occasion of strikers destroying private property, said they ought to be shot. U. S. v. Clune (D. C. 1894) 62 Fed. 798.

Where the district court jury box and the circuit court box at the time of the drawing of a grand jury contain exceeding 300 names and the court directs the jury drawn from the "jury boxes," the indictment cannot be quashed on the ground that the jury box from which the jury were drawn contained less than 300 names, for, though the particular jury was drawn from one of the boxes, all of the names in both boxes may be regarded as the jury body from which the grand jury were selected. U. S. v. Greene (D. C. 1902) 113 Fed. 683.

An indictment will not be quashed on the ground that the jury box was not kept continuously in the clerk's custody, but was delivered by him to strangers, thus giving an opportunity to tamper with the jury box, where it has been the practice, when necessary at the official residence of the judge to draw a jury for another division of the district, to issue a suitable order to the clerk to transmit the jury boxes by a reliable express company, and that was done in the instance referred to in the plea. Id.

An indictment will not be quashed on the ground that no venire facias was issued by the clerk, nor filed in the clerk's office for the Eastern division of the Southern district of Georgia, until after the persons whose names were drawn had been summoned, where it is not denied that a venire facias was issued by a deputy clerk of the court having his residence in the Western division. Id.

Where jurors were lawfully chosen by jury commissioners of opposing political faiths, it is of no moment that their names were placed in the jury box by the handfuls, instead of alternately by the clerk and by the commissioner. Id.

A defect in the constitution of the grand jury is not a defect or imperfection in the matter of form within this section. U. S. v. Haskell (D. C. 1909) 169 Fed. 449.

In a prosecution for conspiracy to defraud the United States, the action of the court in refusing to permit defendant to withdraw his plea of not guilty and file a motion to quash the indictment on the ground that the grand jury was not legally formed was within the discretion of the court. U. S. v. London (D. C. 1909) 176 Fed. 976.

Objections to competency of grand jury, not made until 35 days after service of process, are waived, where the the court was open every day, except holidays, during such period. U. S. v. Louisville & N. R. Co. (D. C. 1910) 177 Fed. 780.

It is no objection to an indictment found in a federal district court that the order for the grand jury was made for the district court alone and did not summon the jurors for service in both the District and Circuit Courts. U. S. v. Lewis (D. C. 1911) 192 Fed. 633.

An indictment held vitiated by improper selection of a grand jury in violation of Act Cong. June 30, 1879; the defect not being one of form within this section. Id.

That some members of a grand jury were by order of the court summoned by the marshal from the body of the district without the drawing of names is not such an irregularity as will affect the validity of an indictment, where such members were duly qualified. U. S. v. Nevin (D. C. 1912) 199 Fed. 831.

5. Proceedings of grand jury.—See, also, note, post, as to "Averments as to grand jury and proceedings."

An objection that an indictment recited that it was presented upon the oath of the grand jurors, when in fact it was presented upon the oath of all but one, who affirmed, instead of making oath, is a merely formal defect, without prejudice, which is cured by this section. An objection that neither in the indictment nor in the prooof at the hearing of pleas in abatement did it affirmatively appear that a grand juror, who was permitted to affirm, instead of making oath, had conscientious scruples against taking an oath, is without merit, in view of this section, in view of the fact that the mode of ascertaining the existence or nonexistence of such scruples is committed to the discretion of the officer who affirmed the juror. Bram v. U. S. (1897) 18 Sup.

Ct. 183, 196, 168 U. S. 532, 42 L. Ed. 568.

An indictment need not be quashed because the grand jury considered testimony of admissions by the prisoner which were obtained under circumstances that made them incompetent. Holt v. U. S. (1910) 31 Sup. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, affirming judgment (U. S. v. Holt (C. C. 1909) 168 Fed 141.

The affidavit in support of a motion to quash an indictment on the ground that it was founded on incompetent testimony was to the effect that no other or different evidence than that given by deponent, which was objected to, was produced, or taken before the grand jury, pertaining to the question in issue, and that deponent was present "in and about the grand jury during the entire session thereof," was insufficient to show that no other testimony was introduced. Radford v. U. S. (1904) 129 Fed. 49, 63 C. C. A. 491.

The denial of a motion to quash an indictment, on the ground that it was based on incompetent evidence of essential facts before the grand jury is a matter of discretion, and is not a proper subject of exception. Id.

It is not the duty of a trial court, on a motion to quash an indictment, to investigate the character of the evidence taken by the grand jury, in order to ascertain if a portion of it was incompetent or illegal, or if it was insufficient to justify the finding of the indictment, and such matters should not be gone into unless in exceptional cases, where the ends of justice imperatively require it. McGregor v. U. S. (1904) 134 Fed. 187, 69 C. C. A. 477.

A motion to quash an indictment, based on an affidavit that the grand jury received certain incompetent evidence, is insufficient, where it is not alleged nor shown that there was not other and competent evidence on the subject upon which the indictment was based. Chadwick v. U. S. (1905) 141 Fed. 225, 72 C. C. A. 343.

It is no objection to an indictment that the assistant United States attorney, who appeared before the grand jury finding the indictment, took his oath of office the day before such appearance, and, indictment being found, resigned after holding office only six days; and it is immaterial whether the salary of such assistant was illegal, and whether he was also counsel for persons having claims against the government. Browne v. United States (1905) 145 Fed. 1, 76 C. C. A. 31, affirming judgments U. S. v. Rosenthal (C. C. 1903) 126 Fed. 766, and Same v. Cohn (C. C. 1903) 128 Fed. 615, and writ of certiorari denied (1906) 26 S. Ct. 755, 200 U. S. 618, 50 L. Ed. 623.

A grand jury can be discharged only by direct order of the court or by the final adjournment of the court for the term for which the jury is impaneled. Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied (1908) 29 S. Ct. 685, 212 U. S. 576, 53 L. Ed. 657.

The improper discharge of a grand juror will not vitiate an indictment, if the number necessary to find the indictment remained. Id.

The absence of one or more federal grand jurors, by reason of a failure to notify them of a meeting at which an indictment was found, was not sufficient to invalidate the indictment; there being present a sufficient number to find the indictment. Id.

Since the territorial courts of Oklahoma exercised a dual criminal jurisdiction, one over offenses against the United States and the other over offenses against the territory, it was not improper that the minutes of the court recited that the indictments were returned to the "United States" District Court of Logan county, Okl. T., when in fact the grand jurors were territorial grand jurors and the court a territorial court. Billingsley v. U. S. (1910) 178 Fed. 653, 101 C. C. A. 465.

That competent evidence upon which an indictment was founded, consisting of books and documents, were unlawfully seized, and produced before the grand jury, is no ground for abating the indictment. Hillman v. U. S. (1911) 192 Fed. 264, 112 C. C. A. 522, writ of certiorari denied (1912) 32 Sup. Ct. 834, 225 U. S. 699, 56 L. Ed. 1263.

An indictment for using the mails to defraud held not subject to be quashed because private books belonging to accused were wrongfully produced before the grand jury. Id.

Where an indictment was properly returned, it will be presumed that the grand jury and officials properly discharged their respective duties. Carlisle v. U. S. (1912) 194 Fed. 827, 114 C. C. A. 531.

Unless in extreme instances to prevent clear injustice, or an abuse of judicial process a defendant against whom an indictment has been returned cannot require the court to review the evidence before the grand jury to determine its sufficiency or whether incompetent evidence was received. McKinney v. U. S. (1912) 199 Fed. 25, 117 C. C. A. 403.

It cannot be pleaded in abatement to an indictment that it was founded on illegal testimony introduced before the grand jury. U. S. v. Smith (C. C. 1806) Fed. Cas. No. 16,341a.

An indictment will be quashed as irregularly found, where the grand jury received testimony of a person not under oath. U. S. v Coolidge (C. C. 1815) Fed. Cas. No. 14,858.

The court has no power to inquire into the mode in which the examination of witnesses was conducted before the grand jury, for the purpose or invalidating an indictment. U. S. v. Reed (C. C. 1852) Fed. Cas. No. 16,134.

It will, however, inquire into the competency of evidence, whether oral or documentary, and into the manner of authenticating the latter. Id.

The court cannot revise the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint. Id.

The fact that a stenographer who was in the employ of the district attorney at the latter's request attended before the grand jury, and took notes of the testimony of a witness, is no ground for quashing an indictment, as such stenographer was an assistant to the district attorney. U. S. v. Simmons (C. C. 1891) 46 Fed. 65.

The fact that the grand jury, after voting not to find an indictment, but, before reporting to the court, reconsidered their decision, and voted to find one without hearing any new evidence, is no ground for quashing the indictment. Id.

This section is applicable to improper or irregular action of persons before the grand jury, and it may be within the discretion of the court to sustain an indictment based on an investigation before the grand jury in which an attorney or person other than the district attorney has participated. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862.

Indictments based on proceedings before a federal grand jury by an unauthorized officer will be quashed. Id.

A court is not authorized to review the action of a grand jury at the instance of a defendant against whom an indictment has been returned by investigating the evidence before it either to ascertain whether all of it was competent or whether it was sufficient to justify the finding of the indictment, although it is perhaps competent to inquire into the proceedings of the grand jury under special circumstances where mistake or irregularity is charged. U. S. v. Cobban (C. C. 1904) 127 Fed. 713.

The conduct of proceedings before a grand jury by an assistant district attorney considered, and held not such as to affect the validity of indictments returned. Id.

It is within the province of a district attorney in conducting an examination by a grand jury to explain both his case and the law to the jurors, reserving to them the right, when in doubt, to call upon the court. Id.

Mere general objections that a United States district attorney who obtained an indictment against defendant was very prejudiced against him, had actively worked up feeling against him, and had been present in the grand jury room while the jury were deliberating on the indictment, etc., were insufficient to authorize the vacation of the indictment. U. S. v. Mitchell (C. C. 1905) 136 Fed. 896.

The presence in a grand jury room, during an investigation of a case which results in an indictment, of a person not authorized by law to be there is ground for quashing the indictment. U. S. v. Heinze (C. C. 1910) 177 Fed. 770.

An affidavit of defendant that he believed the grand jury acted upon incompetent or insufficient evidence in finding an indictment against him is not admissible on a motion to quash. U. S. v. Brown (D. C. 1871) Fed. Cas. No. 14,671.

It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in willful disregard of the rights of the accused, the court should interfere and quash the indictment. U. S. v. Farrington (D. C. 1881) 5 Fed. 343.

It is never proper to show how individual members of a grand jury voted, nor what they said during their investigations, though, in some instances, inquiry may be had as to what transpired before them. Id.

Courts sometimes give permission to the district attorney, or his regular assistant, to go before the grand jury when requested by the foreman, or when it seems necessary he should attend for a speedy and proper administration of justice. These officers, when before a grand jury, may properly assist in examining witnesses, may advise in matters of procedure, according to the well-settled course and practice of the courts, and may read statutes upon which bills of indictment are founded; but they cannot give opinions on questions of law in the case, or as to the weight and sufficiency of evidence. U. S. v. Kilpatrick (D. C. 1883) 16 Fed. 765.

A grand jury is a component part of the court, and is under its general supervision and control. Grand jurors may be punished for contempt, for any willful misconduct or neglect of duty, but they are independent in their actions in determining questions of fact, and no investigation can ever be made as to how a grand juror voted, or what opinions he expressed on matters before him. Id.

If a bill of indictment be found without evidence, or upon illegal evidence, or for any improper conduct of the jury, or for any improper influence brought to bear upon the jury, such matters may be pleaded in abatement, or may be grounds for quashing an indictment, but cannot be availed of by motion in arrest of judgment. Id.

It has been held a misdemeanor and high contempt of court in any individual acting as a volunteer to approach

or communicate with a grand jury in reference to any matter which either is or may come before them. No person has a right to communicate private information to a grand jury for the purpose of obtaining a presentment. Id.

The court is the only proper source from which a grand jury may obtain advice as to questions of law. No other person has a right to give a grand jury an opinion on questions of law which affect the rights of individuals or society. Id.

Allegations of facts contrary to the record, or which can be proven only by testimony of the grand jurors disclosing their proceedings, cannot properly be inquired into by plea in abatement, but the inquiry must be addressed to the discretion of the court, by suggestion or motion, and it will be allowed only in rare and extraordinary cases, where the matters, if true, work a manifest and substantial injury to the defendant. U. S. v. Terry (D. C. 1889) 39 Fed. 355.

In the United States district court, the mere refusal of the district attorney to summon witnesses for the accused at the request of the grand jury furnishes no ground for setting aside the indictment. Id.

In the United States district court, the mere fact that the district attorney was present during the expression of opinion of the grand jury upon the charge in the indictment, and during their voting thereon, is at most an irregularity, which, in the absence of averment of injury or prejudice to defendant, is a matter of form, and not of substance. Id.

The mere presence of the district attorney when the voting by the grand jury takes place is at most an irregularity, which, when there is no proof or averment of injury or prejudice to the defendant, is a matter of form, and not of substance, within this section. Id.

The fact that after a large number of witnesses had been examined by the grand jury, and the district attorney had been instructed to prepare indictments against defendants, the jury dispensed with the reading of the indictments, and returned them into court without knowing their exact contents, because of the statement made to them by the attorney that it would take three hours to read them, and that the supreme court justice wanted to leave, and wanted the indictments found before he left, affords no ground for setting aside the indictments. Id.

No person, other than a witness undergoing examination and the government attorney, can be present at the sessions of a grand jury; and an indictment should be quashed where an expert witness remained in the jury room while another witness was being examined, and put questions to him. U. S. v. Edgerton (D. C. 1897) 80 Fed. 374.

An indictment should be quashed when it appears that defendant was compelled by subpœna to attend before the grand jury, and give material testimony, without knowing that his own conduct was under investigation. Id.

A court cannot set aside an indictment for lack of evidence to support it, even in those jurisdictions where such a motion may be entertained, when there was any evidence before the grand jury on which to base it. U. S. v. Thomas (D. C. 1906) 145 Fed. 74.

Where the district attorney, at the conclusion of the evidence, without invitation from the grand jury or request for advice, made an extended address, commenting upon and reviewing the evidence for the purpose of securing an indictment, while his mere presence during the taking of the vote or during the deliberations without intending to influence any action is not necessarily fatal to an indictment returned, yet by his conduct in expressing an opinion and urging the finding of an indictment, where it is manifest that at least one defendant was indicted without substantial evidence, prejudice will be presumed, and the indictment will be quashed. U. S. v. Wells (D. C. 1908) 163 Fed. 313.

The district attorney has no right to participate in or be present during the deliberations of a grand jury, nor to express opinions on questions of fact or as to the weight and sufficiency of the evidence. Id.

The mere introduction of incompetent testimony before a grand jury is not ground for quashing an indictment returned in the matter to which such evidence related. U. S. v. Haskell (D. C. 1909) 169 Fed. 449.

An inadvertent misstatement of the law by a prosecuting officer to a grand jury is not misconduct invalidating an indictment found. Id.

The fact that during the investigation of a matter by a federal grand jury, in which an indictment was returned, the assistant district attorney, who was in the grand jury room, made stenographic notes of the testimony taken, and afterwards while the investigation was still in progress read the same to the district attorney and also to a special agent and attorney for the government, who was in consultation with him, was not a violation of any legal rights of the accused, and does not constitute ground for abatement of the prosecution. U. S. v. American Tobacco Co. (D. C. 1910) 177 Fed. 774.

An indictment for violation of the Interstate Commerce Act (post, § 8597), is not invalid and the prosecution subject to abatement because a special agent and attorney for the Interstate Commerce Commission, who had investigated the matters out of which the indictment arose, was pres-

ent at the office of the district attorney while the case was under investigation by the grand jury was consulted by him, and advised as to the witnesses and documentary evidence to be presented. Id.

Except in states having statutes on the subject, courts will not review the evidence received by a grand jury on a motion to quash, for the purpose of passing on its competency. U. S. v. Swift (D. C. 1911) 186 Fed. 1002.

An indictment held not vitiated because accused had no notice of the grand jury investigation. U. S. v. Lewis (D. C. 1911) 192 Fed. 633.

The court in a criminal case will not inquire into the evidence before the grand jury, to ascertain whether it was all competent or sufficient to warrant the indictment, and especially on a plea verified on information and belief only. U. S. v. Nevin (D. C. 1912) 199 Fed. 831.

To warrant the return of an indictment, it should be based on competent legal evidence such as is legitimate and proper before a petit jury. U. S. v. Bolles (D. C. 1913) 209 Fed. 682.

Where, in support of a motion to quash, it is shown that hearsay and incompetent testimony has been introduced before the grand jury, it is not necessary to show that the grand jury was influenced thereby to find the indictment. U. S. v. Rubin (D. C. 1914) 218 Fed. 245.

6. Sending indictment to grand jury without previous presentment.—The court may order an indictment to be sent to the grand jury without a previous presentment for the same offense. U. S. v. Madden (C. C. 1801) Fed. Cas. No. 15,705.

7. Indictment without complaint or arrest.—An indictment may be found and presented by a grand jury without a preliminary formal complaint or prior arrest. U. S. v. Baumert (D. C. 1910) 179 Fed. 735.

8. Delivery of indictment to court.—Any right to have an indictment quashed on motion because the foreman of the grand jury delivered it to the court in the absence of the other grand jurors was waived on failure to raise the question until after the term and denial of a motion to quash on other grounds. Breese v. U. S. (1912) 33 S. Ct. 1, 226 U. S. 1, 57 L. Ed. 97.

The delivery of an indictment to the court by the foreman of the grand jury in the absence of the other jurors, if a defect at all, is "in matter of form only," within the meaning of this section; it not being disputed but that the indictment was found and returned into court as a true bill. Id.

Where the record in a criminal case shows that the indictment was properly indorsed "a true bill" by the foreman of the grand jury, and was filed by the clerk on the same day, and a motion to quash, subsequently made and overruled, recited that the indictment was found a true bill and returned into open court, the defendants cannot after the lapse of 12 years attack the indictment on extrinsic evidence to show that it was not returned in open court. United States v. Breese (D. C. 1909) 172 Fed. 765.

The finding of a grand jury need not be read in open court, but it is sufficient if the bill be handed to the clerk in open court, and the entry made by him on the record. U. S. v. Butler (C. C. 1877) Fed. Cas. No. 14,700.

9. Indictment not duly found and presented.—This section has no application to an indictment not duly found and presented; the defect in such case not being one of form, but of substance. Renigar v. U. S. (1909) 172 Fed. 646, 97 C. C. A. 172, 26 L. R. A. (N. S.) 683, 19 Ann. Cas. 1117; Angle v. Same (1909) 172 Fed. 658, 97 C. C. A. 184.

10. Minutes or record of court as to finding or return of indictment.—In Mississippi it is not necessary that the minutes of the court should show the finding of the indictment, where the party is not under arrest, or on recognizance. U. S. v. Davis (D. C. 1871) Fed. Cas. No. 14,928.

Record entry of the return of an indictment, though informal and incomplete, held sufficient; the defect being one in form only. Breese v. U. S. (1913) 203 Fed. 824, 122 C. C. A. 142, affirming order U. S. v. Breese (D. C. 1908) 172 Fed. 761.

11. Requisites and sufficiency of indictment in general.—See, also, notes under Const. Amend. 5, and title 69a, post.

All the material facts and circumstances embraced in the d finition of the offense must be stated in the indictment, and the omission of any essential element cannot be supplied by intendment or implication. Pettibone v. U. S. (1893) 13 Sup. Ct. 542, 545, 148 U. S. 197, 37 L. Ed. 419.

Where common-law words or phrases are used in an indictment or information, they must be given their common-law meaning. Green v. MacDougall (1905) 26 Sup. Ct. 748, 199 U. S. 601, 50 L. Ed. 328, affirming order U. S. v. Green (D. C. 1905) 136 Fed. 618.

The accused is not entitled to demand that all special or particular means employed in the commission of the offense should be more fully set out in the indictment, where the words of such indictment directly, and without ambiguity, disclose all the elements essential to the commission of the offense charged. Burton v. U. S. (1906) 26 Sup. Ct. 688, 202 U. S. 344, 50 L. Ed. 1057.

Indictment charging shipper with accepting rebates held good. Armour Packing Co. v. U. S. (1908) 28 Sup.

Ct. 428, 436, 209 U. S. 56, 52 L. Ed. 681.

An indictment for murder which charges that the acts constituting the assault were made feloniously and with malice aforethought need not contain such allegations in the preliminary averment of assault. Holt v. U. S. (1910) 31 Sup. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, affirming judgment U. S. v. Holt (C. C. 1909) 168 Fed. 141.

It is a rule of pleading that, when the fact which is made by the statute an essential element of the crime is a collective or general one, including many, it is necessary to specify the particular thing intended to be charged. McKenna v. U. S. (1904) 127 Fed. 88, 62 C. C. A. 88.

Technical accuracy must yield to the fair and obvious meaning of the language employed, when tested by the ordinary rules of construction, and regard must be had to the necessity of punishing the guilty, as well as acquitting the innocent. Clement v. U. S (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

An indictment is fatally defective, if an essential element of the crime intended to be charged is omitted. Foster v. U. S. (1910) 178 Fed. 165, 101 C. C. A. 485; Tapack v. U. S. (C. C. A. 1915) 220 Fed. 445.

Where an indictment states an offense within any statute, it is not material that the district attorney had other statutes in mind when drawing it. Rogers v. U. S. (1910) 180 Fed. 54, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264. See, also, Williams v. U. S. (1897) 18 Sup. Ct. 92, 94, 168 U. S. 382, 389, 42 L. Ed. 509.

Since, as before, the enactment of this section and section 1687, ante, relating to indictments for perjury, every indictment for perjury in a federal court must contain allegations showing (a) judicial proceeding or course of justice; (b) that the defendant was sworn to give evidence therein; (c) the testimony given by him; (d) its falsity; and (e) its materiality to the issue or inquiry. Hogue v. U. S. (1910) 184 Fed. 245, 106 C. C. A. 387.

A demurrer to an indictment for conspiracy held not to challenge the sufficiency of the indictment, so far as it charges a conspiracy as distinguished from allegations of overt acts. Hedderly v. U. S. (1912) 193 Fed. 561, 114 C. C. A. 227.

An indictment under section 6099, post, for purchasing distilled spirits which had been removed from the distillery to a place other than the warehouse provided by law, held, at most, defective in form only, and sufficient under this section. Rosenfeld v. U. S. (1912) 202 Fed. 469, 120 C. C. A. 599.

Under this section an indictment for perjury in violation of Bankruptcy Act July 1, 1898, § 29b, which charges that defendant falsely swore that his books were burned in April, while they were in existence and in his possession up to November following, and that he knew he made a false oath, is sufficient. Kovoloff v. U. S. (1912) 202 Fed. 475, 120 C. C. A. 605.

All indictments on statutes must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it. U. S. v. Clark (C. C. 1813) Fed. Cas. No. 14,804.

An indictment charging embezzlement, which is a purely statutory crime, in a territory where there is no statutory offense by that name, is fatally defective, and will not afford a basis for an order for the removal of the accused to such territory for trial, although the acts charged constitute the offense of larceny under its statutes. In re Richter (D. C. 1900) 100 Fed. 295.

All indictments require direct, positive, and affirmative allegation of every point necessary to be proven. U. S. v. Post (D. C. 1902) 113 Fed. 852.

The objection that it is within the exclusive jurisdiction of the land department to determine questions of fact involved in the trial of an indictment for conspiracy to defraud the United States by an illegal entry of public lands cannot be raised by demurrer, where the indictment does not show that any proceeding relating to such entry is pending in the department. U. S. v. Peuschel (D. C. 1902) 116 Fed. 642.

As nothing in a criminal case can be charged by implication, intendment, or recital, every fact necessary to be proven to constitute the crime must be directly and affirmatively alleged. U. S. v. Louisville & N. R. Co. (D. C. 1908) 165 Fed. 936.

Where an indictment for conspiracy to further a scheme to defraud by means of the post office establishment stated an offense under R. S. § 5480, post, § 10385, it was immaterial that it recited that the facts showed a violation of Cr. Code, § 215. Ex parte King (D. C. 1912) 200 Fed. 622.

An indictment for a statutory offense is sufficient, if it charges the commission of the acts which the statute declares constitute the offense. U. S. v. Maxey (D. C. 1912) 200 Fed. 997.

Where an indictment under R. S. § 5479, post, § 10192, for falsely making and forging an application to the United States Civil Service Commission for examination for employment in the civil service, charged the accused by implication only with making a false answer to a question in the application, such defect was not cured by verdict, where a demurrer to the count containing it was overruled. U S. v. Johnson (1905) 26 App. D. C. 136.

12. Indictment in several counts or charging separate and distinct offenses. —See, note, post, as to "Motion to quash or set aside indictment."

See, also, notes under § 1690, ante.

A conviction on a general verdict will be sustained, even though some of the counts are faulty, if there be one good count. Clifton v. U. S. (1846) 45 U. S. (4 How.) 242, 11 L. Ed. 957; Claassen v. U. S. (1891) 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Connors v. U. S. (1895) 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033; Powers v. U. S. (1912) 32 Sup. Ct. 281, 223 U. S. 303, 56 L. Ed. 448; Dimmick v. U. S. (1902) 116 Fed. 825, 54 C. C. A. 329 (affirming judgment U. S. v. Dimmick [D. C. 1901] 112 Fed. 350, and writ of certiorari denied [1903] 23 Sup. Ct. 850, 189 U. S. 509, 47 L. Ed. 923); Milby v. Same (1903) 120 Fed. 1, 57 C. C. A. 21; Lehman v. Same (1903) 127 Fed. 41, 61 C. C. A. 577; Woods v. U. S. (1909) 174 Fed. 651, 98 C. C. A. 405 (writ of certiorari denied [1910] 30 Sup. Ct. 574, 216 U. S. 620, 54 L. Ed. 641); Botsford v. U. S. (1914) 215 Fed. 510, 132 C. C. A. 22; U. S. v. Burroughs (C. C. 1844) Fed. Cas. No. 14,695; Same v. Burns (C. C. 1849) Fed. Cas. No. 14,691; Babcock v. U. S. (C. C. 1888) 34 Fed. 873; U. S. v. Jenson (D. C. 1883) 15 Fed. 138.

Where the information contains several counts, and there is a general verdict for the informants, and no motion is made to have the government elect on which of the counts it claims a verdict, and on appeal it appears that the bill of exceptions does not contain all the evidence, it is sufficient if any one of the counts is good. Friedenstein v. U. S. (1888) 125 U. S. 224, 8 Sup. Ct. 838, 31 L. Ed. 736.

Where one good count of an indictment is sufficient to sustain the judgment, it is immaterial whether the others alleged a scienter. Dunbar v. U. S. (1895) 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

The objection that the indictment includes various offenses cannot be taken after verdict. Durland v. U. S. (1896) 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

The inclusion of more than one offense in the same count of the indictment is not ground for disturbing the verdict, if the jury were expressly told that there could be a conviction of only one of such offenses. Wiborg v. U. S. (1896) 163 U. S. 632, 16 Sup. Ct. 1127, 41 L. Ed. 289.

Where a verdict of guilty is rendered on a number of counts, a sentence which does not exceed that which may legally be imposed on any one count is supported by the indictment, if any count is good. Haynes v. U. S. (1900) 101 Fed. 817, 42 C. C. A. 34; Tubbs v. U. S. (1900) 105 Fed. 59, 44 C. C. A. 357.

In the federal courts duplicity in an indictment cannot be taken advantage of on general demurrer or motion in arrest of judgment. Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307.

Where defendants were acquitted on certain counts of an indictment and convicted on others, and the judgment imposes a punishment within the limits permissible under any one of such counts, if any of them are good it is sufficient to support the judgment. Krause v. U. S. (1906) 147 Fed. 447, 78 C. C. A. 642.

Where, in a prosecution for cutting timber from the public domain, defendant was not prejudiced by the fact that the indictment charged that he cut the timber with intent unlawfully to export and with intent to dispose of the same, the conviction could not be set aside because of such duplicity under this section. Morgan v. U. S. (1906) 148 Fed. 189, 78 C. C. A. 323, writ of certiorari denied U. S. v. Morgan (1906) 27 S. Ct. 784, 203 U. S. 595, 51 L. Ed. 333.

An objection to an indictment on the ground of duplicity cannot be raised for the first time after verdict by motion in arrest of judgment. Id.

Accused was indicted for violating the national banking act under an indictment containing 27 counts. He demurred unsuccessfully to 10 counts, and was found guilty on 24, and sentenced to a term of 8 years in the penitentiary on each count, with a provision that time should run on all concurrently. Held that, as the sentence did not exceed that which might rightfully have been imposed on any one count, defendant was not prejudiced by the overruling of his demurrer to 10 counts of the indictment. Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 189.

The objection, that an indictment is bad for duplicity must be taken by a motion to quash, demurrer, or motion to require an election, and is waived by going to trial without objection. Lemon v. U. S. (1908) 164 Fed. 953, 90 C. C. A. 617.

Where there is a general verdict of guilty on an indictment containing several counts, the fact that some of the counts are bad does not vitiate a sentence of imprisonment based on a good count, although a separate sentence for the same term is imposed on each count, when it is further provided that the terms shall run concurrently. Bartholomew v. U. S. (1910) 177 Fed. 902, 101 C. C. A. 182, writ of certiorari denied (1910) 30 S. Ct. 697, 217 U. S. 608, 54 L. Ed. 901.

The refusal of the court in a criminal case to permit the defendant to withdraw his plea and file a motion to quash on the ground of duplicity in joining counts charging different offenses, if erroneous, was without prejudice, where the government dismissed as to

one of the counts. Waller v. U. S. (1910) 179 Fed. 810, 103 C. C. A. 302, 31 L. R. A. (N. S.) 113.

Where a defendant indicted on two counts was convicted on both and given less than the maximum sentence permissible under either one, it is no ground for reversal of the judgment that one of the counts may have been defective. Kalen v. U. S. (1912) 196 Fed. 888, 116 C. C. A. 450.

Where an indictment contained counts based on two different transactions, but the counts arising out of one of the transactions were dismissed, and only those alleging the other transaction were submitted to the jury, accused was not prejudiced by the denial of a motion to quash the indictment for misjoinder of offenses. Kulp v. U. S. (1914) 210 Fed. 249, 127 C. C. A. 67.

The rule that, if a criminal act is charged in several ways and sentences run concurrently, one good count, supported by competent evidence, will sustain a general verdict of guilty does not apply where the elements involved in the offenses charged in two sets of counts are not identical. Johnson v. U. S. (C. C. A. 1914) 215 Fed. 679.

Where a duplicitous indictment was treated at the trial as charging only the offense of carrying liquor into the Indian country from without the state, it will be construed on appeal as charging only that offense. Lewellen v. U. S. (1915) 223 Fed. 18, 138 C. C. A. 432.

At common law, and by the preceding section, several distinct misdemeanors may be joined in the same indictment. Any objection to such misjoinder, as matter of form merely, is disposed of by this section. U. S. v. Nye (C. C. 1880) 4 Fed. 888.

An objection that an indictment charges two separate and distinct offenses cannot be availed of on a motion in arrest of judgment. U. S. v. Bayaud (C. C. 1883) 16 Fed. 376.

Where of two counts in an indictment one is bad, but the court does not direct a verdict of not guilty upon it, and evidence is taken which is sufficient to convict upon the other count, and a verdict of guilty is rendered, held, that judgment should be entered on the verdict. U. S. v. Walsh (C. C. 1884) 22 Fed. 644.

The objection of duplicity in an indictment comes too late after verdict and judgment. Babcock v. U. S. (C. C. 1888) 34 Fed. 873.

In a demurrer to an indictment for perjury committed in an election contest, counts which treat the indictment as charging fraud at the election, instead of perjury in the contest proceedings, will be overruled. U. S. v. Pettus (C. C. 1897) 84 Fed. 791.

Where an indictment for violating the oleomargarine regulations charged in several counts a failure to make any return for a particular month, whether such counts could be supported by evidence of the making of a false or incomplete return for that month could not be considered on a motion to quash the indictment. U. S. v. Lamson (C. C. 1909) 173 Fed. 673.

On a general verdict of guilty, the evidence will be applied to any sufficient count in the indictment, and the remaining counts will be wholly disregarded. U. S. v. Knapp (D. C. 1849) Fed. Cas. No. 15,538.

Where a verdict finds defendant "guilty on all the counts contained in the indictment," the fact that some of the counts are bad does not warrant an order arresting judgment, where some are good. U. S. v. Clarke (D. C. 1889) 40 Fed. 325.

The arrest of judgment upon some of the counts in an indictment on which the defendant was tried and found guilty because of their insufficiency necessitates the setting aside of the verdict, and the granting of a new trial as to the remaining counts, where the evidence introduced under the defective counts was such as to prejudice the defendant in his trial on the others. U. S. v. Tubbs (D. C. 1899) 94 Fed. 356.

Judgment will not be arrested on motion for insufficiency of the indictment if any one of the counts therein is good. U. S. v. McClure (D. C. 1901) 107 Fed. 268.

On trial of a writ of habeas corpus, the alleged authority for the imprisonment appeared to be the judgment and sentence of the district court of the United States, upon a conviction which appeared by the record to have been had upon two counts only in an indictment, neither of which charged an offense within the jurisdiction of the court. Held, that such judgment was coram non judice and void, notwithstanding that other counts charged an offense within such jurisdiction. In re Booth (1854) 3 Wis. 157.

13. —— Reference between counts.— One count may, to avoid repetition, refer to matter in a previous count; and, if the reference is sufficient to incorporate such matter into the count, the count will not be vitiated, even where the previous count is held defective, or is rejected. Blitz v. U. S. (1894) 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. Same (1896) 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

A reference in the first count to an election held for representative in congress may be drawn through the second count into the third by the words "at the said election," so as to make the third count sufficient, although the first count is insufficient in another particular. Id.

The first count of an indictment alleged conspiracy, and each of the other

counts presented a different overt act, but did not repeat the presentment as to the conspiracy in furtherance of which the act was committed, but did state that such act was "in further pursuance of the said unlawful conspiracy in the first count in this indictment mentioned and described," etc. Held, that repetition may properly be avoided by so referring from one count to another, and that this was a sufficient reference to the first count to incorporate the matter therein with that in the count containing the reference, without expressly stating that such matter is made a part of the latter count. Browne v. U. S. (1905) 145 Fed. 1, 76 C. C. A. 31, affirming judgments U. S. v. Rosenthal (C. C. 1903) 126 Fed. 766, and Same v. Cohn (C. C. 1904) 128 Fed. 615, and writ of certiorari denied (1906) 26 S. Ct. 755, 200 U. S. 618, 50 L. Ed. 623.

Where an indictment consists of several counts, it is not necessary to set out in full in each count matter contained in a previous count to avoid unnecessary repetition, and if a previous count be defective, or is rejected, that will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter going before with that in the count in which the reference is made. Foster v. U. S. (1910) 178 Fed. 165. 101 C. C. A. 485.

This section forbidding the court to quash an indictment for defect of form, makes it unnecessary to repeat an averment contained in the first count, where subsequent counts refer back to the first, and are thereby rendered sufficiently explicit in stating the offense. U. S. v. Peters (C. C. 1898) 87 Fed. 984.

One count in an indictment may refer to matter in a previous count for the purpose of avoiding unnecessary repetition. U. S. v. McKinley (C. C. 1903) 127 Fed. 166.

The words "said Johnson," in a second count, indicate the Johnson mentioned and described in the first count, including his status or condition as therein stated, with reference to the charge made in the indictment. U. S. v. Hendric (D. C. 1873) Fed. Cas. No. 15,346.

Allegations in the first count in an indictment may be adopted in the second one by referring to them. Id.

It is not good pleading to refer to a former count in aid of the averments of another, but it is a matter of form only, and cured by this section. U. S. v. Jolly (D. C. 1888) 37 Fed. 108.

In construing an indictment based on R. S. § 5440, post, § 10201, for conspiring to defraud the United States, on demurrer, under the liberal rule required by this section, a statement, in the first count, of the general scheme of the conspiracy, its purpose, and the intended manner of its accomplishment, and of the powers of one of the alleged conspirators as an officer of the United States, must be read into every count, whether it describes a conspiracy or an overt act. U. S. v. Greene (D. C. 1902) 115 Fed. 343.

Where several counts in an indictment for using the mails in furtherance of a lottery or similar scheme referred to the first count for a description of the scheme, they were not rendered invalid because the offense alleged in the first count was barred by limitations. U. S. v. Ridgway (D. C. 1912) 199 Fed. 286.

It is proper to incorporate in a subsequent count by reference facts alleged in a previous one by reference. U. S. v. New Departure Mfg. Co. (D. C. 1913) 204 Fed. 107.

Where, in an indictment for conspiracy containing several counts, the first count by way of introduction states the details of the alleged conspiracy, which statement is clearly meant to be applicable to all of the counts, and the remaining counts in charging conspiracy expressly refer to the same dishonest scheming and arrangement described and set forth in the first count, the omission to repeat the averments of the first count, setting out the dishonest scheme and fraud, was a defect which was cured by this section. Lorenz v. U. S. (1904) 24 App. D. C. 337.

One count of an indictment may properly refer to matter in a previous count, so as to avoid unnecessary repetition; and a charge in one count that the accused did an act under the circumstances and conditions set forth in a preceding count, "well knowing, all and singular, the premises set forth in that count," is a sufficiently full and distinct reference to the matter contained in the first count to incorporate it in the second. Benson v. U. S. (1906) 27 App. D. C. 331.

Where the second and subsequent counts of an indictment for conspiracy to defraud the United States out of public lands selected and to be selected charged that the conspiracy was entered into "under circumstances and conditions set forth in the said first count"; that the defendants conspired to defraud the United States out of the title to public lands "by obtaining from the said United States by means of the false and fraudulent practice described in the said first count," and appropriating such title for their benefit "as in the said first count set forth," and "that, in pursuance of the said unlawful conspiracy," and "to effect the object of the same," the alleged overt act was done; and that the described public lands were selected by the defendants "in pursuance of the same fraudulent practice, and in the manner and by the means in said first count set forth"—the references in such second and subsequent counts to the matter in the first count are sufficiently full to incorporate such matter into them, so as to

make unnecessary the repetition of the language of the first count in the succeeding counts. Hyde v. U. S. (1906) 27 App. D. C. 362.

14. Description of offense in general.—The requisites of an indictment in respect to the description of the offense stated. Baskin v. U. S. (1913) 209 Fed. 740, 126 C. C. A. 464; Offner v. Same (1913) 209 Fed. 749, 126 C. C. A. 473.

The offense need not be called by its statutory name where it is set out in hæc verba. Bargie v. U. S. (C. C. 1861) Fed. Cas. No. 18,229.

Anything that forms part of the description of the crime is not a matter of form. U. S. v. Conant (C. C. 1879) Fed. Cas. No. 14,844.

Precision in the description of an offense is of the last importance to the innocent, for it is that which marks the limits of the acquisition and fixes the proof of it. U. S. v. Burns (C. C. 1893) 54 Fed. 351, 360.

On a motion in arrest of judgment, on the ground that the indictment does not sufficiently describe the offense charged, defects or imperfections in matter of form only, not tending to the prejudice of the accused, will not be considered, under this section. Dufour v. U. S. (1911) 37 App. D. C. 497.

15. Certainty and particularity.—See, also, note, post, as to "Following language of statute."

An indictment in the language of the statute is not sufficient, unless it apprise the accused with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. U. S. v. Simmons (1877) 96 U. S. 360, 24 L. Ed. 819.

Where deceased was first shot, and afterwards thrown into the sea, by defendant, an indictment which charges both acts in the same court, and that death resulted from both shooting and drowning, is not objectionable on the ground of uncertainty. Andersen v. U. S. (1898) 18 Sup. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

A want of particularity in describing the offense intended to be charged is not a ground for reversing a conviction, where the indictment states the elements of the offense with sufficient particularity fully to advise defendant of the crime charged, and to enable a conviction, if had, to be pleaded in bar of a subsequent prosecution for the same offense. New York Cent. & H. R. R. Co. v. U. S. (1909) 29 Sup. Ct. 304, 308, 212 U. S. 481, 53 L. Ed. 613, affirming judgment U. S. v. New York Cent. & H. R R. Co. (C. C. 1906) 146 Fed. 298.

An indictment must allege the facts constituting the offense so clearly that the court can determine on inspection whether the facts will sustain a conviction, so as to advise the accused of the charge he has to meet, so that he can prepare his defense. Miller v. U. S. (1904) 133 Fed. 337, 66 C. C. A. 399.

Under this section, providing that, so far as possible, consistent with assuring accused a fair and impartial trial, the court shall disregard form, imperfection of statement, and unimportant defects which do not reasonably tend to prejudice accused, an indictment is sufficiently certain if it alleges facts sufficient to enable accused to make his defense, and to plead the judgment in bar of any further prosecution for the same offense. Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

Under this section an indictment is sufficiently certain if it alleges facts sufficient to enable accused to make his defense, and to plead the judgment in bar of any further prosecution for the same offense. Id.

The objection that an indictment for conspiracy to defraud the United States of certain public lands does not make it altogether clear to what lands the conspiracy related cannot be taken by a motion in arrest of judgment. Stearns v. U. S. (1907) 152 Fed. 900, 82 C. C. A. 48.

The test of the sufficiency of an indictment is not whether it might have been more certain, but whether it sufficiently apprises defendant of what he must be prepared to meet, and is sufficiently explicit to avail him on a subsequent plea of former conviction or acquittal. Hauger v U. S. (1909) 173 Fed. 54, 97 C. C. A. 372.

An indictment under R. S. § 3893, post, § 10381, charging defendant with depositing on a day named in the mail, a letter containing indecent information addressed to a person named, but which contains no copy of the letter, no averment that it could not properly be spread on the record of the court, and no allegation of its date, of the name signed to it, of the place where it was mailed, or of any marks whereby it could be identified, is insufficient on motion in arrest, because of uncertainty. Floren v. U. S. (1911) 186 Fed. 961, 108 C. C. A. 577.

On motion in arrest, as well as on demurrer, it is unnecessary to the validity of the indictment that it contain averments of the facts constituting the offense it charges, so certain that on conviction or acquittal the judgment will constitute a complete defense to a second prosecution. Id.

In a prosecution for receiving stolen stamps, knowing them to have been stolen, an indictment held demurrable for uncertainty. Naftzger v. U. S. (1912) 200 Fed. 494, 118 C. C. A. 598.

Uncertainty in an indictment is not fatal if it does not fail to charge a

crime, so that accused will not be exposed to the danger of a second prosecution. Ulmer v. U. S. (1915) 219 Fed. 641, 134 C. C. A. 127.

Many of the niceties and technicalities with reference to form in criminal pleading are no longer allowed to prevail, but there has been no relaxation of the rule with reference to certainty and clearness as to the matter charged, and where an indictment charges fraud it must aver wherein the fraud consisted, and the means by which it was effected. U. S. v. Goggin (C. C. 1880) 1 Fed. 49, 51.

Under R. S. § 5209, post, § 9772, defining and punishing the offense of making a false entry in a report with intent to deceive an agent appointed to examine the affairs of a national bank, where there is a doubt whether the indictment charges an offense within the statute, the indictment should not be quashed, but the doubt be left to be solved on a motion in arrest of judgment. U. S. v. Bartow (C. C. 1882) 10 Fed. 874.

An indictment under R. S. § 5440, post, § 10201, making it an offense to conspire either to commit any offense against the United States or to defraud the United States, must charge the act constituting the offense with reasonable certainty, and not by mere inference. U. S. v. Atlanta Journal Co. (C. C. 1911) 185 Fed. 656.

An indictment for a statutory misdemeanor need not charge the offense with the particularity of time, place, and circumstance required for a felony or a common-law offense, as defendant has a remedy by application for a rule for specifications and particulars. U. S. v. Schimer (D. C. 1870) Fed. Cas. No. 16,229.

An indictment which alleges the time as "on or about" a certain day is void for uncertainty. U. S. v. Winslow (D. C. 1875) Fed. Cas. No. 16,742.

Unreasonable strictness in the wording of an indictment ought not to be required, and where the indictment clearly charges a crime, and fairly advises the defendant what act of his is the subject of complaint, the principal object of pleading is attained. The highest degree of certainty is not required. Certainty to a common intent is sufficient. U. S. v. Fero (D. C. 1883) 18 Fed. 901.

An indictment in the words of Act Aug. 2, 1886, post, § 5967, charging defendant with knowingly, willfully and unlawfully carrying on the business of wholesale dealer in oleomargarine without having paid the special tax therefor as required by law, is not objectionable for indefiniteness. U. S. v. Joyce (D. C. 1905) 138 Fed. 455.

A charge in an indictment must be made directly, and not inferentially or by way of recital, and the indictment must be free from all ambiguity. U. S. v. Johnson (1905) 26 App. D. C. 136.

Although the allegations of an indictment might have been couched in more precise and definite terms, yet under this section, if such imperfections do not tend to the prejudice of the defendant, the indictment cannot be held to be bad. Geist v. U. S. (1906) 26 App. D. C. 594.

See U. S. v. Crittenden (Super. Ct. Ark. 1828) Fed. Cas. No. 14,890a.

16. Omission of or mistakes in matter of substance.—Where an indictment charges accused with uttering and publishing a falsely made, forged, and counterfeited obligation of the United States, but omits to allege that he knew the obligation to be false, forged, and counterfeit, the omission is of matter of substance, and not a "defect or imperfection in matter of form only," within the meaning of this section. U. S. v. Carll (1881) 105 U. S. 611, 613, 26 L. Ed. 1135.

An indictment under R. S. § 5480, post, § 10385, renders it criminal for any person, having devised a scheme or artifice to defraud other persons by inciting them to open communication with him through the post office, to place any letter in, or receive any letter from, any post office, is insufficient which only charges the offense in general language, without disclosing the particulars of the alleged scheme or artifice to defraud, and such an omission is matter of substance, and not of form, and cannot be aided or cured by the verdict. U. S. v. Hess (1888) 8 Sup. Ct. 571, 124 U. S. 483, 31 L. Ed. 516.

This section is not to be construed as permitting the omission of any matter of substance, but it is applicable where the only defect complained of is that some element of the offense is stated loosely, and without technical accuracy. An indictment under R. S. § 2865, post, § 5548, making it an offense to smuggle into the country any goods, wares, or merchandise subject to duty by law, and R. S. § 3082, post, § 5785, declaring a punishment for bringing into the country any merchandise contrary to law, or assisting in so doing, sufficiently describes the article as prepared opium, subject to duty by law, to wit, the duty of $12 per pound, where the only opium subject to duty of $12 per pound is opium containing less than 9 per cent. of morphia, and opium prepared for smoking (Act Oct. 1, 1890, § 1, par. 48), especially where no objection was made to the indictment till after verdict, and in view of this section. Dunbar v. U. S. (1895) 15 Sup. Ct. 325, 328, 156 U. S. 185, 39 L. Ed. 390.

This section does not dispense with the requirements of R. S. § 5396, ante, § 1687, that an indictment for perjury shall set forth the substance of the offense charged. Markham v. U. S. (1895) 16 Sup. Ct. 288, 291, 160 U. S. 319, 40 L. Ed. 441.

This section does not relieve the

United States from alleging in some form every matter of substance of a statutory offense. Blake v. U. S. (1895) 71 Fed. 286, 290, 18 C. C. A. 117.

While matters of substance are essential, an indictment which will enable a person of common understanding to know what is intended is sufficient. Nickell v. U. S. (1908) 161 Fed. 702, 88 C. C. A. 562.

This section cannot be construed as permitting the omission of any matter of substance, but is applicable to an indictment where the only defect is that some element of the offense is stated loosely and without technical accuracy. Harper v. U. S. (1909) 170 Fed. 385, 95 C. C. A. 555.

The provision that no indictment found by a federal grand jury shall be deemed insufficient by reason of any defect or imperfection in matter of form only, that shall not prejudice the defendant, does not permit the omission of matter of substance, but applies where the only defect complained of is that some element of the offense is stated loosely and without technical accuracy; the test being whether the indictment contains every elment of the offense intended to be charged, and sufficiently apprises accused of what he will be required to meet, and, in case other proceedings are taken against him, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Horn v. U. S. (1910) 182 Fed. 721, 105 C. C. A. 163, writ of certiorari denied (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

Mistakes in expressing the substance of a crime, if the meaning can be understood, will be looked upon as formal defects. U. S. v. Jackson (C. C. 1880) 2 Fed. 502.

Where a statute requires that an act shall be accompanied by a particular intent to make it an offense, the omission to charge that intent is one of substance, and not form only. U. S. v. Jackson (C. C. 1885) 25 Fed. 548, 550.

An indictment under R. S. § 5523, for a refusal to answer a lawful inquiry of the supervisor of elections in the verification of a registration list, must aver that such inquiries were made of the defendant at the place assigned by him in such list as his place of residence, and such omission is matter of substance, and cannot be aided by amendment under this section. U. S. v. Davis (D. C. 1881) 6 Fed. 682, 684.

17. Indictment where statute punishes common-law crime.—Where a statute declares an offense punishable, designating it merely by a common-law name, an indictment for the offense must allege facts constituting the offense at the common law. U. S. v. Crosby (C. C. 1871) Fed. Cas. No. 14,893.

18. Stating offense under later statute.—Where an indictment properly states an offense under a statute in force when the offense was committed, the validity of the indictment is in no way affected by the fact that it may also be sufficient to state an offense under a later statute carrying a heavier penalty. Wilson v. U. S. (1911) 190 Fed. 427, 111 C. C. A. 231.

19. Averment of second offense.—An averment that the prisoner was tried and convicted of larceny, as by the record of the court doth appear, is not a sufficient averment of a second offense. U. S. v. Thompson (C. C. 1833) Fed. Cas. No. 16,485.

20. Necessity of excluding every possible exemption from jurisdiction.—Where the offense is within the general jurisdiction of a court of the United States, it is not necessary that the indictment should exclude, by descriptive terms, every possible exemption of defendant from the jurisdiction. U. S. v. Demarchi (C. C. 1862) Fed. Cas. No. 14,944.

21. Charging offense in alternative.—It is not charging an offense in the alternative where the language describes the same offense. U. S. v. Potter (C. C. 1854) Fed. Cas. No. 16,077.

22. Particulars constituting or evidence of offense.—An indictment is not required to set forth matters of evidence but only ultimate matters of fact. Brown v. U. S. (1906) 143 Fed. 60, 74 C. C. A. 214, writ of certiorari denied (1906) 26 S. Ct. 765, 202 U. S. 620, 50 L. Ed. 1174.

The particulars constituting the offense are matters of evidence, and need not be pleaded. U. S. v. O'Sullivan (D. C. 1851) Fed. Cas. No. 15,974.

23. Specific averments of facts.—The truth of specific averments of facts made in a criminal information cannot be put in issue and determined on demurrer, unless the evidence necessary to such determination appears from the record or is of such character that the court may take judicial notice of it. U. S. v. Morrison (D. C. 1901) 109 Fed. 891.

24. Surplusage.—See, also, note, post, as to "Negativing exceptions in statutes or constitution."

An indictment in the words of the statute creating an offense held sufficient without the averment of the place, and the averment of place may be rejected as surplusage. U. S. v. Vickery (C. C. 1803) Fed. Cas. No. 16,619.

Unnecessary words, not altering the nature of the charge, inserted in an indictment by the grand jury, may be rejected as surplusage after verdict. U. S. v. Larkin (C. C. 1835) Fed. Cas. No. 15,561.

No allegation, whether it be necessary or unnecessary, more or less par-

ticular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage. U. S. v. Howard (C. C. 1837) Fed. Cas. No. 15,403.

Mere surplusage will not vitiate an indictment, and need not be established in proof. Id.

It is not necessary to set forth the county in which an alleged conspiracy was formed, in violation of Act March 2, 1867, § 30, post, § 10201, and it may be rejected as surplusage. U. S. v. Smith (C. C. 1869) Fed. Cas. No. 16,-322.

An indictment need not set out the law upon which the offense was founded. Such allegations cannot, though unnecessary, be rejected as surplusage, so as to allow judgment to be rendered under another statute enacted in place of the one repealed. U. S. v. Goodwin (C. C. 1884) 20 Fed. 237.

Surplusage in an indictment is not ground for quashing the same, in whole or in part. U. S. v. Moody (D. C. 1908) 164 Fed. 269.

25. Bill of particulars.—If it appears at the trial to be essential in the preparation of the defense to an indictment for receiving stolen property that defendant should know the name of the person from whom the government expects to prove that the property was received, the court may require the prosecution to give a bill of particulars. Kirby v. U. S. (1899) 19 Sup. Ct. 574, 174 U. S. 47, 43 L. Ed. 890.

Where an indictment contains three counts, to the first of which a motion to quash is overruled, and afterwards a bill of particulars is filed with the first count, which practically confines the prosecution to the more specific charges contained in the other counts, overruling the motion cannot be assigned as error. MacDonald v. U. S. (1894) 63 Fed. 426, 12 C. C. A. 339.

The office of a bill of particulars is, not to make a bad indictment good, but to give defendant, who faces a good indictment, further information. Floren v. U. S. (1911) 186 Fed. 961, 108 C. C. A. 577.

An indictment so fatally defective in its statement of the facts to constitute the offense that a judgment of conviction or acquittal thereon constitutes no defense to another prosecution for the same offense may not be cured by a bill of particulars. Id.

Where the language used in an indictment, though sufficient to state the offense intended to be charged, was such that defendants might be surprised by the production of evidence for which they were unprepared, their remedy was by an application for a bill of particulars before trial. Rimmerman v. U. S. (1911) 186 Fed. 307, 108 C. C. A. 385, writ of certiorari denied (1911) 32 Sup. Ct. 523, 223 U. S. 721, 56 L. Ed. 630.

A bill of particulars cannot cure an indictment which fails to state an essential element of the offense, but may cure a lack of specificness in an indictment which, though alleging the essential elements of the offense, is couched in such language that accused may be surprised at the trial. May v. U. S. (1912) 199 Fed. 53, 117 C. C. A. 431.

An indictment not demurrable on its face does not become so by the addition of a bill of particulars, since the bill of particulars is no part of the record. Coomer v. U. S. (1914) 213 Fed. 1, 129 C. C. A. 617.

A bill of particulars cannot cure the omission of a material averment from an indictment; but when, as in this case, the indictment shows that the description of the stamps removed is all that was within the power of the grand jury to give, and such description is sufficient to show that an offense has been committed, and when it appears of record that further and full particulars were afterwards given under the order of the court, a bill of particulars so obtained is an answer to the suggestion that the accused will not be able to identify by evidence the stamps to which the indictment refers, and plead an acquittal or conviction on such indictment in bar of a subsequent charge for the same offense. U. S. v. Bayaud (C. C. 1883) 16 Fed. 376.

An indictment charging embezzlement being so indefinite that the court was unable to understand whether it involved but a single transaction or a series of peculations, the court ordered that a bill of particulars be furnished, and continued the case to allow time to prepare it. At a subsequent term, upon the case being called for trial, the district attorney declared his inability to furnish the bill of particulars, and moved to discontinue the cause. Held, that the statement of the district attorney was equivalent to an admission of a lack of evidence to sustain the charge and the motion should be granted, notwithstanding defendant's protest and demand for a jury trial. U. S. v. Brooks (D. C. 1890) 44 Fed. 749; Same v. Harned (D. C. 1890) 44 Fed. 751.

It is not the office of a bill of particulars to cure a bad indictment, and the failure of a defendant to ask for such bill does not deprive him of the right to object to the sufficiency of the indictment by motion in arrest. U. S. v. Tubbs (D. C. 1899) 94 Fed. 356.

Where a demurrer goes both to the indictment and the bill of particulars, and is so treated by counsel on both sides, the court may so consider it to avoid a useless trial of the indictment, though the law does not require it to do so. U. S. v. Adams Exp. Co. (D. C. 1902) 119 Fed. 240.

An indictment may be so expressed as to be good on demurrer which still does not give the defendant all the informa-

tion which he should in fairness have to properly prepare for trial, and the omission may be supplied under the federal practice by a bill of particulars. U. S. v. Thompson (D. C. 1911) 189 Fed. 838.

It is not the office of an indictment to set out the evidence, but it is within the discretion of the trial court in a proper case to require the prosecution to furnish the defendants with a bill of particulars of the evidence intended to be relied on. Hyde v. U. S. (1906) 27 App. D. C. 362.

Where an indictment is sufficiently certain in its terms, the question whether the district attorney shall be required to file a bill of particulars is a matter within the discretion of the trial court. Fields v. U. S. (1906) 27 App. D. C. 433, certiorari denied (1907) 27 Sup. Ct. 543, 205 U. S. 292, 51 L. Ed. 807.

26. Clerical mistake.—An indictment for perjury held not vitiated by an obvious clerical mistake in using the word "clerk," instead of "court." Hogue v. U. S. (1912) 192 Fed. 918, 114 C. C. A. 11.

27. Innuendo.—An innuendo may not change or enlarge the sense of expressions beyond their usual meaning, but may serve as an explanation. Nave-McCord Mercantile Co. v. U. S. (1910) 182 Fed. 46, 104 C. C. A. 486.

Informality of the averments in an indictment to show that certain "tickets," "prizes," and "drawings," referred to, were meant to mean tickets, prizes, and drawings in and of a lottery, was a mere "matter of form," which the statute intended should be disregarded, where not prejudicial to the defendant. U. S. v. Noelke (C. C. 1880) 1 Fed. 426, 431.

28. Use of participial form.—An indictment for a misdemeanor is not bad because it uses the participial form, as by charging that defendant committed the offense "by then and there executing and presenting" a false voucher to obtain payment of a pension. Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307.

29. Abbreviations of words.—In an indictment charging a conspiracy to procure the allowance of a false and fraudulent claim for compensation for a survey of land claimed to have been made by defendant, a description of the property alleged to have been surveyed, and for which the fraudulent claim is charged to have been presented, should be made in ordinary language. Abbreviations of words employed by men of science or in the arts will not answer, without full explanation of their meaning in ordinary language. U. S. v. Reichert (C. C. 1887) 32 Fed. 142.

30. Use of words "then and there."—The words "then and there" as used in an indictment merely bring forward prior averments of date and venue, and do not otherwise enlarge the description of the offense. Shaw v. U. S. (1908) 165 Fed. 174, 91 C. C. A. 208.

Use of the words "then and there," in different parts of an indictment, as rendering it bad for repugnancy. U. S. v. Dow (C. C. 1840) Fed. Cas. No. 14,990.

31. Use of word "heretofore" instead of "theretofore."—An indictment for violating the national banking laws averred that the bank in question had been "heretofore" created and organized under the laws of the United States. Held, that even if it were assumed that the word should have been "theretofore," in order to make it certain that the bank had been incorporated prior to the finding of the indictment, the result was only an imperfect statement of what the law implies to be true after verdict. Coffin v. U. S. (1896) 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109.

32. Description of persons and misnomer.—See, also, note, post, as to "Designation of defendants."

An indictment, under R. S. § 3266, post, § 6004, charging the defendant with causing or procuring some other person to use a still, boiler, or other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, is bad, unless it states the name of such other person, or avers that the same is unknown. U. S. v. Simmons (1877) 96 U. S. 360, 24 L. Ed. 819.

A charge in an indictment that the defendant sold liquor to divers Indians of a certain tribe to the grand jurors unknown sufficiently specifies the buyers, in the absence of evidence of their identity. Foerster v. U. S. (1902) 116 Fed. 860, 54 C. C. A. 210, writ of certiorari denied (1902) 23 S. Ct. 844, 187 U. S. 644, 47 L. Ed. 347.

Objection to the overruling or striking out of a plea of misnomer is waived by the subsequent filing of a demurrer to the indictment. Lee v. U. S. (1907) 156 Fed. 948, 84 C. C. A. 448.

A defendant cannot interpose a plea of misnomer after having challenged the sufficiency of the indictment by a motion to quash. Id.

If the official character of an officer of the United States is not a necessary ingredient of the offense charged in the indictment, the naming him as such, and the averment that he was such an officer, will not prevent a court of law from taking cognizance of the offense. U. S. v. Watkins (C. C. 1829) Fed. Cas. No. 16,649.

An indictment charging an assault may be good, although not setting forth the name of the person assaulted, if it avers that the name was unknown to the grand jury. U. S. v. Davis (C. C. 1833) Fed. Cas. No. 14,924.

Quære, whether an indictment will lie for assault and battery upon "a per-

son unknown" without the addition "to the jurors." Id.

In an indictment for committing an offense on shipboard under Act March 3, 1825, §§ 22, 25, post, § 10449, the particular ownership of the vessel is immaterial, and a misnomer of the owner is of no consequence. U. S. v. Howard (C. C. 1837) Fed. Cas. No. 15,403.

In case of misnomer, a variance is fatal only when there is a misnomer of one whose existence is essential to the offense charged. Id.

A draft signed "Jos. Johnson" is not admissible under a count averring it to be signed "Joseph Johnson, President." U. S. v. Keen (C. C. 1839) Fed. Cas. No. 15,510.

A person is properly described in an indictment by a given name used in the manner he has selected. U. S. v. Winter (C. C. 1876) Fed. Cas. No. 16,743.

An indictment of an officer of the United States, under Act Jan. 16, 1883, § 11, post, § 10288, for soliciting or receiving any assessment for any political purpose, was not bad for failure to name the particular persons from whom the contributions were solicited or received, where it was averred that the names of such persons were unknown to the grand jury. U. S. v. Scott (C. C. 1895) 74 Fed. 213.

An indictment charging "John Doe, a Chinese person, whose true name is to the grand jurors aforesaid unknown," with the offense of aiding the illegal landing of a Chinese person in the United States, showed on its face that the name "John Doe" was fictitious only, and that the grand jurors were unable to identify the person whom they were indicting, and was therefore void for insufficiency of description. U. S. v. Doe (D. C. 1904) 127 Fed. 982.

33. Designation of defendants.—An indictment charging several defendants, jointly, with murder by striking, beating, and drowning, need not show which one or more of them committed the alleged assault. St. Clair v. U. S. (1894) 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

An indictment held to charge the members of a firm individually, and not the firm under its firm name. Schraubstadter v. U. S. (1912) 199 Fed. 568, 118 C. C. A. 42.

Where a statute inflicts a penalty on persons of a certain description only, it is necessary to aver all the facts requisite to show that defendant was of that description at the time of committing the act. U. S. v. McCormick (C. C. 1810) Fed. Cas. No. 15,663.

A statement that defendant was a bookkeeper in a certain place held not equivalent to an averment that he was a clerk or servant employed therein. U. S. v. Forrest (C. C. 1826) Fed. Cas. No. 15,131.

The meaning of a defendant being indicted under an alias is that he is described in the indictment under one name, otherwise called another name. If the jury find as a fact that the accused's name is as set forth in the indictment, and that he acted as charged under the alias name, then the description in the indictment is such as conforms sufficiently to the facts. U. S. v. Wright (C. C. 1883) 16 Fed. 112.

An indictment against a man by the initials of his Christian name only is subject to plea in abatement, unless the grand jury add that his name is unknown to them otherwise than as set out. U. S. v Upham (C. C. 1890) 43 Fed. 68.

A plea in abatement for misnomer, in that defendant's full name was "John Frazer Janes," whereas he is indicted as "J. F. Janes," held bad, because it failed to further allege that defendant was not known or called by the name of "J. F. Janes," or that he had theretofore been known and called by the name of "John Frazer Janes." U. S. v. Janes (D. C. 1896) 74 Fed. 543.

An averment in an indictment that the accused are "fugitives from justice" is sufficient, without further specification, to put them upon notice of the charge which the government means to prove. U. S. v. Greene (D. C. 1906) 146 Fed. 778.

34. Averment of venue or place of offense.—An indictment will not be held bad on motion in arrest of judgment because the only venue stated is to aver the county in which the offense was committed, and that it was within the jurisdiction of the court. Ledbetter v. U. S. (1898) 18 Sup. Ct. 774, 170 U. S. 606, 42 L. Ed. 1162.

An allegation in an indictment for murder that the crime was committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States," charges with sufficient clearness that such reservation was under the exclusive jurisdiction of the United States at the time of the murder. Holt v. U. S. (1910) 31 Sup. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment U. S. v. Holt (C. C. 1909) 168 Fed. 141.

The exact place of the formation of a conspiracy to use the mails to defraud, denounced by R. S. § 5480, post, § 10385, need not be stated in the indictment, which lays the venue in the place where an overt act was committed. Brown v. Elliott (1912) 32 Sup. Ct. 812, 225 U. S. 392, 56 L. Ed. 1136.

An indictment charging that defendant "in the county of Licking, in the state of Ohio, * * * did then and there * * * break into a building, then and there used in part as a post office of the United States, to wit, the post office at Granville," etc., is sufficiently specific in locating the place of the offense." Considine v. U. S. (1901)

112 Fed. 342, 50 C. C. A. 272, writ of certiorari denied (1902) 22 Sup. Ct. 938, 184 U. S. 699, 46 L. Ed. 765.

An indictment in the circuit court for an offense committed on land should show that it was committed in the district where the court sits. U. S. v. Wood (C. C. 1818) Fed. Cas. No. 16,757.

Upon a prosecution of the offense of larceny, as having been committed in a place under the sole and exclusive jurisdiction of the United States, under Act April 30, 1790, § 16, post, § 10460, there must be an averment in the indictment that the place where the crime was committed was within such sole and exclusive jurisdiction. U. S. v. Davis (C. C. 1829) Fed. Cas. No. 14,930.

Except in cases of treason, the indictment need not state the county in which the offense was committed; it is sufficient if it show that the court had jurisdiction. U. S. v. Wilson (C. C. 1830) Fed. Cas. No. 16,730.

A charge that a crime was committed "on the high seas, within the admiralty and maritime jurisdiction of the U. S., and out of the jurisdiction of any particular state," held a sufficient statement of the venue. U. S. v. Gibert (C. C. 1834) Fed. Cas. No. 15,204; Same v. Plumer (C. C. 1859) Fed. Cas. No. 16,056.

It is not necessary to set forth the county in which an alleged conspiracy was formed, in violation of Act March 2, 1867, § 30, post, § 10201, and it may be rejected as surplusage. U. S. v. Smith (C C. 1869) Fed. Cas. No. 16,322.

An indictment purporting to be founded on R. S. § 5346, post, § 10449, charging the commission of an assault with a dangerous weapon on board a vessel belonging in whole or in part to a citizen of the United States, alleged the assault to have taken place "in the harbor of Guantanamo, in the island of Cuba," but did not allege that that place was out of the jurisdiction of any state of the United States. Held, that the indictment was bad for that reason. U. S. v. Anderson (C. C. 1879) Fed. Cas. No. 14,448.

In a prosecution under Act Sept. 19, 1890, for obstructing navigation by casting rubbish into a river, an indictment describing the rubbish as "ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste of divers kinds," and alleging that it was cast into the Little Kanawha river "at the district of West Virginia," is bad, although it quotes the words of the statute, since it does not give the defendant sufficiently clear notice of the character of the article or of the place where the alleged offense was committed. U. S. v. Burns (C C. 1893) 54 Fed. 351.

An indictment in similar terms, charging the placing of such articles upon the banks of the Little Kanawha river "at the district of West Virginia," in a place where the same were liable to be washed into the river, and thereby impede navigation, is bad for want of particularity of place, which is of the utmost importance in the offense charged. Id.

An indictment charging the building of a certain wharf, pier, or other structure "in, along, upon, and across" the Little Kanawha river "at the district of West Virginia," so as to obstruct navigation, in violation of Act Sept. 19, 1890, § 7, is bad for want of particularity of place. Id.

An indictment charging the excavation of the bottom, shore, side, bed, and channel of the Little Kanawha river "at the district of West Virginia," and with filling the same, thereby unlawfully altering the course and capacity of the channel of the said river, in violation of Act Sept. 19, 1890, § 7, is bad for want of particularity of place. Id.

Objection that an indictment under R. S. § 5511, for aiding illegal voting "at Boston, * * * at an election for a representative * * * for the 4th congressional district of the commonwealth * * * instituted and held in said Boston * * *" which failed to state that the election was held in the Fourth congressional district, and that the precinct where the offense was alleged to have been committed was in that district, held cured by this section. U. S. v. Doherty (D. C. 1885) 25 Fed. 28, 29.

An indictment for a larceny committed "in the county of Charles Mix, in the district aforesaid, and at a place in said county of Charles Mix within the Great Sioux Indian reservation and within the Indian country," sufficiently alleges the venue, although the name "Great Sioux Reservation" is more properly applicable to another Sioux reservation in the state. U. S. v. Ewing (D. C. 1891) 47 Fed. 809.

The indictment charged that defendant on a certain day, "at the county of Wapello, in the southern district of Iowa, did then and there present to the commissioner of pensions at Washington, in the District of Columbia," etc. At its close it charged: "And that at the time and place aforesaid, that is to say, on * * * at the county of Wapello, state of Iowa, the said * * * did then and there present and cause to be presented to the commissioner of pensions aforesaid," etc. Held, construing the parts of the indictment together, that it charged the presentation of the false affidavit at Wapello county, Iowa, and not at Washington, D. C. U. S. v. Adler (D. C. 1892) 49 Fed. 733.

An indictment alleging that defendants, of the Eastern District of Virginia, did at Washington, in the District of Columbia, and at Norfolk, in the

Eastern District of Virginia, and within the jurisdiction of this court, conspire, is defective in failing to make it clear within what jurisdiction the offense was committed. U. S. v. Marx (D. C. 1903) 122 Fed. 964.

Where the caption to an indictment is placed thereon when it comes from the grand jury, an allegation of venue as the "county and district aforesaid" is sufficient, though the venue of the county and district only appears in the caption. U. S. v. Schneider (1893) 21 D. C. 381.

An indictment charged that a crime was committed "at a place near the Crow Creek Indian agency, in the Indian country, in a place and district of country under the exclusive jurisdiction of the United States, in the said Second judicial district and territory of Dakota, and within the jurisdiction of this court." Held to sufficiently state the place of commission of the offense, the court taking judicial notice of the fact that the Crow Creek Indian agency is within its jurisdiction. Beebe v. U. S. (1880) 2 Dak. 292, 11 N. W. 505.

35. Averment of time or date.—See, also, notes under § 1787, ante.

An allegation that an offense was committed on the "—— day" of the month in which the indictment was found does not render it fatally defective after verdict. Ledbetter v. U. S. (1898) 18 Sup. Ct. 774, 170 U. S. 606, 42 L. Ed. 1162.

The designation in an indictment of the year in which the offense is laid by Arabic figures is sufficient, and no prefix is essential; the year of the Christian era being understood as meant in all public or judicial documents in this country, unless otherwise expressed. Peters v. U. S. (1899) 94 Fed. 127, 36 C. C. A. 105.

The date of an alleged offense as stated in an indictment is not binding on the United States, and is only material in reference to the bar of limitation, and to show that the offense was committed anterior to the presentment of the indictment. Hume v. U. S. (1902) 118 Fed. 689, 55 C. C. A. 407, writ of certiorari denied (1903) 23 Sup. Ct. 850, 189 U. S. 510, 47 L. Ed. 923.

An indictment under Act March 3, 1903, § 3, as amended by Act Feb. 20, 1907, § 3, post, § 4247, for importing an alien woman for immoral purposes, held sufficient as to an offense committed within three years before the indictment was found, though no date is alleged. U. S. v. Lair (1912) 195 Fed. 47, 115 C. C. A. 49.

An information may be amended by filling up the blank of the date of the commission of the offense. U. S. v. Evans (C. C. 1802) Fed. Cas. No. 15,063.

An indictment need not state the county in which the offense was committed. It is enough if it shows that the court had jurisdiction. U. S. v. Wilson (C. C. 1830) Fed. Cas. No. 16,730.

Unless the date stated in an indictment is of the essence of the crime, it need not be proved as alleged. Johnson v. U. S. (C. C. 1842) Fed. Cas. No. 7,418; U. S. v. Blaisdell (D. C. 1869) Fed. Cas. No. 14,608.

A charge that an offense was committed "on the —— day" of a month and year named is not defective where any day of that month was prior to the finding of the indictment and within the period of limitation applicable, and where time is not of the essence of the offense. U. S. v. Conrad (C. C. 1894) 59 Fed. 458.

The averment of time in an indictment is a matter of form, not generally material, and in view of this section, as well as under the Oregon statute (adopted by rule in the federal courts in that state), which provides that the precise time need not be stated, an indictment alleging the time of commission of the offense as "on or about" a day named is sufficient, except in cases where the time is an ingredient of the offense. U. S. v. McKinley (C. C. 1903) 127 Fed. 168.

An indictment under R. S. § 5440, post, § 10201, for conspiracy to defraud the United States, is not insufficient because it charges that the conspiracy was formed on a date more than three years prior to the time it was found, and sets out overt acts at different times thereafter up to and within the three years, where it is also charged that the conspiracy was in continuous operation and continuously in process of execution at all times down to that of the last overt act specified. U. S. v. Eccles (C. C. 1910) 181 Fed. 906.

A charge that the offense was committed on a day certain "and on divers other days" between that day and the finding of the bill by the grand jury will not vitiate an indictment. U. S. v. Trobe (D. C. 1865) Fed. Cas. No. 16,541.

An allegation in an indictment that the defendant did the act charged "on or about" a certain day is void for uncertainty. It does not show but that the action is barred by lapse of time. U. S. v. Winslow (D. C. 1875) Fed. Cas. No. 16,742.

A count in an indictment for aiding the misapplication of national bank funds in violation of § 9772, post, with ample allegations of fraudulent intent and purpose, distinctly charged embezzlement by the cashier of a national bank on many different days and times between May 24, 1897, and March 24, 1900, for the benefit and gain of defendant, by a pretended discount of paper contrary to the express direction of the directors, whereby defendant obtained $140,000 of its money and funds, and converted the same to his own use. Held good on a motion in arrest in

view of the statute declaring the form of an indictment to be immaterial, provided the substance is there; the word "embezzlement," as used therein, showing a misapplication by the cashier of the property in his official possession, within the meaning of the statute, and the punishment prescribed being not so much for each offense, but so much for every officer or agent who commits such offenses, and every person who aids or abets, irrespective of the number of times. U. S. v. McClure (D. C. 1901) 107 Fed. 268.

An indictment for subornation of perjury, which charges that the offense was committed "on the ——— day of December, 1893," is defective, but, the date not being of the essence of the offense, the defect is one of form only, and is cured by this section, which provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

While the time of the commission of an offense must be averred, it may be proved to have been committed on any day prior to the filing of the bill during the period of limitations. U. S. v. Francis (D. C. 1906) 144 Fed. 520, judgment modified Francis v. United States (1907) 152 Fed. 155, 81 C. C. A. 407, writ of certiorari denied (1907) 27 Sup. Ct. 797, 206 U. S. 565, 51 L. Ed. 1191.

The time of the commission of an offense as laid in the indictment does not ordinarily confine the proof within the limits of that period, but proof that the offense was committed on or about the dates fixed in the indictment, if confined to dates prior to the finding of the grand jury is competent to establish the charge. U. S. v. Sheridan-Kirk Contract Co. (D. C. 1906) 149 Fed. 809.

Under this section an indictment charging a conspiracy held to sufficiently show the time of the conspiracy. U. S. v. Aviles (D. C. 1915) 222 Fed. 474.

Indictment is quashable in which the time is alleged "on or about" such a day. U. S. v. Crittenden (Super. Ct. Ark. 1828) Fed. Cas. No. 14,890a.

36. Alleging intent.—Where an offense is created by a statute which does not use the word "feloniously," an indictment therefor need not aver felonious intent. U. S. v. Staats (1850) 49 U. S. (8 How.) 41, 12 L. Ed. 979; Bannon v. U. S. (1895) 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494.

An indictment under R. S. § 5440, as amended by Act May 17, 1879 (post, § 10201), for a conspiracy to commit an offense against the United States, need not allege that defendants "feloniously" conspired, as felonious intent is not a part of the description of the offense in the statute, and the infamous character of the punishment affixed does not of itself render the offense a felony. Bannon v. U. S. (1895) 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494.

Where intent is of the essence of an offense as defined in the statute, it must be averred in an indictment for such offense. Green v. MacDougall (1905) 26 S. Ct. 748, 199 U. S. 601, 50 L. Ed. 328, affirming order U. S. v. Green (D. C. 1905) 136 Fed. 618.

In an indictment for violation of the law against counterfeiting, a general averment that the defendant did the acts charged "with intent to defraud" is sufficient, the pleader in a case where intent is the essence of the crime not being required to set out the facts going to prove such intent, or the particular means by which the intent was to be effected. McCarty v. U. S. (1900) 101 Fed. 113, 41 C. C. A. 242.

Under a statute making an intent to "injure or defraud" an essential element of the crime of uttering a forged instrument, an indictment, charging an intent to "injure and defraud" is sufficient. Stockslager v. U. S. (1902) 116 Fed. 590, 54 C. C. A. 46.

As against objection to testimony or motion in arrest, an indictment for using the mails to defraud sufficiently charged that a letter was intended to be sent or delivered by the post office department, where it stated that accused deposited and caused to be deposited in a particular post office a certain envelope, duly stamped and sealed, and addressed to certain persons. Dyar v. U. S. (1911) 186 Fed. 614, 108 C. C. A. 478; Register v. Same (1911) 186 Fed. 624, 108 C. C. A. 488.

Where a crime is made a felony by statute, it is not necessary to charge in the indictment that it was feloniously committed, unless the statute itself makes a felonious intent an element of the offense. Wood v. U. S. (1913) 204 Fed. 55, 122 C. C. A. 369.

An indictment under the penitentiary act for assault and battery with intent to kill need not aver malice aforethought, or any other evil intent than the intent to kill. U. S. v. Lloyd (C. C. 1834) Fed. Cas. No. 15,619.

Where a statute creates an offense, and the indictment charges the same in the precise words of the statute, it is unnecessary to prefix to the charging words the word "unlawful," or any other word showing a wrongful intention. U. S. v. Thompson (C. C. 1853) Fed. Cas. No. 16,490.

A particular intent which, by the statute, makes an act a crime, is matter of substance; but mistakes in expressing the substance of a crime, if the meaning can be understood, will be looked upon as formal defects. U. S. v. Jackson (C. C. 1880) 2 Fed 502, 503.

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1880) 2 Fed. 502; Same v. Wentworth (C. C. 1882) 11 Fed. 52.

In a criminal case, where the intent is made a part of the offense, the intent should be alleged in the indictment, and must be proved; but the particular manner in which the act is to be done need not generally be alleged. U. S. v. Wentworth (C. C. 1882) 11 Fed. 52.

It is only where the prohibition of a particular act is accompanied by a declaration that it shall be done with a specified intent to constitute a crime that the intent need be specifically averred by the indictment or specifically proved on the trial. U. S. v. Jackson (C. C. 1885) 25 Fed. 548.

In an indictment for an assault with a dangerous weapon, an allegation of criminal intent is implied in the word "assault." U. S. v. McClare (D. C. 1854) Fed. Cas. No. 15,659; Same v. Lunt (D. C. 1855) Fed. Cas. No. 15,-643.

An indictment must charge that the act was unlawfully done, with wrongful intent. U. S. v. Alaska Packers' Ass'n (1901) 1 Alaska, 217.

An indictment charging an attempt to rob the mails by threatening the person in custody thereof with dangerous weapons, in violation of R. S. § 5473, post, § 10387, which only alleges that defendant "did unlawfully, willfully, and feloniously attempt to rob the U. S. mail by assaulting the person in custody thereof," etc., is not so defective, in failing to allege an intent to rob the mails, as to authorize the arrest of a judgment of conviction in a prosecution in which the instructions required a finding of such intent; but the defect is merely of form, and cured by verdict, under Rev. St. Ariz. 1887, par. 1467, providing that no defect as to form which does not prejudice the substantial rights of defendant shall render an indictment insufficient, or affect the trial, judgment, or other proceedings thereon. Downing v. U. S. (1902) 68 P. 555, 8 Ariz. 31.

It is not necessary in an indictment for larceny to use the words "felonious intent," where there are other words in the indictment that convey the same meaning. Territory v. Garcia (1904) 75 P. 34, 12 N. M. 87.

37. Alleging scienter or knowledge.—See, also, note, ante, as to "Bill of particulars."

Where one good count of an indictment is sufficient to sustain the judgment, it is immaterial whether the others alleged a scienter. Dunbar v. U. S. (1895) 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

An indictment under R. S. § 3893, post, § 10381, for depositing an obscene paper in the mails, which alleges that it was done unlawfully, willfully, and knowingly, sufficiently states knowledge by defendant of the contents of the paper, as against an objection first made after verdict. Rosen v. U. S. (1896) 16 Sup. Ct. 434, 161 U. S. 29, 40 L. Ed. 606.

Any defect in a charge that defendant knowingly deposited in the mail a printed book, etc., the character of which is so obscene, lewd, and lascivious that it would be offensive to set it forth in the indictment, should be regarded, after verdict, as a defect of form, under this section. Price v. U. S. (1897) 17 Sup. Ct. 366, 368, 165 U. S. 311, 41 L. Ed. 727.

A charge that defendant "knowingly deposited" in the mails a printed book, etc., "the character of which is so obscene, lewd, and lascivious" that it would be offensive to set it forth in the indictment, sufficiently charges, after verdict, both that the book is in fact obscene, etc., and that defendant knew it to be so. King v. U. S. (1902) 112 Fed. 988, 50 C. C. A. 647.

An objection, to an indictment for depositing certain nonmailable pictures in the mails, that it did not expressly charge that defendants were aware of the character of the pictures, not having been specifically urged before verdict, was within this section. Tyomies Pub. Co. v. U. S. (1914) 211 Fed. 385, 128 C. C. A. 47.

In an indictment founded on Slave-Trade Act April 20, 1818, §§ 2, 3, post, §§ 10422, 10427, for causing a vessel to sail from a port of the United States to be employed in such trade, it is not necessary to aver that the defendant knowingly committed the offense. U. S. v. Smith (C. C. 1820) Fed. Cas. No. 16,338.

When a statute prohibits generally, and is silent as to intention, the pleader need not aver knowledge. U. S. v. Malone (C. C. 1881) 9 Fed. 897.

Where an indictment charges that defendant "knowingly deposited in the post office the obscene matter," the word "knowingly" qualifies the whole act charged, and it is not necessary to allege that he knew the matter to be obscene. U. S. v. Clark (C. C. 1888) 37 Fed. 106; Same v. Nathan (D. C. 1894) 61 Fed. 936.

Scienter as to the obscene, lewd, and lascivious character of the matter mailed is an essential ingredient of the offense denounced by section 10381, ante, prohibiting the use of the mails for the circulation of obscene matter, and the failure to allege it is not cured by this section. U. S. v. Slenker (D. C. 1887) 32 Fed. 691, 694.

The scienter, when necessary to be alleged in an indictment, is matter of substance and not of form, and its omission is not cured by this section, and an indictment in the language of the statute is insufficient, where it is necessary to allege guilty knowledge. Id.

38. Allegation of "willfulness" or "willfully" committing acts.—Under this section, where an indictment for con-

spiracy to induce certain persons to commit perjury in the making of public land entries alleged that the acts were knowingly done, and that defendants knew that the entrymen were applying to purchase the lands on speculation, and not in good faith, to appropriate the same to their exclusive use and benefit, the indictment was not fatally defective for failure in terms to allege that such acts were "willfully" committed. Nickell v. U. S. (1909) 161 Fed. 702, 88 C. C. A. 562, judgment affirmed on rehearing (1909) 167 Fed. 741, 93 C. C. A. 229, writ of certiorari denied (1909) 29 Sup. Ct. 699, 214 U. S. 517, 53 L. Ed. 1064.

An indictment for perjury, consisting of an alleged false statement sworn to by defendant for the purpose of purchasing lands as required by Timber and Stone Act June 3, 1878, § 2, post, § 4672, set out an exact copy of the statement, including the oath, and after directly alleging that the application was made to purchase the land for speculation, and not for defendant's exclusive use and benefit, as testified by him, and directly alleging the existence of a contract to transfer the title, and that defendant's sole purpose was to procure the title for the benefit of another, charged that defendant on the date specified, etc., in and by said statement in writing, verified upon his oath, before the receiver of the land office, "willfully, corruptly, feloniously, and contrary to the same oath of him," the said defendant, etc., subscribed material matters contained in the statement, which he did not then believe to be true, and which he knew were not true, in a case where a law of the United States authorized an oath to be administered, etc. Held, that such allegation of "willfulness" should be construed as a part of the charge in the indictment, and not merely as a conclusion of the pleader, within this section, providing that no indictment, etc., shall be found insufficient by reason of a defect in matter of form only, the indictment further concluding with an allegation that defendant did willfully commit perjury, against the peace and dignity of the United States, etc. U. S. v. Eddy (C. C. 1905) 134 Fed. 114.

39. Use of words "knowingly and fraudulently."—Indictment for conspiring to conceal bankrupt's property, in violation of Bankr. Act, § 29b (1), held not defective for failure to use the words "knowingly and fraudulently," in view of this section. Tapack v. U. S., 220 Fed. 445, 137 C. C. A. 39.

40. Charging fraud.—An indictment charging fraud should aver the fraud with sufficient particularity to enable the defendant to prepare his defense and plead the judgment as a bar to a subsequent prosecution. U. S. v. Goggin (C. C. 1880) 1 Fed. 49.

When the act charged in an indictment is fraudulent, it is not necessary to use the word "fraudulent." U. S. v. Caruthers (D. C. 1882) 15 Fed. 309.

41. Pleading by way of recital.—An indictment will not be held insufficient on an objection first made after going to trial, on the ground that the facts were stated more by way of recital than directly; all the elements of the offense being set out. Dyar v. U. S. (1911) 186 Fed. 614, 108 C. C. A. 478; Register v. Same (1911) 186 Fed. 624, 108 C. C. A. 488.

An indictment, alleging that at a particular time defendants had devised a fraudulent scheme, sufficiently charges that defendants theretofore "did" devise such scheme, and was therefore not defective as pleading the scheme or artifice by way of recital only. Wilson v. U. S. (1911) 190 Fed. 427, 111 C. C. A. 231.

42. Material matter alleged under videlicet.—Material matter, although alleged under a videlicet, is traversable, and must be proved as laid. U. S. v. Burnham (C. C. 1816) Fed. Cas. No. 14,690.

43. Conclusion of pleader.—In an indictment for mailing nonmailable matter, an averment that the pamphlet charged to have been mailed was "obscene, lewd, and lascivious" is one of fact, and not a conclusion of law. Konda v. U. S. (1908) 166 Fed. 91, 92 C. C. A. 75, 22 L. R. A. (N. S.) 304.

An allegation that an act innocent in itself, but criminal if done fraudulently, was performed fraudulently, or with an intent to defraud, without the averment of any acts tending to show fraud, is a legal conclusion, and insufficient to charge the offense of fraudulently taking away or removing a record or document, under R. S. § 5408, post, § 10299. Martin v. U. S. (1909) 168 Fed. 198, 93 C. C. A. 484, reversing judgment (1907) 104 S. W. 678, 7 Ind. T. 451.

In an indictment against a bankrupt and others for conspiracy to conceal assets from his trustee in bankruptcy, an averment that a person named was "duly" appointed trustee is sufficient; the matter of appointment being an incidental matter only, and not a vital element of the crime. Kerrch v. U. S. (1909) 171 Fed. 366, 96 C. C. A. 258, writ of certiorari denied (1909) 30 S. Ct. 402, 215 U. S. 602, 54 L. Ed. 344.

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tle, and that defendant's sole purpose was to procure the title for the benefit of another, charged that defendant on the date specified, etc., in and by said statement in writing, verified upon his oath, before the receiver of the land office, "willfully, corruptly, feloniously, and contrary to the same oath of him," the said defendant, etc., subscribed material matters contained in the statement, which he did not then believe to be true, and which he knew were not true, in a case where a law of the United States authorized an oath to be administered, etc. Held, that such allegation of "willfulness" should be construed as a part of the charge in the indictment, and not merely as a conclusion of the pleader, within this section, providing that no indictment, etc., shall be found insufficient by reason of a defect in matter of form only, the indictment further concluding with an allegation that defendant did willfully commit perjury, against the peace and dignity of the United States, etc. U. S. v. Eddy (C. C. 1905) 134 Fed. 114.

It is never sufficient to charge in an indictment that an act is illegal, but something more must be alleged which the court can see on the face of the indictment is illegal if the facts are proven. U. S. v. John Reardon & Sons Co. (C. C. 1911) 191 Fed. 454.

An indictment charging a railroad company with having transported live stock from a quarantined district into another state, in violation of Act March 3, 1905, post, § 8701, which avers that the Secretary of Agriculture gave notice of the establishment of such quarantine to the "proper officers" of defendant, is insufficient, as alleging a mere legal conclusion; nor is the establishment of such quarantine sufficiently alleged by stating that the Secretary "duly and legally established" it, but it must further show that he published the notice required by section 1 of the act, which is prerequisite to a criminal conviction. U. S. v. El Paso & N. E. R. Co. (D. C. 1910) 178 Fed. 846.

44. **Negative pregnants.**—That denials of the truth of alleged false representations in an indictment were in the form of negative pregnants did not render the indictment fatally defective under this section, especially where the allegations as a whole constituted a full and complete denial of the truth of the representations. Horn v. U. S. (1910) 182 Fed. 721, 105 C. C. A. 163, writ of certiorari denied (1911) 31 Sup. Ct. 470, 219 U. S. 585, 5 L. Ed. 347.

45. **Inconsistent allegations and repugnancy.**—An objection to an indictment on the ground of repugnancy cannot be reviewed on appeal when it was not raised in the Circuit Court. Sims v. U. S. (1903) 121 Fed. 515, 58 C. C. A. 92.

Objection to repugnant averments in a count of an indictment should be taken by demurrer or motion to quash, or by exceptions to the charge; and under this section, where not so taken the defect is cured by a general verdict of guilty. Lehman v. U. S. (1903) 127 Fed. 41, 61 C. C. A. 577.

The court will not reject any material allegation in an indictment or information which is consistent in the place where it occurs, and is not repugnant to any antecedent matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, which latter allegation cannot itself be rejected. U. S. v. Dow (C. C. 1840) Fed. Cas. No. 14,990.

The words "then and there" in an indictment mean simply "at the time and place aforesaid." Where, therefore, an indictment alleged that the prisoner, "late of Maryland, on the 31st day of October, 1839, then and there being on board of a certain brig called * * *, on the high seas, * * * in latitude 33°, out of the jurisdiction of any particular state and within the jurisdiction of the United States * * * did then and there commit," etc., is bad for repugnancy; the words "then and there," as first used, referring to October 31st as to time and to Maryland as to place, and the same words, as used afterwards, referring to the same date, but to the high seas, latitude 33°, as to place. Id.

Where two allegations are sensible and consistent in the places where they occur, but are inconsistent with each other, neither can be rejected. Id.

46. **Setting out or describing written instruments.**—An instrument may be set out by its legal effect; but, if words descriptive of the instrument are used, they must be proved. U. S. v. Keen (C. C. 1839) Fed. Cas. No. 15,510.

The objection to an indictment for mailing a circular concerning a lottery, that the circular was not set out in hæc verba, but only by a description of its contents, was a defect of substance rather than of form merely, and was not cured by this statute. U. S. v. Noelke (C. C. 1880) 1 Fed. 426, 433.

Counts charging false entries by the president in reports of the condition of the bank, which alleges that the reports were made in conformity with the law and then sets them out by their tenor, are bad, notwithstanding this section, for their failure to allege specifically that the reports were verified and attested by the cashier. U. S. v. Potter (C. C. 1892) 56 Fed. 97, 103.

The rule which requires a setting out of an entire instrument or its tenor in an indictment in the federal courts is limited mainly, if not wholly, to cases of forgery, counterfeiting, and sending threatening letters. U. S. v. Heinze (C. C. 1908) 161 Fed. 425.

By all rules of pleading, criminal as

well as civil, when a written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either verbatim or in substance, and not a statement of the opinion of the pleader as to the effect it was intended to or might produce; and a criminal information that does not give the substance of a document relied on, but only its effect, is not sufficient. U. S. v. Watson (D. C. 1883) 17 Fed. 145.

47. Averments as to grand jury and proceedings thereof.—An objection that an indictment recited that it was presented "upon the oath" of the grand jurors, when in fact it was presented upon the oath of all but one, who affirmed instead of making oath, is a merely formal defect, without prejudice, which is cured by the provisions of this section. Bram v. U. S. (1897) 18 Sup. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

The designation of the grand jurors in an indictment found in the district court for the district of Alaska as "the grand jurors of the United States of America, selected, impaneled, sworn, and charged within and for the district of Alaska," is not a substantial error which vitiates the indictment; and under the Code of Oregon (Hill's Ann. Laws, § 1280), also, such defect must be disregarded, as not tending to the prejudice of the substantial rights of the defendant upon the merits. Jackson v. U. S. (1900) 102 Fed. 473, 42 C. C. A. 452.

An indictment returned into a federal court, reciting that the "grand inquest" of the United States of America, inquiring for the body of the district of Maryland, do on their oath present, etc., was not objectionable for failure to show that it was returned by a grand jury. Geiger v. U. S. (1908) 162 Fed. 844, 89 C. C. A. 516.

The objection that an indictment in a federal court fails to show on its face that the grand jury which returned it came from the district in which it was found is one to a matter of form only and under this section does not render the indictment insufficient at least when first raised in an appellate court. Morris v. U. S. (1909) 161 Fed. 672, 88 C. C. A. 532, judgment reversed on rehearing (1909) 168 Fed. 682, 94 C. C. A. 168, writ of certiorari denied (1909) 29 Sup. Ct. 704, 214 U. S. 527, 53 L. Ed. 1068.

Since the territorial courts of Oklahoma exercised a dual criminal jurisdiction, one over offenses against the United States and the other over offenses against the territory, it was not improper for indictments returned in such court for federal crimes to recite that they were found by grand jurors of the "United States" within and for a particular county. Billingsley v. U. S. (1910) 178 Fed. 653, 101 C. C. A. 465.

An indictment need not state that the grand jurors who found it are residents of the division of the district in which they served. May v. U. S. (1912) 199 Fed. 53, 117 C. C. A. 431.

An indictment for murder on the high seas is not defective because it states that it is found by "the jurors of the United States of America," instead of saying "grand jurors." U. S. v. Williams (C. C. 1858) Fed. Cas. No. 16,707.

An indictment need not allege that the grand jury was duly organized and that 12 concurred in the finding. U. S. v. Laws (D. C. 1872) Fed. Cas. No. 15,579.

The declaration in an indictment that the grand jurors have been "duly summoned, impaneled, and sworn" is sufficient to show, on the face of the indictment, that they were the lawful jurors, duly qualified to serve as grand jurors in the district court in which the indictment was presented. Keith v. Territory (1899) 57 P. 834, 8 Okl. 307.

A declaration in an indictment was to the effect that the grand jurors had been "duly summoned and sworn." Held that, if such recitation had been omitted, the indictment would not be defective for that reason. Id.

48. Caption and reference thereto.—The entitling of an indictment returned in the district court for the district of Alaska, "In the District Court of the United States for the District of Alaska," although inaccurate, is merely a clerical or technical error, which does not vitiate such indictment, either upon general principles, or under the statute of Oregon in force in the territory. Jackson v. U. S. (1900) 102 Fed. 473, 42 C. C. A. 452.

The grand jury which found an indictment being impaneled in the district court, and having returned the indictment in that court, and all the proceedings thereafter being had therein, an order remitting the indictment from the circuit to the district court was neither necessary nor proper, notwithstanding it was entitled "In the Circuit Court," as that is merely a formal imperfection, not necessarily prejudicial to accused, nor having the effect to return it to that court, or vitiating the same. Ledbetter v. U. S. (1901) 108 Fed. 52, 47 C. C. A. 191.

The caption of an indictment is a part of the record, and may be considered to ascertain the court in which the jury was summoned and charged, when the indictment was returned, and whether the jurors were sworn. Burchett v. U. S. (1912) 194 Fed. 821, 114 C. C. A. 525.

Where the names of the grand jurors who found the indictment appear in the caption of it, it is not necessary that their names should also appear in the body thereof. U. S. v. Crawford (C C. 1843) Fed. Cas. No. 14,890.

The caption or title is no part of the

indictment, and may be amended after verdict as a clerical error. U. S. v. Thompson (C. C. 1853) Fed. Cas. No. 16,490.

The caption of an indictment may be referred to, to show that the United States mentioned in the body of the indictment are the United States of America. U. S. v. Boyden (C. C. 1868) Fed. Cas. No. 14,632.

A misrecital in the caption of an indictment as to the date of the finding, it reading "1885" for "1888," comes within the purview of this section. U. S. v. Bornemann (C. C. 1888) 35 Fed. 824.

Such misrecital, where from the whole record the error appears to be merely clerical, is not fatal, as the caption is no part of the indictment. Id.

An error in the caption of an indictment in stating the term at which it was found is not ground for quashing the indictment, the caption being amendable by the record. U. S. v. Clark (D. C. 1903) 125 Fed. 92.

The caption and commencement of an indictment may be looked to for the purpose of showing the court in which the indictment was found—that being the office of the caption—but not for the purpose of making more certain any of the essential averments in relation to the charging of the offense. U. S. v. Howard (D. C. 1904) 132 Fed. 325.

Where the caption is placed on the indictment when it comes from the grand jury, an allegation of venue as the "county and district aforesaid" is sufficient, though the venue of the county and district only appears in the caption. U. S. v. Schneider (1893) 21 D. C. (10 Mackey) 381.

Where a caption to an indictment reads: "Territory of New Mexico, County of Socorro. In the District Court at the April Term, A. D. 1900"—it cannot be quashed on the ground that it does not describe the court where it was found, or state the place where the court was sitting when it was returned. Territory v. Claypool (1903) 71 P. 463, 11 N. M. 568.

49. **Formal conclusion.**—Omission of the conclusions to a count that the offense charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," is a matter of form, which does not tend to the prejudice of the defendant, and is therefore, by the provisions of this section, to be disregarded. Frisbie v. U. S. (1895) 157 U. S. 160, 15 Sup. Ct. 586, 589, 39 L. Ed. 657.

The conclusion of an indictment returned in the district court for the district of Alaska, "against the peace and dignity of the United States," is proper; the only laws in force in the territory, and which an accused can be charged with violating, being those provided by the congress of the United States. Jackson v. U. S. (1900) 102 Fed. 473, 42 C. C. A. 452.

Where a statute merely alters the punishment of a common-law offense, the statutory punishment may be inflicted, although the indictment does not conclude against the form of the statute. U. S. v. Norris (C. C. 1807) Fed. Cas. No. 15,899.

A conclusion to an indictment founded on a statute, "contrary to the true intent and meaning of the act of the congress of the United States in such case made and provided," is good, and equivalent to a conclusion "against the form of the statute in such case made and provided." U. S. v. Smith (C. C. 1820) Fed. Cas. No. 16,338.

An indictment alleging a statute offense in the words of the act is not vitiated by a conclusion which calls the offense by a wrong name. U. S. v. Elliot (C. C. 1823) Fed. Cas. No. 15,044.

A conclusion against the form of the statutes (in the plural) is good even if the offense be punishable by a single statute only. U. S. v. Gibert (C. C. 1834) Fed. Cas. No. 15,204.

A conclusion against the form of the statute (in the singular) is sufficient in all cases where the offense is distinctly within more than one independent statute. Id.

An indictment must conclude "against the government of the United States." U. S. v. Boling (C. C. 1835) Fed. Cas. No. 14,621.

In an indictment under Act April 5, 1866, § 2, post, § 10462, it is not necessary to aver that the offense is not punishable by any law of congress, and is punishable by the state laws; and a conclusion "against the form of the statute" is correct. U. S. v. Wright (D. C. 1871) Fed. Cas. No. 16,774.

An indictment which states facts constituting an offense under a certain statute, and concludes with the averment that the acts alleged to have been committed were "contrary to the form of the statutes," is not objectionable because it also alleges that defendant thereby committed a certain named crime, while the statute does not declare the offense it prohibits to be that crime, as the allegation is surplusage. U. S. v. Lehman (D. C. 1889) 39 Fed. 768.

The formal closing, "contrary to the form of the statute," etc., is surplusage, to be disregarded. U. S. v. Berry (D. C. 1899) 96 Fed. 842, 846.

An indictment which fails to conclude "against the peace and dignity of the U. S." may be quashed. U. S. v. Crittenden (Super. Ct. Ark. 1828) Fed. Cas. No. 14,890a.

An indictment in the territory of Arkansas must conclude "against the peace and dignity of the United States."

U. S. v. Lemmons (Super. Ct. Ark. 1828) Fed. Cas. No. 15,591a.

50. Reference to statute.—An indictment for a statutory offense charging the same to have been committed "in contempt of the laws of the United States of America," without referring to the statute, is bad. U. S. v. Andrews (C. C.) Fed. Cas. No. 14,455.

An indictment need not aver the existence or provisions of a public statute upon which the prosecution is founded. U. S. v. Rhodes (C. C. 1866) Fed. Cas. No. 16,151.

The means employed to effect the commission of a statutory offense need not be set out in the information. U. S. v. Ballard (D. C. 1871) Fed. Cas. No. 14,506.

An indictment charging an offense against the United States will be upheld if there is any act of Congress in force which can sustain it, whether or not such act is specifically mentioned. U. S. v. Wood (D. C. 1909) 168 Fed. 438.

51. Following language of statute.—In indictments for offenses created by statute, it is, in general, sufficient to describe the offense in the words of the statute. U. S. v. La Coste (C. C. 1820) Fed. Cas. No. 15,548; Same v. Wilson (C. C. 1830) Fed. Cas. No. 16,730; Same v. Lancaster (C. C. 1841) Fed. Cas. No. 15,556; Same v. O'Sullivan (D. C. 1851) Fed. Cas. No. 15,974; Same v. Armstrong (D. C. 1862) Fed. Cas. No. 14,468; Same v. Henry (D. C. 1868) Fed. Cas. No. 15,350; Same v. Ballard (D. C. 1871) Fed. Cas. No. 14,506; Same v. White (D. C. 1877) Fed. Cas. No. 16,674.

In general it is sufficient to allege an offense in an indictment in the words of the statute, but there are many exceptions to this rule. U. S. v. Gooding (1827) 25 U. S. (12 Wheat.) 460, 6 L. Ed. 693.

An indictment under R. S. § 3296, post, § 6038, for aiding in the concealment of distilled spirits on which the tax had not been paid, and which had been removed to a place other than the distillery warehouse provided by law, is sufficiently certain where it charges the offense substantially in the language of the statute, and need not aver that there was a warehouse provided by law where such spirits should have been stored. Pounds v. U. S. (1898) 18 S. Ct. 729, 171 U. S. 35.

An indictment, under Act Feb. 8, 1875, § 16, post, § 5966, is sufficient which charges, in the language of the statute, that defendant, at a time and place stated, did willfully, unlawfully, and feloniously "carry on the business of a retail liquor dealer, without having paid the special tax therefor as required by law," without more particularly defining the offense. Ledbetter v. U. S. (1898) 18 S. Ct. 774, 170 U. S. 606.

Where a statute fully, directly, and expressly, without any uncertainty or ambiguity, sets forth all the elements of an offense, an indictment is sufficient which charges the offense substantially in the language of the statute. Peters v. U. S. (1899) 94 Fed. 127, 36 C. C. A. 105.

An indictment in the language of Oleomargarine Act Aug. 2, 1886, § 4, post, § 5967, charging that the defendant at a certain time and place did unlawfully "carry on the business of a manufacturer of olemargarine without having first then and there paid the special tax therefor as required by law," states all the elements of the offense and is sufficiently specific in the absence of a motion for a bill of particulars showing whether the defendant is charged with being a manufacturer in the ordinary sense under the original act or as defined in the amendment by Act May 9, 1902, § 2, post, § 5977. Morris v. U. S. (1908) 161 Fed. 672, 88 C. C. A. 532, judgment reversed on rehearing (1909) 168 Fed. 682, 94 C. C. A. 168, writ of certiorari denied (1909) 29 S. Ct. 704, 214 U. S. 527, 53 L. Ed. 1068.

An indictment under R. S. § 5480, as amended by Act March 2, 1889 (post, § 10385), for using the mails to defraud, need not follow the language of the statute, but it is sufficient if the averments bring the charge within the substance and true meaning of the statute. Lemon v. U. S. (1908) 164 Fed. 953, 90 C. C. A. 617.

Under Oleomargarine Act Aug. 2, 1886, § 17, post, § 6229, which makes it a criminal offense if any person engaged in carrying on the business of manufacturing oleomargarine "defrauds or attempts to defraud the United States of the tax on the oleomargarine produced by him" an indictment which, after showing defendant to have been a manufacturer within the statute, charges in the language of the statute that he attempted to defraud the United States of the tax, is sufficient, without setting out the particular acts relied on. Hardesty v. U. S. (1909) 168 Fed. 25, 93 C. C. A. 417.

An indictment in the words of a statute is insufficient where the statute does not fully, without any uncertainty, set forth all the elements necessary to constitute the offense. Martin v. U. S. (1909) 168 Fed. 198, 93 C. C. A. 484, reversing judgment (1907) 104 S. W. 678, 7 Ind. T. 451.

An indictment, under R. S. § 5480, post, § 10385, for using the mails to defraud, which substantially follows the language of the statute, is sufficient after verdict. Grey v. U. S. (1909) 172 Fed. 101, 96 C. C. A. 415.

An indictment charging a statutory crime in the language of the statute is sufficient when the statute fully, directly, and with certainty sets forth all the elements of the crime. Rupert

v. U. S. (1910) 181 Fed. 87, 104 C. C. A. 255.

An indictment, charging the defendant generally in the language of the statute with carrying on the business of a manufacturer of oleomargarine without having paid the special tax required by Oleomargarine Act Aug. 2, 1886, § 3, as amended by Act May 9, 1902, § 2, post, § 5977, is sufficient, and need not set out a statement of the facts which constitute the defendant a manufacturer. Hart v. U. S. (1910) 183 Fed. 368, 105 C. C. A. 588, writ of certiorari denied (1911) 31 S. Ct. 714, 220 U. S. 609, 55 L. Ed. 608.

Oleomargarine Act Aug. 2, 1886, § 17, post, § 6229, provides that whenever any person, engaged in carrying on the business of manufacturing oleomargarine, defrauds or attempts to defraud the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him and all oleomargarine and raw material for the production of oleomargarine found in the factory, and shall be fined, imprisoned, etc. Held that, since the tax on oleomargarine is leviable when the substance is manufactured and sold or removed for consumption and use, an indictment alleging a manufacture and sale of oleomargarine without payment of the tax, and with intent to defraud the United States of the same and that it should not be paid, in the language of the statute, was not invalid, in the absence of an application for a bill of particulars, for failure to allege the specific means by which defendant attempted or intended to attempt to defraud the United States. Enders v. U. S. (1911) 187 Fed. 754, 109 C. C. A. 502, writ of certiorari denied (1911) 32 S. Ct. 523, 223 U. S. 719, 56 L. Ed. 629.

If several things are denounced by a statute creating an offense, connected with the disjunctive "or," they must be connected in the indictment by the conjunctive "and." Ackley v. U. S. (1912) 200 Fed. 217, 118 C. C. A. 403.

Where a statute denounces a common-law crime, an indictment thereunder must allege the common-law ingredients; but, if the crime is statutory, it is sufficient if it charges in the language of the statute, unless generic or common-law terms are used. Id.

In an indictment for a statutory offense it is sufficient, if the offense is substantially set forth, though not in the exact words of the statute. U. S. v. Bachelder (C. C. 1814) Fed. Cas. No. 14,490; In re Dewees (C. C. 1869) Fed. Cas. No. 3,848.

In an indictment for such an offense it is sufficient if the offense be substantially set forth, though not in the precise words of the act. Id.

If a statute offense is alleged in the indictment according to the words of the act, it is not vitiated by a conclusion which calls the offense by a wrong name. U. S. v. Elliot (C. C. 1823) Fed. Cas. No. 15,044.

An indictment charging an offense in the precise words of the statute creating it need not prefix to the charging words the word "unlawful," or any other word showing a wrongful intent. U. S. v. Thompson (C. C. 1853) Fed. Cas. No. 16,490.

An indictment under Act July 7, 1838, § 12, against the officers and employés of a steamboat, is sufficient if it charge them substantially in the language of a statute, with misconduct, negligence, or inattention to their respective duties, whereby the lives of passengers are destroyed. U. S. v. Collyer (C. C. 1855) Fed. Cas. No. 14,838.

In indictments for misdemeanors it is sufficient to lay the charge in the words of the act describing the offense, unless it appear that those words include cases not intended to be embraced within the laws, in which event the indictment must show the case to be one not thus excluded. U. S. v. Pond (C. C. 1855) Fed. Cas. No. 16,067.

In drawing an indictment it is not necessary that the exact words of the statute be used, if their precise equivalent is expressed, and the words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of." U. S. v. Nunnemacher (C. C. 1876) Fed. Cas. No. 15,-903.

Where a criminal statute does not so define the acts constituting the offense as to give the offender information of the nature and cause of the accusation, an indictment which does not go beyond the words of the statute is defective. U. S. v. Staton (C. C. 1878) Fed. Cas. No. 16,382.

It is not necessary in an indictment charging the offense declared by R. S. § 5358, post, § 10470, to distinguish between acts supposed to be characterized as "plundering" and those supposed to be characterized as "stealing" or "destroying." It may well be charged, in the language of the statute, as a single offense, and will be supported by proof of any act that could be denominated plundering, stealing, or destroying. Nor is it necessary to distinguish between acts of depredation committed on the wreck and those on property belonging to it, but separated from it. If the indictment be so drawn, the separation may be disregarded, and a general verdict had upon the whole indictment. U. S. v. Stone (C. C. 1881) 8 Fed. 232, 251.

In an indictment for crime defined by statute, it is usually sufficient to follow the language of the definition; but when the language of the statute is ambiguous, so that an indictment following it does not with reasonable certainty notify accused of the offense, or omits a necessary ingredient thereof,

the indictment must by proper allegation supply the omission or avoid the ambiguity. U. S. v. Campbell (C. C. 1883) 16 Fed. 233, 235.

In the statute making it an offense for any officer of the United States to "directly or indirectly solicit or receive or be in any manner concerned in soliciting or receiving" any assessment, etc., for any political purpose (Act Jan. 16, 1883, § 11, post, § 10288), the expression, "being concerned in," is not a legal term or conclusion which needs a specification of facts for completeness of description. It is a colloquial expression, equivalent to "being engaged in," or "taking part in," and sufficiently informs the accused of what the government intends to prove; and hence it is sufficient to charge the offense in the words of the statute. U. S. v. Scott (C. C. 1895) 74 Fed. 213.

The rule that an indictment following the words of the statute is sufficient is subject to the qualification that all the material facts and circumstances embraced in the definition of the offense must be stated. U. S. v. Brazeau (C. C. 1897) 78 Fed. 464.

The provision of Bankr. Act 1898, c. 541, § 29a, 30 Stat. 554, subjecting any person to criminal prosecution for "having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy," sets forth all the elements of the offense, and an indictment in the terms of the statute is sufficient. U. S. v. Comstock (C. C. 1908) 161 Fed. 644.

It is no objection to an indictment for conspiracy that the agreement constituting the conspiracy is laid in the words of the statute. U. S. v. White (C. C. 1909) 171 Fed. 775.

Since the common-law refinements in criminal pleading are not applicable to statutory offenses, under the laws of the United States, it is sufficient, usually, to allege the offense in the very terms of the statute. U. S. v. Armstrong (D. C. 1862) Fed. Cas. No. 14,-468.

Where a statute defines an offense generally, and designates the particular acts constituting it, it is sufficient in charging a crime in an indictment to follow substantially the language of the statute; but, where the statute defines the crime generally, without naming the particular acts which constitute it, it is necessary to set out the acts done, so that it may appear to the court whether such acts amount to a crime. U. S. v. Scott (D. C. 1865) Fed. Cas. No. 16,241.

An indictment, under 13 Stat. 8, for the murder of an officer who is in the performance of service in relation to the enrollment of the militia, is defective for uncertainty where it merely follows the words of the statute. Id.

Where a statute is elliptical, so that its meaning must be gathered from the context, or from other parts of the same or other statutes, an indictment founded thereon must of itself allege a crime according to the true intent of the statute, and not in the exact words thereof. U. S. v. Reed (D. C. 1868) Fed. Cas. No. 16,136.

An indictment under R. S. § 5438, post, § 10196, for conspiracy to defraud the government of the United States by obtaining the allowance and payment of a false and fraudulent claim, which charges as the overt act the presentation of such claim, must state the particular facts showing the fraudulent character of the claim, and a general averment in the language of the statute that it was fraudulent is not sufficiently specific. U. S. v. Greene (D. C. 1902) 115 Fed. 343.

Section 10196, post, provides that any person who shall "demand or obtain" any valuable thing under certain false pretenses shall be guilty, etc. An indictment in following the words of the statute alleged that the defendant "did demand and obtain" a certain thing of value. Held, that it was not necessary in order to sustain the indictment to prove that he both demanded "and" obtained. U. S. v. Ballard (D. C. 1902) 118 Fed. 757.

Where an offense is statutory, and is described in the statute, an indictment sufficiently describes the offense which follows the language of the statute, and describes in addition what was the act done constituting the offense. Id.

In an indictment for an offense against a statute, the offense may be described in the general language of the act; but the description must contain all of the particulars essential to constitute the offense or crime, in order to advise the accused of what he is charged. U. S. v, Marx (D. C. 1903) 122 Fed. 964.

Where a person is indicted for the unlawful sale of oleomargarine, in violation of Act Aug. 2, 1886, post, § 5967, it is sufficient to charge in the words of the act that the defendant was carrying on the business of a wholesale or of a retail dealer, as the case may be, without having paid the tax required by law. U. S. v. Joyce (D. C. 1905) 138 Fed. 457.

While the offense may be set forth in an indictment in the general language of the statute, it must be accompanied by a statement of all the particulars necessary to show the commission of the crime without uncertainty or ambiguity. U. S. v. Baltimore & O. R. Co. (D. C. 1907) 153 Fed. 997.

It is sufficient in an accusation to follow the words of the statute describing the offense, if by doing so the act constituting the offense is fully, directly, and expressly alleged, without uncertainty or ambiguity. U. S. v. Ore-

gon Short Line Ry. Co. (D. C. 1908) 180 Fed. 483.

It is not sufficient to charge an offense in the words of a statute creating the offense, unless they of themselves directly and with requisite certainty set forth every essential fact necessary to constitute the offense. U. S. v. Van Wert (D. C. 1912) 195 Fed. 974.

In an indictment for obtaining transportation of interstate freight at an illegal rate, in violation of Interstate Commerce Act Feb. 4, 1887, § 10, as amended by Act June 18, 1910, § 10, par. 3 (post, § 8574), it was sufficient to charge the offense in the language of the statute. U. S. v. Sterling Salt Co. (D. C. 1912) 200 Fed. 593.

An indictment under a statute is sufficient, which, though brief, follows the language of the statute, and informs the defendant with substantial certainty of the time, place, and character of the offense which he is called upon to defend. Knoll v. U. S. (1906) 26 App. D. C. 457.

It is a safe rule, in criminal pleading, to follow the language of the statute, where there is any uncertainty in respect of its meaning. U. S. v. Evans (1906) 28 App. D. C. 269.

Where an indictment for combination or conspiracy in restraint of trade in violation of Sherman Anti-Trust Law (Act July 2, 1890, c. 647) § 3, 26 Stat. 209, post, § 8822, was uncertain as to some of its allegations, owing to the fact that the offense was first charged in the language of the statute, and the purposes and objects of the conspiracy were not fully stated until after the overt acts were described, the defect was one of form, and not of substance, not prejudicial to defendant, and therefore immaterial under this section, providing that no indictment shall be quashed for a nonprejudicial defect of form. Tribolet v. U. S. (Ariz. 1908) 95 P. 85.

Mansf. Dig. § 1587 (Ind. T. Ann. St. 1899, § 930), provides that any person convicted of obtaining carnal knowledge of any female by any false promise of marriage shall be imprisoned, etc. Held, that an indictment in the language of the statute was not demurrable for failure to allege that prosecutrix was of previous chaste character. Kerr v. U. S. (Ind. T. 1907) 104 S. W. 809.

52. Negativing exceptions in statutes or constitution.—Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment must allege enough to show that the accused is not within the exception. If the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the indictment may omit such reference. The matter contained in the exception is that of defense, and must be shown by the accused. U. S. v. Cook (1872) 84 U. S. (17 Wall.) 168, 173, 21 L. Ed. 538.

An indictment in the circuit court for the Eastern district of Texas for a murder committed in the Indian Territory sufficiently negatives the exception to the jurisdiction of the court contained in R. S. § 2146, post, § 4149, when it charges that defendants were not Indians, nor citizens of the Indian Territory. Westmoreland v. U. S. (1895) 155 U. S. 545, 15 Sup. Ct. 243, 39 L. Ed. 255; Wheeler v. Same (1895) 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244.

In an indictment for a statutory offense, it is only necessary to negative an exception in the statute when that exception is such as to render the negative of it an essential part of the definition of the offense. Shelp v. U. S. (1897) 81 Fed. 694, 26 C. C. A. 570.

An indictment which charges the accused in the language of R. S. § 5508, post, § 10183, with having conspired to injure and intimidate a citizen named in the free exercise of a right secured by the Constitution and laws, and avers that such right was the right to the free exercise and enjoyment of freedom from involuntary servitude, and that the conspiracy was to be effected by arresting, guarding, and compelling him by threats and intimidation to work against his will for the defendants, sufficiently describes the offense, and need not exclude the defendants from the operation of the exception in the thirteenth constitutional amendment by an averment that such person was not held in servitude as a punishment for crime. Smith v. U. S. (C. C. A. 1907) 157 Fed. 721, writ of certiorari denied (1908) 28 S. Ct. 569, 208 U. S. 618, 52 L. Ed. 647.

An indictment for carrying on the business of a manufacturer of oleomargarine without having paid the special tax therefor, based on the amendment to section 3 of the oleomargarine act added by Act May 9, 1902, § 2, post, § 5977, which provides that any person that sells, vends, or furnishes oleomargarine for the use and consumption of others "except to his own family table without compensation," and who shall color the same to resemble butter, shall be deemed a manufacturer, need not negative such exception which is in fact mere surplusage, since it does not exempt from the operation of the statute anything which would otherwise be within it. Morris v. U. S. (1908) 161 Fed. 672, 88 C. C. A. 532, judgment reversed (1909) 168 Fed. 682, 94 C. C.

A. 168, writ of certiorari denied (1909) 29 S. Ct. 704, 214 U. S. 527, 53 L. Ed. 1068.

When negative words constitute a part of the description of an offense, they must be used in the indictment. U. S. v. McCormick (C. C. 1810) Fed. Cas. No. 15,663.

Where an exception is contained in the same clause of a statute creating an offense and prescribing its punishment, the indictment must show that the act or person is not within the exception; but if the exception or proviso be in a subsequent clause, or a subsequent statute, it need not be stated in the indictment. It is mere matter of defense. U. S. v. Moore (C. C. 1882) 11 Fed. 248.

As a rule, an exception in a statute by which certain particulars are withdrawn from the operation of its enacting clause, defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed near to or remote from such enacting clause; and an indictment charging a person with the violation of such statute need not negative such exception. Nelson v. U. S. (C. C. 1887) 30 Fed. 112.

The rule in respect to negativing an exception when the statute is that under which the right is claimed does not extend to every statute collaterally involved in the description of every incidental allegation of the pleading, as, in an indictment for conspiracy to defraud the revenue on imports, the allegations need not cover the possibility that the dutiability of the merchandise might be avoided by change of its destination. It is more than enough advantage that the defendant may at trial prove such an exception without pleading it. U. S. v. White (C. C. 1909) 171 Fed. 775.

An indictment for a crime alleged to have been committed in the course of bankruptcy proceedings against a corporation, alleging that the court was there concerned in adjudicating the corporation a bankrupt, was not objectionable for failure to negative the exceptions contained in Bankr. Act July 1, 1898, § 4b, post, § 9588, specifying the corporations that may be declared bankrupts. U. S. v. Freed (C. C. 1910) 179 Fed. 236.

Where an exception in an act does not occur in the enacting clause, it is not necessary to set it out or negative it in the indictment. U. S. v. Schimer (D. C. 1870) Fed. Cas. No. 16.229.

When the enacting clause of a statute describes an offense, with certain exceptions, it is necessary to state in the indictment all the circumstances, and to negative the exceptions; but, if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment, and the accused must show that his case comes within them to avail himself of their benefit. U. S. v. Nelson (D. C. 1886) 29 Fed. 202.

An indictment based on R. S. § 5440, post, § 10201, charging a conspiracy to defraud the United States by causing the violation of another statute subsequently enacted, need not negative an exception found in the later statute, which, being entirely separable from the section upon which the indictment is founded, is matter of defense. U. S. v. Stone (D. C. 1905) 135 Fed. 392.

An indictment in the words of Act Aug. 2, 1886, post, § 5967, charging defendant with knowingly, willfully, and unlawfully carrying on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor as required by law, is not objectionable for failure to negative that defendant was a manufacturer selling his own product in stamped packages at the place of manufacture, within the exception of the statute (post, § 5977). U. S. v. Joyce (D. C. 1905) 138 Fed. 455.

Under the rule that, where a statute in defining a criminal offense states an exception, an indictment for such offense must allege enough to show that the accused is not within the exception, an indictment under Act Sept. 13, 1888, § 9, post, § 4310, which makes it a misdemeanor for the master of any vessel to knowingly bring within the United States on said vessel and land or attempt to land any Chinese person "in contravention of the provisions of this act," must negative the exceptions stated in section 10 of the act (post, § 4311). U. S. v. Wood (D. C. 1907) 159 Fed. 187.

It is unnecessary to negative an exception not embraced within the same clause, which defines and creates the offense, and which constitutes no part of the description of the offense. When an exception is contained in a distinct section, it is a matter of defense. Garver v. Territory (1897) 49 P. 470, 5 Okl. 342.

53. Setting out rules and regulations of executive department.—Regulations made by an executive department, in pursuance of authority delegated by congress have the force of law, and the courts will take judicial notice of their existence and provisions; hence an indictment charging a violation of such a regulation, which is made an offense by statute, need not set out such regulation, but is sufficient if it avers that an act done in pursuance of such regulation was done under the requirements of law. Wilkins v. U. S. (1899) 96 Fed. 837, 37 C. C. A. 588.

It is not necessary that an information for driving diseased animals from one state to another, contrary to the statute (post, § 8695) and rules and regulations of the Department of Agriculture, set out such rules and regulations, since the court may take judicial

notice of them. U. S. v. Slater (D. C. 1903) 123 Fed. 115.

It is unnecessary to set out regulations made by an executive department in pursuance of authority delegated by Congress in an indictment for their violation or to specify the particular rule violated. U. S. v. Moody (D. C. 1908) 164 Fed. 269.

54. Indorsement of statute on margin.—Indorsement on margin of indictment of citation of the statute is not part of the indictment, and does not make it an indictment under that statute alone; but the indictment will be good if it states an offense embraced in any statute then in force. Williams v. U. S. (1897) 18 Sup. Ct. 92, 93, 168 U. S. 382, 42 L. Ed. 509.

That an indictment is indorsed on the margin as having been based on a particular statute is immaterial; such indorsement being no part of the indictment, which is good if it charges an offense under any statute, although indorsed and purporting to be drawn under a different one. Wechsler v. U. S. (1907) 158 Fed. 579, 86 C. C. A. 37.

The mere fact that the district attorney marks an indictment as drawn under a certain act of Congress is not ground for sustaining a demurrer to the indictment, if there is any other statute in force making the act charged by the indictment an offense. U. S. v. Sandefuhr (D. C. 1906) 145 Fed. 49.

55. Misnomer of offense on back of indictment.—A misnomer of the offense on the back of a good indictment and in the other records is not fatal to a conviction of the offense which is properly charged in the indictment. Smith v. U. S. (1913) 208 Fed. 131, 125 C. C. A. 353.

56. Indorsement of names of witnesses on indictment.—See, also, notes under § 1699, post.

In a prosecution by the United States in a territorial court, the sufficiency of the indictment and the indorsements thereon must be tested by the requirements of the federal statutes; and, since there is no law of the United States requiring the names of witnesses to be indorsed upon the indictment, absence of such indorsement is a mere imperfection in form, which imperfections this section declares shall not affect the indictment unless they tend to the prejudice of defendant. Fisher v. U. S. (1892) 1 Okl. 252, 31 Pac. 195.

57. Indorsement of prosecutor's name on indictment.—At common law, the name of the prosecutor need not be written at the foot of the indictment. U. S. v. Mundell (C. C. 1795) Fed. Cas. No. 15,834.

When a presentment for a misdemeanor is found by the grand jury without the name of a prosecutor, the court will order an indictment to be sent to the grand jury upon the suggestion of the prosecuting attorney. U. S. v. Dulany (C. C. 1808) Fed. Cas. No. 14,999.

Defendant will not be compelled to plead until the prosecutor's name is indorsed on the indictment. U. S. v. Carr (C. C. 1823) Fed. Cas. No. 14,729.

An indictment for a misdemeanor will be quashed unless the name of the prosecutor is indorsed thereon as required by law, although defendant has given a recognizance. U. S. v. Helriggle (C. C. 1827) Fed. Cas. No. 15,344; Same v. Hollinsberry (C. C. 1829) Fed. Cas. No. 15,380.

The name of a prosecutor must be written at the foot of an indictment for a misdemeanor under the Virginia law. U. S. v. Shackelford (C. C. 1828) Fed. Cas. No. 16,261.

The indictment will not be quashed for want of a prosecutor's name if the witnesses were called for by the grand jury; contra where the witnesses were not sent to the grand jury by the court, and it did not appear that they were called for by the grand jury. U. S. v. Lloyd (C. C. 1834) Fed. Cas. No. 15,616.

A motion to quash an indictment for want of the name of a prosecutor is too late after verdict. Id.

Where an indictment for conspiracy to defraud the United States was found by a federal grand jury, without the intervention of a prosecutor, the indictment was not defective because a prosecutor's name was not indorsed on the back thereof. U. S. v. Wetmore (D. C. 1914) 218 Fed. 227.

58. Indorsement of indictment "A true bill."—It is advisable, at least, that an indictment found be indorsed "A true bill," and signed by the foreman of the grand jury. Frisbie v. U. S. (1895) 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657.

An objection to an indictment that it has not the indorsement "A true bill," signed by the foreman of the grand jury, is waived unless made when defendant is called on to plead, as the defect does not go to the substance of the charge, but only to the form. Id.

59. Signature to indictment.—It is advisable that an indictment found be signed by the foreman of the grand jury. Frisbie v. U. S. (1895) 15 Sup. Ct. 586, 157 U. S. 160, 39 L. Ed. 657.

The designation "Foreman" is sufficient to show that the person to whose name it was appended was foreman of the grand jury. U. S. v. Plumer (C. C. 1859) Fed. Cas. No. 16,056.

The signature of a district attorney is no part of an indictment, and is only necessary as evidence to the court that he is prosecuting the offender conformably to his statutory duty. U. S. v. McAvoy (C. C. 1860) Fed. Cas. No. 15,654.

Where the foreman of the grand jury wrote his name in blank across the back of a bill of indictment, under the proper date, without more, and no finding

by the grand jury was either reduced to writing or publicly announced in court, after plea of not guilty, trial, and conviction, judgment must be arrested for want of a finding. U. S. v. Levally (D. C. 1888) 36 Fed. 687.

Where the transcript of the record on appeal in a criminal case shows that the grand jury was impaneled at a regular term, that a foreman was duly appointed, and that the indictment on which the accused was tried was returned in open court, indorsed "A true bill," over the signature of the foreman, it must be presumed that the grand jury impaneled was the grand jury required by the constitution and the law, and that the true bill returned in open court was concurred in by the requisite number of the grand jurymen; and that the foreman's name, as written in the indictment, contains only the initial of his given name, while the minutes recite his full given name, is a fact of no consequence. Lanckton v. U. S. (1901) 18 App. D. C. 348.

Since there is nothing in the statutes requiring the United States district attorney to sign an indictment, it is no valid objection thereto that it is signed by one as district attorney pro tem. People v. Lyman (1877) 2 Utah, 30.

60. Variance between indictment and proof.—See note, ante, as to "Material matter alleged under videlicet."

See, also, notes under title 69a, post.

After the jury is sworn the court will not quash the indictment for a fatal variance, the prisoner having a right to a verdict. U. S. v. Peacock (C. C. 1804) Fed. Cas. No. 16,019.

The proof must correspond with the averments, though the offense is stated with greater particularity than is required by law. U. S. v. Porter (C. C. 1808) Fed. Cas. No. 16,074; Same v. Brown (C. C. 1843) Fed. Cas. No. 14,-666.

Literal variances, which are not fatal, are those which do not make a word different in sense and grammar,—which leave the sound and sense in substance the same. U. S. v. Hinman (C. C. 1831) Fed. Cas. No. 15,370; Same v. Mason (C. C. 1875) Fed. Cas. No. 15,736.

A variance between the indictment and the evidence is immaterial if the substance of the matter be found. U. S. v. Howard (C. C. 1837) Fed. Cas. No. 15,403.

61. Arraignment and plea.—See, also, notes at end of this chapter.

Before a court of last resort affirms a judgment of conviction of an infamous crime, it must appear affirmatively from the record that the accused was called upon to plead, or did plead, to the indictment. This is a matter of substance, and not of form, and the failure of the record to show it is not cured by this section (three justices dissenting). Crain v. U. S. (1896) 16 Sup. Ct. 952, 956, 162 U. S. 625, 40 L. Ed. 1097.

Failure to plead is fatal to the judgment. Shelp v. U. S. (1897) 81 Fed. 694, 701, 26 C. C. A. 570.

Where, after mistrial, and before a new trial, amendments are made to purely formal parts of certain counts of an indictment, and the defendants are not rearraigned, even if the irregularity is material it can affect only the counts so amended, and the error is cured by arrest of judgment on such counts. Gardes v. U. S. (1898) 87 Fed. 172, 30 C. C. A. 596, certiorari denied (1898) 19 Sup. Ct. 884, 171 U. S. 689, 43 L. Ed. 1179.

A prisoner twice indicted for the same crime, who has never been arraigned under the first indictment, has no right to have it quashed before going to trial on the second. U. S. v. Maloney (C. C. 1853) Fed. Cas. No. 15,713a.

Where a defendant was not arraigned and made no plea, but was identified, knew the offense charged, denied the charge, went to trial on the denial, and went upon the witness stand and there denied the offense, and was convicted, the failure of the record to show an arraignment and plea was a "defect or imperfection in matter of form only," within the meaning of this section, and did not tend to his prejudice. U. S. v. Molloy (C. C. 1887) 31 Fed. 19.

It is not essential that a plea to an indictment in a federal court for irregularities in the procedure should aver that the matters therein set forth were prejudicial to defendant, which is merely a legal conclusion; but facts showing such prejudice must be averred and proved under this section, which applies as well to irregularities in procedure as to defects of form in the indictment. U. S. v. Cobban (C. C. 1904) 127 Fed. 713.

62. When and how objections may be raised in general.—Objections to the sufficiency of an indictment cannot be raised by objecting to the introduction of any evidence thereunder. Nurnberger v. U. S. (1907) 156 Fed. 721, 84 C. C. A. 377.

While the better practice is to raise objections to an indictment by demurrer in advance of the trial, accused cannot be convicted and punished unless the indictment, even if not attacked until by motion in arrest of judgment, states the substance of an offense. Morris v. U. S. (1909) 168 Fed. 682, 94 C. C. A. 168, reversing judgment on rehearing (1908) 161 Fed. 672, 88 C. C. A. 532, and writ of certiorari denied (1909) 29 S. Ct. 704, 214 U. S. 527, 53 L. Ed. 1068.

The ruling of the trial court, on defects apparent on the face of an indictment, may be had on the trial by motion to direct a verdict for accused, or for alleged defects or imperfections of

form within this section, or defects, which are cured by verdict, by motion in arrest of judgment, for generally what is fatal on demurrer is equally so on motion in arrest. Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631.

Objections to irregularities in summoning, impaneling, or organizing a grand jury must be called to the trial court's attention by a plea in abatement or motion to quash before a plea of not guilty. Burchett v. U. S. (1912) 194 Fed. 821, 114 C. C. A. 525.

The validity of an indictment cannot be tested by an objection to any evidence on the part of the government. McSpadden v. U. S. (1915) 224 Fed. 935, 140 C. C. A. 413.

A defendant in a criminal case will be held to have waived by laches an objection to an indictment as having been irregularly found by the grand jury, where he fails to make such objection until a motion is made by him to continue the indictment, and suspend sentence and judgment, after having gone to trial upon the indictment, and, after conviction, having moved for a new trial. U. S. v. Hartwell (C. C. 1870) Fed. Cas. No. 15,319.

Where the accused had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them by plea in abatement. U. S. v. Hammond (C. C. 1875) Fed. Cas. No. 15,294.

Defendants who have not had any earlier chance to object to the composition of the grand jury by which they have been indicted may do so by plea in abatement. U. S. v. Reeves (C. C. 1878) Fed. Cas. No. 16,139.

An objection to the sufficiency of an indictment must be taken before trial by motion to quash or demurrer, or, after trial, by motion in arrest. It cannot be raised at the trial by objecting to the introduction of evidence in support of it. U. S. v. Harmon (D. C. 1891) 45 Fed. 414.

Where an indictment shows on its face that it is void for insufficiency of description of the person indicted, the defect may be taken advantage of by demurrer as well as by plea in abatement. U. S. v. Doe (D. C. 1904) 127 Fed. 982.

An objection to an indictment on the ground that the grand jury was illegally constituted when substantial, and not merely technical, may be taken at any time before arraignment. U. S. v. Haskell (D. C. 1909) 169 Fed. 449.

All objections to the competency of, and to irregularities in selecting, drawing, and impaneling, grand jurors, not appearing of record, must be taken advantage of by plea in abatement of the indictment, and not by motion to quash it. Tarrance v. State (1901) 30 So. 685, 43 Fla. 446, affirmed (1903) 23 Sup. Ct. 402, 188 U. S. 519, 47 L. Ed. 572.

63. Objection after plea of guilty.—After a plea of guilty, the only objection than can be made to the indictment is that it fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment. U. S. v. Bayaud (C. C. 1883) 16 Fed. 376.

A technical defect in an indictment, not tending to prejudice defendant, affords no ground for a motion in arrest of judgment after a plea of guilty. U. S. v. Chase (C. C. 1886) 27 Fed. 807, 808.

64. Motion to quash or set aside indictment.—See notes, ante.

See, also, notes under § 1690, ante.

See, also, notes at end of this chapter.

A motion to quash an indictment is ordinarily addressed to the trial court's sound discretion. Durland v. U. S. (1896) 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Hillman v. U. S. (1911) 192 Fed. 264, 112 C. C. A. 522 (writ of certiorari denied [1912] 32 Sup. Ct. 834, 225 U. S. 699, 56 L. Ed. 1263).

A motion to quash an indictment is ordinarily addressed to the discretion of the court, and the overruling thereof is not ordinarily assignable as error. Endleman v. U. S. (1898) 86 Fed. 456, 30 C. C. A. 186.

A motion to quash an indictment is addressed to the discretion of the court, and in the federal courts the refusal to quash will not be reviewed in an appellate court. McGregor v. U. S. (1904) 134 Fed. 187, 69 C. C. A. 477.

A motion to quash an indictment is addressed to the sound discretion of the trial court, and in general its ruling thereon is not reviewable, and especially where the motion was heard on affidavits which are not in the record. Chadwick v. U. S. (1905) 141 Fed. 225, 72 C. C. A. 343.

The discretion of a trial court in ruling on a motion to quash an indictment cannot be reviewed. Dillard v. U. S. (1905) 141 Fed. 303, 72 C. C. A. 451.

The general rule that a motion to quash an indictment is addressed to the discretion of the court and a refusal to grant it cannot be assigned as error, while subject to exception in some cases in the federal courts, will be followed where the motion is founded only on alleged defects appearing on the face of the indictment, since in such case the ruling could not finally determine any right of the defendant. Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631, affirming judgment U. S. v. Hillegass (D. C. 1910) 176 Fed. 444, and writ of certiorari denied Hillegass v. U. S. (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

Denial of a motion to quash an indictment will not be reviewed, except where there has been such a failure to properly exercise judicial discretion as to cause real injustice. Carlisle v.

U. S. (1912) 194 Fed. 827, 114 C. C. A. 531.

Pendency of two indictments against the defendant for the same offense is not ground for motion to quash the second. Thompson v. U. S. (1913) 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206.

The action of a federal court in overruling a motion to quash an indictment will not be reviewed by an appellate court, unless the failure to properly exercise judicial discretion amounts to a denial of justice. Steigman v. U. S. (1915) 220 Fed. 63, 135 C. C. A. 631.

The court will not take notice of presentments by the grand jury on which the prosecuting attorney does not think proper to institute proceedings, and on this principle a motion to quash a presentment, after a nolle prosequi entered, will be overruled. U. S. v. Hill (C. C. 1809) Fed. Cas. No. 15,364.

In every case of a motion to the court for a cassetur, the facts on which it is grounded must be proved by affidavit. U. S. v. Coolidge (C. C. 1815) Fed. Cas. No. 14,858.

A motion to quash the indictment will not be heard until defendant has been taken. U. S. v. Taylor (C. C. 1836) Fed. Cas. No. 16,437.

An indictment will not be quashed because it appears upon the record that it was not found within two years after the offense was committed, as the defendant might have been a fugitive from justice. U. S. v. White (C. C. 1836) Fed. Cas. Nos. 16,675, 16,676.

It is discretionary with the court to quash an indictment, or to hold defendant to plead in abatement or demur. U. S. v. Stowell (C. C. 1854) Fed. Cas. No. 16,409.

A defect pleadable only in abatement is not ground for quashing an indictment. U. S. v. Pond (C. C. 1855) Fed. Cas. No. 16,067.

On a motion to quash an indictment for treason, held, that defendant's counsel would be required to file with the clerk a formal statement of the grounds upon which the motion was based. Case of Davis (C. C. 1867–1871) Fed. Cas. No. 3,621a.

A motion to quash an indictment may be heard on an agreed statement of facts without putting the defendant to plead the matters alleged as ground for the motion. U. S. v. Tallman (C. C. 1872) Fed. Cas. No. 16,429.

The fact that an indictment has been quashed because of insufficient averments is no ground for quashing an information subsequently filed by the district attorney against the same person for the same offense. U. S. v. Nagle (C. C. 1879) Fed. Cas. No. 15,-852.

Where there is doubt whether an indictment charges an offense within a statute, it should not be quashed, but the doubt be left to be solved on motion in arrest of judgment. U. S. v. Bartow (C. C. 1882) 10 Fed. 874.

An indictment will be quashed only when it is very grossly bad. U. S. v. Wardell (C. C. 1892) 49 Fed. 914.

On a motion to quash an indictment, the court will consider only such propositions as raise clear points of law. U. S. v. Grunberg (C. C. 1904) 131 Fed. 137.

A motion to quash an indictment is a proper mode of taking objections to it for defect of form or substance. U. S. v. O'Sullivan (D. C. 1851) Fed. Cas. No. 15,974.

It is discretionary with the court whether it will quash an indictment for defect of form. Id.

Where a statute declaring an offense and its punishment is repealed without a provision saving pending prosecutions, an indictment previously found, but not yet tried, should be quashed on motion. U. S. v. Finlay (D. C. 1869) Fed. Cas. No. 15,099.

A motion to set aside or quash an indictment will not lie unless the objection appears upon the face of the indictment. U. S. v. Brown (D. C. 1871) Fed. Cas. No. 14,671.

The courts do not favor motions to quash indictments, and will not, as a rule, allow them, where they are made upon some matter which might have been presented by demurrer, or by motion in arrest of judgment, or which might be made available by way of defense in trial before a jury. U. S. v. Kilpatrick (D. C. 1883) 16 Fed. 765.

Where an indictment for mailing a newspaper containing an obscene article includes a number of counts, charging as a separate offense the mailing of a copy of that issue to each of a number of persons, the objection that all the counts are for the same offense should be made by motion to require the prosecution to elect, and not by motion to quash the indictment. U. S. v. Harman (D. C. 1889) 38 Fed. 827.

Where, from the inspection of an indictment, it becomes clear to the court that, if a jury should find defendant guilty under the evidence on which it is conceded the government would be compelled to rely, a new trial would necessarily be granted, the indictment will be quashed. U. S. v. Kuhl (D. C. 1898) 85 Fed. 624.

It was within the trial court's sound discretion to permit accused to withdraw their pleas of not guilty and file motions to quash. U. S. v. Lewis (D. C. 1911) 192 Fed. 633.

Motions to quash an indictment held filed in time. Id.

Cited without definite application, U. S. v. Perrin (1889) 9 Sup. Ct. 681, 682, 131 U. S. 55, 33 L. Ed. 88; Connors v. U. S. (1895) 15 Sup. Ct. 951, 952, 158 U. S. 408, 39 L. Ed. 1033; Rosen v. Same (1896) 16 Sup. Ct. 480, 482, 161 U. S. 29, 40 L. Ed. 606 (dissenting opinion); Rieger v. Same

(1901) 107 Fed. 916, 923, 47 C. C. A. 61 (writ of certiorari denied [1901] 21 Sup. Ct. 923, 181 U. S. 617, 45 L. Ed. 1030); Pooler v. Same (1904) 127 Fed. 509, 62 C. C. A. 307; Conrad v. Same (1904) 127 Fed. 798, 62 C. C. A. 478; Brown v. Same (1906) 143 Fed. 60, 74 C. C. A. 214; Nurnberger v. Same (1907) 156 Fed. 721, 724, 84 C. C. A. 377; Shepard v. Same (1908) 160 Fed. 584, 87 C. C. A. 486 (certiorari denied [1908] 29 Sup. Ct. 682, 212 U. S. 571, 53 L. Ed. 655); Grey v. Same (1909) 172 Fed. 101, 96 C. C. A. 415; Standard Oil Co. of New York v. Same (1910) 179 Fed. 614, 103 C. C. A. 172; Rogers v. Same (1910) 180 Fed. 54, 58, 61, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264; Shaw v. Same (1910) 180 Fed. 348, 103 C. C. A. 494; Dyar v. Same (1911) 186 Fed. 617, 108 C. C. A. 478; Kovoloff v. Same (1912) 202 Fed. 475, 120 C. C. A. 605 (dissenting opinion); Babcock v. Same (C. C. 1888) 34 Fed. 873, 876; U. S. v. Clark (C. C. 1888) 37 Fed. 106, 107; Same v. French (C. C. 1893) 57 Fed. 382, 388; Same v. Pettus (C. C. 1897) 84 Fed. 791, 792; Same v. Clifford (C. C. 1900) 104 Fed. 296, 298; Same v. Nelson (D. C. 1886) 29 Fed. 202, 210; Same v. Adler (D. C. 1892) 49 Fed. 733, 735; Same v. Durland (D. C. 1894) 65 Fed. 408, 413 (affirmed [1896] 16 Sup. Ct. 508, 161 U. S. 306, 40 L. Ed. 709); Same v. Greene (D. C. 1906) 146 Fed. 778; Same v. Swift (D. C. 1911) 188 Fed. 92; Same v. Sterling Salt Co. (D. C. 1912) 200 Fed. 593.

§ 1692. (R. S. § 1026.) Judgment on demurrer to an indictment.

In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require.

Act May 23, 1872, c. 202, 17 Stat. 158.

Notes of Decisions

See, also, notes at end of chapter.

Overruling demurrer in general.—In the federal courts, the overruling of a demurrer to an indictment, where the defendant is allowed to plead over, is not properly assignable as error. Hillegass v. U. S. (1910) 183 Fed. 199, 105 C. C. A. 631, affirming judgment U. S. v. Hillegass (D. C. 1910) 176 Fed. 444, and writ of certiorari denied Hillegass v. U S. (1911) 31 Sup. Ct. 470, 219 U. S. 585, 55 L. Ed. 347.

Former practice on overruling demurrer.—On demurrer to an indictment, where it is not suggested that defendant has any defense thereto, judgment absolute will be rendered against him on overruling the demurrer. U. S. v. Quinn (C. C. 1870) Fed. Cas. No. 16,110.

Pleading over on overruling demurrers to replications.—In a prosecution for conspiring to monopolize commerce, it was proper, upon overruling defendant's demurrers to replications to his special pleas in bar, to allow him to plead over. U. S. v. Rockefeller (D. C. 1915) 226 Fed. 328.

Cited without definite application, MacDaniel v. U. S. (1898) 87 Fed. 324, 325, 30 C. C. A. 670, writ of certiorari denied (1898) 19 Sup. Ct. 885, 171 U. S. 689, 43 L. Ed. 1179.

§ 1693. (R. S. § 1027.) When several indictments against the same person, one writ sufficient.

When two or more charges are made, or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms.

Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162.

Cited without definite application, Fuller v. U. S. (D. C. 1893) 58 Fed. 329, 333; Waters v. Same (1896) 31 Ct. Cl. 307.

§ 1694. (R. S. § 1028.) Copy of writ to be jailer's authority; original returned.

Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner, and the

original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon.

Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 163.

Notes of Decisions

Construction with section 1696.—This section must be construed with section 1696, post; both being sections of the same act. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 486, 2 L. R. A. 229.

Defective copy as rendering detention unlawful.—This section does not render a prisoner's detention unlawful because of a defect in such copy, which is merely evidence of the judgment and sentence on which the detention is based. Howard v. U. S. (1896) 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509.

Necessity of writ or warrant.—A certified copy of the record of a sentence to imprisonment is sufficient to authorize the detention of the prisoner, without any warrant or mittimus. Ex parte Wilson (1885) 5 Sup. Ct. 935, 114 U. S. 417, 29 L. Ed. 89, granting writ of habeas corpus (D. C. 1883) 18 Fed. 33.

After conviction, a final writ of commitment is necessary, setting forth the fact of trial and conviction and the term of imprisonment prescribed in the sentence. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 2 L. R. A. 229.

Necessity of seal of court.—The warrant of commitment of a defendant under final judgment should be under the seal of the court. Goodrich v. U. S. (D. C. 1890) 42 Fed. 392, following Van Duzee v. U. S. (D. C. 1890) 41 Fed. 571.

Sufficiency of commitment and fees of clerk.—A clerk is entitled to charge fees for copies of mittimus writs issued under this section and for copies of writs of sci. fa. issued under section 1239, ante; they having been issued by order of court, and not as matter of course, in the routine of office. Clough v. U. S. (C. C. 1893) 55 Fed. 921.

The clerk is entitled to fees for issuing, entering, and filing returns of four separate commitments, when four separate bench warrants are issued for the four defendants, and each defendant is committed to jail by a different deputy marshal on the same day. Fuller v. U. S. (D. C. 1893) 58 Fed. 329.

In the absence of a statutory requirement in the state, the commitment prescribed by this section is sufficient, and the clerk is entitled to a fee for it alone. Martin v. U. S. (1891) 26 Ct. Cl. 160.

Commitment to state jail.—See, also, section 10,523, post, and notes thereunder.

In a state where the use of local jails for United States prisoners is permitted whenever a prisoner is committed to jail, a copy of the writ of commitment showing grounds thereof must be left with the jailer. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 2 L. R. A. 229.

It is the proper practice, when prisoners are committed to a state jail under sentence of a federal court, that there shall be furnished to the jailer the evidence which the state statute requires him to demand before he will receive a prisoner under his custody. Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643, 650, affirmed (1891) 52 Fed. 930, 3 C. C. A. 361.

Cited without definite application, Marvin v. U. S. (C. C. 1890) 44 Fed. 405, 412 (appeal dismissed [1893] 13 Sup. Ct. 1053, 149 U. S. 789, 37 L. Ed. 961); Taylor v. Same (C. C. 1891) 45 Fed. 531, 535 (reversed [1893] 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335).

§ 1695. (R. S. § 1029.) Writ for removal of a prisoner from one district to another.

Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed.

Act Feb. 26, 1853, c. 80, § 1, 10 Stat. 162, 163.

Notes of Decisions

Construction with section 1674.—This section and section 1674, ante, expressly confer on the marshal of the district where the arrest is effected authority, and make it his duty, to execute a warrant of removal when signed by the judge. He must either turn over the prisoner to the marshal of the other district, or commit the prisoner to jail there. Either would be a commitment into custody. Puleston v. U. S. (C. C. 1898) 85 Fed. 570, 573.

Right of marshal to fee.—A marshal is entitled to a fee of 50 cents for committing a prisoner on warrant of removal in the district to which he has been removed. Puleston v. U. S. (C. C. 1898) 85 Fed. 570.

§ 1696. (R. S. § 1030.) No writ necessary to bring into court a person in custody.

No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal.

Act Feb. 26, 1853, c. 80, § 3, 10 Stat. 169.

Notes of Decisions

1. Construction with section 1694.
2. Necessity of writ or warrant in general.
3. Statute as restrictive.
4. Prohibition of fees for temporary warrants.
5. Statute as applicable where prisoner is in custody under warrant from the court.
6. Remanding prisoners in custody before commissioner.
7. Prisoner in state jail pending or after examination.
8. Duty of marshal as to prisoners pending examination and decision.
9. Cases when court is held in place when prisoner is in custody.
10. Warrant for removal of prisoner for trial from place within district.
11. Orders to bring to court for trial prisoners committed to jails of other counties.
12. Fees of clerk for entry of proceedings.
13. Fees of clerk for issuing commitments in addition to copy of order of removal.
14. Expenses of marshal in taking prisoner from jail in one city to courthouse in another.
15. Right of marshal to mileage under Connecticut practice.
16. Charge by marshal for serving subpœnaes or other process.

1. Construction with section 1694.—This section must be construed with section 1694, ante; both being sections of the same act. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 486, 2 L. R. A. 229.

2. Necessity of writ or warrant in general.—A writ to bring the prisoner into court is not necessary. An order of the court or of the district attorney is sufficient. U. S. v. Harden (D. C. 1881) 10 Fed. 802.

This section, in declaring a writ unnecessary to bring a prisoner into court, does not apply to proceedings before commissioners acting under the authority of section 1674, ante, which provides that the commissioners shall proceed agreeably to the usual mode of process against offenders in such state, and it is doubtful if a jailer having a prisoner in custody for trial in the circuit or district court is obliged to bring or send him into court, or deliver him to the marshal for that purpose, without a written order to that effect. U. S. v. Martin (D. C. 1883) 17 Fed. 150.

Strictly under this section a formal writ or warrant to bring a prisoner confined is not needed. Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643, 648, affirmed (1891) 52 Fed. 930, 3 C. C. A. 361.

A formal warrant was not necessary to authorize a marshal to bring a prisoner confined at Sioux City to Ft. Dodge for trial, and the clerk was not entitled to a fee for issuing the same. Van Duzee v. U. S. (D. C. 1891) 48 Fed. 643, 648, affirmed (1891) 52 Fed. 930, 3 C. C. A. 361.

When an examination before a commissioner is adjourned from day to day, the marshal is authorized by the original warrant of arrest to retain the defendant in custody. For that purpose no additional warrant is required, and none can be charged for. Davies v. U. S. (1888) 23 Ct. Cl. 468.

3. Statute as restrictive.—From this grant of express power, it seems that in the opinion of congress it did not exist as an implied power, and, as the power is only granted to the court and district attorney, the statute may be regarded as restrictive, and intended to exclude all officers of the government not mentioned. U. S. v. Harden (D. C. 1881) 10 Fed. 802, 809.

4. Prohibition of fees for temporary warrants.—Charges by the marshal for serving temporary warrants of commitment were properly disallowed in view of section 1696. Fletcher v. U. S. (C. C. 1891) 45 Fed. 213, 216, reversed (1893) 13 Sup. Ct. 434, 147 U. S. 664, 37 L. Ed. 322.

This section was enacted to correct the abuse of charging fees for temporary warrants. Gilbert v. U. S. (1888) 23 Ct. Cl. 218.

5. Statute as applicable where prisoner is in custody under warrant from the court.—This section is applicable where the accused is already in custody by virtue of a warrant from the court. The first warrant of the commissioner is simply to arrest and bring before him, and when it is executed it has spent its force. A commitment to jail becomes necessary, if the prisoner is to be held. U. S. v. McMahon (1895) 65 Fed. 976, 977, 13 C. C. A. 257, reversed (1896) 17 Sup. Ct. 28, 164 U. S. 81, 41 L. Ed. 357.

The provision of this section, that no writ is necessary for remanding a prisoner from the court into custody, applies where the accused is in custody under a warrant from the court, and not where he is arrested on the first warrant of the commissioner to arrest and bring before him, and the commissioner is entitled to a fee for a mitti-

mus upon the first continuance, if the prisoner is to be held. Marvin v. U. S. (C. C. 1890) 44 Fed. 405.

6. Remanding prisoners in custody before commissioner.—A marshal having prisoners in custody before a commissioner is prohibited from charging a fee when they are remanded; and, should the commissioner needlessly issue warrants of commitment, the prohibition of the statute will still apply. Turner v. U. S. (1884) 19 Ct. Cl. 629.

7. Prisoner in state jail pending or after examination.—This section relates exclusively to the clerk's action in entering the order of the court or district attorney, and to the marshal's action in transferring the prisoner to and from jail, and has no reference to his custody in a state jail pending or after examination. U. S. v. Ewing (1891) 11 Sup. Ct. 743, 744, 140 U. S. 142, 35 L. Ed. 388.

8. Duty of marshal as to prisoners pending examination and decision.—It is the duty of the marshal to hold prisoners pending examination and decision without an additional warrant. Gilbert v. U. S. (1888) 23 Ct. Cl. 218.

9. Cases where court is held in place where prisoner is in custody.—The provision that no fees shall be charged for bringing into court any person in custody applies only to prisoners confined at the place where the court is in session. U. S. v. Donahower (1898) 85 Fed. 547, 29 C. C. A. 342.

This section seems to contemplate those cases where the court is held in the place where the prisoner is in custody. Kinney v. U. S. (C. C. 1893) 54 Fed. 313, 319, overruled (C. C. 1894) 60 Fed. 883.

10. Warrant for removal of prisoner for trial from place within district.—A warrant for the removal of a prisoner, confined in a jail remote from the place of trial, but within the district, to the place of trial, is unauthorized; and such a warrant must be regarded simply as an order of court, under this section, for the service of which the marshal is not entitled to any fee. Saunders v. U. S. (C. C. 1896) 73 Fed. 782.

11. Orders to bring to court for trial prisoners committed to jails of other counties.—Orders made by the court upon the marshal to bring prisoners to court for trial who have been committed by commissioners to jails of other counties are not within the provision of this section, which relates solely to prisoners and witnesses while in attendance on court, and the clerk is entitled to charge the proper fees for making and authenticating the same. Taylor v. U. S. (C. C. 1891) 45 Fed. 531, judgment reversed U. S. v. Taylor (1893) 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335.

12. Fees of clerk for entry of proceedings.—This section has reference to prisoners or witnesses in custody while in attendance upon a session of court, and does not deny the clerk fees for entering orders of court for the removal of prisoners from one county to another, into which they are to be brought for trial, but he is not entitled to a fee for entering an order for the bringing of prisoners into court for trial or sentence, or for remanding them to jail. U. S. v. Marsh (1901) 106 Fed. 474, 45 C. C. A. 436.

The clerk is entitled to a fee of 15 cents per folio for the entry of orders for the removal of United States prisoners from a jail to which they had been committed, under mittimus of a commissioner, to await trial, to the jail of the place where court is to be held for their trial, and for such a number of certified copies as the court may direct the clerk to deliver to the marshal, and for filing and entering the return of said order by the marshal, and for entering in the journals of the court orders remanding, and for the production of prisoners for sentence. Marsh v. U. S. (D. C. 1898) 88 Fed. 879, 883.

The fee here spoken of refers to the issuance of a writ, and a charge for an entry cannot be affected by this section. Id.

13. Fees of clerk for issuing commitments in addition to copy of order of removal.—A clerk's claim for fees for issuing commitments to jail in addition to copy of the order of removal is too general, and cannot be allowed unless it appears that the writ was not issued to bring a prisoner into court, or for remanding him from the court, for in such cases commitments are declared to be unnecessary by this section. U. S. v. McCandless (1893) 13 Sup. Ct. 465, 466, 147 U. S. 692, 37 L. Ed. 334.

14. Expenses of marshal in taking prisoner from jail in one city to courthouse in another.—A marshal is entitled to expenses incurred in taking a prisoner from the jail in one city to the courthouse in another, such a case not falling within this section. Kinney v. U. S. (C. C. 1893) 54 Fed. 313.

15. Right of marshal to mileage under Connecticut practice.—A marshal is entitled to mileage for taking a prisoner to and from the commissioner and jail, by virtue of warrant and mittimus under the Connecticut practice, as in such case this section has no application. Kinney v. U. S. (C. C. 1893) 54 Fed. 313, following Harmon v. U. S. (C. C. 1890) 43 Fed. 560.

16. Charge by marshal for serving subpœnas or other process.—The marshal is entitled to charge for service of subpœnas duly issued and regularly placed in his hands for service, and

served, although the persons served were at the time prisoners awaiting trial or serving sentence. U. S. v. Donahower (1898) 85 Fed. 547, 29 C. C. A. 342.

A marshal should be allowed the usual fees for serving subpœnas or other process, even when such process is unnecessary or contrary to act of congress, if issued without connivance or procurement on his part. Donahower v. U. S. (C. C. 1896) 77 Fed. 153, 156, 160, affirmed (1898) 85 Fed. 547, 29 C. C. A. 342.

Cited without definite application, Hitch v. Same (D. C. 1895) 66 Fed. 937, 941.

§ 1697. (R. S. § 1031.) When peremptory challenges exceed the number allowed by law.

If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made.

Act March 3, 1835, c. 40, § 4, 4 Stat. 777. Act March 3, 1865, c. 86, § 2, 13 Stat. 500.

The number of challenges to be allowed was prescribed by R. S. § 819, which was incorporated in Jud. Code, § 287, ante, § 1264.

Cited without definite application, Brewer v. Jacobs (C. C. 1884) 22 Fed. 217, 242.

§ 1698. (R. S. § 1032.) Prisoner standing mute, etc.

When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury.

Act April 30, 1790, c. 9, § 30, 1 Stat. 119. Act March 3, 1825, c. 65, § 14, 4 Stat. 118. Act March 3, 1835, c. 40, § 4, 4 Stat. 777.

Notes of Decisions

Use of word "arraignment."—The word "arraignment" is used as comprehensive by discriptive of what shall precede the plea. Johnson v. U. S. (1912) 32 Sup. Ct. 748, 750, 225 U. S. 405, 56 L. Ed. 1142.

What "due process of law" requires.—"Due process of law" requires that the accused plead, or be ordered to plead, or, in a proper case, that the plea of not guilty be entered for him, before his trial can rightfully proceed; and the record should show distinctly that every step involved in due process of law was taken. Crain v. U. S. (1896) 16 Sup. Ct. 952, 959, 162 U. S. 625, 40 L. Ed. 1097.

Plea of not guilty in general.—See, also, notes at end of this chapter.

On a plea of not guilty, evidence may be given in mitigation of the fine to be assessed by the jury. U. S. v. Bartle (C. C. 1805) Fed. Cas. No. 14,531.

The court will permit the prisoner to retract his plea of guilty in a capital case, and to plead not guilty. U. S. v. Dixon (C. C. 1807) Fed. Cas. No. 14,968.

The plea of not guilty will put the prisoner upon the country by a sufficient issue, without any further express words. U. S. v. Gibert (C. C. 1834) Fed. Cas. No. 15,204.

The defendant's plea of not guilty operates in law as a denial of all the charges in the indictment, and puts the government on proof to make out its case on fact and law. U. S. v. Mayfield (C. C. 1893) 59 Fed. 118, 119.

Defendant, on trial upon an indictment, may take advantage of the bar of the statute under the plea of not guilty. U. S. v. White (C. C. 1836) Fed. Cas. No. 16,676; Id. (C. C. 1837) Fed. Cas. No. 16,677; U. S. v. Brown (D. C. 1873) Fed. Cas. No. 14,665.

Amendment of record to show plea of not guilty was never entered.—Defendant will not be allowed to have the record amended after conviction so as to show that the plea of not guilty was never entered by him, where he failed to object when the record was read in open court. U. S. v. Conklin (C. C. 1873) Fed. Cas. No. 14,845.

Entry of plea of not guilty when prisoner stands mute.—On arraignment for a capital offense, where the prisoner stands mute, a plea of "Not guilty" will be entered. U. S. v. Hare (C. C. 1818) Fed. Cas. No. 15,304.

The word "indicted," as used in this

section, authorizing the court to enter a plea of not guilty when the defendant stands mute, is fairly to be construed to include an information. U. S. v. Borger (C. C. 1881) 7 Fed. 193, 194.

The refusal of a defendant to plead to a criminal information will not defeat the jurisdiction of a circuit court. The word "indicted," in this section, authorizing the court to enter a plea of not guilty when the defendant stands mute, is fairly to be construed to include an information. The entry of a plea of not guilty, under the direction of the court, is a mere matter of form, and amounts to no more than ordering the trial to proceed as if such plea were entered. U. S. v. Borger (C. C. 1881) 7 Fed. 193.

This section, which provides that when one is "indicted" for any offense against the United States stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter a plea of not guilty in his behalf, and proceed to try him by a jury, should be literally construed to bring within its scope persons arraigned upon information of complaints, as well as persons indicted. In re Smith (C. C. 1882) 13 Fed. 25.

Trial without entry of plea.—A trial without the entry of a plea is invalid. Shelp v. U. S. (1897) 81 Fed. 694, 701, 26 C. C. A. 570.

In view of Act March 3, 1835, providing that, whenever any person indicted for an offense against the United States shall, on his arraignment, stand mute, or will not plead or answer, it shall be the duty of the court to enter a plea of not guilty, and when the party shall plead not guilty, or such plea shall be entered, the cause shall be deemed at issue and tried, the trial of a prisoner without the entry of a plea is a ground for reversing the judgment. Palmer v. U. S. (1854) 1 Wash. T. 5.

Cited without definite application, Ex parte Jackson (1877) 96 U. S. 727, 728, 24 L. Ed. 877.

§ 1699. (R. S. § 1033.) Copy of indictment and list of jurors and witnesses to be delivered to prisoner in capital cases.

When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.

Act April 30, 1790, c. 9, § 29, 1 Stat. 118.

Notes of Decisions

Right to insist on compliance with statute.—Compliance with this statute can be insisted on. Johnson v. U. S. (1912) 32 Sup. Ct. 748, 750, 225 U. S. 405, 56 L. Ed. 1142.

Application to procedure of territorial courts.—This section does not control the procedure of the courts of a territory. Thiede v. Utah (1895) 16 Sup. Ct. 62, 64, 159 U. S. 510, 40 L. Ed. 237. See, also, Binyon v. U. S. (1903) 76 S. W. 265, 4 Ind. Ter. 642; Leftridge v. U. S. (1906) 97 S. W. 1018, 6 Ind. Ter. 305.

Provisions of original statute as to trial and evidence.—This and the following section as originally enacted did not make any express provision concerning the mode of conducting a criminal case after the jury are sworn, and did not prescribe any rule by which the trial is to be conducted nor the testimony by which the guilt or innocence of accused is to be determined. U. S. v. Reid (1851) 12 How. 361, 365, 13 L. Ed. 1023.

Cause for continuance.—It is no cause for a continuance that defendant has not been furnished with a copy of the indictment and a list of the jurors, if he has not applied for them. U. S. v. Shive (C. C. 1832) Fed. Cas. No. 16,278.

Copy of indictment.—See, also, notes, ante.

Though Const. Amend. 6, entitles the accused in all criminal cases to be informed of the nature and cause of the accusation, he is not entitled, without an order of the court, to a copy of the indictment against him at the expense of the government, except in capital cases, as expressly provided by this section, and clerks who have furnished such copies cannot charge the government therefor. U. S. v. Van Duzee (1891) 11 Sup. Ct. 758, 760, 140 U. S. 169, 35 L. Ed. 399, reversing Van Duzee v. U. S. (D. C. 1890) 41 Fed. 571.

A copy of the caption of an indictment must be delivered to the prisoner along with the indictment of which it forms a part. U. S. v. Insurgents (C. C. 1795) Fed. Cas. No. 15,443, 2 Dall. 335, 1 L. Ed. 404.

The omission of the words "A true bill" on the copy of the indictment furnished defendant is waived where the prisoner makes no objection on that

ground. U. S. v. Cornell (C. C. 1820) Fed. Cas. No. 14,868.

In capital cases the prisoner is entitled to a copy of the indictment, to be delivered to him two entire days before his arraignment. U. S. v. Curtis (C. C. 1826) Fed. Cas. No. 14,905; Same v. Dow (C. C. 1840) Fed. Cas. No. 14,990.

Upon a prosecution under Act March 3, 1823, post, § 10,193, for knowingly transmitting false papers to the pension office, a prisoner is not entitled to have a copy of the indictment furnished to him at the expense of the government. U. S. v. Bickford (C. C. 1859) Fed. Cas. No. 14,591.

Minutes of proceedings before grand jury.—The accused is not entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him. U. S. v. Southmayd (C. C. 1875) Fed. Cas. No. 16,-361.

List of witnesses or jurors in general.—See, also, notes, ante.

This section is mandatory, and the failure to comply therewith is error; nor is the error rendered harmless by the fact that accused was acquitted of the capital charge and convicted only of a lesser crime; the right to the list being based on the indictment. Logan v. U. S. (1892) 12 Sup. Ct. 617, 631, 144 U. S. 263, 36 L. Ed. 429.

The right to object to a witness in a capital case on the ground that his name was not furnished to defendant two days before the trial, as required by this section, is waived by failure to make the objection until after his examination in chief is closed, even if the omission was not before discovered, for inquiry in that regard should be made earlier. Hickory v. U. S. (1894) 14 Sup. Ct. 334, 336, 151 U. S. 303, 38 L. Ed. 170.

This section does not apply to witnesses introduced purely for rebuttal purposes. Goldsby v. U. S. (1895) 16 Sup. Ct. 216, 219, 160 U. S. 70, 40 L. Ed. 343.

A woman who has been married and divorced is not incompetent as a witness in a capital cause because she is designated on the list of witnesses by her maiden name, under which she has gone since her divorce some 10 or 12 years before. Bird v. U. S. (1902) 23 Sup. Ct. 42, 45, 187 U. S. 118, 47 L. Ed. 100.

The required list of witnesses is only of those who are to be produced on the trial. Wilson v. U. S. (1911) 31 Sup. Ct. 538, 542, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

On an indictment for selling intoxicating liquors in Alaska, the accused has the right to have indorsed on the indictment only the names of the witnesses examined before the grand jury; this being the provision of the Oregon statute made applicable by the act of congress. This section, in requiring a list of all the witnesses to be furnished before the trial, applies only to trials for capital crimes. Shelp v. U. S. (1897) 81 Fed. 694, 26 C. C. A. 570.

This statute applies only to capital cases. Id.

Since this section, in providing that a person indicted for treason or a capital offense shall be furnished with a list of witnesses, to be produced three days before the trial on the indictment for treason and two days before the trial of any other capital cases, limits such right to trials for treason and capital offenses, it impliedly authorizes the examination of witnesses in trials in the federal courts for lesser crimes without such witnesses being previously disclosed to accused. Balliet v. U. S. (1904) 129 Fed. 689, 64 C. C. A. 201.

This section, in requiring the district attorney to furnish accused with a list of all witnesses to be produced against him on the trial, applies only to treason and capital cases tried in the courts of the United States, and not to felonies for which prosecutions were had in a territorial court of Alaska, under the Alaska Codes of Criminal and Civil Procedure. Ball v. U. S. (1906) 147 Fed. 32, 78 C. C. A. 126.

Since the Alaska Codes of Criminal and Civil Procedure contain no requirement that a list of witnesses be furnished the accused, the government is entitled to call witnesses against accused whose names have not been furnished to him before trial. Id.

If a federal prisoner is not indicted for a capital offense, he is not entitled as of right to a list of witnesses or jurors. Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied (1908) 29 Sup. Ct. 685, 212 U. S. 576, 53 L. Ed. 657.

The requirement of this section as to the delivery of a copy of the list of jurors to defendant at least two days before trial applies only to the list of the regular panel in attendance at the opening of the trial, and does not require notice of jurors brought in on a special venire to complete the jury. Stewart v. U. S. (1914) 211 Fed. 41, 127 C. C. A. 477.

In the list of the jury and witnesses, furnished to the defendant, the township in which they reside must be given. The county is not sufficient; but the statute does not require their occupations to be stated. U. S. v. Insurgents (C. C. 1795) Fed. Cas. No. 15,443, 2 Dall. 335, 342, 1 L. Ed. 404.

A reasonable time will be allowed, after the list of witnesses is furnished to the defendant, to enable him to procure testimony from the counties in which the witnesses reside. U. S. v. Stewart (C. C. 1795) Fed. Cas. No. 16,401, 2 Dall. 343, 344, 1 L. Ed. 408.

While counterfeiting a note of the Bank of the United States is made a

felony, the prisoner is not entitled to a list of witnesses and jurors two days before pleading. U. S. v. Williams (C. C. 1804) Fed. Cas. No. 16,709.

Act April 30, 1790, § 29 (this statute as originally enacted), which required a list of the witnesses to be delivered to the prisoner three days before the trial, was confined to treason. U. S. v. Wood (C. C. 1818) Fed. Cas. No. 16,756.

The arraignment is to be regarded as the commencement of the trial, and the day of delivery and the day of the arraignment are not computed in the time. Act April 30, 1790, c. 38, § 29. U. S. v. Curtis (C. C. 1826) Fed. Cas. No. 14,905; Same v. Dow (C. C. 1840) Fed. Cas. No. 14,990.

In capital cases the prisoner is entitled to a list of the jury, with their residences, to be delivered to him two entire days before his arraignment. Id.

Where there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury to be furnished the accused. U. S. v. Southmayd (C. C. 1875) Fed. Cas. No. 16,361.

In cases not capital, the district attorney is not bound to furnish defendant with the names of the prosecutor and witnesses. U. S. v. Butler (C. C. 1877) Fed. Cas. No. 14,700.

The court may not, in advance of the trial of case not capital, require United States attorney to give defendant list of witnesses examined by grand jury, but the matter may be brought up on application for continuance. U. S. v. Aviles (D. C. 1915) 222 Fed. 474.

Under this section a delivery of a list of witnesses after the trial begins is insufficient, though the court should adjourn the trial for three days in order that defendant may not be surprised; and the trial is to be considered as beginning when the jury is made up and sworn, not when defendant is arraigned. U. S. v. Neverson (D. C. 1880) 1 Mackey, 152.

A witness whose name has not been given to the defendant until after the trial has begun cannot testify, although the trial is adjourned for several days in order that the defendant may not be surprised. Id.

This section does not prevent the prosecution from calling a material witness discovered for the first time after the trial has commenced, on the ground that his name was not included in the list furnished accused. U. S. v. Schneider (1893) 21 D. C. 381.

Where the list of witnesses for the prosecution, furnished the accused as required by this section, contained 2 identical names, separated by 34 intervening names, with nothing to show whether they were of the same person or of different persons, and it appeared on the trial that the names were of mother and daughter, and there was nothing to show that the accused had been misled or prejudiced by the manner in which the witnesses were named in the list, it was not error for the trial court to permit the daughter to testify against the accused. Shaffer v. U. S. (1904) 24 App. D. C. 417.

There was no presumption that there was but one person, in fact, named twice in the list, but the presumption was rather the other way; and the accused, if he had been in doubt, should have applied to the trial court to require the prosecuting officer to make the necessary correction in the list. Id.

Indorsement of names of witnesses on indictment.—See, also, notes under § 1691, ante.

A federal court in 1859 adopted certain chapters of the Code of the state in which it was sitting relating to criminal procedure, requiring the names of all witnesses, on whose evidence the indictment is found, to be indorsed on the indictment, and providing that the county attorney should not introduce any witness who was not examined before a committing magistrate or the grand jury, etc. In 1893 the practice in such court was changed so as to authorize the government to introduce testimony of witnesses other than those whose names were indorsed on the indictment, without giving previous notice to accused. Held, that a defendant subsequently indicted was not entitled to claim the benefit of the former practice. Balliet v. U. S. (1904) 129 Fed. 689, 64 C. C. A. 201.

State statutes or practice, requiring that the names of the witnesses shall be indorsed on the indictment, are not controlling in the United States courts. United States v. Aviles (D. C. 1915) 222 Fed. 474.

Mansfield's Ark. Dig. § 2103, provides that, when an indictment is found, the names of all witnesses who were examined must be written at the foot of or on the indictment. Held that, as the Arkansas procedure is in force in the Indian Territory, this section was not applicable to a prosecution therein, and a compliance with section 2103 was sufficient. Leftridge v. U. S. (1906) 97 S. W. 1018, 6 Ind. T. 305.

Cited without definite application, Summers v. U. S. (1913) 34 Sup. Ct. 38, 41, 231 U. S. 92, 58 L. Ed. 137; Brewer v. Jacobs (C. C. 1884) 22 Fed. 217, 242; U. S. v. Davis (C. C. 1900) 103 Fed. 457.

§ 1700. (R. S. § 1034.) Persons indicted for capital crimes entitled to counsel and to compel witnesses.

Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. He shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

Act April 30, 1790, c. 9, § 29, 1 Stat. 118.

Notes of Decisions

See, also, notes under the preceding section.

Constitutional rights of accused.—See, also, Const. Amend. 6, and notes thereunder.

A petitioner held not entitled to a writ of habeas corpus on the ground that he had been deprived of his constitutional right to be represented by counsel, which rendered the judgment void. Andersen v. Treat (1898) 19 Sup. Ct. 67, 172 U. S. 24, 43 L. Ed. 351.

The provision of the constitution, which secures to the accused the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to ambassadors or consuls, who by public law or express treaty are not amenable to the process of the courts. In re Dillon (D. C. 1854) Fed. Cas. No. 3,914.

The indorsement of the name of a witness by the grand jury on the presentment is prima facie evidence that it was made upon his testimony. Virginia v. Gordon (C. C. Dist. Col. 1802) Fed. Cas. No. 16,961.

A witness whose name is on the back of the indictment need not be called by the prosecution if not material. U. S. v. Dowden (Cr. Ct. Dist. Col. 1843) Fed. Cas. No. 14,990a.

Fees of counsel.—The government is not liable for the fees of counsel assigned by a United States court to defend a criminal. Nabb v. U. S. (1864) 1 Ct. Cl. 173.

§ 1701. (R. S. § 1035.) Verdict of less offense than charged.

In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: Provided, That such attempt be itself a separate offense.

Act June 1, 1872, c. 255, § 9, 17 Stat. 198.

Notes of Decisions

Conviction of included offenses in general.—On an indictment for murder, a verdict of guilty is sufficient to support a sentence of death, as referring to the single offense charged, although the jury had the power to find the accused guilty of a lesser offense included therein. St. Clair v. U. S. (1894) 14 Sup. Ct. 1002, 1010, 154 U. S. 134, 38 L. Ed. 936.

Where the evidence in a criminal trial tends to show the commission of the crime charged, it is proper to instruct that there can be no conviction of an offense included in or less than the one charged. Sparf v. U. S. (1895) 15 Sup. Ct. 273, 278, 156 U. S. 51, 39 L. Ed. 343.

Defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment. U. S. v. Carr (C. C. 1872) Fed. Cas. No. 14,732.

This section recognizes the fact that a charge and indictment for one offense may include a less offense. U. S. v. Hansee (C. C. 1897) 79 Fed. 303, 304.

Conviction of attempt to commit offense charged.—A charge of monopolizing in violation of Anti-Trust Act, § 1, will support a verdict of attempting to monopolize. U. S. v. Patterson (D. C. 1912) 201 Fed. 697.

Conviction of larceny on indictment for burglary.—Upon an indictment for burglary, the jury may find the prisoner guilty of larceny only. U. S. v. Dixon (C. C. 1807) Fed. Cas. No. 14,968.

Conviction of larceny on indictment for felonious entry and taking goods from storehouse.—On an indictment for a felonious entry and taking of goods from a storehouse, held, that defendant might be found guilty of simple

larceny. U. S. v. Read (C. C. 1820) Fed. Cas. No. 16,126.

Conviction of simple assault on indictment for assault to kill.—On an indictment for an assault with intent to kill or murder, the defendant may be convicted of a simple assault. U. S. v. Cropley (C. C. 1835) Fed. Cas. No. 14,-892.

Conviction of manslaughter on indictment for murder.—On an indictment for murder the defendant may be found guilty of manslaughter. Wallace v. U. S. (1896) 16 Sup. Ct. 859, 863, 162 U. S. 466, 40 L. Ed. 1039; U. S. v. Leonard (C. C. 1880) 2 Fed. 669; Same v. Meagher (C. C. 1888) 37 Fed. 875; Same v. Lewis (C. C. 1901) 111 Fed. 630.

If there is any evidence which tends to show such a state of facts as may bring the crime within the grade of manslaughter, it is then a proper question for the jury whether this evidence is true, and whether it showed that the crime was manslaughter instead of murder, and it is then error to refuse an instruction upon that subject. Stevenson v. U. S. (1896) 16 Sup. Ct. 839, 162 U. S. 313, 40 L. Ed. 980.

An indictment held to sufficiently allege manslaughter, so as to authorize a conviction of manslaughter under such indictment which charged murder. U. S. v. Leonard (C. C. 1880) 2 Fed. 669, 671.

A verdict finding a defendant guilty of murder in the first degree, as charged in the indictment, was set aside by the court, and a new trial granted, on the ground that, under the evidence, defendant was guilty of manslaughter only. Subsequently, and at the same term of court, defendant offered a plea of guilty of manslaughter. Held, that the court had power to accept such a plea and render judgment thereon, notwithstanding the objection of the district attorney, since it still had power to vacate its order setting aside the verdict, and to render judgment for manslaughter thereon, as it, in fact, should have done in the first instance. U. S. v. Linnier (C. C. 1903) 125 Fed. 83.

Under this section, a defendant charged with murder in the first degree may be found guilty of manslaughter, provided there is evidence to sustain such a verdict. U. S. v. Densmore (1904) 75 Pac. 31, 12 N. M. 99.

Conviction on indictment for procuring false affidavit in pension case to defraud United States.—An indictment charging defendant with procuring a false affidavit to be presented to the pension office in a pension case with intent to defraud the United States alleges but a single offense,—an offense under R. S. § 5421, post, § 10193, punishing the making or procuring of false papers, etc., generally, with intent to defraud the United States,—though it also includes the offense of procuring a false affidavit in pension case, under R. S. § 4746, post, § 9079, without regard to such intent, for which, under this section, the defendant could be convicted, as an included charge, on failure to prove the intent alleged. U. S. v. Hansee (C. C. 1897) 79 Fed. 303.

Cited without definite application, Ball v. U. S. (1891) 11 Sup. Ct. 761, 768, 140 U. S. 118, 35 L. Ed. 377; Id. (1896) 16 Sup. Ct. 1192, 1195, 163 U. S. 662, 41 L. Ed. 300; Berkowitz v. Same (1899) 93 Fed. 452, 457, 35 C. C. A. 379.

§ 1702. (R. S. § 1036.) Verdict against part of several joint defendants.

On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury.

Act June 1, 1872, c. 255, § 10, 17 Stat. 198.

Notes of Decisions

When indictment considered several.—An indictment in which there is a joinder of offenses or offenders, so far as the jury are concerned, is to be considered a several one as to each of such offenses or offenders. U. S. v. Davenport (D. C. 1867) Fed. Cas. No. 14,-920.

Finding verdict as to some defendants and disagreement as to others.—Where separate indictments against different defendants are tried together, an instruction given to the jury, after they have been deliberating for three days without returning any verdict, that they may find a verdict of guilty as to all the defendants, or find some guilty and some not guilty, but that they cannot find a verdict as to some and disagree as to others, is ground for the reversal of a judgment of conviction. Bucklin v. U. S., 2nd case (1895) 16 Sup. Ct. 182, 184, 159 U. S. 682, 40 L. Ed. 305.

Finding one defendant guilty when another has been discharged.—Where two are indicted together for receiving, etc., stolen property, one may be found guilty of a separate receiving, etc., when the other has been discharged on

a plea of prior conviction. U. S. v. Montgomery (D. C. 1875) Fed. Cas. No. 15,800.

Convicting one defendant of murder and another of manslaughter on joint indictment for murder.—On a joint indictment for murder, one defendant may be found guilty of murder, and another of manslaughter. U. S. v. Harding (C. C. 1846) Fed. Cas. No. 15,301.

Cited without definite application, Nash v. U. S. (1913) 33 Sup. Ct. 780, 229 U. S. 373, 57 L. Ed. 1232.

(R. S. §§ 1037–1039. Superseded.)

Section 1037 of the Revised Statutes provided for remitting an indictment, whenever the district attorney might deem it necessary, from a circuit court to a district court, or from a district court to a circuit court. Section 1038 authorized any district court to remit to the circuit court any indictment when difficult and important questions of law were involved in the case. And section 1039 required every indictment of a capital offense, presented to a district court, to be remitted to the circuit court. All these provisions became inoperative on the abolition of the circuit courts and the transfer of their powers and duties to the district courts, by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

See U. S. v. Tiernay (C. C. 1881) 16 Fed. 513; Same v. Dietrich (C. C. 1904) 126 Fed. 659.

(R. S. § 1040. Superseded.)

This section of the Revised Statutes was as follows:

"Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceedings shall be had in the lower court as the Supreme Court may direct."

It was superseded by the provisions of Act Feb. 6, 1889, c. 113, § 6, post, § 1703, for review of all cases of conviction of crime punishable by death on writ of error, such writ to operate as a stay of proceedings, and for remand of the cause on affirmance or reversal of the judgment.

See notes to said Act Feb. 6, 1889, c. 113, § 6, post, § 1703.

§ 1703. (Act Feb. 6, 1889, c. 113, § 6.) Writ of error on conviction of crime punishable by death.

Hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the Clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the Clerk of the Supreme Court of the United States to receive, file, and docket the same. Every such writ of error shall during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have

power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record. (25 Stat. 656.)

This section was part of an act entitled "An act to abolish circuit court powers of certain district courts of the United States, and to provide for writs of error in capital cases," etc.

The provisions of other sections of the act were superseded by those of the Judicial Code, §§ 128, 238, ante, §§ 1120, 1215.

Before this act, provisions for review by the Supreme Court of questions in criminal cases, on certificate of division of opinion by the judges of a circuit court, were made by R. S. §§ 651, 697. But said sections, and so much of the provisions of this section as authorized writs of error to the Supreme Court "in all cases of conviction of crime the punishment of which provided by law is death," were superseded by the Circuit Courts of Appeals Act of March 3, 1891, c. 517, § 5, which, as originally enacted, authorized such writs of error "in cases of conviction of a capital or otherwise infamous crime"; but this latter provision was amended by striking out the words "or otherwise infamous," by Act Jan. 20, 1897, c. 68, 29 Stat. 492. And all these provisions giving the Supreme Court jurisdiction in criminal cases were superseded by those of Jud. Code, §§ 128, 238–241, ante, §§ 1120, 1215–1218, under which the circuit courts of appeals have appellate jurisdiction thereof, and their decisions are final in all cases arising under the criminal laws.

All provisions in force at the time of the enactment of said Circuit Courts of Appeals Act of March 3, 1891, c. 517, regulating appeals or writs of error, were made applicable to the appeals and writs of error provided for in that act in respect of the circuit courts of appeals, by a provision of section 11 of the act, ante, § 1651.

Notes of Decisions

Review in supreme court in general.—This statute, authorizing a writ of error, is clearly limited to convictions only. U. S. v. Sanges (1892) 12 Sup. Ct. 609, 613, 144 U. S. 310, 36 L. Ed. 445.

Up to the time of this statute the Supreme Court had no general authority to review on error or appeal the judgments of the circuit courts in cases within their criminal jurisdiction. U. S. v. Rider (1896) 16 Sup. Ct. 983, 985, 163 U. S. 132, 138, 41 L. Ed. 101.

A defendant in a capital case is given the right to obtain a review in the Supreme Court by writ of error. U. S. v. Dickinson (1909) 29 Sup. Ct. 485, 487, 213 U. S. 92, 53 L. Ed. 711. But see section 1120, ante, and notes thereunder.

Allowance of writ of error.—Where a petition for a writ of error is made by a prisoner under sentence of death within a very few days, the motion for allowance was permitted in view of the circumstances to be argued at the earliest motion day before the full bench. Twitchell v. Pennsylvania (1868) 7 Wall. 321, 325, 19 L. Ed. 223.

Review of judgment of supreme court of District of Columbia.—The supreme court has no authority to review by writ of error a sentence of death imposed by the supreme court of the District of Columbia; this section not applying to that court. Cross v. U. S. (1892) 12 Sup. Ct. 842, 843, 145 U. S. 571, 36 L. Ed. 821.

The supreme court has no jurisdiction to grant a writ of error to review a judgment of the supreme court of the District of Columbia in any criminal case. Cross v. Burke (1892) 13 Sup. Ct. 22, 146 U. S. 82, 36 L. Ed. 896. See, also, Chapman v. U. S. (1896) 17 Sup. Ct. 76, 77, 164 U. S. 436, 41 L. Ed. 504.

R. S. D. C. § 845, providing that, when judgment of death or confinement in the penitentiary is pronounced, the court shall, on application of the condemned, to enable him to apply for a writ of error, postpone the final execution to a reasonable time beyond the next term of the court, in no case exceeding 30 days, is not a limitation of the time of execution, and when a judgment is affirmed on writ of error the court should set another day for execution, although the 30 days have passed. In re Cross (1892) 13 Sup. Ct. 109, 146 U. S. 271, 36 L. Ed. 969.

Bail pending appeal or error.—In view of R. S. §§ 1014–1016, ante, §§ 1674, 1679, 1680, providing that before trial bail "may be admitted" on all arrests in capital cases, and "shall be admitted" on all arrests in other criminal cases, and designating the courts and judges, including the justices of the supreme court, who may take the bail; and Act March 3, 1879, c. 176, providing that on review by the circuit court of judgments in the district court in criminal cases the circuit justice or the circuit judge may take bail; and

R. S. § 1017, ante, § 1681, providing that on writ of error from the supreme court to a state court bail may be taken; and Act Feb. 6, 1889, § 6 (this section), providing for review by the supreme court on writ of error, under such rules and regulations as it may prescribe, of judgments of inferior courts of the United States in capital cases, such writ of error to be allowed as of right, and without the requirement of any security for prosecution of the same, or for costs, and to operate during its pendency as a stay of proceedings on the judgment,—it will be held that congress intended that under Act March 3, 1891, ante, § 1108 et seq., establishing the court of appeals, allowing appeals and writs of error from the circuit and district courts direct to the supreme court "in cases of conviction of capital or otherwise infamous crimes," as well as in certain other classes of cases, and declaring that "all provisions of law, now in force, regulating the methods and system of review * * * shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other security," in cases of crimes not capital, at least, bail might be taken on writ of error by order of the proper court, justice, or judge. Mr. Justice Brewer and Mr. Justice Brown dissenting, agreeing, however, that the supreme court has, in criminal cases pending proceedings in error, power to admit to bail, but deducing this solely from the grant of jurisdiction over the proceedings in error. Hudson v. Parker (1895) 15 Sup. Ct. 450, 453, 156 U. S. 277, 39 L. Ed. 424.

No statute of the United States provides for taking bail for a defendant, after conviction and sentence, and pending an appeal or writ of error to the supreme court, nor is bail, under such circumstances, authorized by the common law. U. S. v. Hudson (D. C. 1894) 65 Fed. 68.

Cited without definite application, Alexander v. U. S. (1891) 11 Sup. Ct. 350, 138 U. S. 353, 34 L. Ed. 954; Ball v. Same (1891) 11 Sup. Ct. 761, 765, 140 U. S. 118, 35 L. Ed. 377; Sparf v. Same (1895) 15 Sup. Ct. 273, 321, 156 U. S. 51, 39 L. Ed. 343 (dissenting opinion); Ballew v. Same (1895) 16 Sup. Ct. 263, 268, 160 U. S. 187, 40 L. Ed. 388; Sinclair v. District of Columbia (1904) 24 Sup. Ct. 212, 213, 192 U. S. 16, 48 L. Ed. 322; Bessette v. W. B. Conkey Co. (1904) 24 Sup. Ct. 665, 670, 194 U. S. 324, 48 L. Ed. 997; Harless v. U. S. (1898) 88 Fed. 97, 98, 31 C. C. A. 397; Bristol v. Same (1904) 129 Fed. 87, 63 C. C. A. 529.

§ 1704. (Act March 2, 1907, c. 2564.) Writs of error in criminal cases on behalf of United States in certain instances.

A writ of error may be taken by and on behalf of the United States from the district [or circuit] courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant. (34 Stat. 1246.)

This was an act entitled "An act providing for writs of error in certain instances in criminal cases," cited above.

The words in the first sentence of this act inclosed in brackets, "or circuit," became inoperative on the abolition of the circuit courts and the transfer of their powers and duties to the district courts by Jud. Code, §§ 289–291, ante, §§ 1266–1268.

Appellate jurisdiction to review "final decisions" in the district courts in

criminal cases was given to the circuit courts of appeals, and their judgments were made final in all cases arising under the criminal laws, by Jud. Code, §§ 128, 238–241, ante, §§ 1120, 1215–1218. But this act was not specifically repealed by the repealing provisions of said Code in section 297 thereof, ante, § 1274.

Notes of Decisions

1. Constitutionality.
2. Effect of Judicial Code.
3. Construction and purpose in general.
4. —— Criminal cases within statute.
5. Decisions reviewable in general.
6. —— Decision quashing indictment.
7. —— Decision setting aside indictment.
8. —— Decision sustaining demurrer to indictment.
9. —— Decision sustaining special plea in bar.
10. Scope and extent of review.
11. —— Conclusiveness of construction of indictment.

1. Constitutionality.—This statute allowing the government to prosecute a writ of error, held not to violate constitutional rights of accused. U. S. v. Bitty (1908) 28 Sup. Ct. 396, 208 U. S. 393, 52 L. Ed. 543.

This act is directed to judgments rendered before the moment of jeopardy is reached, and is not in conflict with the Fifth Amendment. Taylor v. U. S. (1907) 28 Sup. Ct. 53, 55, 207 U. S. 120, 52 L. Ed. 130. See U. S. v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195, holding that a defendant filing a special plea in bar, which the court sustained and from which decision the government brought error, had not been in jeopardy.

Constitutional rights of accused are not violated though accused may not bring up the case in the same way when a demurrer to the indictment or some count thereof has been overruled. U. S. v. Bitty (1908) 28 Sup. Ct. 396, 208 U. S. 393, 52 L. Ed. 543, reversing judgment (C. C. 1907) 155 Fed. 938.

Congress could, by this act, authorize the government to bring up a criminal case from a federal court to the supreme court when a demurrer to an indictment has been sustained, though the same privilege is denied the accused when the indictment is sustained, even assuming that the United States is bound to afford the equal protection of the laws to persons within its jurisdiction. U. S. v. Heinze (1910) 31 Sup. Ct. 98, 218 U. S. 532, 54 L. Ed. 1139, 21 Ann. Cas. 884.

2. Effect of Judicial Code.—This act was not repealed by Judicial Code March 3, 1911, since the former act is not mentioned among the statutes expressly repealed by section 297 of the Code, is not superseded by any other regulations of the matter, and is a special provision. U. S. v. Winslow (1913) 33 Sup. Ct. 253, 227 U. S. 202, 57 L. Ed. 481.

3. Construction and purpose in general.—Interpretation as well as construction of the statute, conceding an abstract distinction between these two terms, is within this section. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 126, 211 U. S. 370, 53 L. Ed. 230, reversing order (D. C. 1907) 157 Fed. 396; Same v. Herr (1908) 29 Sup. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; Id. (1908) 29 Sup. Ct. 135, 211 U. S. 406, 53 L. Ed. 252; Same v. Biggs (1909) 29 Sup. Ct. 181, 182, 183, 211 U. S. 507, 53 L. Ed. 305. See U. S. v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195, for comment on the difference in the language of the paragraphs authorizing a review. See U. S. v. Bitty (1908) 28 Sup. Ct. 396, 208 U. S. 393, 52 L. Ed. 543.

The purpose of the statute is to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, but not to open the whole case. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 53 L. Ed. 230; Same v. Mason (1909) 29 Sup. Ct. 480, 481, 213 U. S. 115, 53 L. Ed. 725; Same v. Dickinson (1909) 29 Sup. Ct. 485, 488, 213 U. S. 92, 53 L. Ed. 711; Same v. Evans (1909) 29 Sup. Ct. 507, 213 U. S. 297, 53 L. Ed. 803; Same v. Barber (1911) 31 Sup. Ct. 209, 219 U. S. 72, 55 L. Ed. 99.

4. —— Criminal cases within statute.—An action by the United States to recover the penalty named in a forfeited recognizance given for the appearance of the defendant in a criminal case is not a criminal proceeding, and the United States may prosecute a writ of error for a review of an adverse judgment. U. S. v. Zarafonitis (1907) 150 Fed. 97, 80 C. C. A. 51, 10 Ann. Cas. 290.

A motion by the representative of a person deceased to abate a judgment entered against him in a criminal action in his lifetime, because of his death after it was entered, is an independent proceeding of a civil nature, and the order or judgment therein may be reviewed on error by the United States. U. S. v. New York Cent. & H. R. R. Co. (1908) 164 Fed. 324, 90 C. C. A. 256, reversing order U. S. v. Pomeroy (C. C. 1907) 152 Fed. 279; U. S. v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145, affirming judgment U. S. v. Mitchell (C. C. 1908) 163 Fed. 1014.

5. Decisions reviewable in general.—The court has no authority to revise the mere interpretation of an indictment, and is confined to ascertaining whether the lower court erroneously construed the statute. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370,

53 L. Ed. 230; Same v. Biggs (1909) 29 Sup. Ct. 181, 211 U. S. 507, 53 L. Ed. 305; Same v. Stevenson (1909) 30 Sup. Ct. 35, 215 U. S. 190, 54 L. Ed. 153; Same v. Carter (1913) 34 Sup. Ct. 173, 231 U. S. 492, 58 L. Ed. 330.

A decision on demurrer, that the averments of an indictment charging violations of Anti Trust Act July 2, 1890, ante, § 8820 et seq., were not sufficient to connect the individual defendants with the offense charged, is a construction of the indictment, and may not be reviewed. U. S. v. Pacific & A. Ry. & Nav. Co. (1913) 33 Sup. Ct. 443, 228 U. S. 87, 57 L. Ed. 742.

The sufficiency of the indictment upon general principles of criminal law is not open for review on writ of error on behalf of the government. U. S. v. Stevenson (1909) 30 Sup. Ct. 35, 37, 215 U. S. 190, 54 L. Ed. 153.

The judgment actually entered below, and not the terms of a stipulation of counsel previously made and filed, controls the federal Supreme Court in determining whether such judgment is reviewable on writ of error under this section, as one sustaining a special plea in bar when the defendant has not been put in jeopardy. U. S. v. Barber (1911) 31 Sup. Ct. 209, 219 U. S. 72, 55 L. Ed. 99.

A motion by the executrix of a person deceased to abate a judgment entered against him in a criminal action in his lifetime, because of his death after it was entered, is an independent proceeding of a civil nature, and the order or judgment therein may be reviewed on error by the United States. U. S. v. New York Cent. & H. R. R. Co. (1908) 164 Fed. 324, 90 C. C. A. 256, reversing order U. S. v. Pomeroy (C. C. 1907) 152 Fed. 279.

An order of a Circuit Court declaring a judgment in a criminal action abated by reason of the death of the defendant after entry of judgment is in an independent proceeding of a civil nature, and reviewable on writ of error by the Circuit Court of Appeals at the instance of the United States. U. S. v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145, affirming judgment U. S. v. Mitchell (C. C. 1908) 163 Fed. 1014.

See U. S. v. Heinze (1910) 31 Sup. Ct. 102, 218 U. S. 547, 54 L. Ed. 1145, as to effect of claim that action of court in quashing an indictment is not reviewable because discretionary.

6. —— Decision quashing indictment.—The United States may bring error to review a judgment of a federal Circuit Court, quashing an indictment for violating Immigration Act March 3, 1903, c. 1012, § 18, by willfully permitting an alien to land at another place than that designated by the immigration officers, because the indictment disclosed that the alien in question was a seaman. Taylor v. U. S. (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130 (reversing judgment [1907] 152 Fed. 1, 81 C. C. A. 197); Schrotter v. U. S. (1908) 157 Fed. 1005, 85 C. C. A. 679.

Jurisdiction of Supreme Court of writ of error sued out to review a judgment quashing an indictment for a conspiracy illegally to acquire coal lands from the United States, because of the opinion that the federal statute did not prohibit the acts complained of, cannot be successfully challenged on the theory that the indictment, and not the statute, was construed. U. S. v. Keitel (1908) 29 Sup. Ct. 128, 126, 211 U. S. 370, 53 L. Ed. 230, reversing order (D. C. 1907) 157 Fed. 396; Same v. Herr (1908) 29 Sup. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; Id. (1908) 29 Sup. Ct. 135, 211 U. S. 406, 53 L. Ed. 252.

The construction of a statute is concerned, so as to give the Supreme Court jurisdiction of a writ of error in behalf of the government in a criminal case, where an indictment against a national bank officer for making false reports to the Comptroller of the Currency is quashed because such officer is not an agent within the meaning of the statute defining the crime. U. S. v. Corbett (1909) 30 Sup. Ct. 81, 215 U. S. 233, 54 L. Ed. 173, reversing judgment (D. C. 1908) 162 Fed. 687.

A judgment of a federal Circuit Court, quashing, on motion, certain counts of an indictment for willfully misapplying the funds of a national bank, in violation of R. S. § 5209, post, § 9772, because they possessed the defects which that court had found in a prior indictment, which it held did not charge a crime under the statute, is reviewable. U. S. v. Heinze (1910) 31 Sup. Ct. 102, 218 U. S. 547, 54 L. Ed. 1145.

A decision quashing as "bad in law" certain counts of an indictment purporting to charge violations of R. S. § 5209, post, § 9772, is not reviewable, as based on the construction of the statute on which the indictment was founded, since such ruling may as well have rested on the opinion of the court as to the mere insufficiency of the indictment. U. S. v. Carter (1913) 34 Sup. Ct. 173, 231 U. S. 492, 58 L. Ed. 330.

7. —— Decision setting aside indictment.—A judgment in a prosecution of an express company sustaining motion to quash service, which the lower court treated as a demurrer, dismissing the case because the express company was a joint-stock association, and not a corporation is reviewable as a decision setting aside the indictment, based on the construction of the statute on which the indictment was founded. U. S. v.

Adams Exp. Co. (1913) 33 Sup. Ct. 878, 229 U. S. 381, 57 L. Ed. 1237.

8. —— **Decision sustaining demurrer to indictment.**—Where the trial court sustained a demurrer on the ground that, as to the offense charged, the statute, properly construed, did not include defendant, the case was reviewable. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 53 L. Ed. 230; Same v. Mescall (1909) 30 Sup. Ct. 19, 20, 215 U. S. 26, 54 L. Ed. 77.

A judgment sustaining a demurrer to an indictment upon two grounds, one of which involves the construction of the federal statute on which the indictment is founded, and the other the sufficiency of such indictment on general principles of criminal law, is reviewable. U. S. v. Stevenson (1909) 30 Sup. Ct. 35, 215 U. S. 190, 54 L. Ed. 153.

A decision sustaining a demurrer to an indictment for introducing liquor into the Indian country is reviewable, where the question whether the indictment charges an offense involves the validity of Act Jan. 30, 1897, c. 109, post, § 4137. U. S. v. Sutton (1909) 30 Sup. Ct. 116, 117, 215 U. S. 291, 54 L. Ed. 200.

A judgment holding insufficient on demurrer certain counts of an indictment charging willful misapplication of the funds of a national bank, in violation of R. S. § 5209, post, § 9772, because the facts alleged did not constitute a crime under that section, as it should be construed is reviewable as based upon the construction of the statute upon which the indictment was founded. U. S. v. Heinze (1910) 31 Sup. Ct. 98, 218 U. S. 532, 54 L. Ed. 1139.

A judgment sustaining a demurrer to certain counts in an indictment charging violations of Anti-Trust Act July 2, 1890, ante, § 8820 et seq., upon the ground that the acts charged are not within the condemnation of that statute, is based on a construction of such statute within the meaning of this section. U. S. v. Patten (1913) 33 Sup. Ct. 141, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, reversing judgment (C. C. 1911) 187 Fed. 664.

A decision sustaining a demurrer to an indictment on the ground that the acts charged did not fall within the condemnation of the statute on which the indictment is founded is based upon the construction of such statute. U. S. v. Birdsall (1914) 34 Sup. Ct. 512, 233 U. S. 223, 58 L. Ed. 930.

A decision sustaining a demurrer to an indictment charging conspiracy to defraud the United States by unlawfully increasing the gross post office receipts on which a salary is to be based is based on the construction of the statute, and therefore within the appellate jurisdiction of the Supreme Court; a construction of a statute being necessary to determine the validity of the regulations of the postmaster general. U. S. v. Foster (1914) 34 Sup. Ct. 666, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C. 1913) 211 Fed. 206.

The meaning of Act March 4, 1913, post, § 8706, on which an indictment is founded may be misconstrued within this act, not only by misinterpreting the language of the statute, but by overlooking its existence. U. S. v. Nixon (1914) 35 Sup. Ct. 49, 235 U. S. 231, 59 L. Ed. 207.

9. —— **Decision sustaining special plea in bar.**—A decision sustaining a special plea in bar to an indictment is reviewable, though the decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute on which the indictment was founded. U. S. v. Celestine (1909) 30 Sup. Ct. 93, 94, 215 U. S. 278, 54 L. Ed. 195.

A judgment purporting to dismiss an indictment on the ground that the statute of limitations was a bar to the prosecution is one sustaining a special plea in bar, though the plea of the statute of limitations filed and heard by consent and stipulation was denominated a plea in abatement. U. S. v. Barber (1911) 31 Sup. Ct. 209, 219 U. S. 72, 55 L. Ed. 99.

10. **Scope and extent of review.**—The court is confined to ascertaining whether the trial court in a case under review erroneously construed the statute, and may not revise the mere interpretation of the indictment. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 53 L. Ed. 230; Same v. Stevenson (1909) 30 Sup. Ct. 35, 215 U. S. 190, 54 L. Ed. 153; Same v. Miller (1912) 32 Sup. Ct. 323, 223 U. S. 599, 56 L. Ed. 568; Same v. Carter (1913) 34 Sup. Ct. 173, 231 U. S. 492, 58 L. Ed. 330.

The whole case is not open to review in the Supreme Court on the writ of error, but the scope of review is limited to the particular decisions enumerated in that statute. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 132, 211 U. S. 370, 53 L. Ed. 230, reversing order (D. C. 1907) 157 Fed. 396; Same v. Herr (1908) 29 Sup. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; Id. (1908) 29 Sup. Ct. 135, 211 U. S. 406, 53 L. Ed. 252; Same v. Kissel (1910) 31 Sup. Ct. 124, 125, 218 U. S. 601, 54 L. Ed. 1168.

Every question of the character referred to in this act need not be decided by the Supreme Court when the decision of one question disposes of the case. U. S. v. Biggs (1909) 29 Sup. Ct. 181, 185, 211 U. S. 507, 53 L. Ed. 305, affirming judgment (D. C. 1907) 157 Fed. 264; Same v. Freeman (1909) 29 Sup. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; Same v. Sullenberger

(1909) 29 Sup. Ct. 186, 211 U. S. 522, 53 L. Ed. 311.

The various grounds of demurrer to the indictment cannot be considered on a writ of error sued out by the government in a criminal case to review a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy," but the court has jurisdiction to review only the ruling of the court below on the sufficiency of such plea. U. S. v. Mason (1909) 29 Sup. Ct. 480, 482, 213 U. S. 115, 53 L. Ed. 725.

Where it appears that the trial court sustained the demurrer on the ground that as to the offense charged the statute, properly construed, did not include the defendant, the case was one which might be brought to the supreme court; but the inquiry is limited to the particular questions decided by the court below. U. S. v. Mescall (1909) 30 Sup. Ct. 19, 20, 215 U. S. 26, 54 L. Ed. 77.

The only question before the federal Supreme Court on an appeal taken under this provision from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy is whether such plea in bar can be sustained. U. S. v. Kissel (1910) 31 Sup. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168, reversing judgment (C. C. 1909) 173 Fed. 823.

The supreme court, when reviewing the act of the trial court sustaining a plea in bar of the statute of limitations to an indictment charging a continuing conspiracy, is not concerned with the technical sufficiency or redundancy of the indictment, or even with any consideration of the nature of the overt acts alleged. U. S. v. Barber (1911) 31 Sup. Ct. 209, 219 U. S. 72, 55 L. Ed. 99.

The Supreme Court, when reversing a judgment sustaining demurrers to an indictment charging violations of Anti-Trust Act July 2, 1890, post, § 8820 et seq., which is based on the construction of that act, will leave it open to the lower court to pass on such of the grounds of demurrer as were not considered in the former ruling,—especially where the government does not express great confidence in the sufficiency of the indictment. U. S. v. Pacific & A. Ry. & Nav. Co. (1913) 33 Sup. Ct. 443, 228 U. S. 87, 57 L. Ed. 742.

The Supreme Court will not examine the entire record to resolve in favor of its appellate jurisdiction a doubt as to whether a ruling quashing certain counts of an indictment as "bad in law" was based on a construction of the statute on which the indictment was founded or was rested on the mere insufficiency of the indictment. U. S. v. Carter (1913) 34 Sup. Ct. 173, 231 U. S. 492, 58 L. Ed. 330.

II. —— Conclusiveness of construction of indictment.—The district court's construction of the indictment must be accepted by the supreme court when reviewing a judgment sustaining a demurrer to certain counts in the indictment, which is based on the construction of the federal statute on which the indictment is founded. U. S. v. Miller (1912) 32 Sup. Ct. 323, 223 U. S. 599, 56 L. Ed. 568; Same v. Patten (1913) 33 Sup. Ct. 141, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; Same v. Winslow (1913) 33 Sup. Ct. 253, 227 U. S. 202, 57 L. Ed. 481.

The Supreme Court, when reviewing a judgment sustaining a demurrer to certain counts in an indictment charging violations of Anti-Trust Act July 2, 1890, post, § 8820 et seq., must accept the court's construction of the counts of the indictment, and can consider only whether the decision that the acts charged are not condemned as criminal by the statute is based upon an erroneous construction of that statute. U. S. v. Patten (1913) 33 Sup. Ct. 141, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325.

Cited without definite application, U. S. v. Forrester (1908) 29 Sup. Ct. 132, 133, 211 U. S. 399, 53 L. Ed. 245; Same v. Grimaud (1911) 31 Sup. Ct. 480, 220 U. S. 506, 55 L. Ed. 563; Same v. Johnson (1911) 31 Sup. Ct. 627, 221 U. S. 488, 55 L. Ed. 823; Same v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676; Same v. Munday (C. C. 1911) 186 Fed. 375 (reversed [1911] 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149); Same v. Chaves (D. C. 1912) 199 Fed. 518.

§ 1704a. (Act Jan. 28, 1915, c. 22, § 6). Limitation of effect of act; pending cases; criminal cases.

This Act shall not affect cases now pending in the Supreme Court of the United States or cases in which writs of error or appeals have been allowed at the date of its approval. And nothing in this Act shall be deemed to repeal, amend, or modify the provisions of an Act entitled "An Act providing for writs of error in certain instances in criminal cases," approved March second, nineteen hundred and seven. (38 Stat. 804.)

This was § 6 of Act Jan. 28, 1915, c. 22, cited above. Section 1 of said Act amended § 1107, ante. Section 2 amended §§ 1120, 1215, 1223, ante, and provided that writs of error and appeals from final judgments and decrees of the supreme courts of Hawaii and Porto Rico, where the amount involved, exclusive of costs, exceeded $5,000, might be taken and prosecuted in the circuit courts of appeals, set forth ante, § 1126a. Section 3 repealed § 1221, ante.

Section 4 prescribes when judgments and decrees of the Circuit Courts of Appeals shall be final, and is set forth ante, § 1120a. Section 5 provides that United States courts shall not have jurisdiction of suits by or against railroad companies on the ground that such companies were incorporated under an act of Congress, and is set forth ante, § 1233a.

The act referred to in this section is set forth ante, § 1704.

§ 1705. (R. S. § 1041.) Judgments for fines, how collected.

In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: Provided, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

Act June 1, 1872, c. 225, § 12, 17 Stat. 198.

Notes of Decisions

Common-law jurisdiction to collect fine.—This is the only expressed method of collecting a fine, but the court has common-law jurisdiction according to local usage to commit to jail until fine is paid. Ex parte Barclay (C. C. 1907) 153 Fed. 669.

R. S. § 3062, post, § 5764, provides that if any person who may be driving or conducting or in charge of any carriage, vehicle or beast, or any person traveling shall willfully refuse to stop and allow search and examination to be made by United States revenue officers for goods imported without payment of duty, when required to do so, he shall be punished by a fine of not more than $1,000 nor less than $50. Held that, where a fine imposed under such section was not paid, the court had common-law jurisdiction, according to local usage since the original judiciary act, to commit the defendant to jail until the fine was paid or he should be otherwise discharged according to law. Id.

Enforcement by execution or capias.—This section, providing that judgments in criminal and penal cases as to the fine or penalty may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced, means only that the government in enforcing judgments for fines and penalties is not restricted to mere imprisonment of the defendant, but may proceed also by execution against his property. Allen v. Clark (1903) 126 Fed. 738, 740, 62 C. C. A. 28; Clark v. Allen (D. C. 1902) 114 Fed. 374.

Where one is adjudged guilty of criminal contempt, the court may issue execution to collect the fine and have it levied on the property of accused. Wasserman v. U. S. (1908) 161 Fed. 722, 88 C. C. A. 582.

Penalties may be enforced either by an execution against defendant's property or by capias; but where the sentence directs collection by execution a subsequent imprisonment under a capias is illegal. In re Teuscher (C. C. 1877) Fed. Cas. No. 13,846.

Homestead exemption.—The following section, which provides that a poor convict, who has been imprisoned 30 days solely because of the nonpayment of a fine or fine and costs, may be released on making oath that he has not any property exceeding $20 in value, "except such as is by law exempt from being taken on execution for debt," construed in connection with this section, evidences an intention on the part of Congress to place the United States on an equality with civil contract creditors in the enforcement of judgments in criminal and penal cases, and to give the families of poor convicts the full benefit of the exemption and homestead laws of the states as against such judgments; and, in the absence of any statute expressly providing therefor, an execution on a judgment for a fine in favor of the United States cannot be levied on the defendant's homestead in Virginia, although under the state law such homestead is only exempt from contract debts, and not from judgments for torts or in favor of the commonwealth in criminal cases. Allen v. Clark (1903) 126 Fed. 738, 62 C. C. A. 58, affirming decree Clark v. Allen (D. C. 1902) 114 Fed. 374.

A homestead exemption given by the laws of a state may be asserted against a judgment in favor of the United States in a civil cause, and also, by virtue of this section, which provides that judgments for a fine or penalty may be enforced by execution "in like manner as judgments in civil cases are enforced," against a judgment imposing a fine, even though under the state decisions the exemption does not extend to executions on judgments for torts or for fines imposed under the

criminal laws of the state. U. S. v. Stacey (D. C. 1907) 155 Fed. 510.

Collection from estate.—A judgment imposing a fine is abated in the death of the accused, and is not enforceable against his personal representatives. Dyar v. U. S. (1911) 186 Fed. 614, 108 C. C. A. 478; U. S. v. Pomeroy (C. C. 1907) 152 Fed. 279, reversed (1908) 164 Fed. 324, 90 C. C. A. 256.

A judgment entered against a defendant convicted under R. S. § 1782, post, § 10283, which provides that any person violating the same shall be deemed guilty of a misdemeanor and shall be imprisoned and fined, is wholly penal, and the death of the defendant after judgment and while the case is pending in an appellate court operates to abate the entire cause of action, and the fine is not collectible from the defendant's estate. U. S. v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145, affirming judgment Same v. Mitchell (C. C. 1908) 163 Fed. 1014, affirmed (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145.

A fine for an offense abated with accused's death, especially where the judgment was reversed for error, entitling his estate to a fund deposited to secure its payment. Dyar v. U. S. (1911) 186 Fed. 614, 108 C. C. A. 478; Register v. Same (1911) 186 Fed. 624, 108 C. C. A. 488.

Where accused was convicted of giving rebates, in violation of the interstate commerce act and its amendments, and sentenced to pay a fine, but died after judgment before the fine was paid, the judgment and entire proceedings abated on his death, and it was not a claim enforceable against his personal representatives. U. S. v. Pomeroy (C. C. 1907) 152 Fed. 279, order reversed Same v. New York Cent. & H. R. R. Co. (1908) 164 Fed. 324, 90 C. C. A. 256.

Though the federal statutes provide for the collection of a fine in a criminal prosecution by execution as in case of civil judgments, there is no provision making it a debt, and, where a defendant on whom a fine has been imposed by a federal court dies before the fine has been paid, the cause abates, and the fine cannot be collected from his estate. U. S. v. Mitchell (C. C. 1908) 163 Fed. 1014, judgment affirmed Same v. Dunne (1909) 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145.

Action against heirs to enforce penalty.—A judgment in favor of the United States against the owner of whisky seized for violation of the internal revenue laws, on a delivery bond given by him, is one for a penalty, and an action cannot be maintained thereon to enforce the same against the heirs of the defendant after his death. U. S. v. Theurer (1914) 213 Fed. 964, 130 C. C. A. 370.

Action to recover money paid.—Payment of a fine imposed in a criminal case, even if the judgment of conviction was void, is not to be deemed a voluntary contribution to the government, and is not a bar to a suit to recover the money, if otherwise sustainable. U. S. v. Rothstein (1911) 187 Fed. 268, 109 C. C. A. 521.

Cited without definite application, Same v. Thompson (D. C. 1891) 45 Fed. 468, 469; Ex parte Peeke (D. C. 1906) 144 Fed. 1016 (affirmed [1907] 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. [N. S.] 314).

§ 1706. (R. S. § 1042.) Poor convicts sentenced and imprisoned for fines.

When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of (State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of, for may future use or benefit. So help me God." And thereupon

such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts.

Act June 1, 1872, c. 255, § 14, 17 Stat. 198.

These provisions were incorporated also in R. S. § 5296, post, § 10138.

Notes of Decisions

Statute as impliedly authorizing imprisonment.—This section impliedly authorizes imprisonment of a defendant sentenced to pay a fine until such fine is paid, but there is nothing to indicate that such imprisonment can be extended beyond the maximum term of imprisonment for the offense, and no authority for imprisonment in a state prison in default of the payment of a fine imposed. In re Greenwald (C. C. 1896) 77 Fed. 590.

Use of the word "jail."—The word "jail" in this section did not imply that no prisoner should be held in a penitentiary for nonpayment of a fine or a fine and costs, but was used merely to indicate the place of confinement, and hence a federal prisoner could be properly retained in the same institution where he had served his term of imprisonment for the nonpayment of a fine, or a fine and costs, assessed as a part of the sentence, until the fine was paid, or the prisoner applied to take the poor debtor's oath after the expiration of 30 days from the completion of his term. Haddox v. Richardson (1909) 168 Fed. 635, 94 C. C. A. 99.

Calling on state jailer to bring in poor convicts for examination.—The jailer of a state jail, in which prisoners, under sentence or awaiting trial by the federal courts, are confined, is not an officer of the United States; and a United States commissioner has no power to call upon him to perform any service. Saunders v. U. S. (C. C. 1896) 73 Fed. 782.

Prisoner erroneously discharged on habeas corpus.—Where a prisoner in the penitentiary, after having served the imprisonment part of the sentence, was erroneously discharged on habeas corpus because it was supposed that his incarceration could not be continued for nonpayment of the fine assessed, the United States, on reversal of such order, could retake and return him to the penitentiary from which he had been released, and hold him therein until he had been lawfully discharged by payment of the fine, or by taking the poor debtor's oath after 30 days' additional imprisonment, as authorized by this section and section 10138, post. Haddox v. Richardson (1909) 168 Fed. 635, 94 C. C. A. 99.

Exemptions.—This section is held to be a recognition by congress that, in case of executions on judgments in civil actions, the United States are subject to the same exceptions as apply to private persons by the law of the state in which the property levied on is found, and that by this provision in favor of poor convicts it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemptions as in civil cases. Fink v. O'Neil (1882) 1 Sup. Ct. 325, 334, 106 U. S. 272, 27 L. Ed. 196.

—— **Homestead.**—See, also, notes under the preceding section.

This section construed in connection with the preceding section, providing for the collection of fines and penalties by execution against the property of the defendant "in like manner as judgments in civil cases are enforced," evidences an intention on the part of Congress to place the United States on an equality with civil contract creditors in the enforcement of judgments in criminal and penal cases, and to give the families of poor convicts the full benefit of the exemption and homestead laws of the states as against such judgments; and, in the absence of any statute expressly providing therefor, an execution on a judgment for a fine in favor of the United States cannot be levied on the defendant's homestead in Virginia, although under the state law such homestead is only exempt from contract debts, and not from judgments for torts or in favor of the commonwealth in criminal cases. Allen v. Clark (1903) 126 Fed. 738, 62 C. C. A. 58, affirming decree Clark v. Allen (D. C. 1902) 114 Fed. 374.

Pardon on condition of paying fine and costs.—A pardon on condition of paying a fine and costs imposed with a sentence of imprisonment is wholly inoperative until such fine and costs are paid; and an application for discharge as a poor convict under this section, cannot be based thereon. In re Ruhl (D. C. 1878) Fed. Cas. No. 12,124.

Charges of marshal.—A marshal is not entitled to any fee for the discharge of a poor convict, after examination pursuant to this section. Saunders v. U. S. (C. C. 1896) 73 Fed. 782. CONTRA, Hitch v. U. S. (D. C. 1895) 66 Fed. 937.

A United States marshal is entitled to a fee of two dollars for the service of a mandate to bring in a poor convict for examination, upon his application for release, pursuant to this section. Saunders v. U. S. (C. C. 1896) 73 Fed. 782; Hitch v. Same (D. C. 1895) 66 Fed. 937; Saunders v. Same (D. C. 1896) 73 Fed. 792.

Under section 1386, ante, allowing

mileage for going, only, to serve any warrant, etc., or other writ, a marshal is entitled to mileage on writs of commissioners for the production of prisoners under this section. Hitch v. U. S. (D. C. 1895) 66 Fed. 937.

A marshal may charge for travel and transportation in bringing in poor convicts before a commissioner. Lovering v. U. S. (D. C. 1902) 117 Fed. 565.

Per diem of district attorney.—A district attorney is entitled to a per diem for attendance before a commissioner to examine poor convicts applying for discharge under this section, and for attendance before a commissioner on days when recognizances are taken, though no witnesses are examined. Bird v. U. S. (D. C. 1891) 45 Fed. 110, 111.

DECISIONS RELATING TO SUBJECT IN GENERAL

See, also, notes under § 1537, ante.

1. Proceeding by indictment in absence of informer.
2. Capias.
3. Signature to information.
4. Verification of information.
5. What information need not show.
6. Inspection of minutes of grand jury.
7. Oath of witnesses before grand jury.
8. Arraignment and plea in general.
9. Arraignment and plea on new trial.
10. Withdrawal of plea of guilty.
11. Withdrawal of plea of not guilty and filing motion to quash on demurrer.
12. Plea in abatement and demurrer thereto.
13. Plea of nolo contendere.
14. Plea of autrefois acquit or convict.
15. Double pleading.
16. Use of demurrer in general.
17. Special demurrer.
18. General demurrer.
19. Withdrawal of plea and demurring to indictment.
20. Withdrawal of demurrer after argument.
21. Judgment against party committing first fault in pleading.
22. Sustaining demurrer.
23. Stay to discover evidence for new trial.
24. Discharge of prisoners not indicted.
25. Holding prisoner to answer new indictment.
26. Separate trials of defendants jointly indicted.
27. Proper location of prisoners within bar.
28. General verdict of guilty.
29. Omission of jury to find on all counts.
30. Judgment where separate verdict is rendered on each count.
31. Arrest of judgment.
32. Motion to continue indictment and suspend sentence.
33. Stay to prepare bill of exceptions.
34. Sentence and punishment on conviction of several offenses.
35. Mittimus and enforcement of sentence after term.
36. Sentence on conviction of second offence while under sentence for first.
37. Discharge on serving full term under one judgment.
38. Assessment of firm in misdemeanor cases.
39. Arrest and commitment under sentence.
40. Motion in arrest of judgment.

1. Proceeding by indictment in absence of informer.—Although, in the absence of an informer, the government may have judgment for the whole, yet this does not authorize the proceeding by indictment. U. S. v. Tilden (C. C. 1859) Fed. Cas. No. 16,523.

2. Capias.—A capias is proper process on an indictment for misdemeanor. U. S. v. Jamesson (C. C. 1801) Fed. Cas. No. 15,466.

A capias is the proper process upon an indictment for misdemeanor found after service of a summons to show cause why an indictment or information should not be filed. U. S. v. Veitch (C. C. 1802) Fed. Cas. No. 16,613.

A capias may be issued upon an indictment as the first process against the defendant. U. S. v. Cottom (C. C. Dist. Col. 1802) Fed. Cas. No. 14,873; Same v. Burr (C. C. 1807) Id. 14,694.

3. Signature to information.—The sworn assistant of the district attorney may sign the latter's name to an information. U. S. v. Nagle (C. C. 1879) Fed. Cas. No. 15,852.

4. Verification of information.—The verification of an information filed by a prosecuting attorney in the United States is unnecessary, unless required by some constitutional or statutory provision. Weeks v. U. S. (1914) 216 Fed. 292.

5. What information need not show.—It is not necessary that an information shall show that defendant was held to answer the charge on complaint before a commissioner, or that the charge has been found true by a grand jury. U. S. v. Moller (C. C. 1879) Fed. Cas. No. 15,794.

6. Inspection of minutes of grand jury.—Defendant is not entitled to an order for the inspection of the minutes of the grand jury. U. S. v. Rubin (D. C. 1914) 214 Fed. 507.

7. Oath of witnesses before grand jury.—A general oath to give evidence touching criminal charges to be laid before the grand jury without reference to any particular person is unobjectionable. U. S. v. Reed (C. C. 1852) Fed. Cas. No. 16,134.

But where the oath names one or more persons, evidence cannot be given under it in support of an accusation against others. Id.

Sufficiency of oath of witnesses sworn to testify before a grand jury. Id.

8. Arraignment and plea in general.—See, also, notes under §§ 1691 and 1698, ante.

Pleading to an indictment in which a person is charged with having committed an act cannot be construed to waive a right which he would have possessed had he been charged with having advised the act. U. S. v. Burr (C. C. 1807) Fed. Cas. No. 14,693.

In the Indian Territory before statehood, an arraignment or a waiver of it and the entering of a plea for accused

was necessary to a valid trial. Harris v. U. S. (Okl. Cr. 1910) 111 P. 982.

On an indictment for murder, the record contained the following entry: "Comes now C., who prosecutes in behalf of the territory, and the defendant in his own proper person and by his attorneys. The prisoner upon being asked as to his right name replied that it was 'Elick.' Arraignment of prisoner waived by counsel." Held, that the arraignment was not sufficient, and that all subsequent proceedings were without warrant of law. Elick v. Territory (1861) 1 Wash. T. 136.

9. Arraignment and plea on new trial.—There having been a prior arraignment and plea, one is not necessary on a new trial. U. S. v. McKnight (D. C. 1902) 112 Fed. 982.

10. Withdrawal of plea of guilty.—Trial court held to exercise discretion on application for leave to withdraw plea of not guilty for purpose of demurring to the indictment, and its ruling is not reviewable. Andrews v. U. S. (1915) 224 Fed. 418, 139 C. C. A. 646.

Defendants, against whom four indictments were found for violation of revenue laws, entered a plea of guilty to two indictments, under advice of counsel, and upon a promise of the district attorney to enter a nolle prosequi as to the other indictments, and to postpone motion for sentence till an effort to compromise matters could be made at Washington. The effort at compromise was a complete failure. Thereupon defendants moved for leave to withdraw their plea of guilty. No inducements for this arrangement had been held out by the prosecuting attorney. Held, that the plea should stand. U. S. v. Bayaud (C. C. 1883) 23 Fed. 721.

11. Withdrawal of plea of not guilty and filing motion to quash on demurrer.—Where defendant was arraigned and pleaded "not guilty," but thereafter obtained leave to withdraw his plea and file a motion to quash the indictment and a demurrer thereto, which was thereafter overruled, whereupon he went to trial, the withdrawal of the plea of not guilty was provisional only, and it was not material that a plea of "not guilty" should be again entered of record. O'Hara v. U. S. (1904) 129 Fed. 551, 64 C. C. A. 81.

Where the defendant in a criminal case by leave of court withdrew his plea of not guilty and interposed a demurrer and motion to quash, which were overruled, on a second trial of the cause after limitation had run against a new indictment it was within the sound discretion of the court to refuse leave to defendant to again withdraw his plea and file a second motion to quash. Waller v. U. S. (1910) 179 Fed. 810, 103 C. C. A. 302, 31 L. R. A. (N. S.) 118.

The refusal of the trial court to allow accused to withdraw his plea of not guilty and file a demurrer to the indictment will not be disturbed, in the absence of an abuse of discretion. Phillips v. U. S. (1912) 201 Fed. 259, 120 C. C. A. 149.

It was within the trial court's sound discretion to permit accused to withdraw their pleas of not guilty and file motions to quash. U. S. v. Lewis (D. C. 1911) 192 Fed. 633.

12. Plea in abatement and demurrer thereto.—See, also, notes under § 1691, ante.

An appellate court cannot review the ruling of a trial court in refusing to entertain a plea in abatement tendered by a defendant in a criminal case after a demurrer had been overruled and at a term succeeding the one at which defendant had entered a plea of not guilty; there being nothing in the record to excuse the delay or to show that the court abused its discretion. Wilder v. U. S. (1906) 143 Fed. 433, 74 C. C. A. 567, writ of certiorari denied (1907) 27 Sup. Ct. 787, 204 U. S. 674, 51 L. Ed. 674.

Where a plea in abatement in a criminal case was submitted to the court and overruled, being determined as a question of law, it was not error, when it subsequently appeared that a question of fact was involved, to submit such question to a jury. Jones v. U. S. (1910) 179 Fed. 584, 103 C. C. A. 142.

Pleas in abatement are to be strictly construed. Hillman v. U. S. (1911) 192 Fed. 264, 112 C. C. A. 522, writ of certiorari denied (1912) 32 S. Ct. 834, 225 U. S. 699, 56 L. Ed. 1263.

Plea in abatement to an indictment on the ground of production before the grand jury of books containing incriminating evidence held bad, where it shows that the books belonged to corporations, and not to accused individually. And fails to show there was no other evidence on which to find the indictment. Hillman v. U. S. (1911) 192 Fed. 264, 112 C. C. A. 522, writ of certiorari denied (1912) 32 Sup. Ct. 834, 225 U. S. 699, 56 L. Ed. 1263.

Pleas in abatement to an indictment must be pleaded with strict exactness. U. S. v. Williams (C. C. 1871) Fed. Cas. No. 16,716.

A plea in abatement alleging a disqualification of one of the grand jurors who found the indictment need not be verified. U. S. v. Hammond (C. C. 1875) Fed. Cas. No. 15,294.

A plea in abatement which prays for a judgment which the court cannot give upon a plea in abatement is defective and bad. Id.

A plea in abatement which alleges as a disqualification of a grand juror that he joined the Rebellion against the United States, without any specific averment of time and place, is bad. Id.

The proper conclusion of a plea in abatement is a prayer that the indictment be quashed. Id.

In misdemeanors, as well as in felonies, two or more pleas in abatement, not repugnant to each other, may be pleaded together. U. S. v. Reeves (C. C. 1878) Fed. Cas. No. 16,139.

Where a plea in abatement to an indictment alleges facts contrary to the record, or which could be proven only by the testimony of the grand jurors disclosing their proceedings or impeaching their findings, a demurrer to the plea cannot be regarded as admitting the truth of such allegations, but will be considered as an objection or exception to the filing or allowance of the plea. U. S. v. Terry (D. C. 1889) 39 Fed. 355.

A plea in abatement, that a witness gave the grand jury hearsay evidence, referred to books of which he was not the legal custodian, and gave his opinion as an expert, was insufficient. U. S. v. Jones (D. C. 1895) 69 Fed. 973.

No inference will be indulged by the court to supply omitted material averments or to cure inaccuracies in a plea in abatement in a criminal case. U. S. v. Standard Oil Co. of Indiana (D. C. 1907) 154 Fed. 728.

Matters not disclosed by the record may be presented by plea in abatement, and the filing of counter affidavits disputing matters set up in affidavits, accompanying a plea in abatement, is a waiver of the objection that the issue was raised by plea rather than by motion to quash. U. S. v. Wells (D. C. 1908) 163 Fed. 313.

A plea in abatement to an indictment, alleging misconduct on the part of a witness before the grand jury, who was also a special agent and attorney for the Interstate Commerce Commission, in that while on the stand he stated his opinions as to the sufficiency of the evidence and argued its sufficiency, and alleging generally that defendant was prejudiced thereby, is not sufficiently specific to raise an issue. U. S. v. American Tobacco Co. (D. C. 1910) 177 Fed. 774.

A plea in abatement to an indictment, alleging matters of irregularity merely, which in a technical sense are dilatory, and which even if sustained do not finally dispose of the subject-matter of the indictment, must be presented with the greatest promptness; and such a plea, filed 19 days after service of process on the indictment and more than 2½ months after it was returned, and which contains no statement as to when the fact of the indictment or the matters alleged first became known to defendant, comes too late. Id.

In the federal courts, a plea in abatement in a criminal case may properly raise an issue of fact as to what evidence was presented to the grand jury. U. S. v. Swift (D. C. 1911) 186 Fed. 1002.

Quære, whether on a plea in abatement to an indictment an inquiry can be made as to whether the indictment was found upon an indictment by a former grand jury without re-examination of witnesses. Thompson v. United States (1908) 30 App. D. C. 352.

A demurrer to a plea in abatement to an indictment is properly sustained, when the grounds assigned in support of the plea do not consist of certain and distinct allegations of fact, but merely conclusions of law. Id.

13. Plea of nolo contendere.—A plea of nolo contendere is a plea of guilty to every essential element of the offense well pleaded and warrants the accused's conviction thereof without more, though the conviction could not be used against him in any other case. U. S. v. Lair (C. C. 1912) 195 Fed. 47, 115 C. C. A. 49.

The plea of "nolo contendere" is not a plea in the strict sense of the term and is allowable only upon leave of court being equivalent to a plea of guilty, but distinguishable from that plea in that it cannot be used against the defendant as an admission in any civil suit for the same act. Tucker v. U. S. (1912) 196 Fed. 260, 116 C. C. A. 62.

A plea of nolo contendere may be allowed under an indictment containing different counts, some of which charge offenses punishable by fine alone; but in such case punishment can be imposed only on such counts and by fine only. Id.

A judgment and sentence to both fine and imprisonment, based on an indictment containing counts charging offenses punishable by fine alone and by fine and imprisonment, without a jury trial, is not supported by a tendered plea of nolo contendere and void for want of jurisdiction. Id.

The legal effect of the plea of "Nolo contendere" and "Guilty" is the same as regards all the proceedings on the indictment. U. S. v. Hartwell (C. C. 1869) Fed. Cas. No. 15,318.

14. Plea of autrefois acquit or convict.—A plea of autrefois acquit or convict should not be tendered simultaneously with the general issue. U. S. v. J. L. Hopkins & Co. (D. C. 1912) 228 Fed. 173.

15. Double pleading.—Pleas of the general issue and the statute of limitations, being double pleading, are not allowable, and the special plea will be stricken out. U. S. v. Shorey (C. C. 1869) Fed. Cas. No. 16,280.

16. Use of demurrer in general.—See, also, § 1692, and notes thereunder.

A demurrer can only be used to object to an indictment as insufficient in law because defective in substance or

form. U. S. v. Kilpatrick (D. C. 1883) 16 Fed. 765.

Under the practice of the federal courts, the defense of limitation cannot be raised by demurrer to an indictment. U. S. v. Andem (D. C. 1908) 158 Fed. 996.

17. Special demurrer.—A special demurrer will not be entertained, but the paper filed as such may be retained as an assignment of causes of demurrer under the general demurrer. U. S. v. French (C. C. 1893) 57 Fed. 382.

Surplusage in an indictment cannot be reached by demurrer of any character; but, if it be assumed that a special demurrer will lie, it must point out the specific language objected to, and not require counsel and the court to search through the indictment for what is claimed as demurrable. U. S. v. Patterson (C. C. 1893) 59 Fed. 280.

18. General demurrer.—It is no ground for general demurrer to an indictment for a misdemeanor under Acts Va. Nov. 13, 1792, and Act 1795, p. 346, that the name of a prosecutor is not written at the foot of the indictment. U. S. v. Sandford (C. C. 1806) Fed. Cas. No. 16,221.

Where it appears upon the whole record upon an indictment for misdemeanor that the offense was committed more than two years before the indictment was found, defendant may avail himself of that defense by a general demurrer. U. S. v. White (C. C. 1837) Fed. Cas. No. 16,678.

19. Withdrawal of plea and demurring to indictment.—The refusal of the trial court to allow accused to withdraw his plea of not guilty and file a demurrer to the indictment is within the sound discretion of the trial court. Phillips v. U. S. (1912) 201 Fed. 259, 120 C. C. A. 149.

20. Withdrawal of demurrer after argument.—The court, as a condition of permitting defendant to withdraw his demurrer after argument, may require him to waive the right to move in arrest of judgment for any matter apparent upon the indictment. U. S. v. Watkins (C. C. 1829) Fed. Cas. No 16,649.

21. Judgment against party committing first fault in pleading.—On demurrer to a pleading in a criminal case, judgment is to be given against the party who has committed the first fault in pleading. U. S. v. Lawrence (C. C. 1876) Fed. Cas. No. 15,573.

22. Sustaining demurrer.—Where demurrer to indictment is sustained, it is the duty of the court to resubmit the matter to the grand jury, and the accused is held under bail to await that action. U. S. v. Manthei's Bondsmen (1905) 2 Alaska, 459.

23. Stay to discover evidence for new trial.—The court will not delay judgment merely to give defendant time to discover new evidence on which to ask a new trial. U. S. v. Randall (D. C. 1869) Fed. Cas. No. 16,118.

24. Discharge of prisoners not indicted.—The judge of the court which the grand jury attended is to make the order for the discharge of prisoners against whom no indictment is found. Act 1863, c. 81, § 3. In re Blum (D. C. 1863) Fed. Cas. No. 1,572.

25. Holding prisoner to answer new indictment.—Where the indictment has been quashed, defendant will be held in custody to answer a new indictment. U. S. v. Dustin (C. C. 1869) Fed. Cas. No. 15,011.

Where an indictment for homicide is held bad, the prisoner will be remanded to custody on proof of the commission of the offense. U. S. v. Town-Maker (D. C. 1836) Fed. Cas. No. 16,-533a.

26. Separate trials of defendants jointly indicted.—Where several persons are included in one indictment, it is in the court's discretion to try them separately or together. Lee Dock v. U. S. (1915) 224 Fed. 431, 140 C. C. A. 125; U. S. v. Kelly (C. C. 1825) Fed. Cas. No. 15,516; Same v. White (C. C. 1826) Fed. Cas. No. 16,682; Same v. Wilson (C. C. 1830) Fed. Cas. No. 16,730; Same v. Gibert (C. C. 1834) Fed. Cas. No. 15,204; Same v. Davidson (C. C. 1835) Fed. Cas. No. 14,922; Same v. Matthews (C. C. 1843) Fed. Cas. No. 15,741b. CONTRA, U. S. v. Sharp (C. C. 1815) Fed. Cas. No. 16,-264.

Under federal law, severance in criminal cases is within the discretion of the trial court. Talbott v. U. S. (C. C. 1913) 208 Fed. 144, 125 C. C. A. 360.

Separate trials will not be granted in the case of persons jointly indicted to enable one to have the benefit of the testimony of the others, as they are not competent witnesses for each other. U. S. v. Gibert (C. C. 1834) Fed. Cas. No. 15,204; Same v. Collyer (C. C. 1855) Fed. Cas. No. 14,838.

27. Proper location of prisoners within bar.—Proper location of the prisoners within the bar, where there were 12 in number. U. S. v. Gibert (C. C. 1834) Fed. Cas. No. 15,204.

28. General verdict of guilty.—On an indictment for assault and battery on H. with intent to kill him, a verdict, "Guilty of an assault by shooting H. with intent to kill," is substantially a general verdict of guilty. U. S. v. Lloyd (C. C. 1834) Fed. Cas. No. 15,-619.

On a general verdict of guilty, the evidence will be applied to any sufficient count, and the remaining counts will be wholly disregarded. U. S. v. Burroughs (C. C. 1844) Fed. Cas. No. 14,695; Same v. Potter (C. C. 1854) Fed. Cas. No. 16,078; Same v. Dustin

(C. C. 1869) Fed. Cas. No. 15,011; Same v. Knapp (D. C. 1849) Fed. Cas. No. 15,538.

29. Omission of jury to find on all counts.—The court may permit discontinuance of a count upon which the jury have omitted to find; but the verdict cannot be amended, as in case of special verdict, by entering not guilty on such count. U. S. v. Keen (C. C. 1839) Fed. Cas. No. 15,510.

Where an indictment describes in different counts different offenses, of different grades and punishments, implied from the same transaction, and the verdict is guilty of the last count only, judgment may properly be rendered on the verdict. U. S. v. Stetson (C. C. 1847) Fed. Cas. No. 16,390.

Where there are two or more counts upon distinct offenses, or upon different statements of the same offense, the jury may find a verdict upon any or all of such counts; and where they disagree upon any count, they may be discharged as to that, and it will stand for retrial. U. S. v. Davenport (D. C. 1867) Fed. Cas. No. 14,920.

30. Judgment where seperate verdict is rendered on each count.—But one judgment should be rendered where the various offenses charged substantially constitute but one offense, though a separate verdict of guilty is rendered on each count. Ex parte Joyce (D. C. 1877) Fed. Cas. No. 7,556.

31. Arrest of judgment.—Error in the admission of evidence does not afford proper ground for a motion in arrest of judgment. Pfieffer v. U. S. (1908) 31 App. D. C. 109.

32. Motion to continue indictment and suspend sentence.—Upon a motion by defendants to continue an indictment and suspend sentence, held, that admitted rights may be waived in criminal cases by laches where it clearly appears that the omission to claim their exercise was voluntary, and with a full knowledge of all the circumstances. U. S. v. Hartwell (C. C. 1870) Fed. Cas. No. 15,319.

33. Stay to prepare bill of exceptions.—A stay of proceedings will not be granted after verdict to enable counsel to prepare a bill of exceptions, where none of the exceptions go to the merits. U. S. v. Williams (C. C. 1860) Fed. Cas. No. 16,722.

34. Sentence and punishment on conviction of several offenses.—Where defendant is convicted of several offenses, charged in one indictment, in separate counts, he may be separately punished for each offense. U. S. v. Bennett (C. C. 1879) Fed. Cas. No. 14,572.

A criminal convicted of several offenses under several counts of an indictment may be sentenced under the first count, and sentence suspended as to the others until after the first sentence is fully executed. U. S. v. Blaisdell (D. C. 1869) Fed. Cas. No. 14,608.

Where a party is convicted of two crimes arising out of one transaction, that fact will be considered in fixing the measure of his punishment. U. S. v. Harmison (D. C. 1876) Fed. Cas. No. 15,308.

35. Mittimus and enforcement of sentence after term.—The court held entitled to issue a mittimus and enforce a sentence after expiration of the term at which it is imposed, notwithstanding an invalid order suspending it. Morgan v. Adams (1915) 226 Fed. 719, 141 C. C. A. 475.

36. Sentence on conviction of second offense while under sentence for first.—If a person be convicted of a second offense while under sentence for the first, the sentence for the second may be made to commence from the expiration or other termination of the period for which he was first sentenced. U. S. v. Farrell (C. C. 1837) Fed. Cas. No. 15,074.

37. Discharge on serving full term under one judgment.—Where a separate sentence was rendered on each verdict, the prisoner is entitled to be discharged on serving the full term of imprisonment under one judgment. Ex parte Joyce (D. C. 1877) Fed. Cas. No. 7,556.

38. Assessment of fine in misdemeanor cases.—In misdemeanor cases in the federal courts, the court, and not the jury, should assess the fine. U. S. v. Mundell (C. C. 1795) Fed. Cas. No. 15,834.

39. Arrest and commitment under sentence.—That a defendant was under parole from imprisonment in New York held not a bar to his arrest for commitment under a sentence of a federal court in another state for a different offense. U. S. v. Marrin (D. C. 1915) 227 Fed. 314.

That a defendant, after conviction and sentence, was also convicted and sentenced in another jurisdiction, and imprisoned for a time longer than the term of his first sentence, held not a bar to his subsequent commitment under the latter. Id.

40. Motion in arrest of judgment.—See, also, notes under § 1691, ante.

A judgment in a criminal case can be arrested only for matter appearing on the face of the record, and the evidence is not a part of the record for this purpose. Demolli v. U. S. (1906) 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121.

A motion in arrest of judgment cannot be entertained after sentence, and after the term at which it was entered has expired. McInerney v. U. S. (1906) 147 Fed. 183, 77 C. C. A. 411.

While accused may raise the question of the sufficiency of the indictment to charge a public offense by motion in arrest of judgment, it is better practice to raise the question by demurrer.

Clement v. U. S. (1906) 149 Fed. 305, 79 C. C. A. 243, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

The court, as a condition of permitting defendant to withdraw his demurrer after argument, may require him to waive the right to move in arrest of judgment for any matter apparent upon the indictment. U. S. v. Watkins (C. C. 1829) Fed. Cas. No. 16,649.

Where there is doubt whether an indictment charges an offense within a statute, it should not be quashed, but the doubt be left to be solved on motion in arrest of judgment. U. S. v. Bartow (C. C. 1882) 10 Fed. 874.

On a motion in arrest of judgment the indictment should receive a liberal construction, and an informal or imperfect allegation of an essential fact will be deemed a sufficient averment of such fact. U. S. v. Dimmick (D. C. 1901) 112 Fed. 352, judgment affirmed Dimmick v. U. S. (1903) 121 Fed. 638, 57 C. C. A. 664, writ of certiorari denied (1903) 24 Sup. Ct. 846, 191 U. S. 574, 48 L. Ed. 308.

An arrest of judgment will only be decreed for illegality or irregularity apparent on the face of the record. U. S. v. McKnight (D. C. 1902) 112 Fed. 982.

A criminal judgment will only be arrested for matter appearing of record which would render the judgment erroneous if given, the evidence being no part of the record for such purpose. The rule in civil cases that the matter alleged in arrest must be such as would have been sufficient upon demurrer to overturn the action or plea applies, also, to criminal cases. U. S. v. Marrin (D. C. 1908) 159 Fed. 767, judgment affirmed Marrin v. U. S. (1909) 167 Fed. 951, 93 C. C. A. 351, writ of certiorari denied (1911) 32 Sup. Ct. 523, 223 U. S. 719, 56 L. Ed. 629.

Where circumstantial evidence warranted the jury in finding beyond a reasonable doubt that accused was guilty, a judgment on the verdict should not be arrested. U. S. v. Stern (D. C. 1911) 186 Fed. 854, judgment affirmed Stern v. U. S. (1912) 193 Fed. 888, 114 C. C. A. 102.

A motion in arrest of a judgment in a criminal case can only be granted for matter appearing of record which would render the judgment erroneous if entered. U. S. v. Maxey (D. C. 1912) 200 Fed. 997.

Matter alleged on motion in arrest must be such as would have been sufficient on demurrer to overturn the action or plea. Id.

A motion in arrest of judgment lies only for want of jurisdiction, and that the facts stated do not constitute a crime. U. S. v. Richards (1902) 1 Alaska, 613.

Where an accused in a criminal case moves in arrest of judgment on the ground of the insufficiency of the indictment, and, his motion being overruled, appeals from the judgment, and there is no bill of exceptions in the record, the only question presented on the appeal is the sufficiency of the indictment. Simon v. U. S. (1911) 37 App. D. C. 280.

While the statement, in an application by one under indictment for a speedy trial, that he did not intend to demur to the indictment or to enter any other plea than that of not guilty, will not preclude him from afterwards taking advantage of a defect in the indictment on a motion in arrest of judgment, the court is at liberty to consider such statement on the hearing of such a motion. Dufour v. U. S. (1911) 37 App. D. C. 497.

Cited without definite application, Ex parte Fisk (1885) 5 Sup. Ct. 724, 727, 113 U. S. 713, 28 L. Ed. 1117; U. S. v. Allred (1895) 15 Sup. Ct. 231, 233, 155 U. S. 591, 39 L. Ed. 273; Starr v. U. S. (1897) 17 Sup. Ct. 223, 224, 164 U. S. 627, 41 L. Ed. 577; In re Lincoln (1906) 26 Sup. Ct. 602, 202 U. S. 178, 50 L. Ed. 984; Stroheim v. Deimel (C. C. 1896) 73 Fed. 430, 436 (reversed [1897] 77 Fed. 802, 23 C. C. A. 467); Donahower v. Same (C. C. 1896) 77 Fed. 153, 159 (affirmed [1898] 85 Fed. 547, 29 C. C. A. 342); Ex parte Barclay (C. C. 1907) 153 Fed. 669; U. S. v. Hom Hing (D. C. 1892) 48 Fed. 635, 639; In re Sanborn (D. C. 1892) 52 Fed. 583, 585; In re Wetherell (D. C. 1894) 60 Fed. 265, 266 (reversed [1894] 65 Fed. 987, 13 C. C. A. 264); Ex parte Peeke (D. C. 1906) 144 Fed. 1016 (affirmed [1907] 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. [N. S.] 314); U. S. v. Stacey (D. C. 1907) 155 Fed. 510.

CHAPTER NINETEEN

Limitations

Sec.
1707. Capital offenses.
1708. Offenses not capital.
1709. Fleeing from justice.
1710. Crimes under revenue laws or slave trade laws.
1711. Crimes under internal revenue laws.
1712. Penalties and forfeitures under laws of the United States.
1713. Penalties and forfeitures under customs revenue laws.

§ 1707. (R. S. § 1043.) Capital offenses.

No person shall be prosecuted, tried, or punished for treason or other capital offense, willful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed.

Act April 30, 1790, c. 9, § 32, 1 Stat. 119.

Notes of Decisions

See, also, § 1709, and notes thereunder.

Willful murder.—A seaman on the American schooner M. was indicted for having shot in the harbor of Havana one Miller, who died therefrom three days afterwards in the hospital at Havana, on January 21, 1892. The indictment was not found until March 10, 1896, and H. in the meantime had been imprisoned at Havana upon conviction for an assault, and on the expiration of his sentence delivered to the United States authorities. On demurrer to the indictment, held, that the case was not one of "willful murder" within this section, and the indictment was therefore barred by the three-year limitation. U. S. v. Hewecker (1896) 79 Fed. 59, 60.

Cited without definite application, U. S. v. Cook (1872) 17 Wall. 168, 173, 21 L. Ed. 538; Streep v. U. S. (1895) 16 Sup. Ct. 244, 245, 160 U. S. 128, 40 L. Ed. 365.

§ 1708. (R. S. § 1044, as amended, Act April 13, 1876, c. 56.) Offenses not capital.

No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws.

Act April 30, 1790, c. 9, § 32, 1 Stat. 119. Act April 13, 1876, c. 56, 19 Stat. 32.

This section, as enacted in the Revised Statutes, limited the time for prosecution of offenses not capital to two years. It was amended by Act April 13, 1876, c. 56, cited above, by changing the limitation to three years, and by adding the last sentence relating to offenses barred by existing laws, making the section read as set forth here.

R. S. § 1046, mentioned in this section, relating to crimes under the revenue laws or the slave-trade laws, is set forth post, § 1710.

Notes of Decisions

1. Repeal of statute.
2. Prospective operation of former law.
3. Application of state statute of limitations.
4. Offenses to which statute applies in general.
5. Application to evidence.
6. When limitations begin to run.
7. Finding indictment or information within period of limitation.
8. Statute as running in favor of offender not known.
9. Withdrawal of plea and moving to quash indictment after running of limitation against new indictment.
10. Actions for penalties.
11. Prosecutions by information.
12. Misdemeanors.
13. Criminal contempts.
14. Offense on ship engaged in whaling voyage.
15. Conspiracy.
16. Offenses relating to official duties.
17. Frauds on the government.
18. Paying congressman for procuring government contract.
19. Offenses against the postal service.
20. Counterfeiting.
21. Bigamy or polygamy.
22. Violation of white slave act.

23. Pleading and proof as to time of offense.
24. How defense of limitations may be raised.

See, also, notes under the following section.

1. Repeal of statute.—The further prosecution of a criminal offense is not barred by the failure of the grand jury to act within nine months from the date when the accused was held to bail to await such action, although it is provided by Code D. C. § 939 (31 Stat. 1189, 1342), that under such circumstances, unless the court enlarges the time, the prosecution of such charge shall be deemed to have been abandoned, and the accused shall be set free, or his bail discharged, as the case may be, but this section must be deemed to operate merely as ending the pending prosecution, and not as repealing pro tanto the general statute of limitations contained in this section. U. S. v. Cadarr (1905) 25 Sup. Ct. 487, 488, 197 U. S. 475, 49 L. Ed. 842, 3 Ann. Cas. 1057.

General three-year statute of limitations, applicable to crimes, held not repealed by the Pure Food and Drugs Law. U. S. v. J. L. Hopkins & Co. (D. C. 1912) 199 Fed. 649.

2. Prospective operation of former law.—Act April 30, 1790, § 32 (this section as originally enacted), limiting the time for a criminal prosecution to two years, applies to offenses created after, as well as before, the act. U. S. v. White (C. C. 1836) Fed. Cas. No. 16,675; Johnson v. U. S. (C. C. 1842) Fed. Cas. No. 7,418; U. S. v. Ballard (C. C. 1844) Fed. Cas. No. 14,507.

3. Application of state statute of limitations.—Act July 7, 1898, § 2, post, § 10462, providing that when any offense is committed in any place, jurisdiction over which has been retained by, or ceded to, the United States the punishment for which is not provided for by any law of the United States, the offender shall receive the same punishment as the laws of the state provide for the like offense, does not incorporate into the federal law the general statute of limitations of the state relating to crimes, but a prosecution thereunder is governed as to limitation by the federal statute. U. S. v. Andem (D. C. 1908) 158 Fed. 996.

4. Offenses to which statute applies in general.—This section is applicable to offenses described in sections 10199, 10201, 10255, and 10264, post. Greene v. U. S. (1907) 154 Fed. 401, 411, 85 C. C. A. 251, certiorari denied (1907) 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

5. Application to evidence.—The limitation of this section does not apply to evidence submitted in support of the charges in an indictment so as to render it inadmissible. Dow v. U. S. (1897) 82 Fed. 904, 909, 27 C. C. A. 140.

6. When limitations begin to run.—The running of the three-year limitation prescribed by this section for criminal prosecutions to punish criminal contempts of an injunction against a boycott began as to each specific act charged from the date of the commission of such act. Gompers v. U. S. (1914) 34 Sup. Ct. 693, 233 U. S. 604, 58 L. Ed. 1115, reversing judgment In re Gompers (1913) 40 App. D. C. 293.

The crime of conspiracy to defraud the United States consists in putting a corrupt agreement into active operation, and limitations run from the date of the last overt act committed for the purpose of completing the object of the conspiracy. U. S. v. Brace (D. C. 1907) 149 Fed. 874, 877.

7. Finding indictment or information within period of limitation.—The date of an alleged offense as stated in an indictment is not binding on the United States, and is only material in reference to the bar of limitation, and to show that the offense was committed anterior to the presentment of the indictment. Hume v. U. S. (1902) 118 Fed. 689, 55 C. C. A. 407, writ of certiorari denied (1903) 23 Sup. Ct. 850, 189 U. S. 510, 47 L. Ed. 923.

The finding of an informal presentment is not the finding or instituting of the indictment, so as to take the case out of the statute. U. S. v. Slacum (C. C. 1808) Fed. Cas. No. 16,311.

The time of finding the indictment will appear by the caption, and, where it appears therefrom that the offense was committed beyond the time limited, judgment will be rendered for defendant. U. S. v. Watkins (C. C. 1829) Fed. Cas. No. 16,649.

The indictment or information must be found within the limitation of the statute. A second indictment after the two years will not save the bar where the first one, found in due time, was non-prossed. U. S. v. Ballard (C. C. 1844) Fed. Cas. No. 14,507.

8. Statute as running in favor of offender not known.—The statute of limitations runs in favor of an offender, although it was not known that he was the person who committed the offense. U. S. v. White (C. C. 1836) Fed. Cas. Nos. 16,675, 16,676.

9. Withdrawal of plea and moving to quash indictment after running of limitation against new indictment.—Where the defendant in a criminal case by leave of court withdrew his plea of not guilty and interposed a demurrer and motion to quash, which were overruled, on a second trial of the cause after limitation had run against a new indictment it was within the sound discretion of the court to refuse leave to defendant to again withdraw his plea and file a second motion to quash. Waller v. U. S. (1910) 179 Fed. 810, 103 C. C. A. 302, 31 L. R. A. (N. S.) 113.

10. Actions for penalties.—The act of April 30, 1790, limiting prosecutions upon penal statutes, extends as well to penalties created after, as before, that act, and to actions of debt as well as to informations and indictments. Adams v. Woods (1805) 2 Cranch, 336, 340, 2 L. Ed. 297.

The act of April 30, 1790, limiting prosecutions upon penal statutes, extends to an action of debt for the penalty of $2,000 under the second section of the act of congress of March 22, 1794, to prohibit the carrying on the slave trade from the United States to any foreign place or country. Id.

Neither this section limiting prosecutions for the commission of offenses not capital, nor Rev. Laws Mass. c. 202, § 5, limiting actions for the enforcement of penalties, applies to actions for the penalty for importing an alien contract laborer under Immigration Act, § 5. U. S. v. Dwight Mfg. Co. (D. C. 1914) 213 Fed. 522.

11. Prosecutions by information.—Under this section a prosecution by information is expressly recognized by Congress. In re Wilson (D. C. 1883) 18 Fed. 33, 34.

12. Misdemeanors.—Act April 30, 1790, § 32, limiting the prosecution of offenses not capital to two years, is applicable to common-law misdemeanors, in the District of Columbia. U. S. v. Slacum (C. C. 1808) Fed. Cas. No. 16,-311; Same v. Porter (C. C. 1812) Fed. Cas. No. 16,072; Same v. Watkins (C. C. 1829) Fed. Cas. No. 16,649.

This section, being general in its language, applies to all misdemeanors constituting offenses against the United States, whenever added by Congress to the list of statutory crimes. U. S. v. Central Vermont Ry. (C. C. 1907) 157 Fed. 291.

13. Criminal contempts.—See, also, note, ante, as to "When limitations begin to run."

Criminal contempts are crimes, within this section, though the right of trial by jury in criminal cases does not extend to such contempts. Gompers v. U. S. (1914) 34 Sup. Ct. 693, 233 U. S. 604, 58 L. Ed. 1115, reversing judgment In re Gompers (1913) 40 App. D. C. 293.

Proceedings to punish acts not committed in the presence of the court as criminal contempts of an injunction are none the less governed by the three-year limitation of this section, because such proceedings may not be instituted by indictment or information. Id.

The federal Supreme Court would prescribe by analogy a three-year limitation for proceedings to punish past acts not committed in the presence of the court as criminal contempts of an injunction, if the case were not covered by this section. Id.

14. Offense on ship engaged in whaling voyage.—Where an offense is committed on a ship engaged in a whaling voyage, and which ship does not return to the United States until more than two years afterwards, the limitation of Act April 30, 1790, will bar a prosecution against the offender. U. S. v. Brown (D. C. 1873) Fed. Cas. No. 14,-665.

15. Conspiracy.—Under this section a conspiracy to defraud the United States of the duties on certain imported goods is not "a crime arising under the revenue laws," and persons charged therewith cannot be prosecuted therefor unless they be indicted within three years next after the alleged committing thereof. U. S. v. Hirsch (1879) 100 U. S. 33, 34, 25 L. Ed. 539.

A conspiracy to restrain or monopolize trade, in violation of Sherman Act July 2, 1890, post, § 8821, by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, continues, so far as the statute of limitations is concerned, so long as any further action is taken in furtherance of the conspiracy. U. S. v. Kissel (1910) 31 Sup. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168, reversing judgment (C. C. 1909) 173 Fed. 823.

A special plea of the statute of limitations is not good as against an indictment charging a conspiracy to restrain or monopolize trade, in violation of Sherman Act July 2, 1890, post, § 8821, by improperly excluding a competitor from business, although the conspiracy is alleged to have been formed on a specified date, which was more than three years before the finding of the indictment, where such indictment, consistently with the other facts, alleges that the conspiracy continued to the date of its presentment. Id.

A conspiracy to acquire fraudulently school lands from the states of California and Oregon, and to corrupt the officers of the general land office to facilitate their selection, under Act June 4, 1897, in exchange for other public lands, continues, so far as limitations are concerned, so long as any overt acts are done in furtherance of the conspiracy. Hyde v. U. S. (1912) 32 Sup. Ct. 793, 802, 803, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, afirming judgment (1910) 35 App. D. C. 451.

Some affirmative action to defeat the purpose of a continuing conspiracy to defraud the United States, contrary to R. S. § 5440, post, § 10201, must be taken by a conspirator to prevent the overt act of an associate from continuing him in the conspiracy. Id.

Disclosure by a government employé of continuing conspiracy to which he was a party, to defraud the United States out of its public lands, contrary

to R. S. § 5440, post, § 10201, does not prevent subsequent overt acts of any of his associates from continuing him in the conspiracy so far as the statute of limitations is concerned, if, after the first disclosure, he acquiesced in the later acts. Id.

Conspiracy to use the mails to defraud, within R. S. § 5480, post, § 10385, which the indictment alleges was designed to be and was in fact continuous, continues, so far as the limitations are concerned, so long as the overt acts are done by any of the conspirators. Brown v. Elliott (1912) 32 Sup. Ct. 812, 815, 225 U. S. 392, 56 L. Ed. 1136.

Conspiracy to commit against the United States, contrary to Cr. Code, § 37, an act criminal under Bankr. Act July 1, 1898, is not an offense arising under that act within section 29d, limiting prosecutions, but is governed by this section, limiting prosecutions for offenses not capital. U. S. v. Rabinowich (1915) 35 Sup. Ct. 682, 238 U. S. 78, 59 L. Ed. 1211.

A prosecution for conspiracy to defraud the United States under R. S. § 5440, post, § 10201, is maintainable if instituted within three years of the commission of the last, or of any overt act. Bradford v. U. S. (1907) 152 Fed. 617, 81 C. C. A. 607.

This section in applicable to the offense mentioned in section 10201. Greene v. U. S. (1907) 154 Fed. 401, 85 C. C. A. 251, certiorari denied (1907) 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

Where a conspiracy has been formed and an overt act done in execution thereof more than three years before the filing of an indictment, but subsequent overt acts were committed under the old conspiracy within three years, the existence of the conspiracy and the participation of defendant therein within the three years, if established, will sustain a prosecution for the conspiracy. Ware v. U. S. (1907) 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233, writ of certiorari denied (1907) 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353.

An overt act committed by one of alleged co-conspirators within three years, under a conspiracy between him and the defendant formed and followed by an overt act more than three years before the filing of the indictment, without the defendant's consent or agreement within the three years to the continued existence and execution of the conspiracy, is incompetent to establish its existence and his participation therein within three years. Id.

Where a conspiracy has been formed and an overt act done in execution of it more than three years before the filing of an indictment, a prosecution therefor is barred by limitations. Id.

Proof of the formation by defendant and others more than three years before the indictment of such a conspiracy as that charged in the indictment and of an overt act thereunder prior to the three years is insufficient to sustain the charge of conspiracy within the three years, but other evidence of the existence of the conspiracy and of defendant's conscious participation in it within three years is competent evidence for the jury. Id.

To constitute a violation of R. S. § 5440, post, § 10201, providing a penalty where persons conspire to defraud the United States and one of them does any act to effect the object of the conspiracy, by conspiring to defraud the government of public lands subject to entry under Timber and Stone Act June 3, 1878, § 1, post, § 4671, it is not essential that a patent for the lands be issued and delivered; a violation of the section not depending upon the success of the conspiracy, and becoming complete when the final step was taken by the conspirators in inducing fraudulent entries and the issuance of certificates of purchases. U. S. v. Black (1908) 160 Fed. 431, 87 C. C. A. 383.

Under an indictment charging a violation of R. S. § 5440, post, § 10201, providing a penalty where persons conspire to defraud the United States, and one of them does any act to effect the object of the conspiracy, by conspiring to defraud the government of public lands subject to entry under Timber and Stone Act June 3, 1878, § 1, post, § 4671, an averment of payment, on certain dates within three years of the filing of the indictment, to procure false application, final proof and entry for the lands, does not charge overt acts within this section. Any violation of section 5440 was complete before certificates of purchase covering the lands were issued, though such payment was made subsequently. Id.

Where an alleged conspiracy to defraud the United States, denounced by R. S. § 5440, post, § 10201, contemplated various overt acts and the consequent continuance of the conspiracy beyond the commission of the first one, each overt act gave a new, separate, and distinct effect to the conspiracy, and constituted another crime, so that a prosecution was not barred by limitations until three years after the commission of the last overt act alleged. Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303, writ of certiorari denied (1908) 29 Sup. Ct. 685, 212 U. S. 576, 53 L. Ed. 657.

While under R. S. § 5440, post, § 10201, providing for the punishment of persons conspiring to commit any offense against the United States, the gravamen of the offense is the conspiracy, the period of conspiracy must be computed from the date of the overt act rather than the formation of the conspiracy, and, where there are successive overt acts, the period of limitations must be computed from the date

of the last of them to which there is appropriate allegation and proof. Lonabaugh v. U. S. (1910) 179 Fed. 476, 103 C. C. A. 56, reversing judgment U. S. v. Lonabaugh (D. C. 1907) 158 Fed. 314.

Where an alleged conspiracy to defraud the United States contemplated various overt acts, and the consequent continuance of the conspiracy beyond the commission of the first one, each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime, and a prosecution is not barred until three years after the last overt act averred in the indictment. Jones v. U. S. (1910) 179 Fed. 584, 103 C. C. A. 142.

Where defendants devised a scheme to defraud, consisting of plans for the sale of corporate stock by false representations to be carried out by means of correspondence through the post office, the conspiracy was a continuing offense, and a prosecution therefor was not barred until three years from the last overt act. Wilson v. U. S. (1911) 190 Fed. 427, 111 C. C. A. 231.

Where a conspiracy to defraud the United States of its public lands contemplated various overt acts, and such acts extended down to a designated date, a prosecution begun within three years of the last overt act was not barred by this section. Hedderly v. U. S. (1912) 198 Fed. 561, 569, 114 C. C. A. 227.

A prosecution for a conspiracy held not barred by limitations prescribed by this section. Id.

The essence of the offense made punishable by R. S. § 5440, post, § 10201, is not the devising of a scheme or artifice to defraud, but the using of the mails in pursuance of such a scheme and a prosecution thereunder is not barred by limitation because the scheme may have been devised more than three years prior to the indictment, where the overt acts were committed within that time. Mitchell v. U. S. (1912) 196 Fed. 874, 116 C. C. A. 436.

An indictment for conspiracy to embezzle and misapply the funds of a national bank, made more than three years before indictment, but involving an overt act committed within the three-year period, was not barred by limitations. Breese v. U. S. (1913) 203 Fed. 824, 122 C. C. A. 142, affirming order U. S. v. Breese (D. C. 1908) 172 Fed. 761.

Where, in a prosecution for conspiracy to commit a crime against the United States in violation of Cr. Code, §§ 87, 232, et seq., the indictments charged the first overt act as of January 20, 1908, and the last August 27, 1911, and were filed February 6, 1912, and February 26, 1912 respectively, the prosecution was not barred by limitations. Ryan v. U. S. (1914) 216 Fed. 13.

Where a conspiracy to defraud the United States was formed more than three years prior to the indictment, and acts in pursuance thereof were done both prior to and within the three years' prosecution therefor under R. S. § 5440, post, § 10201, it is not barred by the limitation imposed by this section. Houston v. U. S. (1914) 217 Fed. 852, 133 C. C. A. 562.

Limitations held not to run against prosecutions for conspiracy to defraud the United States in connection with sale of zinc to it until payment of check therefor or giving of credit by the bank of deposit. Meyer v. U. S. (1915) 220 Fed. 800, 135 C. C. A. 564.

Under indictment for conspiring to restrain interstate business of competitors, held, that conviction could be had only for conspiring against the competitors named who were in existence within three years. Patterson v. U. S. (1915) 222 Fed. 599, 138 C. C. A. 123, reversing judgment U. S. v. Patterson (D. C. 1912) 201 Fed. 697, certiorari denied (1915) 35 Sup. Ct. 939, 238 U. S. 635, 59 L. Ed. 1499.

If conspiracy existing before period of limitation continues into such period, held, that to support conviction nothing need be done in furtherance thereof within such period. Id.

A prosecution for conspiracy to commit an offense arising under the bankruptcy act is governed by the general limitation of three years contained in this section. Rabinowitz v. U. S. (1915) 222 Fed. 846, 138 C. C. A. 272.

An overt act being necessary to sustain a prosecution for conspiracy to defraud the United States, under R. S. § 5440, post, § 10201, the statute of limitations does not begin to run against such a prosecution until the commission of an overt act; and since every such overt act is a renewal of the conspiracy, a prosecution may be instituted within three years after the commission of any overt act, although more than that length of time may have elapsed since the conspiracy was first formed or the first of such acts was committed thereunder. U. S. v. Bradford (C. C. 1905) 148 Fed. 413, judgment affirmed Bradford v. U. S. (1907) 152 Fed. 616, 81 C. C. A. 606, writ of certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 563, 51 L. Ed. 1190.

Limitation does not begin to run against a prosecution for conspiracy between officers of a national bank to embezzle, abstract, or willfully misappropriate its funds so long as the conspiracy continues or acts to effect its object are committed. U. S. v. Breese (C. C. 1909) 173 Fed. 402.

A conspiracy in restraint of interstate commerce or to monopolize the same in violation of Sherman Anti-Trust Act July 2, 1890, §§ 1, 2, post, §§ 8820, 8821, by causing a manufacturing corporation to suspend business in the interest of a competing concern by obtain-

ing control of its stock through a contract was complete, at the latest, when its object was fully accomplished by the making of the contract and the election of a board of directors, who voted to cease business, and a prosecution therefor is barred in three years from that time under this section. U. S. v. Kissel (C. C. 1909) 173 Fed. 823, reversed (1910) 31 Sup. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168.

An indictment under R. S. § 5440, post, § 10201, for conspiracy to defraud the United States, is not insufficient because it charges that the conspiracy was formed on a date more than three years prior to the time it was found, and sets out overt acts at different times thereafter up to and within the three years, where it is also charged that the conspiracy was in continuous operation and continuously in process of execution at all times down to that of the last overt act specified. U. S. v. Eccles (C. C. 1910) 181 Fed. 906.

The crime of conspiracy to defraud the United States is composed of the conspiracy and an act done in pursuance thereof, and as soon as the one is formed and the other committed the crime is consummated, and the statute begins to run against the prosecution therefor, and in three years thereafter the bar is complete. U. S. v. Owen (D. C. 1887) 32 Fed. 534, 536.

A conspiracy to defraud the United States, within R. S. § 5440, post, § 10201, is not "a crime arising under the revenue laws," and therefore the persons charged therewith cannot be prosecuted therefor, under this and the following section, unless they be indicted within three years next after the alleged commission thereof. Id.

A conspiracy to defraud the United States by making unlawful entries of public lands cannot, for the purpose of avoiding the statute of limitations, be split up into different conspiracies for each section of land entered or for each overt act done; nor can it be held that there is a new conspiracy by the parties to the original conspiracy, whenever a new party is brought into the scheme, so as to make the statute of limitations begin to run from that time. U. S. v. McCord (D. C. 1895) 72 Fed. 159.

A conspiracy to defraud the United States is punishable under the statute, notwithstanding the fact that the scheme to defraud was originally devised and entered into at a time so remote that a prosecution for acts then done would be barred by limitation, when it was continuous in its operation, and overt acts have been committed thereunder within the period of limitation; and an indictment, which after reciting the original scheme, charges a conspiracy at a later date to apply it, in pursuance of which overt acts were committed, is not objectionable on the ground of duplicity. U. S. v. Greene (D. C. 1902) 115 Fed. 343.

Where an indictment charged that defendant and others did, on the 18th day of April 1904, unlawfully, etc., conspire together to commit an offense against the United States, and the evidence established that defendant came into the conspiracy in October, 1902, while the indictment was found June 15, 1905, the offense was not barred by the three-year limitation. U. S. v. Francis (D. C. 1906) 144 Fed. 520, judgment modified Francis v. U. S. (1907) 152 Fed. 155, 81 C. C. A. 407, writ of certiorari denied (1907) 27 Sup. Ct. 797, 206 U. S. 565, 51 L. Ed. 1191.

Where an alleged conspiracy to defraud the United States out of public lands was formed in September, 1902, and the necessary affidavits to consummate the fraud were filed on the 7th and 8th of October, 1902, the filing of such affidavits constituted an overt act, which started limitations against a prosecution for conspiracy, which was barred on October 8, 1905, under this section. Ex parte Black (D. C. 1906) 147 Fed. 832, 840.

Where a conspiracy to defraud the United States out of public lands was formed, the filing of the necessary affidavits to consummate the fraud constituted an overt act, which started limitations. Id.

The crime denounced by R. S. § 5440, post, § 10201, punishing conspiracy to commit an offense against, or to defraud the United States, consists in putting a corrupt agreement into active operation, and hence limitations run from the date of the last overt act committed for the purpose of completing the object of the conspiracy. U. S. v. Brace (D. C. 1907) 149 Fed. 874.

Where an indictment for conspiracy set out a number of overt acts on different dates, held, that the offense was consummated when the first overt act was committed, and from that date the statute began to run. U. S. v. Biggs (D. C. 1907) 157 Fed. 264, affirmed (1909) 29 Sup. Ct. 181, 211 U. S. 507, 53 L. Ed. 305.

Defendants entered into an agreement, the purpose of which was to obtain title to a large tract of coal lands from the United States, and to vest such title in a company organized by them for the purpose. Pursuant to such agreement, they procured third persons to make individual entries under the statute which were secured by false testimony. Defendants furnished the money to pay for the land, and, when final receipts were obtained, they took the same, paid small sums to the entrymen, and took deeds from them to the company. Held, that the offense of conspiracy to defraud the United States within the meaning of R. S. § 5440, post, § 10201, which such acts constituted, was not complete until the final receipts held by defendants were

surrendered and patents obtained, from which time only the statute of limitations began to run. U. S. v. Lonabaugh (D. C. 1907) 158 Fed. 314, judgment reversed Lonabaugh v. U. S. (1910) 179 Fed. 476, 103 C. C. A. 56.

Where conspirators are acting together for a common purpose comprehended by the scheme, limitations begin to run from the last overt act, except as to a conspirator withdrawing from the scheme, as to whom the statute runs from time of his withdrawal. U. S. v. Raley (D. C. 1909) 173 Fed. 159.

The defendants are indicted for conspiracy in restraint of trade. The indictment shows that defendant corporation constructed a line of railroad from Skagway, Alaska, to the boundary line at the summit of White Pass, in 1898–99; that at that time there were in competitive operation, parallel to the railroad, three aerial trams and a toll wagon road, which defendants purchased, dismantled, and thereafter discontinued to date when this indictment was returned in 1912. These are the substantial facts upon which the indictment is based, and upon demurrer, on the ground that the offense is barred by the statute of limitations, held, the facts do not show a continuing conspiracy, but one which ended when the trams and toll road were discontinued and dismantled in 1899, and therefore the three years' statute of limitations bars the indictment. U. S. v. Pacific & A. Ry. & Nav. Co. (1912) 4 Alaska, 574.

Where a conspiracy is formed and a single overt act in aid of its object is committed beyond the statutory period of limitation before the finding of the indictment and subsequent overt acts are committed within that period, then, through the repetition of such acts, the conspiracy is made a continuing offense, and by each of such acts it is repeated and entered into anew, and the prosecution is not barred. Lorenz v. U. S. (1904) 24 App. D. C. 337.

16. Offenses relating to official duties.—Act April 30, 1790, § 32, sometimes called the Crimes Act, enacts the only limitation applicable to the offense of the paymaster of the army indicted for embezzling the public money. U. S. v. Cook (1872) 17 Wall. 168, 182, 21 L. Ed. 538.

An indictment found September 15, 1875, charging a pension agent with having, on December 24, 1870, refused to pay over pension money on demand, and thereafter continuously withholding the same, is barred. U. S. v. Irvine (1878) 98 U. S. 450, 452, 25 L. Ed. 193.

This section is applicable to the offense mentioned in section 10264, post. Greene v. U. S. (1907) 154 Fed. 401, 85 C. C. A. 251, certiorari denied (1907) 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

This section is applicable to the offense mentioned in section 10255, post. Id.

Prosecution for payment to member of congress for procuring government contract held not barred. U. S. v. Driggs (C. C. 1903) 125 Fed. 520.

17. Frauds on the government.—This section providing for a limitation of three years is applicable to the offense mentioned in section 10199, post. Greene v. U. S. (1907) 154 Fed. 401, 85 C. C. A. 251, certiorari denied (1907) 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

Section 3 of the act of March 2, 1863 (section 10199, post), to prevent and punish frauds upon the government, contemplates two proceedings, one civil and the other criminal; of which the former is subject to the limitation prescribed by the seventh section of that act (section 6415, post), and the latter to that prescribed by the thirty-second section of the act of April 30, 1790 (this section). (1872) 14 Op. Atty. Gen. 54.

18. Paying congressman for procuring government contract.—R. S. §§ 1781, 1782, post, §§ 10280, 10283, make it a criminal offense for any Congressman to receive or agree to receive any money, property, or other valuable consideration for procuring or aiding to procure any contract from the government, or to receive any compensation for services rendered in relation to any claim or contract in which the United States is a party. R. S. § 1781, post, § 10282, also makes it an offense for any person to give or agree to give any money, property, or other valuable consideration for procuring or aiding to procure such contract by a Congressman. A nonnegotiable note, made by a government contractor, promising to pay a certain sum as the proceeds of the contract were received, was executed pursuant to an agreement to pay the Congressman for his services in procuring the contract. Held, that indictments under the statute, based on payments subsequently made and received in accordance with the terms of the note, were not barred by limitation, where such payments were made within three years, though the note was delivered more than three years prior to the finding of the indictment. U. S. v. Driggs (C. C. 1903) 125 Fed. 520.

19. Offenses against the postal service.—The limitation of two years in Act April 30, 1789, held to apply to a prosecution for embezzlement of money belonging to a postal money order office. U. S. v. Norton (1875) 91 U. S. 566, 569, 23 L. Ed. 454.

The federal supreme court has no jurisdiction to review an order of a federal district court, permitting the entry of a nolle prosequi to an indictment for violating R. S. § 5480, post, § 10385, punishing the sending of letters

through the mails with intent to defraud, where no new indictment has been returned within three years from the date of the commission of the alleged offense, or, if returned, is not still pending, since, under the circumstances, the case has become merely a moot one. Lewis v. U. S. (1910) 30 Sup. Ct. 438, 439, 216 U. S. 611, 54 L. Ed. 637.

Where an indictment charged that defendant and others did, on the 18th day of April 1904, unlawfully, etc., conspire together to commit an offense against the United States, and the evidence established that defendant came into the conspiracy in October, 1902, while the indictment was found June 15, 1905, the offense was not barred by the three-years' limitation fixed by this section. U. S. v. Francis (D. C. 1906) 144 Fed. 520, judgment modified Francis v. U. S. (1907) 152 Fed. 155, 81 C. C. A. 407, writ of certiorari denied (1907) 27 Sup. Ct. 797, 206 U. S. 565, 51 L. Ed. 1191.

20. Counterfeiting.—An indictment for counterfeiting, not found within two years subsequent to the commission of the acts charged, is barred by the statute of limitations. U. S. v. Shorey (C. C. 1869) Fed. Cas. No. 16,281.

21. Bigamy or polygamy.—The offense of bigamy or polygamy consists in the fact of unlawful marriage, and a prosecution against the offender is barred by the lapse of three years. Murphy v. Ramsey (1885) 5 Sup. Ct. 747, 763, 114 U. S. 15, 29 L. Ed. 47.

22. Violation of white slave act.—An indictment under Act March 3, 1903, § 3, as amended by Act Feb. 20, 1907, § 3, for importing an alien woman for immoral purposes, held sufficient as to an offense committed within three years before the indictment was found, though no date is alleged. U. S. v. Lair (1912) 195 Fed. 47, 115 C. C. A. 49.

23. Pleading and proof as to time of offense.—A charge that an offense was committed "on the —— day" of a month and year named is not defective where any day of that month was prior to the finding of the indictment and within the period of limitation applicable, and where time is not of the essence of the offense. U. S. v. Conrad (C. C. 1894) 59 Fed. 458.

While the time of the commission of an offense must be averred, it may be proved to have been committed on any day prior to the filing of the bill during the period of limitations. U. S. v. Francis (D. C. 1906) 144 Fed. 520, judgment modified Francis v. U. S. (1907) 152 Fed. 155, 81 C. C. A. 407, writ of certiorari denied (1907) 27 Sup. Ct. 797, 206 U. S. 565, 51 L. Ed. 1191.

24. How defense of limitations may be raised.—The defense of the statute of limitations cannot be made by demurrer to the indictment. U. S. v. Cook (1872) 84 U. S. (17 Wall.) 168, 21 L. Ed. 538; Greene v. U. S. (1907) 154 Fed. 401, 411, 85 C. C. A. 251 (writ of certiorari denied [1907] 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357, and affirming judgment U. S. v. Greene [D. C. 1906] 146 Fed. 803); U. S. v. Andem (D. C. 1908) 158 Fed. 996, 999.

The defense of the statute of limitations cannot be made by demurrer to the indictment, charging an offense created by statute containing no exception or proviso. U. S. v. Cook (1872) 17 Wall. 168, 178, 21 L. Ed. 538.

Where it appears upon the whole record upon an indictment for misdemeanor that the offense was committed more than two years before the indictment was found, defendant may avail himself of that defense by a general demurrer. U. S. v. White (C. C. 1837) Fed. Cas. No. 16,678.

A bar, under the statute of limitations, to be available, must be pleaded. Johnson v. U. S. (C. C. 1842) Fed. Cas. No. 7,418.

Pleas of the general issue and the statute of limitations, being double pleading, are not allowable, and the special plea will be stricken out. U. S. v. Shorey (C. C. 1869) Fed. Cas. No. 16,280.

The defense of the statute of limitations may be raised in a criminal case by a special plea before trial. U. S. v. Kissel (C. C. 1909) 173 Fed. 823, reversed (1910) 31 Sup. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168.

A defendant indicted for an offense against the United States, not capital, cannot avail himself of the defense of the three-year limitation contained in this section by demurrer, where the indictment does not show on its face that defendant is not within the exception of persons fleeing from justice created by the following section. In such case, the proper practice is for defendant to file a special plea in the nature of a plea in abatement, or to avail himself of the defense by evidence under the general issue. U. S. v. Brace (D. C. 1906) 143 Fed. 703, 704.

A defendant, indicted for an offense against the United States not capital, cannot avail himself of the defense of this section by demurrer, where the indictment does not show on its face that defendant is not within the exception of persons fleeing from justice created by the following section. Id.

It is permissible, but not necessary, to raise the defense of limitation in a criminal case by special plea. U. S. v. J. L. Hopkins & Co. (D. C. 1912) 228 Fed. 173.

Cited without definite application, Mackin v. U. S. (1886) 6 Sup. Ct. 777, 779, 117 U. S. 348, 29 L. Ed. 909;

Streep v. Same (1895) 16 Sup. Ct. 244, 245, 160 U. S. 128, 40 L. Ed. 365; U. S. v. Howell (D. C. 1894) 64 Fed. 110, 111; Pereles v. Weil (D. C. 1907) 157 Fed. 419; Arnold v. Same (D. C. 1907) 157 Fed. 429.

§ 1709. (R. S. § 1045.) Fleeing from justice.

Nothing in the two preceding sections shall extend to any person fleeing from justice.

Act April 30, 1790, c. 9, § 32, 1 Stat. 119.

The two preceding sections of the Revised Statutes, mentioned in this section, were R. S. §§ 1043, 1044, ante, §§ 1706, 1707.

Indictments for the offense of seduction of female passengers on vessels by masters, officers, seamen, or other employés, must be found within one year after the arrival of the vessel on which the offense was committed, at the port of its destination, by Crim. Code, § 281, post, § 10454.

No person is to be prosecuted for any crime arising under the provisions of the Naturalization Act of June 29, 1906, c. 3592, unless the indictment is found or the information is filed within five years after the commission of such crime, by section 24 of said act, post, § 4380.

No criminal proceeding is to be maintained under the Copyright Act of March 4, 1909, c. 320, unless commenced within three years after the cause of action arose, by section 39 of said act, post, § 9560.

Provisions relating to the limitations applicable to offenses against the Articles of War were made by R. S. § 1342, art. 103, post, § 2420.

Notes of Decisions

See, also, notes under the preceding section.

Fleeing from justice in general.—To constitute one a "person fleeing from justice" so as to prevent the running of the statute of limitations against a prosecution for a criminal offense against the United States under this section, it is not necessary that he should have left the United States, but it is sufficient that he had left the district in which the offense was committed when it was sought to apprehend him therefor, and was found in another district in which he did not reside under circumstances indicating a purpose to evade the authority of the court having jurisdiction. Greene v. U. S. (1907) 154 Fed. 401, 411, 85 C. C. A. 251, writ of certiorari denied (1907) 28 S. Ct. 261, 207 U. S. 596, 52 L. Ed. 357, affirming judgment U. S. v. Greene (D. C. 1906) 146 Fed. 803.

An indictment will not be quashed because it appears upon the record that it was not found within two years after the offense was committed, as the defendant might have been a fugitive from justice. U. S. v. White (C. C. 1836) Fed. Cas. Nos. 16,675, 16,676.

A departure of the offender from the place where the offense was committed to his usual residence in another part of the United States for the purpose of avoiding punishment for any offense is a fleeing from justice, and the statute will not run until his public return to the place where the offense was committed. U. S. v. White (C. C. 1836) Fed. Cas. Nos. 16,675, 16,676; Id. (C. C. 1837) Fed. Cas. No. 16,677.

There must be a leaving of one's home, residence, or place of abode within the district, or a concealing of one's self therein, to avoid detection or punishment for some offense against the United States, to constitute a "fleeing from justice," under this section. U. S. v. O'Brian (C. C. 1873) Fed. Cas. No. 15,908.

The New Jersey statute provides that no person shall be prosecuted for any offense not punishable with death unless indicted within two years from its commission, provided that the limitation shall not extend to any person fleeing from justice. Petitioner was indicted for an alleged offense committed in New Jersey some five years previously. It appeared that he then resided in the state, and continued to so reside for about a year thereafter, when he moved his domicile to another state. He was thereafter in the state temporarily from time to time, but not exceeding 18 months in all, including his time of residence after the time of the alleged offense. Held, that he was within the exception to the statute, and the indictment was not barred thereunder. In re Bruce (C. C. 1904) 132 Fed. 390, judgment affirmed, Bruce v. Bryan (1905) 136 Fed. 1022, 69 C. C. A. 342.

In construing a statutory provision excepting from the limitation of time for prosecuting crimes "any person fleeing from justice," for the purpose of determining the sufficiency of an indictment to support proceedings for extradition, the exception should be held to apply to any person who, being within the state at the time the alleged offense was committed, failed for any reason to remain therein until the bar of the statute was complete, and it is immaterial that he did not leave for the purpose of avoiding prosecution. Id.

A defendant indicted for an offense against the United States, not capital, cannot avail himself of the defense of the three-year limitation contained in the preceding section by demurrer, where the indictment does not show on

its face that defendant is not within the exception of persons fleeing from justice created by this section. In such case, the proper practice is for defendant to file a special plea in the nature of a plea in abatement, or to avail himself of the defense by evidence under the general issue. U. S. v. Brace (D. C. 1906) 143 Fed. 703.

Where an arrest is made ten years after the offer of a reward, the person for whom the reward is offered being still a fugitive from justice, the person making the arrest is entitled to the reward. Drummond v. U. S. (1900) 35 Ct. Cl. 356.

Resisting removal.—Where a person charged with crime against the United States in the courts of one federal district, when found elsewhere, resists removal to such district, with intent to avoid the jurisdiction and process of the court therein, such action constitutes a fleeing from justice, which, under this section, takes away from him the privilege of pleading the statute of limitations, and, until he submits himself to such jurisdiction, the statute does not run in his favor as against prosecution for any offense charged to have been previously committed in said district. U. S. v. Greene (D. C. 1906) 146 Fed. 803, 889, judgment affirmed Greene v. U. S. (1907) 154 Fed. 401, 85 C. C. A. 251, writ of certiorari denied (1907) 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

Necessity of being found within jurisdiction of another state.—To constitute a "fleeing from justice," within this section, it is not necessary that the accused shall have been found within the jurisdiction of another court. Porter v. U. S. (1898) 91 Fed. 494, 496, 33 C. C. A. 652.

Intent to avoid justice.—To constitute "fleeing from justice," within the meaning of this section providing that the three-years limitation, fixed by the previous sections, for a prosecution for a criminal offense, shall not apply to one so fleeing, an intent to avoid the justice of the United States is not necessary, an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act being sufficient. Streep v. U. S. (1895) 16 Sup. Ct. 244, 246, 160 U. S. 128, 40 L. Ed. 365.

Pendency of extradition proceedings.—Although, under the extradition treaty of 1890, between Great Britain and the United States and the laws of Canada, a person whose extradition is sought by the United States from the Dominion of Canada has the right to oppose his extradition by legal proceedings, he is nevertheless, during the pendency of such proceedings, a person fleeing from justice, within the meaning of this section. U. S. v. Greene (D. C. 1906) 146 Fed. 803, 889, judgment affirmed Greene v. U. S. (1907) 154 Fed. 401, 85 C. C. A. 251, writ of certiorari denied (1907) 28 Sup. Ct. 261, 207 U. S. 596, 52 L. Ed. 357.

Seaman convicted and sentenced for another offense prior to indictment.—A seaman on the American schooner M. was indicted for having shot in the harbor of Havana one Miller, who died therefrom in the hospital, three days afterwards, at Havana, on January 21, 1892. The indictment was not found until March 10, 1896, and H. in the meantime had been imprisoned at Havana upon conviction for an assault, and on the expiration of his sentence delivered to the United States authorities. On demurrer to the indictment: Held, that the defendant was not a fugitive from justice under this section, so as to be excepted from the exemption of indictment after three years, provided by section 1707, ante. U. S. v. Hewecker (C. C. 1896) 79 Fed. 59, 60.

Conspiracy.—A conspiracy to defraud the United States, within section 10201, post, is not "a crime arising under the revenue laws," and therefore the persons charged therewith cannot be prosecuted therefor, under this and the preceding section, unless they be indicted within three years next after the alleged commission thereof. U. S. v. Owen (D. C. 1887) 32 Fed. 534.

Demurrer to indictment not showing on its face that defendant is not within exception of statute.—A defendant, indicted for an offense against the United States not capital, cannot avail himself of the defense of the three-year limitation contained in section 1708, ante, by demurrer, where the indictment does not show on its face that defendant is not within the exception of persons fleeing from justice created by this section; the proper practice would be for defendant to file a special plea in the nature of a plea in abatement, or to avail himself of the defense by evidence under the general issue. U. S. v. Brace (D. C. 1906) 143 Fed. 703, 704.

Cited without definite application. U. S. v. Cook (1872) 17 Wall. 168, 173, 21 L. Ed. 538; Appleyard v. Massachusetts (1906) 27 Sup. Ct. 122, 124, 203 U. S. 222, 51 L. Ed. 161.

§ 1710. (R. S. § 1046.) Crimes under revenue laws or slave trade laws.

No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United

States, unless the indictment is found or the information is instituted within five years next after the committing of such crime.

Act March 26, 1804, c. 40, § 3, 2 Stat. 290. Act April 20, 1818, c. 91, § 9, 3 Stat. 452.

Limitations of prosecutions for violations of internal revenue laws were prescribed by Act July 5, 1884, c. 225, post, § 1711.

Notes of Decisions

See, also, notes under § 1708, ante.

Statute as recognizing prosecution by information.—Under this section a prosecution by information is expressly recognized by congress. In re Wilson (D. C. 1883) 18 Fed. 33, 34.

Statute as applying to action of debt for fraudulent entries.—The limitation of five years for prosecutions for crimes under the revenue laws (Act 1804, § 3) is applicable to an action of debt to recover the value of imported goods for fraudulent entries. U. S. v. Platt (D. C. 1840) Fed. Cas. No. 16,-054a.

Revenue laws in general.—Revenue laws, as used in this section, mean such laws as made for the direct and avowed purpose of creating revenue or public funds for the service of the government. U. S. v. Norton (1875) 91 U. S. 566, 569, 23 L. Ed. 454.

Act May 17, 1864, 13 Stat. 76, to establish a postal money order system, held not to be a revenue law within the meaning of this section. Id.

Act July 13, 1866, is a revenue law, within the meaning of Act March 26, 1804, § 3, limiting prosecutions thereunder to five years. U. S. v. Wright (C. C. 1870) Fed. Cas. No. 16,770.

The various statutes passed by Congress, applicable to civil and criminal proceedings under the internal revenue laws, reviewed, and the following result reached: (1) That the third section of Act March 26, 1804, c. 40, furnishes the law of limitation as to all criminal proceedings under the internal revenue acts, the period within which such proceedings must be commenced being five years. (2) That the same section perhaps, or, if not, then certainly the fourth section of Act Feb. 28, 1839 (post, § 1712), furnishes the law of limitation as to all proceedings for the recovery of fines, penalties, and forfeitures under the internal revenue acts, the period being the same under either section, namely, five years. (1872) 14 Op. Atty. Gen. 81.

Securing false entry of goods.—An offense under section 10237, post, is a crime arising under the revenue laws, subject to the limitation of this section. U. S. v. Hirsch (1879) 100 U. S. 33, 25 L. Ed. 539.

A prosecution under section 10245, post, for effecting an entry of goods at the custom house by a fraudulent invoice of them and a false classification as to their quality and value, is within the purview of this section. Id.

Smuggling.—An indictment for an offense against Act Aug. 30, 1842, is not barred, if found within five years subsequent to the act charged. U. S. v. Shorey (C. C. 1869) Fed. Cas. No. 16,-282.

Conspiracy.—A conspiracy to defraud the government of duties on imports in violation of section 10201, post, is not a crime arising under the revenue laws subject to the limitation of this section, but is subject to the limitation of section 1708, ante. U. S. v. Hirsch (1879) 100 U. S. 33, 34, 36, 25 L. Ed. 539.

R. S. § 5440, post, § 10201, punishing conspiracies to commit any offense against the government, or to defraud it, is a part of the revenue laws, and prosecutions thereunder are limited to five years. U. S. v. Dustin (C. C. 1872) Fed. Cas. No. 15,012; Same v. Fehrenback (C. C. 1875) Fed. Cas. No. 15,083.

A conspiracy to defraud the United States is a "crime" arising under the revenue laws, within the meaning of this section, whether found denounced in a revenue law or elsewhere in the Criminal Code, more especially if the conspiracy charged is one to commit an act itself made a crime. U. S. v. Sanche (C. C. 1881) 7 Fed. 715, 718.

Cited without definite application, Mackin v. U. S. (1886) 6 Sup. Ct. 777, 779, 117 U. S. 348, 29 L. Ed. 909; Twin Falls Canal Co. v. Foote (C. C. 1911) 192 Fed. 583.

§ 1711. (Act July 5, 1884, c. 225, § 1.) Crimes under internal revenue laws.

No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases: Provided, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not

be taken as any part of the time limited by law for the commencement of such proceedings; Provided further that the provisions of this act shall not apply to offenses committed prior to its passage: And provided further that where a complaint shall be instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district: And provided further that this act shall not apply to offenses committed by officers of the United States. (23 Stat. 122.)

This was the first section of an act entitled "An act to limit the time within which prosecution may be instituted against persons charged with violating internal revenue laws."

Section 2 of the act repealed all laws and parts of laws inconsistent therewith.

Prosecutions of crimes under the revenue laws were barred by a limitation of five years, by R. S. § 1046, ante, § 1710. The limitation provided by this section, applicable only to offenses under the internal revenue laws, may be regarded as superseding the provisions of R. S. § 1046, in so far as they applied to offenses against the internal revenue laws.

§ 1712. (R. S. § 1047.) Penalties and forfeitures under laws of the United States.

No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: Provided, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property.

Act March 2, 1799, c. 22, § 89, 1 Stat. 695. Act March 26, 1804, c. 40, § 3, 2 Stat. 290. Act April 20, 1818, c. 91, § 9, 3 Stat. 452. Act Feb. 28, 1839, c. 36, § 4, 5 Stat. 322. Act March 3, 1863, c. 76, § 14, 12 Stat. 741. Act July 25, 1868, c. 236, § 1, 15 Stat. 183.

A limitation of three years, for suits for the recovery of pecuniary penalties and forfeitures accruing under the customs revenue laws, was prescribed by Act June 22, 1874, c. 391, § 22, post, § 1713.

A limitation of six years, for suits for forfeitures and double damages for violation of R. S. § 3490, post, § 6411, by making false claims against the United States, was prescribed by R. S. § 3494, post, § 6415.

Notes of Decisions

1. Repeal of former law.
2. Application of statute to civil actions in general.
3. Application to suits other than in behalf of the United States.
4. Application whether action is in personam or rem.
5. Suits in favor of the United States.
6. Penal sum named in bond.
7. Exception in case of concealed fraud.
8. Action against carrier for discrimination.
9. Crimes punishable by imprisonment.
10. Action for assault in violating civil rights act.
11. Penalty for conspiring to settle on Indian lands and to return to Indian country.
12. Penalties for violating immigration law as to contract laborers.
13. Penalties and forfeitures under customs laws.
14. Special taxes and fines, penalties, and forfeitures under internal revenue laws.
15. Penalties or forfeitures under anti-trust act.
16. Crime arising under the revenue laws.
17. Penalties under embargo act.
18. Penalties and forfeitures under national bank act.

1. Repeal of former law.—Act April 30, 1790, § 32, limiting suits for penalties to two years, is repealed by implication by Act Feb. 28, 1839, § 4, which extends the time to five years. Stimpson v. Pond (C. C. 1855) Fed. Cas. No. 13,455.

The effect of the repealing provisions of Act March 3, 1863, § 14, in relation to forfeitures, is to leave in full force the limitation contained in Act Feb. 28, 1839, § 4, with its proviso. U. S. v. Maillard (D. C. 1871) Fed. Cas. No. 15,709.

2. Application of statute to civil actions in general.—Act March 2, 1799, c. 22, § 89, 1 Stat. 695, providing that no action or prosecution shall be maintained in any case under the act unless the same shall have been commenced within three years after the penalty or forfeiture was incurred contemplates civil actions. Stockwell v. U. S. (1871) 13 Wall. 531, 543, 20 L. Ed. 491.

3. Application to suits other than in behalf of the United States.—It is

doubtful whether this section applies to suits other than those prosecuted in behalf of the United States. Atlanta v. Chattanooga Foundry & Pipe Co. (C. C. 1900) 101 Fed. 900, 904.

4. Application whether action is in personam or rem.—This section applies, whether the action is in personam or in rem. Hatch v. The Boston (D. C. 1880) 3 Fed. 807, 810.

5. Suits in favor of the United States.—Act 1839, § 4, is applicable to suits in favor of the United States. U. S. v. Maillard (D. C. 1871) Fed. Cas. No. 15,709.

6. Penal sum named in bond.—The limitation of suits for penalties or forfeitures provided by this section, does not apply to the penal sum named in a bond. Raymond v. U. S. (C. C. 1876) Fed. Cas. No. 11,596.

7. Exception in case of concealed fraud.—As the act of 1839 makes no exception to the limitation imposed by it in the case of concealed fraud, the court cannot ingraft such an exception upon it. U. S. v. Maillard (D. C. 1871) Fed. Cas. No. 15,709.

8. Action against carrier for discrimination.—This section applies to actions in the federal court against the common carrier to recover damages for discrimination in violation of Act Feb. 4, 1887, §§ 2, 8, post, §§ 8564, 8572, providing that for violation of the terms of the act the carrier shall be liable to the persons injured for the full amount of damages sustained and for reasonable counsel or attorney's fees, to be taxed by the court. Carter v. New Orleans & N. E. R. Co. (1906) 143 Fed. 99, 101, 74 C. C. A. 293.

9. Crimes punishable by imprisonment.—Act Feb. 28, 1839, § 4, extending the time for suits and prosecutions for penalties to five years, does not apply to indictments for crimes which may be punished by imprisonment. U. S. v. Brown (D. C. 1873) Fed. Cas. No. 14,665.

10. Action for assault in violating civil rights act.—The one-year limitation prescribed by Civ. Code La. art. 3536, for actions for damages, and not the five-year limitation prescribed by this section against penalties and forfeitures, must govern a civil action for an assault committed in attempting to prevent plaintiff from voting, contrary to title 24 of the Revised Statutes (title 24, this compilation), securing equal rights to citizens, in view of the provisions of R. S. §§ 1979–1981, 5508, 5510, post, §§ 3932–3934, 10183, 10184, which provide criminal proceedings and punishment for the public wrong, and actions in law or equity for the redress of any private injury, without prescribing any specific limitation for such actions. O'Sullivan v. Felix (1914) 34 Sup. Ct. 596, 233 U. S. 318, 58 L. Ed. 980.

An action under R. S. § 1980, post, § 3933, for an assault committed in attempting to prevent plaintiff from voting in violation of the civil rights act, is one for damages and not for a penalty or a forfeiture within this section and is governed as to limitation by the statutes of the state where brought. O'Sullivan v. Felix (1912) 194 Fed. 88, 114 C. C. A. 166.

11. Penalty for conspiring to settle on Indian lands and to return to Indian country.—An action under R. S. § 2124, post, § 4116, to recover the penalty for conspiring to make settlement on Indian lands, and to return to the Indian country after being removed therefrom, is within the purview of this section. U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427.

12. Penalties for violating immigration law as to contract laborers.—A suit for the penalty for violation of the law as to alien contract labor, is within this section. U. S. v. Banister (C. C. 1895) 70 Fed. 44, 45.

Where, pending demurrer to the government's second amended declaration in a suit to recover penalties for importing contract laborers, defendant consented to the addition of 25 causes of action not originally sued on which were barred by limitations, such consent did not authorize the government to allege them in a substituted declaration constituting an entirely different statement of the offense. U. S. v. Dwight Mfg. Co. (D. C. 1913) 210 Fed. 79.

Where a demurrer was filed to a declaration by the government to recover penalties for violation of the immigration law with reference to contract laborers, and the hearing was continued for the mutual accommodation of the parties until after limitations had expired, the government's application to amend its declaration should not be prejudiced by such fact. U. S. v. Dwight Mfg. Co. (D. C. 1913) 210 Fed. 85.

Where an action was brought by the United States to recover penalties for violation of Immigration Act 1907, §§ 4, 5, post, §§ 4248, 4250, relating to contract laborers, prior to the expiration of the five-year statute of limitations, and demurrer was filed prior to that time, but was not heard until after the time had expired, the government was entitled to amend, so as not to change the cause of action, on condition that its case should stand or fall on the amendment. Id.

13. Penalties and forfeitures under customs laws.—This section which provides a five-year statute of limitations for suits for "any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to customs revenue cas-

es, which are subject to the three-year limitation for similar proceedings "accruing under the customs revenue laws of the United States," which is provided in the following section. U. S. v. Wittemann (1907) 152 Fed. 377, 379, 81 C. C. A. 503.

The limitation of five years for prosecutions for crimes under the revenue laws (Act 1804, § 3) is applicable to an action of debt to recover the value of imported goods for fraudulent entries. U. S. v. Platt (D. C. 1840) Fed. Cas. No. 16,054a.

Under Act March 3, 1863, all criminal and forfeiture proceedings and suits for penalties arising under the customs laws are subject to five years' limitation. In re Landsberg (D. C. 1870) Fed. Cas. No. 8,041.

In proceedings for the forfeiture of certain merchandise imported without the payment of duty it appeared by the averments in the pleadings that the claimant of the property had owned it for more than five years, without knowing or having reason to suspect that it had been imported, that he had never concealed it, and that neither he nor it had since been out of the United States, and that the importation of the merchandise was not known to the customs officers until about six years after the forfeiture accrued. Held, that the proceedings were barred, under this and the following section. U. S. v. One Dark Bay Horse (D. C. 1904) 130 Fed. 240.

14. Special taxes and fines, penalties, and forfeitures under internal revenue laws.—The interest provided for in section 5906, post, relating to collection of internal revenue, is not a penalty, but is recoverable as interest, and the limitation of this section does not apply. U. S. v. Guest (1906) 143 Fed. 456, 457, 74 C. C. A. 590, judgment affirmed (1906) 150 Fed. 121, 80 C. C. A. 75.

A judgment in favor of the United States against the owner of whisky seized for violation of the internal revenue laws, on a delivery bond given by him, is one for a penalty, and an action cannot be maintained thereon to enforce the same against the heirs of the defendant after his death. U. S. v. Theurer (1914) 213 Fed. 964, 130 C. C. A. 370.

Under this section the government may not recover unpaid special taxes and penalties against persons engaged in the business of rectifying, purifying, and refining distilled spirits for a longer period than five years from the date of suit brought. U. S. v. Smith, Kline & French Co. (D. C. 1911) 184 Fed. 532, judgment affirmed Henry K. Wampole Co. v. U. S. (1911) 191 Fed. 573, 112 C. C. A. 633, writ of certiorari denied Hance v. Same (1912) 32 Sup. Ct. 840, 225 U. S. 710, 56 L. Ed. 1268.

The various statutes passed by Congress, applicable to civil and criminal proceedings under the internal revenue laws, reviewed, and the following result reached: (1) That the third section of Act March 26, 1804, ante, § 1710, furnishes the law of limitations as to all criminal proceedings under the internal revenue acts, the period within which such proceedings must be commenced being five years. (2) That the same section perhaps, or, if not, then certainly the fourth section of Act Feb. 28, 1839, c. 36, furnishes the law of limitation as to all proceedings for the recovery of fines, penalties, and forfeitures under the internal revenue acts, the period being the same under either section, namely, five years. (1872) 14 Op. Atty. Gen. 81.

15. Penalties or forfeitures under anti-trust act.—The limitation of five years prescribed by this section does not apply to the action for threefold damages for injury to "business or property," authorized by Anti-Trust Act July 2, 1890, § 7, post, § 8829, in cases of violations of that act. Chattanooga Foundry & Pipe Works v. Atlanta (1906) 27 Sup. Ct. 65, 66, 67, 203 U. S. 390, 51 L. Ed. 241; Atlanta v. Chattanooga Foundry & Pipe Co. (1803) 127 Fed. 23, 28, 61 C. C. A. 387.

An action for treble damages under Sherman Anti-Trust Act (post, § 8829), is not an action for a penalty or forfeiture within this section, but one for the enforcement of a civil remedy given by statute for a private injury, compensatory in its purpose and effect; the recovery permitted in excess of actual damages being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the state in which it is brought. City of Atlanta v. Chattanooga Foundry & Pipeworks (1903) 127 Fed. 23, 28, 61 C. C. A. 387, 64 L. R. A. 721; Same v. Chattanooga Foundry & Pipe Co. (C. C. 1900) 101 Fed. 900, 904.

16. Crime arising under the revenue laws.—A conspiracy to defraud the United States, within section 10201, post, is not "a crime arising under the revenue laws," and therefore the persons charged therewith cannot be prosecuted, under this and the preceding section, unless they be indicted within three years next after the alleged commission thereof. U. S. v. Owen (D. C. 1887) 32 Fed. 534.

17. Penalties under embargo act—Penalties under Act Jan. 9, 1808, are to be sued for within the time limited by the statute of limitations of April 30, 1790, and not by Act March 2, 1799, § 89, or Act March 26, 1804. U. S. v. Mayo (C. C. 1813) Fed. Cas. No. 15,755.

The limitation prescribed by Act March 2, 1799, § 89, continues to apply to suits brought for penalties under the

embargo act of 1808. U. S. v. Woolsey (D. C. 1846) Fed. Cas. No. 16,763.

18. Penalties and forfeitures under national bank act.—A suit by a receiver of a national bank to recover from the president of the bank damages for alleged breach of trust and negligence on his part while the active managing officer and president of the bank is not a suit for a penalty or forfeiture within this section. Stearns v. Lawrence (1897) 83 Fed. 738, 741, 28 C. C. A. 66, writ of certiorari denied (1898) 18 Sup. Ct. 947, 170 U. S. 705, 42 L. Ed. 1217.

If the personal liability imposed by R. S. § 5239, post, § 9831, upon directors for violation of the provisions of the banking act, in favor of any one injured thereby, can be enforced without reference to whether the charter has been forfeited or not, it is not a penalty within the meaning of this section. Welles v. Graves (C. C. 1890) 41 Fed. 459, 467.

The forfeiture of the rights, privileges, and franchises of a bank authorized by section 9831, post, for violation by its directors of the provisions of the banking act, comes within this section. Id.

The fact that a suit by the comptroller of the currency for the forfeiture of the charter of a national bank for violations of the banking laws is barred by limitations under this section does not operate to bar a suit by the bank against its officers and directors, under section 9831, post, to charge them with losses arising from such violations, since an adjudication forfeiting the charter is not a necessary prerequisite to such action against the officers and directors. National Bank of Commerce v. Wade (C. C. 1897) 84 Fed. 10, 15.

Cited without definite application, Lyne v. Delaware, L. & W. R. Co. (C. C. 1908) 170 Fed. 847.

§ 1713. (Act June 22, 1874, c. 391, § 22.) Penalties and forfeitures under customs revenue laws.

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued: Provided, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation. (18 Stat. 190.)

This was a section of the Anti-Moiety Act of June 22, 1874, cited above.

Section 21 of this act provided that settlements as to duties should, in the absence of fraud or protest, after the expiration of one year, be final and conclusive upon all parties. It is set forth post, § 5714.

Suits or prosecutions for penalties or forfeitures under the laws of the United States were barred by a limitation of five years, by R. S. § 1047. The limitation provided by this section, applicable only to penalties or forfeitures under the customs revenue laws, may be regarded as superseding the provisions of R. S. § 1047, in so far as they applied to penalties or forfeitures under the customs laws.

Notes of Decisions

See notes under the preceding section.

See, also, section 5714, post, and notes thereunder.

Customs revenue cases in general.—The preceding section, which provides a five-year statute of limitations for suits for "any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to customs revenue cases, which are subject to the three-year limitation for similar proceedings "accruing under the customs revenue laws of the United States," which is provided in this section. U. S. v. Wittemann (1907) 152 Fed. 377, 81 C. C. A. 503.

Concealment of violin imported without payment of duty.—Decedent held not to have concealed a violin, imported without payment of duty in violation of the customs laws, within Act June 22, 1874, § 22, where he exhibited it to many guests at musicales. U. S. v. One Stradivarius Kieserwetter Violin (1912) 197 Fed. 157, 116 C. C. A. 594, affirming judgment Same v. One Stradivarius Violin (D. C. 1911) 188 Fed. 542.

H., in January, 1906, purchased a violin in London, to be delivered in New York or Boston free of all expense. It was delivered shortly thereafter without duty being paid thereon. H. thereafter habitually kept it in his drawing-room where it was used, displayed and admired by various artists at Sunday afternoon concerts held by H. It was never absent but always present in the house of H., though the revenue officers acquired no information concerning its wrongful importation until July, 1910. Held, that such lack of information by government officers, and the fact that H. knew or had reason to believe the instrument had been imported without paying duty,

did not constitute "concealment" so as to bar limitations prescribed by Act June 22, 1874, c. 391, § 22, 18 Stat. 190, requiring an action to forfeit merchandise unlawfully inported, within three years, provided that the time of the absence from the United States or concealment of property shall not be a part of the period of limitation. U. S. v. One Stradivarius Violin (D. C. 1911) 188 Fed. 542, judgment affirmed Same v. One Stradivarius Kieserwetter Violin (1912) 197 Fed. 157, 116 C. C. A. 594.

(R. S. § 1048. Obsolete.)

This section provided that where, during the rebellion, by reason of certain described conditions arising therefrom, any person could not be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which he was beyond the reach of legal process should not be taken as part of the time limited for the commencement of such action. It has become inoperative by lapse of time, and is omitted as obsolete.

The provision that the laws of the several states are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, except where the constitution, treaties, or statutes of the United States otherwise require or provide, contained in R. S. § 721, ante, § 1538, has been held to include state statutes of limitations.

Suits on marshals' bonds must be brought within six years after the accrual of the right of action, under R. S. § 786, ante, § 1310.

Suits against persons who, having knowledge of the existence of any conspiracy prohibited by Title XXIV, "Civil Rights," negligently fail to prevent the same, must be brought within one year after the cause of action accrues, by R. S. § 1981, post, § 3934.

The time within which suits or proceedings for the recovery of internal revenue taxes, alleged to have been erroneously or illegally assessed, collected, etc., must be commenced, was prescribed by R. S. § 3227, post, § 5950; and the time within which claims for refundment must be presented, was prescribed by R. S. § 3228, post, § 5951.

Actions against persons not in the military or naval service of the United States for making false claims must be begun within six years, under R. S. § 3494, post, § 6415.

Limitations of actions on bonds of contractors for public buildings or works, etc., were prescribed by provisions of Act Aug. 13, 1894, c. 280, amended by Act Feb. 24, 1905, c. 778, post, § 6923.

Limitations of proceedings for recovery of damages for violations of orders of Interstate Commerce Commission were prescribed by provisions of the Interstate Commerce Act of Feb. 4, 1887, c. 104, § 16, set forth, as amended by subsequent acts, post, § 8584.

Limitations of suits on claims against the United States, cognizable in the Court of Claims, were prescribed by Jud. Code, § 156, ante, § 1147.

The time within which suits to vacate or annul patents to public lands erroneously issued under railroad or wagon road grants must be brought was prescribed by Act March 2, 1896, c. 39, § 1, post, § 4901.

The time within which appeals or writs of error to the circuit court of appeals must be taken or sued out was prescribed by a provision of Act March 3, 1891, c. 517, § 11, ante, § 1647; and the time within which appeals or writs of error in certain cases might be taken to the Supreme Court was limited to one year, by section 6 of that act, ante, § 1648.

Appeals or writs of error to the Supreme Court from judgments or decrees in certain proceedings under the Interstate Commerce Act must be taken within twenty days from the date of the rendition of the judgment, by section 16 of said Interstate Commerce Act of Feb. 4, 1887, c. 104, as amended by Act March 2, 1889, c. 382, § 5, post, § 8584.

Notes of Decisions

See Stewart v. Bloom (1870) 11 Wall. 493, 20 L. Ed. 176; U. S. v. Wiley (1870) 11 Wall. 508, 514, 20 L. Ed. 211; Caperton v. Bowyer (1871) 14 Wall. 216, 235, 20 L. Ed. 882; Brown v. Hiatt (1872) 15 Wall. 177, 184, 21 L. Ed. 128; Ross v. Jones (1874) 22 Wall. 576, 585, 22 L. Ed. 730; Harrison v. Myer (1875) 92 U. S. 111, 116, 23 L. Ed. 603; Mayfield v. Richards (1885) 5 Sup. Ct. 1187, 115 U. S. 137, 29 L. Ed. 334; Delancey v. McKeen (C. C. 1806) Fed. Cas. No. 3,749; Chappelle v. Olney (C. C. 1870) Fed. Cas. No. 2,613; Graydon v. Sweet (C. C. 1871) Fed. Cas. No. 5,733; Lockhart v. Horn, Id. 8,445; U. S. v. Muhlenbrink (C. C. 1873) Fed. Cas. No. 15,831; Cross v. Sabin (C. C. 1882) 13 Fed. 308; Whitfield v. Allison (D. C. 1867) Fed. Cas. No. 17,571; Healy v. Mothershed (D. C. 1875) Fed. Cas. No. 6,296; Opie v. Castleman (D. C. 1887) 32 Fed. 511 (decree reversed Washington v. Opie [1892] 12 Sup. Ct. 822, 145 U. S. 214, 36 L. Ed. 680).

CHAPTER TWENTY

The Court of Claims—Organization and Sessions

(R. S. §§ 1049–1058. Repealed.)

This chapter of the Revised Statutes included sections 1049–1058 thereof. The provisions contained therein were incorporated in the Judicial Code, in chapter 7, §§ 136–144 thereof, ante, §§ 1127–1135, and those sections were repealed by section 297 of said Code, ante, § 1274.

Act June 23, 1874, c. 468, 18 Stat. 252, relating to the number of judges who should constitute a quorum of the Court of Claims, was also incorporated in said Judicial Code, in section 138 thereof, ante, § 1178, and was superseded thereby, although it was not included among the acts specifically repealed by section 297 of said Code, ante, § 1274.

CHAPTER TWENTY-ONE

The Court of Claims—Jurisdiction, Powers, and Procedure

(R. S. §§ 1059–1093. Repealed and transferred.)

This chapter of the Revised Statutes included sections 1059–1093 thereof. The provisions contained in sections 1059–1088, 1091–1093, were incorporated in the Judicial Code, in chapter 7 thereof, ante, §§ 1127–1178, and those sections were repealed by section 297 of said Code, ante, § 1274.

R. S. § 1079, had been repealed previously, by the Tucker Act of March 3, 1887, c. 359, § 8, 24 Stat. 506, which section, with other sections of that act, was also repealed by Jud. Code, § 297, ante, § 1274.

R. S. §§ 1089, 1090, relating to the payment of judgments of the Court of Claims, and to interest on such judgments, not being within the scope of said Judicial Code, were not incorporated therein or repealed thereby. R. S. § 1089, is set forth post, § 6405. R. S. § 1090, was superseded by a subsequent provision, relating to the same subject, of Act Sept. 30, 1890, c. 1126, § 1, which also is set forth post, § 6406.

The Bowman Act of March 3, 1883, c. 116, 22 Stat. 485, providing for the transmission by Congress or the Executive Departments to the Court of Claims for findings of facts, etc., was also incorporated in said Judicial Code, in chapter 7 thereof, ante, §§ 1127–1178, and the act was repealed by section 297 of said Code, ante, § 1274.

The Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, amended by Act June 27, 1898, c. 503, § 1, 30 Stat. 494, and Act July 1, 1898, c. 546, § 3, 30 Stat. 649, providing for bringing suits against the United States on certain classes of claims, and giving jurisdiction thereof to the Court of Claims, and jurisdiction, concurrent with that court, to the district courts and circuit courts respectively, dependent on the amount of the claim, was also incorporated, except sections 4–7 and 10 of the act, in the Judicial Code, chiefly in chapters 2 and 7 thereof, ante, §§ 991 (12), 1127–1178, and the act, except sections 4–7 and 10, was repealed by section 297 of said Code, ante, § 1274.

Sections 4–7 and 10 of said Tucker Act, relating to the proceedings in such suits, not being within the scope of the Judicial Code, were not incorporated therein or repealed thereby, and are set forth ante, §§ 1574–1578.

The French Spoliation Claims Act of Jan. 20, 1885, c. 25, 23 Stat. 283, providing for the determination by the Court of Claims of the validity, etc., of certain claims of citizens of the United States, for spoliations committed by the French prior to July 31, 1801, such claims to be presented by petition within two years from the passage of the act, and further providing that all claims not finally presented to said court within the period of two years limited should be forever barred, not being of general or permanent character, is omitted, as temporary merely.

The Indian Depredation Claims Act of March 3, 1891, c. 538, 26 Stat. 851, providing for the adjudication by the Court of Claims of claims arising from Indian depredations, with provisos that all claims existing at the time of the taking effect of the act should be presented to the court within three years after the passage thereof or be forever barred, and that no suit or proceeding should be allowed under the act for any depredation which should be committed after the passage thereof, not being of general or permanent character, is omitted, as temporary merely.

[End of Volume 3]

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